



COUNTRY REPORT  
HUNGARY

# THE PRACTICE OF PRE-TRIAL DETENTION: MONITORING ALTERNATIVES AND JUDICIAL DECISION-MAKING

HUNGARIAN HELSINKI COMMITTEE  
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AUTHORS: TAMÁS FAZEKAS, ANDRÁS KRISTÓF KÁDÁR, NÓRA NOVOSZÁDEK

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Hungarian Helsinki Committee

## About the Hungarian Helsinki Committee

The Hungarian Helsinki Committee (HHC) is an NGO founded in 1989. It monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The Hungarian Helsinki Committee strives to ensure that domestic legislation guarantee the consistent implementation of human rights norms and promotes legal education and training in fields relevant to its activities, both in Hungary and abroad. The Hungarian Helsinki Committee's main areas of activities are centred on protecting the rights of asylum-seekers and foreigners in need of international protection, non-discrimination, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention, access to justice, the effective enforcement of the right to defence and equality before the law.



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## EXECUTIVE SUMMARY

During the past few years, pre-trial detainees have made up almost one-third of the prison population in Hungary, contributing to the overcrowding of the penitentiary system, which, according to a 2015 judgment of the European Court of Human Rights (ECtHR), constitutes a structural problem in Hungary. For over half a decade until 2013, the number of pre-trial detainees in Hungary had increased constantly. However, since 2014, significant positive developments have been detected in the statistical data: there has been a reduction of around 20% in the number of cases in which pre-trial detention is ordered, corresponding to a decrease in the number of prosecutorial motions aimed at ordering this coercive measure. This decrease in the use of pre-trial detention does not, however, guarantee that judicial decisions and indeed the decision-making process as a whole are consistently compliant with standards established by the higher Hungarian judicial forums, the ECtHR and relevant European Union (EU) legislation.

The research project “The Practice of Pre-trial Detention: Monitoring Alternatives and Judicial Decision-making”, funded by the EU, was conducted in 10 different EU Member States in 2014–2015, in Hungary by the Hungarian Helsinki Committee. The project’s research results presented below are based on (i) a desk-research, (ii) a survey conducted among 31 defence counsels, (iii) review of the case files of 116 defendants convicted primarily for robbery, (iv) interviews with five prosecutors, and (vi) written responses provided by 10 judges to a standard set of questions. An overview of the results of the research is as follows:

### 1. Decision-making procedure

The presence of a defence lawyer is optional at judicial hearings on pre-trial detention and in fact ex officio appointed lawyers rarely appear at the hearing. Where they are present, their level of activity is often low. While the reasons for this were not identified through the research, such situations jeopardise the effectiveness of the suspect’s defence. 45% of lawyers surveyed explained that they have only 30 minutes or less with access to the case file in which to prepare for the hearing. While the amendments of the Hungarian Code of Criminal Procedure aimed at transposing Article 7 of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (Right to Information Directive) have brought along substantial improvement in the defence’s access to evidence related to pre-trial detention, the practice of authorities can pose significant obstacles to the effective exercise of this right.

### 2. The substance of decisions

Pre-trial detention was ordered in the vast majority of cases observed and reviewed. The most common reasons for ordering pre-trial detention were the risk of absconding, interfering with the course of justice and the risk of reoffending. The reasons given by judges for ordering pre-trial detention are often abstract and not specific to the case, repeating the prosecutorial motions requesting a pre-trial detention order. The analysis of the data supports a long-standing complaint of defence counsels, namely that courts seem to pay no or little attention to the arguments put forth by the defence: in the sample, judges referred to the evidence or arguments of the prosecution in 92.4% of the decisions, and only in 50% did they refer to the arguments of the defence.

In violation of ECtHR-standards, the risk of absconding is often established solely or primarily on the basis of the gravity of the offence and the prospective punishment. The courts also tend to attribute great relevance to circumstances that, according to the jurisprudence of the ECtHR, may not serve as decisive factors. The Hungarian Helsinki Committee encountered a number of decisions in the case files that referred to the risk of interfering with the course of justice on the basis of very abstract arguments and often in phases of the procedure when such risks are minuscule or non-existent (after the closing of the investigation and, in one case, even after the delivery of the first instance judgment). With regard to the risk of reoffending, court decisions referring to convictions that took place long before the suspected perpetration of the offence serving as the basis of the actual proceeding, or convictions of completely different nature, as well as the substantiation of detention

with nothing but the lack of regular income were encountered, in contradiction with ECtHR jurisprudence.

### 3. Use of alternatives to detention

Statistical data show that existing alternatives to pre-trial detention (house arrest, etc.) are heavily underused. Interviews with judges and prosecutors seem to support defence counsels' perception that there is little confidence in alternatives, and that this has not changed significantly with the introduction of electronic tagging in 2013.

### 4. Review of pre-trial detention

The statistical analysis of further decisions on pre-trial detention (prolonging, upholding or reviewing pre-trial detention) provides evidence for the continuous lack of tailored reasoning for the ongoing deprivation of liberty. The concerns raised above in relation to the substance of initial pre-trial detention decisions also apply to these further decisions.

In relation to appeals against pre-trial detention, second instance courts deciding on pre-trial detention never meet the defendant in person, which may be a violation of the ECtHR standards. In addition, it sometimes takes a very long time to deliver the second instance decisions, which is a violation of the obligation to proceed with adequate speed in cases where the defendant is deprived of his/her liberty.

The research shows that investigating authorities often do not conduct more efficient investigations when cases involve a detainee. These instances result in a number of cases in which the length of detention violates the relevant provisions of the European Convention on Human Rights and Hungarian law. In addition, the elimination of the statutory upper limit of pre-trial detention in some cases gives the dangerous message that the legislator is willing to accept serious delays in procedures even when the defendants are deprived of their liberty.

### Recommendations

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

- The presence of defence counsel at hearings related to pre-trial detention should be made mandatory, and a deadline for notifying the defence counsel about the hearings related to pre-trial detention should be established, which ensures that defence counsel can participate in the hearing.
- The legal amendment that allows for unlimited periods for pre-trial detention in certain cases should be abolished and fair time limits imposed.
- Various legislative steps seem desirable with the purpose of guaranteeing the reasonable length of pre-trial detention. E.g. judges should be authorised to terminate pre-trial detention on the basis of the authorities' failure to conduct the proceeding in a fast track manner if the suspect is detained.
- In order to ensure unrestricted access to the case files, the respective legal provisions should be further amended to ensure the effective implementation of the Right to Information Directive.
- Alternatives to pre-trial detention should be used more often. The underuse of these should be examined by one of the jurisprudence-analysis groups established by the president of the highest judicial forum.
- Reasoning of pre-trial detention orders at all levels could be improved by respective judicial and prosecutorial training, including information on the related ECtHR case-law to ensure ECtHR-standards are applied when making decisions related to pre-trial detention.
- The law should be amended to ensure that appeal decisions in the pre-trial detention context can or in certain cases must only be taken after an oral hearing.
- Legislative reform should further impose deadlines to ensure that second instance decisions are delivered within an adequate timeframe.

# I. INTRODUCTION

## 1. Background and objectives

This report is one of 10 country reports outlining the findings of an EU-funded research project conducted in 10 EU Member States in 2014–2015.

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

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

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

The Roadmap also included the task of examining issues relating to detention, including pre-trial, through a Green Paper published in 2011. Based on its case work experience and input sought through its Legal Expert Advisory Panel (LEAP<sup>2</sup>), Fair Trials responded to the Green Paper in the report "Detained without trial" and outlined the necessity for EU-legislation as fundamental rights of individuals are too often violated in the process of ordering and requesting pre-trial detention. Subsequent Expert meetings in 2012 – 2013 in Amsterdam, London, Paris, Poland, Greece and Lithuania affirmed the understanding that problems with decision-making processes might be responsible for the overuse of pre-trial detention, and highlighted the need for an evidence base clarifying this presumption. Regrettably, no action has been taken to date with regards to strengthening the rights of suspects facing pre-trial detention. However, the European Commission is currently conducting an Impact Assessment for an EU measure on pre-trial detention, which will hopefully be informed by the reports published under this research project.

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

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

## 2. Regional standards

The current regional standards on pre-trial detention decision-making are outlined in Article 5 of the ECHR. Article 5(1)(c) ECHR states that a person's arrest or detention may be "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". Anyone deprived of liberty under the exceptions set out in Article 5 "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" (Article 5(4) ECHR). The European Court of Human Rights (ECtHR) has developed general principles on the implementation of Article 5 that should govern pre-trial decision-making and would strengthen defence rights if applied accordingly. These standards have developed over a large corpus of ever-growing case law.

### A) Procedure

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly<sup>3</sup> or "speedily"<sup>4</sup> before a judicial authority, and the "scope for flexibility in interpreting and applying the notion of promptness is very limited".<sup>5</sup> The trial must take place within a "reasonable" time according to Article 5(3) ECHR and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.<sup>6</sup> Whether this has happened must be determined by considering the individual facts of the case.<sup>7</sup> The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.<sup>8</sup>

According to the ECtHR, the court imposing the pre-trial decision must have the authority to release the suspect<sup>9</sup> and be a body independent from the executive and from both parties of the proceedings.<sup>10</sup> The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to participate effectively.<sup>11</sup>

### B) Substance

The ECtHR has repeatedly emphasised the presumption in favour of release<sup>12</sup> and clarified that the state bears the burden of proof on showing that a less intrusive alternative to detention would not serve the respective purpose.<sup>13</sup> The detention decision must be sufficiently reasoned and should not use "stereotyped"<sup>14</sup> forms of words. The arguments for and against pre-trial detention must not be "general and abstract".<sup>15</sup> The court must engage with the reasons for pre-trial detention and for dismissing the application for release.<sup>16</sup>

The ECtHR has also outlined the lawful grounds for ordering pre-trial detention to be: (1) the risk that the suspect will fail to appear for trial;<sup>17</sup> (2) the risk the suspect will spoil evidence or intimidate witnesses;<sup>18</sup> (3) the risk that the suspect will commit further offences;<sup>19</sup> (4) the risk that the release

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<sup>3</sup> *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.

<sup>4</sup> The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK*, App. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).

<sup>5</sup> *ibid* para 62.

<sup>6</sup> *Stogmüller v Austria*, App 1602/62, 10 November 1969, para 5.

<sup>7</sup> *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

<sup>8</sup> *PB v France*, App 38781/97, 1 August 2000, para 34.

<sup>9</sup> *Singh v UK*, App 23389/94, 21 February 1996, para 65.

<sup>10</sup> *Neumeister v Austria*, App 1936/63, 27 June 1968, para 24.

<sup>11</sup> *Göç v Turkey, Application No 36590/97*, 11 July 2002, para 62.

<sup>12</sup> *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.

<sup>13</sup> *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.

<sup>14</sup> *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.

<sup>15</sup> *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.

<sup>16</sup> *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

<sup>17</sup> *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 59.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Muller v. France*, App 21802/93, 17 March 1997, para 44.

will cause public disorder;<sup>20</sup> or (5) the need to protect the safety of a person under investigation in exceptional cases.<sup>21</sup> The mere fact of having committed an offence is not a sufficient reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.<sup>22</sup> Pre-trial detention based on “the need to preserve public order from the disturbance caused by the offence”<sup>23</sup> can only be legitimate if public order actually remains threatened. Pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.<sup>24</sup>

With regards to flight risk, the ECtHR has clarified that the lack of fixed residence<sup>25</sup> alone or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.<sup>26</sup> The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available;<sup>27</sup> merely a lack of job or local family ties would be insufficient.<sup>28</sup>

### C) Alternatives to detention

The case law of the ECtHR has strongly advocated that pre-trial detention be imposed only as an exceptional measure. In *Ambruszkiewicz v Poland*,<sup>29</sup> the Court stated that the “detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances.”

Furthermore, the ECtHR has emphasised the use of proportionality in decision-making, in that the authorities should consider less stringent alternatives prior to resorting to detention,<sup>30</sup> and the authorities must also consider whether the “accused’s continued detention is indispensable”.<sup>31</sup>

One such alternative is to release the suspect within their state of residence subject to supervision. States may not justify detention in reference to the non-national status of the suspect but must consider whether supervision measures would suffice to guarantee the suspect’s attendance at trial.

### D) Review of pre-trial detention

Pre-trial detention must be subject to regular judicial review,<sup>32</sup> which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.<sup>33</sup> A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.<sup>34</sup> This might require access to the case files,<sup>35</sup> which has now been confirmed in Article 7(1) of the *Right to Information Directive*. The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention.<sup>36</sup> Previous decisions should not simply be reproduced.<sup>37</sup>

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<sup>20</sup> *I.A. v. France*, App 28213/95, 23 September 1988, para 104.

<sup>21</sup> *Ibid* para 108.

<sup>22</sup> *Tomasí v France*, App 12850/87, 27 August 1992, para 102.

<sup>23</sup> *I.A. v. France*, App 28213/95, 23 September 1988, para 104..

<sup>24</sup> *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 149.

<sup>25</sup> *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

<sup>26</sup> *Tomasí v France*, App 12850/87, 27 August 1992, para 87.

<sup>27</sup> *Matznetter v Austria*, App 2178/64, 10 November 1969, concurring opinion of Judge Balladore Pallieri, para 1.

<sup>28</sup> *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

<sup>29</sup> *Ambruszkiewicz v Poland*, App 38797/03, 4 May 2006, para 31.

<sup>30</sup> *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.

<sup>31</sup> *Ibid*, para 79.

<sup>32</sup> *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76.

<sup>33</sup> *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.

<sup>34</sup> See above, note 11.

<sup>35</sup> *Wloch v Poland*, App 27785/95, 19 October 2000, para 127.

<sup>36</sup> See above, note 3, para 84.

<sup>37</sup> See above, note 13.



When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains<sup>38</sup> and continued detention “can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention”.<sup>39</sup> The authorities remain under an ongoing duty to consider whether alternative measures could be used.<sup>40</sup>

### *E) Implementation*

Yet, these guidelines are not being upheld in national courts and EU countries have been found in violation of Article 5 ECHR in more than 400 cases in 2010 - 2014.<sup>41</sup>

Notwithstanding any possible EU-action on this issue at a later stage, the ultimate responsibility for ensuring that the suspects rights to a fair trial and right to liberty are respected and promoted lies with the Member States that must ensure that at least the minimum standards developed by the ECtHR are complied with.

## **3. Pre-trial detention in Hungary**

As far as the relevance of the present research with regard to Hungary is concerned, it shall be mentioned in the first place that up until 2013 the number of pre-trial detainees detained in Hungarian penitentiary institutions had increased constantly.<sup>42</sup> In the past years, pre-trial detainees have constituted almost one-third of the prison population, contributing to the overcrowding of the penitentiary system, which, according to a judgment reached by the ECtHR in 2015,<sup>43</sup> constitutes a structural problem in Hungary. At the same time, alternative coercive measures, such as house arrest or geographical ban, have been underused.<sup>44</sup> However, in the year 2014, thus in the year when the present research started, significant positive developments could be detected in the statistical data: there was a drop of around 20% in the number of pre-trial detentions ordered, in compliance with the decrease in the number of prosecutorial motions aimed at ordering this coercive measure.<sup>45</sup>

At the same time, the success rate of prosecutorial motions aimed at ordering pre-trial detention is still rather high, being above 90%.<sup>46</sup> This seems to support the critical remark made the most often,<sup>47</sup> along with the criticism that pre-trial detention is used excessively, namely that courts accept the reasoning of the prosecution almost automatically, court decisions on pre-trial detention often fail to assess or to give due weight to the defendant’s individual circumstances and the concrete circumstances of the case, and often fail to consider the possibility of applying alternative coercive

<sup>38</sup> See above, note 12, para 145.

<sup>39</sup> *McKay v UK*, App 543/03, 3 October 2006, para 42.

<sup>40</sup> *Darvas v Hungary*, App 19574/07, 11 January 2011, para 27.

<sup>41</sup> See: [http://echr.coe.int/Documents/Overview\\_19592014\\_ENG.pdf](http://echr.coe.int/Documents/Overview_19592014_ENG.pdf).

<sup>42</sup> Source: data published by the National Penitentiary Headquarters (<http://bv.gov.hu/sajtoszoba>). For more information, see Chapter II. 4.

<sup>43</sup> *Varga and Others v Hungary*, App 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015

<sup>44</sup> Source: *A büntetőbíróság előtti ügyési tevékenység főbb adatai I. – 2013. [Main data on prosecutorial activity before criminal courts – Year 2012]*, Legfőbb Ügyészség [Chief Prosecutor’s Office], pp. 51 and 54, <http://www.mklu.hu/repository/mkudok403.pdf> and data submitted by the Chief Prosecutor’s Office upon the data request of the Hungarian Helsinki Committee. For more information, see Chapter II. 4.

<sup>45</sup> Source: *Ügyészségi statisztikai tájékoztató (büntetőjogi szakterület) 2013 [Statistical information note of the prosecution (criminal law)]*, Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor’s Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor’s Office upon the data request of the Hungarian Helsinki Committee. For more information, see Chapter II. 4.

<sup>46</sup> Source: *Ügyészségi statisztikai tájékoztató (büntetőjogi szakterület) 2013 [Statistical information note of the prosecution (criminal law)]*, Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor’s Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor’s Office upon the data request of the Hungarian Helsinki Committee. For more information, see Chapter II. 4.

<sup>47</sup> See e.g. Júlia Iván – András Kádár – Zsófia Moldova – Nóra Novoszádek – Balázs Tóth: *A gyanú árnyékában: kritikai elemzés elemzés a hatékony védelemhez való jog érvényesüléséről [In the shadow of suspicion: a critical analysis of the implementation of the right to effective defence]*. Hungarian Helsinki Committee, 2009, pp. 40-41.

measures. These critical remarks appear from time to time also in the judgments of the ECtHR concerning Hungary.<sup>48</sup>

In order to give an overall picture of the situation, it shall be mentioned that while stakeholders<sup>49</sup> submit that there was a decrease in the length of pre-trial detentions in 2014, a legal amendment adopted in 2013 made pre-trial detention practically unlimited in length in certain cases, which raises serious human rights concerns also in the light of the case law of the ECtHR.<sup>50</sup>

Finally, it shall also be mentioned that preceding the start and under the term of the present research there have been significant positive legal developments<sup>51</sup> in terms of access to the materials of the case, with a view to complying with the Right to Information Directive. These amendments partly put an end to the rather restricted access of the defence to case materials in the course of the investigation phase of the criminal procedure, which was also criticized earlier on by the ECtHR in many of its decisions regarding Hungary.

The Hungarian Helsinki Committee has been involved with these issues for years, and one of its prominent goals is to decrease unjustified pre-trial detentions in Hungary, to ensure that the regulation and practice of pre-trial detention complies with the standards set by the ECtHR, and that the Hungarian legal provisions transpose the provisions of the respective EU directives properly. In the past years, the Hungarian Helsinki Committee has participated in many domestic and international research projects related to pre-trial detention and the right to effective defence, and its attorneys have represented applicants successfully in strategic cases in which the ECtHR established that the applicants' pre-trial detention violated Article 5 of the ECHR<sup>52</sup> while also pointing out structural problems. The Hungarian Helsinki Committee regularly comments on legislative steps pertaining to pre-trial detention and the right to effective defence, requesting their constitutional review if necessary. Along with providing information to the general public and various international organisations, the Hungarian Helsinki Committee also strives to have a good professional relationship with the different participants of the criminal procedure, the last time for example by compiling a manual for judges and attorneys, presenting the practice of the ECtHR with regard to pre-trial detention.<sup>53</sup>

The significant decrease in the number of pre-trial detentions ordered in 2014 and improved access to case materials in the investigative phase are definitely prominently positive developments, and we hope that this favourable tendency continues. At the same time, the decrease in the number of pre-trial detentions does not guarantee that the decision-making process as a whole and the judicial decisions comply every time with the requirements established by the higher Hungarian judicial forums, the ECtHR and the respective EU directives. It is our firm conviction that, along with analysing the statistical data, it is important to examine the decision-making process related to pre-trial detention and the quality of decision-making. That is why the Hungarian Helsinki Committee joined the present research, with the hope that it will contribute to have a fuller picture of the practice of pre-trial detention, and, in the end, to decreasing the number of pre-trial detentions violating fundamental rights.

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<sup>48</sup> See e.g.: *X.Y. v Hungary*, App 43888/08, 19 March 2013; *A.B. v Hungary*, App 33292/09, 16 April 2013; *Baksza v Hungary*, App 59196/08, 23 April 2013; *Hagyó v Hungary*, App 52624/10, 23 April 2013.

<sup>49</sup> See: Tamás Matusik: Gondolatok az előzetes letartóztatás hazai gyakorlatát ért kritikák kapcsán. [Thoughts on the critical remarks made with regard to the domestic practice of pre-trial detention.] *Magyar Jog*, 2015/5., pp. 289–293.

<sup>50</sup> Cf. e.g. *Tomasi v. France*, App 12850/87, 27 August 1992; and see D.J. Harris – M. O'Boyle – E. Bates – C. Buckley: *Law of the European Convention on Human Rights*. Oxford University Press, 2009, p. 181.

<sup>51</sup> For more information, see Chapter II. 3.

<sup>52</sup> See: *A.B. v Hungary*, App 33292/09, 16 April 2013; *Baksza v Hungary*, App 59196/08, 23 April 2013; *Darvas v Hungary*, App 19547/07, 11 January 2011; *Ferencné Kovács v Hungary*, App 19325/09, 20 December 2011; *X.Y. v Hungary*, App 43888/08, 19 March 2013.

<sup>53</sup> András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára / Kézikönyv bírák számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys / Manual for judges.* Magyar Helsinki Bizottság, 2014.

## II. THE BACKGROUND TO THE RESEARCH IN HUNGARY

### 1. General information

Hungary	
Area:	93 030 km <sup>2</sup>
Population:	9,877,365 persons (2014) <sup>54</sup>
Nationalities:	Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Rusyn, Serb, Slovakian, Slovenian, Ukrainian <sup>55</sup>
Form of government:	parliamentary republic
GDP per capita:	13 881 \$ <sup>56</sup>
Legal system:	civil law, continental

### 2. Legal rules on coercive measures

The Fundamental Law of Hungary (i.e. the new constitution of Hungary which came into force on 1 January 2012) provides the following as the constitutional framework of pre-trial detention:

*„Article IV*

*(1) Everyone shall have the right to liberty and security of the person.*

*(2) No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.*

*(3) Any person suspected of having committed a criminal offence and taken into detention shall, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall forthwith take a decision with a written reasoning to release or to arrest that person.*

*(4) Everyone whose liberty has been restricted without a well-founded reason or unlawfully shall have the right to compensation.”*

The Constitutional Court of Hungary also has a significant role in determining the constitutional framework. The following decisions of the Constitutional Court are the most relevant in the context of pre-trial detention.

*Table 1 – Relevant decisions of the Constitutional Court*

Decision nr.	
Decision 66/1991. (XII. 21.) of the Constitutional Court	In its decision the Constitutional Court set out the following: “The legal (»lawful«) deprivation of personal liberty may also result in an ill-founded infringement. Restrictive provisions may be deemed constitutional only if the restriction is necessary and proportionate, as compared to the envisaged and constitutionally acknowledged aim of the provision.”
Decision 19/1999. (VI. 25.) of the Constitutional Court <sup>57</sup>	In its decision the Constitutional Court abolished the provisions of the Code of Criminal Procedure in force at that time, along with the provisions of the new Code of Criminal Procedure (already adopted at that time but not yet

<sup>54</sup> See: [https://www.ksh.hu/docs/hun/eurostat\\_tablak/tabl/tps00001.html](https://www.ksh.hu/docs/hun/eurostat_tablak/tabl/tps00001.html).

<sup>55</sup> Act CLXXIX of 2011 on the Rights of Nationalities, Article 1 (3) and Annex 1. The largest nationality (minority ethnic group) in Hungary is the Roma: their percentage within the entire population is around 7-8% (see e.g.: László Hablicsek László: Kísérleti számítások a roma lakosság területi jellemzőinek alakulására és 2021-ig történő előrebecslésére. [Pilot calculations concerning the trends and assessment until 2021 of the geographical distribution of the Roma population.] In: *Demográfia*, 1/2007., p. 41, [http://www.demografia.hu/letoltes/kiadvanyok/Demografia/2007\\_1/Hablicsek4.pdf](http://www.demografia.hu/letoltes/kiadvanyok/Demografia/2007_1/Hablicsek4.pdf)). It shall be noted that the Hungarian legal provisions do not allow for recording anyone's ethnic affiliation neither in criminal procedures, and, therefore, it was not possible to assess within the framework of the present research whether the defendants' Roma nationality may have an effect on their situation in terms of pre-trial detention or not.

<sup>56</sup> See: <http://countryeconomy.com/gdp/hungary>.

<sup>57</sup> For an English summary of the decision in the CODICES of the Venice Commission, see: [http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1999-3-004?fn=document-frameset.htm\\$f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1999-3-004?fn=document-frameset.htm$f=templates$3.0).

	in force) which in certain cases made (or would have made) it obligatory for courts to uphold pre-trial detention upon the motion of the prosecution. According to the decision this qualified as “completely depriving the court of its power”, which violated the constitutional requirement that “the issue of pre-trial detention shall be decided upon by the court in the whole course of the criminal procedure”. In addition, the Constitutional Court was of the opinion that “by failing to determine the issues to be weighed by the prosecutorial motion”, the legislator also violated the requirement of legal certainty, flowing from the rule of law.
Decision 10/2007. (III. 7.) of the Constitutional Court	In its decision the Constitutional Court abolished the provision of the Code of Criminal Procedure allowing for ordering the pre-trial detention of a defendant in his/her absence if the criminal offence in question was punishable with imprisonment and provided that a bench warrant has been issued in the procedure earlier due to the non-attendance of the accused. According to the decision, it violated the right to personal liberty that defendants could be deprived of their personal liberty without a court hearing and without proper points to be considered. In its decision, the Constitutional Court set out the following: “[T]he Constitution [...] prescribes as a statutory guarantee in the procedure with regard to deciding [on pre-trial detention] that the accused must be heard. To hear the accused is part of the [constitutional] requirement of due process which is relevant in every stage of the proceedings. [...] With a view to all this, there is no such recognizable constitutional interest or aim which would allow a limitation on the defendant’s [constitutional] right to be heard by a court, without a breach of the latter’s right to a due process.” <sup>58</sup>

The legal provisions pertaining to pre-trial detention and coercive measures in general are set out by Act XIX of 1998 on the Code of Criminal Procedure (CCP). When interpreting the statutory provisions, the opinions of judicial chambers, the published decisions of the Curia (the highest judicial forum, formerly called as Supreme Court), etc. are sources of key importance. The most important court decisions and opinions will be presented below in relation to the individual issues discussed.

According to Article 129 (1) of the CCP, pre-trial detention is the judicial deprivation of the defendant’s personal liberty prior to the delivery of the final decision on the merits of the case, thus, according to the Hungarian regulatory concept, “pre-trial” detention lasts not only until the first instance decision on the merits of the case (the first instance judgment) is made, but until the final one is reached. Article 129 (2) of the CCP sets out the following as to the grounds for pre-trial detention:

*„Article 129*

*(2) The defendant may be subjected to pre-trial detention in the case of a criminal offence punishable with imprisonment and if*

- a) he/she has absconded or hid from the court, the prosecutor or the investigation authority; he/she has attempted to abscond, or during the procedure another criminal procedure is launched against him/her for an intentional criminal offence punishable with imprisonment;*
- b) taking into account the risk of his/her absconding or hiding, or for any other reason, there are well-founded grounds to presume that his/her presence at the procedural acts may not be ensured otherwise;*
- c) there are well-founded grounds to presume that if not taken into pre-trial detention, he/she would – through influencing or intimidating the witnesses, eliminating, forging or hiding material evidence or documents – frustrate, hinder or endanger the evidentiary procedure;*

<sup>58</sup> It shall be added that the Hungarian Helsinki Committee encountered a case even after the respective legal provision was abolished in which the defendant’s pre-trial detention was ordered in her absence. In that case the ECtHR established the violation of Article 5 of the ECHR (see: *Kovács Ferencné v Hungary*, App 19325/09, 20 December 2011). In addition, a present provision of Act XIX of 1998 on the Code of Criminal Procedure also allows in certain cases that the defendant’s pre-trial detention is ordered in his/her absence (see below).

- d) *there are well-founded grounds to presume that if not taken into pre-trial detention, he/she would accomplish the attempted or prepared criminal offence or would commit another criminal offence punishable with imprisonment.*"

The precondition that pre-trial detention may be ordered in a criminal procedure launched "in the case of a criminal offence punishable with imprisonment" is called the "general ground" for pre-trial detention, along with the requirement that there shall be a well-founded suspicion that a given criminal offence was committed by the suspect. (The latter requirement is not included explicitly in the article of the CCP quoted above, but it clearly flows from the CCP's regulatory concept and the legal provisions on becoming a suspect.<sup>59</sup>)

Further grounds as enumerated under Article 129 (2) a)–d) of the CCP are referred to as the "special grounds" or "special conditions" for pre-trial detention. In the case of juveniles, the CCP provides for a further condition, saying that even if the grounds specified by Article 129 (2) prevail, pre-trial detention against a juvenile may only be applied "if it is necessary due to the serious gravity of the criminal offence".<sup>60</sup> If the judgment brought in the case does not become final in the first instance but it is appealed against, the court shall "instantly" (i.e. practically at the same trial hearing at which the first instance judgment is reached) deliver a decision on coercive measures, and in these cases pre-trial detention may also be ordered – in addition to the reasons stipulated in Article 129 (2) – owing to the risk that the accused may abscond or hide with a view to the duration of the imprisonment imposed in the judgment.<sup>61</sup> Pre-trial detention shall be decided on by the court (until the filing of the bill of indictment, upon the motion of the prosecution).<sup>62</sup> The usual course of action in the investigation phase is that the investigation authority (i.e. in most cases the police) submits a proposal to the prosecution for a coercive measure, but this proposal is not binding for the prosecution.<sup>63</sup> If the prosecution agrees with the proposal, then it puts forth a motion to the court, which decides on the deprivation of liberty.

Pre-trial detention ordered prior to the filing of the bill of indictment may continue up to the decision of the first instance court issued during the preparations for the trial, but may never be longer than one month. Subsequently, pre-trial detention may be prolonged by the so-called "investigation judge" by maximum three months on each occasion, but the overall period may still not exceed one year from the ordering of the pre-trial detention. Thereafter, pre-trial detention may be prolonged by the tribunal (i.e. the county-level court) by maximum two months on each occasion.<sup>64</sup> Both the decision of the investigation judge and the tribunal may be appealed against, and appeals shall be decided on by a higher level court.<sup>65</sup> After the filing of the bill of indictment, in the course of the preparations for the trial, pre-trial detention may be upheld (or, if the defendant has not been in pre-trial detention, pre-trial detention may be ordered) by the first instance court upon the motion of the prosecution or ex officio.<sup>66</sup> (Pre-trial detention may be ordered by the court at any point of the trial phase.) Pre-trial detention ordered or upheld by the first instance court shall last until the promulgation of the first instance judgment. Pre-trial detention ordered or upheld by the first instance court after the promulgation of the first instance judgment, and pre-trial detention ordered by the second instance court shall last until the end of the second instance procedure, but the length of pre-trial detention may not be longer than the length of the imprisonment imposed by the non-final (first instance) judgment delivered in the case.<sup>67</sup>

If the pre-trial detention of a defendant exceeds a certain length, the CCP obliges the courts to review it. Accordingly, if the length of the pre-trial detention *ordered or upheld after the filing of the bill of*

<sup>59</sup> See e.g.: *A büntetőeljárásról szóló 1998. évi XIX. törvény magyarázata. II. kötet. [Commentary on the Act XIX of 1998 on the Code of Criminal Procedure. Volume II]*. Magyar Hivatalos Közlönykiadó, 2008, p. 504.

<sup>60</sup> CCP, Article 454 (1)

<sup>61</sup> CCP, Article 327 (1)–(2)

<sup>62</sup> CCP, Article 130 (1)

<sup>63</sup> CCP, Article 132 (5); Joint Decree 23/2003 (. (VI. 24.) of the Minister of Interior and the Minister of Justice on the detailed provisions regulating the investigations of investigating authorities under the instruction of the Minister of Interior and on the rules of recording investigative acts in way other than in minutes, Article 63.

<sup>64</sup> CCP, Article 131 (1)

<sup>65</sup> CCP, Article 131 (3)

<sup>66</sup> CCP, Article 269 (1)

<sup>67</sup> CCP, Article 131 (4)

*indictment* exceeds six months and the first instance court has not delivered a judgment yet in the case, the first instance court shall review whether pre-trial detention is justified; while if pre-trial detention exceeds one year, it shall be reviewed by the second instance court. After one year, pre-trial detention shall be reviewed at least every six months by the second instance court.<sup>68</sup>

Before the first instance judgment is delivered, the pre-trial detention may reach a length which entails that it shall be terminated:

*"Pre-trial detention shall be lifted in case*

- a) its term reaches one year and a criminal procedure is conducted against the defendant for a criminal offence punishable with a prison term of up to three years;*
- b) its term reaches two years and a criminal procedure is conducted against the defendant for a criminal offence punishable with a prison term of up to five years,*
- c) its term reaches three years – in all cases beyond the ones listed under points a) and b), except for the case where the pre-trial detention was ordered or upheld after the promulgation of the first instance judgment, and in case a third instance procedure or a repeated trial is ongoing."*<sup>69</sup>

Thus, in the case of most criminal procedures there is an upper time limit for pre-trial detention in the period preceding first instance judgment. However, since November 2013, there is no such time limit for pre-trial detention when the criminal procedure is conducted against the defendant for a criminal offence punishable with up to 15 years of imprisonment or life-long imprisonment.<sup>70</sup>

Releasing the defendant from pre-trial detention may be motioned both by the defendant, the defence counsel and the prosecution at any point of the procedure; the court shall examine the motion in its merit and shall decide on it in a reasoned decision. However, if a motion is submitted repeatedly and it does not contain reference to any new circumstance the court may reject the motion without substantial reasoning, except if three months has elapsed since the last ordering, prolonging or upholding of the pre-trial detention.<sup>71</sup> Up to the point of filing the bill of indictment, pre-trial detention may also be terminated by the prosecution.<sup>72</sup>

Pre-trial detention and coercive measures depriving or restricting personal liberty in general are ordered in the investigative phase<sup>73</sup> at a hearing, in the presence of the defendant. However, when prolonging pre-trial detention, the investigation judge is not obliged to hold a hearing in every case, but only (i) if the motion is aimed at prolonging the pre-trial detention and a new circumstance is referred to in the motion as a ground for prolonging pre-trial detention as compared to the previous judicial decision; (ii) if the motion is aimed at prolonging pre-trial detention in a way that its total length – counted from ordering it – would exceed 6 months; or (iii) if the motion is aimed at making bail.<sup>74</sup> With respect to the presence of the defendant, Article 309 (1) of the CCP shall also be mentioned, according to which if a court hearing has been postponed, the court may, if necessary, decide at a panel meeting, i.e. in the absence of the defendant and the defence counsel on a coercive measure involving the deprivation or the restriction of the defendant's personal liberty. This provision is on the one hand in contradiction with Decision 10/2007. (III. 7.) of the Constitutional Court presented above, and on the other hand it also violates the ECHR.<sup>75</sup>

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<sup>68</sup> CCP, Article 132 (1)–(2)

<sup>69</sup> CCP, Article 132 (3)

<sup>70</sup> See: CCP, Article 132 (3a). The latter provision of the CCP was introduced as of 18 November 2013 by Act CLXXXVI of 2013 on the Amendment of Certain Criminal Law Acts and Other Related Acts, which at the same time amended Article 132 (3) of the CCP, abolishing the four-year time limit of pre-trial detention in criminal procedures conducted due to a criminal offence punishable with up to 15 years of imprisonment or life-long imprisonment. As to the circumstances of this legislative step, see Chapter II. 3. of the present country report.

<sup>71</sup> CCP, Article 133 (1)–(2)

<sup>72</sup> CCP, Article 136 (4)

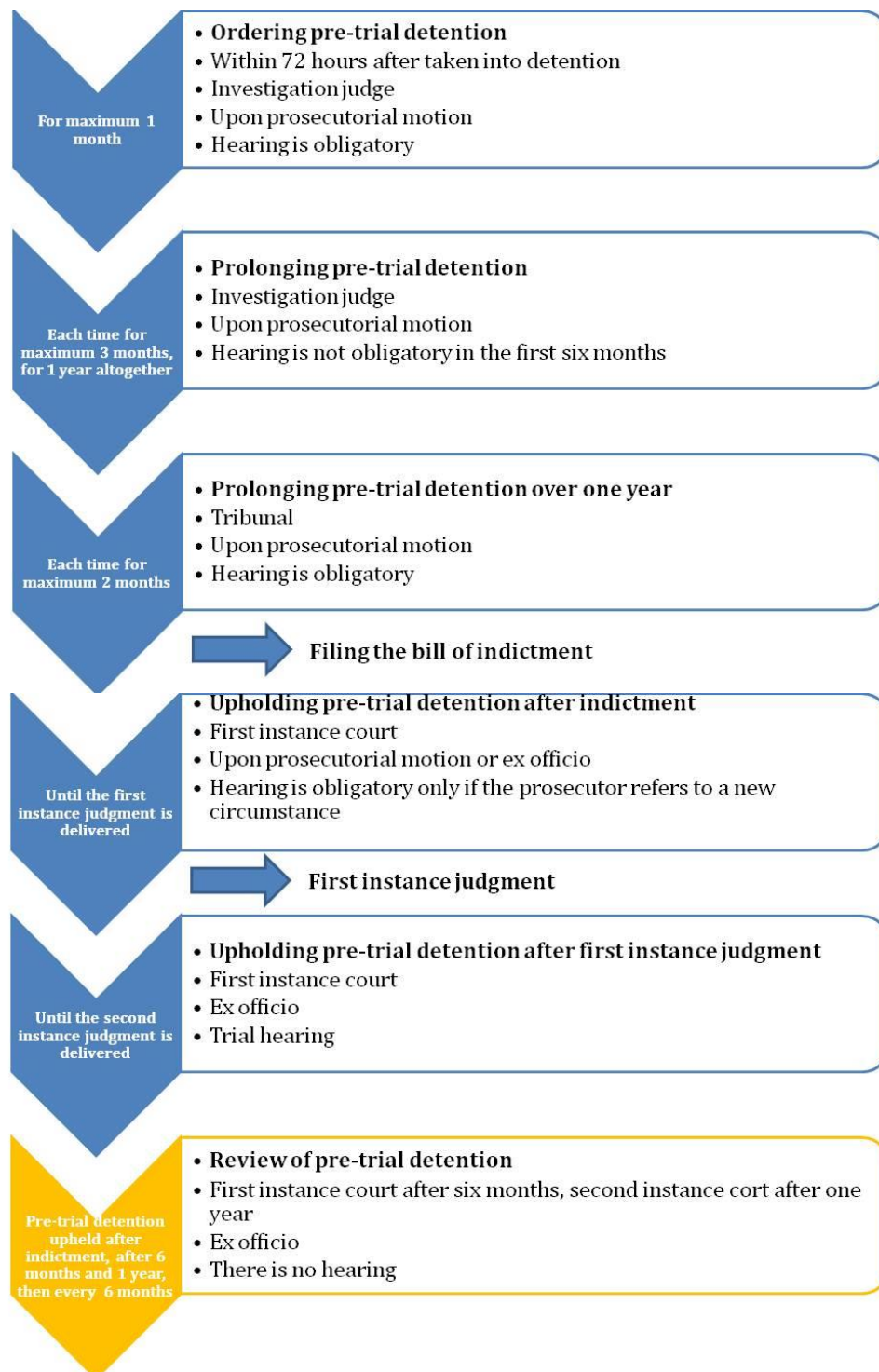
<sup>73</sup> The investigative phase of the criminal procedure lasts until concluding the investigation preceding the indictment.

<sup>74</sup> CCP, Article 210 (1) a)–d)

<sup>75</sup> Therefore, the Hungarian Helsinki Committee submitted an application to the ECtHR, representing a defendant whose pre-trial detention was ordered in his absence on the basis of the above provision (see: [http://helsinkiigyelelo.blog.hu/2014/12/12/torvenyes\\_de\\_nem\\_alkotmanyos](http://helsinkiigyelelo.blog.hu/2014/12/12/torvenyes_de_nem_alkotmanyos)).



Figure 1 – Decisions pertaining to pre-trial detention



If the defendant is detained, defence (i.e. the participation of a defence counsel in the criminal procedure) is mandatory,<sup>76</sup> thus defence is mandatory both in the case of defendants in a 72-hour detention, waiting for their first hearing concerning pre-trial detention, and in the case of defendants whose pre-trial detention has been already ordered. (The so-called 72-hour detention is the temporary deprivation of the defendant's personal liberty without a judicial decision, which may be ordered upon a reasonable suspicion that the defendant committed a criminal offence punishable with imprisonment, provided that a probable cause exists to believe that the defendant's pre-trial detention

<sup>76</sup> CCP, Article 46 b)

will be ordered. If the pre-trial detention of the defendant is not ordered by the court within the maximum 72 hours of the detention, he/she shall be released.<sup>77</sup>) However, in the investigative phase mandatory defence does not entail that the presence of a defence counsel is obligatory at procedural acts, thus e.g. hearings on pre-trial detention and coercive measures in general may be held without the presence of the defence counsel notified about the hearing. (An exception from this rule is that the hearing on coercive measures cannot be held in the absence of the defence counsel in the case of juvenile defendants prior to the filing of the bill indictment.<sup>78</sup>) On the other hand, in the trial phase, if defence is mandatory, no court hearing may be held without a defence counsel's presence.

If defence is mandatory and the defendant does not have a retained defence counsel, a defence counsel shall be appointed for him/her ex officio by the court, the prosecutor or the investigation authority.<sup>79</sup> In this case, the ex officio appointed defence counsel's fee and expenses shall be advanced by the state, but if found guilty by the court, these costs shall be repaid by the defendant, except if the defendant was otherwise granted personal cost exemption based on his/her financial and income situation.<sup>80</sup>

As far as access to the materials of the case is concerned, in the trial phase the defence has unrestricted access to the files of the criminal case.<sup>81</sup> As opposed to that, until 1 January 2014 access to case files was rather limited in the investigative phase: the defence had unrestricted access only to the expert opinions and the minutes of those procedural acts where the defendant and the defence counsel may be present, while the rules of the CCP allow for the presence of the defence counsel practically only at the hearing of the defendant, the hearing of witnesses whose hearing was initiated by either him/her or the defendant, and confrontations held with the participation of the latter kind of witnesses.<sup>82</sup> Access to further materials of the case was granted to the defence only if allowing access did not pose a threat to the "interests of the investigation".<sup>83</sup>

It was a significant change in this regard that, in order to comply with Article 7(1) of the Right to Information Directive, the CCP was recently amended. As a result, since 1 January 2014 the CCP sets out that if the prosecutorial motion is aimed at the ordering of pre-trial detention, the copy of those files of the investigation on which the prosecutorial motion is based shall be attached to the motion submitted to the defendant and the defence counsel. Furthermore, since 1 July 2015 the CCP also sets out that if the prosecutorial motion is aimed at prolonging pre-trial detention, the copy of those files of the investigation on which the prosecutorial motion is based and which emerged since the last decision pertaining to pre-trial detention shall be attached to the motion submitted to the defendant and the defence counsel.<sup>84</sup>

Instead of pre-trial detention, the court may also impose a geographical ban, house arrest or restraining order.<sup>85</sup>

- Defendants under a *geographical ban* must not leave a designated geographical area or district without permission, and are not allowed to change their place of residence and permanent address. A geographical ban may be ordered if, taking into consideration the nature of the criminal offence, the defendant's personal and family circumstances – especially

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<sup>77</sup> CCP, Article 126

<sup>78</sup> CCP, Article 456 (1)

<sup>79</sup> CCP, Article 48 (1)

<sup>80</sup> The defendant is granted a personal cost exemption if due to his/her financial situation it can be expected that he/she will not be able to pay the criminal costs (which includes the defence counsel's expenses and fee), and a defence counsel is appointed for him/her on this basis. In these instances, the fee and expenses of the ex officio appointed defence counsel shall be covered by the state. [See: CCP, Article 74 (3).]

<sup>81</sup> CCP, Article 193 (1)

<sup>82</sup> CCP, Article 186 (1) and 184 (2)

<sup>83</sup> CCP, Article 186 (2)

<sup>84</sup> CCP, Article 211 (1a)

<sup>85</sup> As shown by the legal provisions presented, e.g. house arrest and geographical ban may be ordered if "the aims of pre-trial detention" may be realised also through these measures, thus, the CCP implicitly includes that pre-trial detention may only be applied as a last resort. This concept is supported by Article 60 (2) of the CCP, which sets out the following: "If the present act [the CCP] allows for the restriction of the concerned person's constitutional rights in relation to applying coercive measures, these acts may, even if the further conditions for it prevail, only be ordered if the aim of the procedure may not be ensured through a less restrictive act."



his/her state of health and old age –, or his/her behaviour during the procedure, the aims of pre-trial detention may be realised also through this measure.<sup>86</sup>

- If under *house arrest*, the defendant may only leave the place of residence designated by the court and the enclosed area for a purpose defined in the decision ordering the house arrest – especially in order to satisfy regular everyday needs or for the purposes of medical treatment –, and for the time and distance (destination) defined in the decision. House arrest may be ordered if, taking into consideration the nature of the criminal offence and the duration of the criminal procedure, or the defendant's behaviour during the procedure, the aims of pre-trial detention may be realised also through this measure.<sup>87</sup>
- A *restraining order* may be issued in case of a well-founded suspicion of a criminal offence punishable with imprisonment, if the aims to be achieved may be realised through the restraining order and if ordering pre-trial detention is not necessary, but – especially taking into consideration the nature of the criminal offence, the behaviour of the defendant prior and in the course of the procedure, and the relationship between the defendant and the aggrieved party – there are well-founded grounds to presume that if leaving the defendant in his/her habitat he/she would, through influencing or intimidating the witness being the aggrieved party, frustrate, hinder or threaten the procedure; or that he/she would accomplish the attempted or prepared criminal offence or would commit another criminal offence punishable with imprisonment against the aggrieved party.<sup>88</sup>

In addition, the court may also order that compliance with the rules of geographical ban and house arrest are supervised by the police also through an electronic monitoring device tracing the movement of the defendant, to which the defendant's consent is not necessary any more since 1 January 2014.<sup>89</sup> Furthermore, in the decision ordering geographical ban the court may order that the defendant shall report at the police at certain intervals, and may prescribe other restrictions – rules of conduct – aimed at realising the objective of the geographical ban.<sup>90</sup>

Monetary bail is also available as an option: in cases defined under Article 129 (2) b) (i.e. when the ground for detention is the risk of absconding) the court may terminate the defendant's pre-trial detention if, taking into consideration the criminal offence and the defendant's personal circumstances, the payment of a bail makes it likely that the defendant will appear at the procedural acts. Bail may be motioned by the defendant or the defence counsel.<sup>91</sup>

### 3. Legal and policy background

Before presenting the respective statistical data and the results of the research, it is necessary to briefly introduce the legal and policy environment in which the legal provisions above are applied by the authorities.

After the elections and the change of government in 2010, as a result of the announced stricter criminal policy, several legal steps were made in the field of criminal law, criminal procedure law and petty offence law which are in contradiction with international human rights trends and raise serious concerns in terms of fundamental rights – the Fundamental Law itself also contains such a provision. These steps include for example the inclusion of the possibility of actual life-long imprisonment in the Fundamental Law, introducing the Hungarian version of the so-called "three strikes rule" (a part of which was finally abolished by the Hungarian Constitutional Court), making the petty offence

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<sup>86</sup> CCP, Article 37 (1)–(2)

<sup>87</sup> CCP, Article 138 (1)–(2)

<sup>88</sup> CCP, Article 138/A (2)

<sup>89</sup> CCP, Articles 137 (3) and 138 (4). In addition, since 1 January 2014 if house arrest is ordered in a criminal procedure conducted against the defendant due to a violent criminal offence against the person, or if the house arrest was ordered after the pre-trial detention was lifted due to the expiration of its statutory maximum length, the court shall order that the defendant is supervised by an electronic monitoring device following his/her movement, except if the technical conditions of applying the electronic monitoring device cannot be ensured.

<sup>90</sup> CCP, Article 137 (3)

<sup>91</sup> CCP, Article 147 (2)–(3)

confinement of juveniles possible, and criminalizing homelessness (i.e. “residing on public premises for habitation”).

With respect to the present research, the most important legal change fitting into the above line of policy was the amendment introducing the so-called “unlimited” pre-trial detention.<sup>92</sup> As it was already referred to among the respective legal provisions, since 18 November 2013 no upper time limit applies to pre-trial detention if the criminal procedure is conducted against the defendant for a criminal offence punishable with up to 15 years of imprisonment or life-long imprisonment, pending a first instance judgment. Thus, in these cases the first instance criminal procedure may be practically conducted for as long as the authorities wish, while the defendant remains in pre-trial detention.

The amendment introducing this possibility was clearly a reaction to an individual case, the escape of the members of the “Ároktő gang”, as shown by public statements of governing party representatives and the respective legal amendment’s reasoning referring to “recent unfortunate events”.<sup>93</sup> Two members of the gang, accused of criminal offences against life, spent four years in pre-trial detention, i.e. the statutory maximum time period possible at the time, and during this time no first instance judgment was reached, so their pre-trial detention order had to be lifted. They were put under house arrest, from which they escaped on 4 October 2013, but were captured a few days later.

As a reaction to this case (which gained wide media coverage), the governing party declared its intention to file a proposal to the Parliament to remove the upper time limit of pre-trial detention in certain cases,<sup>94</sup> and subsequently an amendment to a draft Bill was submitted, aimed at abolishing the four-year upper time limit which applied to these cases before. Explicitly in order to prevent a third gang member from being released on the basis that the statutory maximum four-year time period for pre-trial detention expired (which was due on 22 November 2013),<sup>95</sup> the Bill was adopted already on 11 November by deflecting from the House Rules of the Parliament, and the amendment came into force already on 19 November 2013.<sup>96</sup> In January 2014 the Hungarian Helsinki Committee and the Eötvös Károly Institute turned to the Commissioner for Fundamental Rights (the Ombudsperson of Hungary), requesting the Commissioner to initiate that the Constitutional Court abolish the above new rule, which was violating the right to personal liberty.<sup>97</sup> Upon the above request, in March 2015 the Commissioner for Fundamental Rights motioned<sup>98</sup> the Constitutional Court to abolish the respective provisions of the CCP, taking up the standpoint in his motion that it flows from the principle of the rule of law and the fundamental right to personal liberty that it is necessary for pre-trial detention to have a statutory maximum length.<sup>99</sup> Up to the date of publishing the present country report, the Constitutional Court has not delivered a decision in the case.

Meanwhile, there have also been developments pointing forward: for example in May 2013 the police put into operation the “electronic monitoring system”, thus it became possible also in practice to supervise defendants under house arrest or geographical ban by using an electronic monitoring device tracing the movement of the defendants. (Before that, this possibility had existed for years only in law.) Since 1 January 2014 the court may order that compliance with the rules of geographical ban and house arrest are supervised by the police also through an electronic monitoring device even if the defendant does not consent to it (previously it was possible on the basis of the defendant’s consent only).<sup>100</sup> (However, statistical data presented in Chapter II. 4. below show that these developments have not brought any significant increase in the number of alternative coercive measures.)

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<sup>92</sup> CCP, Article 132 (3a)

<sup>93</sup> See: <http://www.parlament.hu/irom39/12617/12617-0019.pdf>, p. 3.

<sup>94</sup> See e.g.: <http://nol.hu/belfold/eltorolnek-a-kormanypartok-az-elozetes-letartoztat-as-hatarat-1418545>.

<sup>95</sup> See e.g.: [http://hvg.hu/itthon/20131108\\_Az\\_arocto\\_banda\\_miatt\\_modosit\\_torvenyt\\_a](http://hvg.hu/itthon/20131108_Az_arocto_banda_miatt_modosit_torvenyt_a)

<sup>96</sup> For an English summary of the issue, see: [http://helsinki.hu/wp-content/uploads/UNWGAD\\_HUN\\_HHC\\_Addendum\\_25November2013.pdf](http://helsinki.hu/wp-content/uploads/UNWGAD_HUN_HHC_Addendum_25November2013.pdf).

<sup>97</sup> The request is available here in Hungarian: [http://helsinki.hu/wp-content/uploads/elo%CC%8Bzetes-letart\\_beadvany.pdf](http://helsinki.hu/wp-content/uploads/elo%CC%8Bzetes-letart_beadvany.pdf)

<sup>98</sup> The motion is available here in Hungarian:

[http://www.ajbh.hu/documents/10180/1957691/Alkotm%C3%A1nyb%C3%ADr%C3%B3s%C3%A1gi+ind%C3%ADtv%C3%A1ny+az+el%C5%91zezes+letart%C3%B3ztat%C3%A1s+id%C5%91tartam%C3%A1r%C3%B3l+441\\_2014/ceab43cc-28b7-45de-bcd8-560451487af3;jsessionid=14B19DE356AB392F37F53AE1DFDF5ADB?version=1.1](http://www.ajbh.hu/documents/10180/1957691/Alkotm%C3%A1nyb%C3%ADr%C3%B3s%C3%A1gi+ind%C3%ADtv%C3%A1ny+az+el%C5%91zezes+letart%C3%B3ztat%C3%A1s+id%C5%91tartam%C3%A1r%C3%B3l+441_2014/ceab43cc-28b7-45de-bcd8-560451487af3;jsessionid=14B19DE356AB392F37F53AE1DFDF5ADB?version=1.1).

<sup>99</sup> For an English summary of the request and the motion, see: <http://www.fairtrials.org/press/quest-post-hungarys-perpetual-pre-trial-detention/>.

<sup>100</sup> CCP, Articles 137 (3) and 138 (4)

As it was presented among the respective legal provisions, in 2014 and in 2015 the rules of the CCP pertaining to access to case files related to pre-trial detention were amended in order to comply with the Right to Information Directive. This was a significant step also because in the past years the ECtHR delivered many decisions establishing that the former Hungarian legal provisions restricted in the investigative phase access to case files – and, accordingly, access to evidence on which pre-trial detention is based – to such an extent which amounted to the violation of the principle of the equality of arms, and, accordingly, Article 5(4) of the ECHR.<sup>101</sup> However, in the absence of respective research data there is no information as to how restrictively or broadly authorities interpret the new rules. Furthermore, the amendments do not entirely comply with the Right to Information Directive since they allow the authorities not to submit to the defence case materials which would raise doubts as to the existence of the grounds for pre-trial detention, which violates the principle of equality of arms, which should prevail also before the investigation judge.

As far as the regulatory framework is concerned, it is also a development to be mentioned that in February 2015 the Government decided that it was necessary to adopt a new Code of Criminal Procedure, and also published the new code's regulatory concept. The draft of the new Code of Criminal Procedure is planned to be submitted to the Parliament in 2016.

In addition, it is a significant development related to the topic of the present research that in the pilot judgment delivered in the case *Varga and Others v Hungary*<sup>102</sup> on 10 March 2015 the ECtHR concluded that the detention conditions of the six applicants – namely the prison overcrowding and the inadequate living space per person – amounted to the violation of the prohibition of inhuman or degrading treatment, enshrined in Article 3 of the ECHR. Furthermore, the ECtHR set out that the overcrowding of penitentiaries in Hungary constitutes a systemic problem, and Hungary should produce within six months an action plan to solve the structural deficiencies of its penitentiary system. According to the ECtHR, the solution would be the reduction of the number of detainees e.g. by more frequent use of non-custodial punitive measures and minimising the recourse to pre-trial detention – thus, the solution lies not simply in establishing new prison places.<sup>103</sup> However, the Government's communication shows that for the time being it wants to solve the situation solely by building prisons.

#### 4. Statistical data

As it was already referred to in the introduction, up until 2013 the number of pre-trial detainees detained in penitentiary institutions had constantly increased. However, in 2014 there was a rather significant drop in the number of pre-trial detainees, which is in correlation with the decrease in the number of prosecutorial motions aimed at ordering pre-trial detention and in the number of court decisions ordering pre-trial detention as presented in Table 4.

*Table 2 – The number of pre-trial detainees, their proportion as compared to the total prison population and their number per 100,000 inhabitants*

Date	Number of pre-trial detainees*	% of pre-trial detainees as compared to the total prison population*	Number of pre-trial detainees per 100,000 inhabitants**
<b>31 December 2009</b>	4,502	29.3%	45
<b>31 December 2010</b>	4,803	29.6%	48
<b>31 December 2011</b>	4,875	28.4%	49
<b>31 December 2012</b>	4,888	27.9%	49

<sup>101</sup> See e.g.: *X.Y. v Hungary*, App 43888/08, 19 March 2013; *A.B. v Hungary*, App 33292/09, 16 April 2013; *Baksza v Hungary*, App 59196/08, 23 April 2013; *Hagyó v Hungary*, App 52624/10, 23 April 2013.

<sup>102</sup> App 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015

<sup>103</sup> *Varga and Others v Hungary*, App 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015; paras 104 and 105

<b>31 December 2013</b>	5,053	28.0%	51
<b>31 December 2014</b>	4,400	24.6%	44

\*Source: data published by the National Penitentiary Headquarters (<http://bv.gov.hu/sajtoszoba>)

\*\*Own calculation based on the data published by the National Penitentiary Headquarters

As also supported by the judgment of the ECtHR in the *Varga and Others v Hungary* case already referred to above, the overcrowding of the Hungarian penitentiary institutions is a systemic problem. In the past years, the average number of detainees has constantly increased, until 2013 in parallel to the average overcrowding rate, and as shown by the table below, the rise of the latter was stopped only because in 2014 the capacity of the penitentiary system was increased by almost 300 places.

*Table 3 – Average prison population and average overcrowding rate*

Year	Average prison population	Capacity of the penitentiary system	Average overcrowding rate
<b>2009</b>	15,373	12,042	128%
<b>2010</b>	16,203	12,335	131%
<b>2011</b>	17,195	12,604	136%
<b>2012</b>	17,517	12,573	139%
<b>2013</b>	18,042	12,584	143%
<b>2014</b>	18,204	12,869	141%

Source: data published by the National Penitentiary Headquarters (<http://bv.gov.hu/sajtoszoba>)

In addition, data requested from the National Penitentiary Headquarters by the Hungarian Helsinki Committee in the framework of its project "Promoting the Reform of Pre-trial Detention in CEE-FSU Countries – Introducing Good Practices" showed that the average overcrowding rate of penitentiary institutions accommodating mainly pre-trial detainees was higher than the average overcrowding rate of the penitentiary system: 135% in 2009, 142% in 2010, and 145% in 2011.<sup>104</sup> It shall also be added that the overcrowding rate in some penitentiaries is much higher than the average, and institutions accommodating mainly pre-trial detainees tend to be especially crowded.<sup>105</sup> This was also underpinned by the Hungarian Helsinki Committee's prison monitoring visits: for example in the course of the monitoring visit to the Bács-Kiskun County Penitentiary Institution in 2013 the data provided by the institution showed an overcrowding rate of 207% in the section of pre-trial detainees,<sup>106</sup> and in the same year overcrowding rate was 179% in the Baranya County Penitentiary Institution's section for pre-trial detainees.<sup>107</sup>

As also mentioned in the introduction and as shown by the table below, the "success rate" of prosecutorial motions aimed at ordering pre-trial detention has been very high, over 90% for years. However, as shown by the table below, there was a significant – 20-21% – decrease in the number of motions requesting pre-trial detention (and, accordingly, in the number of court decisions ordering pre-trial detention) in 2014. The reasons to which the various participants of the criminal procedure attribute this drop in the numbers will be presented among the research results.

*Table 4 – Prosecutorial motions aimed at ordering pre-trial detention and court decisions ordering pre-trial detention prior to filing the bill of indictment*

<sup>104</sup> See: *Promoting the Reform of Pre-trial Detention in CEE-FSU Countries – Introducing Good Practices*. Hungarian Helsinki Committee, 2013, [http://helsinki.hu/wp-content/uploads/Pre-trial\\_detention\\_in\\_CEE-FSU\\_countries.pdf](http://helsinki.hu/wp-content/uploads/Pre-trial_detention_in_CEE-FSU_countries.pdf), p.19.

<sup>105</sup> See e.g.: <http://www.vg.hu/kozelet/jog/tulzsufoletags-a-bortonokban-426495>, <http://www.168ora.hu/itthon/videki-buntetes-vegrehajtasi-intezetekben-200-szazalekos-telitettség-is-lehet-126481.html?print=1>.

<sup>106</sup> See: *A Magyar Helsinki Bizottság jelentése a Bács-Kiskun Megyei Büntetés-végrehajtási Intézetben 2013. április 29–30-án tett látogatásról* [Report of the Hungarian Helsinki Committee about its visit to the Bács-Kiskun County Penitentiary Institution on 29–30 April 2013], available at: <http://helsinki.hu/wp-content/uploads/HHC-Kecskem%C3%A9t-jelent%C3%A9s-int%C3%A9zet-v%C3%A1lasz%C3%A1val-BVOPmegjegyz%C3%A9seivel-v%C3%A9gleges-anonimiz%C3%A1lva.pdf>.

<sup>107</sup> See: *A Magyar Helsinki Bizottság jelentése a Baranya Megyei Büntetés-végrehajtási Intézetben 2013. augusztus 12–13-án tett látogatásról* [Report of the Hungarian Helsinki Committee about its visit to the Baranya County Penitentiary Institution on 12–13 August 2013], available at: [http://helsinki.hu/wp-content/uploads/MHB\\_jelentes\\_Baranya\\_Megyei\\_Bv\\_Intezet\\_2013\\_vegleges.pdf](http://helsinki.hu/wp-content/uploads/MHB_jelentes_Baranya_Megyei_Bv_Intezet_2013_vegleges.pdf).

Year	Prosecutorial motions aimed at ordering pre-trial detention	Pre-trial detentions ordered upon a prosecutorial motion	Proportion of prosecutorial motions granted (%)
<b>2009</b>	5,960	5,591	93.8%
<b>2010</b>	6,355	5,885	92.6%
<b>2011</b>	6,245	5,712	91.5%
<b>2012</b>	5,861	5,334	91.0%
<b>2013</b>	6,673	6,098	91.4%
<b>2014</b>	5,319	4,836	90.9%

Source: *Ügyészeti statisztikai tájékoztató (büntetőjogi szakterület) 2013* [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee]

With regard to the prosecutorial motions it shall be highlighted that even though the success rate of prosecutorial motions is high in general, certain counties stand out: for example in 2013, 100% of the prosecutorial motions aimed at ordering pre-trial detention were successful in Vas county and 99% of them were successful in Békés county, while in 2014 the success rate was 100% both in Vas and Komárom-Esztergom counties. As to the other end of the scale: in 2013, the success rate of prosecutorial motions was 79.3% and 79.4% in Fejér and Zala counties, respectively, while in 2014 the lowest rates applied in Heves and, again, Zala counties, the rates being 81.8% and 80.6%, respectively.<sup>108</sup> (The scope of the research did not allow us to look into the reasons for these differences.)

At the same time, the number and proportion of alternative coercive measures applied remain to be very low – the tables below show the numbers pertaining to house arrest and geographical ban as the coercive measures applied the most often. (Data on restraining orders are not included here due to the special conditions under which a restraining order may be applied.) As far as bail is concerned, in 2013 bail was ordered by courts in 33 cases (while 75 such requests were made), and only in one of these 33 cases did the court accept bail instead of ordering pre-trial detention upon the prosecutor's motion (in 31 cases bail was accepted when an ongoing pre-trial detention was terminated by the court, while in one case it was accepted instead of prolonging the pre-trial detention upon the prosecutor's motion).<sup>109</sup>

Table 5 – Alternative coercive measures ordered instead of pre-trial detention prior to filing the bill of indictment

Year	Prosecutorial motions aimed at ordering pre-trial detention	Coercive measures ordered by the court		
		pre-trial detention	geographical ban	house arrest
<b>2009</b>	5,960	5,591	97	57
<b>2010</b>	6,355	5,885	136	97
<b>2011</b>	6,245	5,712	168	104
<b>2012</b>	5,861	5,334	140	141
<b>2013</b>	6,673	6,098	169	148
<b>2014</b>	5,319	4,836	120	114

Source: *Ügyészeti statisztikai tájékoztató (büntetőjogi szakterület) 2013* [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee

<sup>108</sup> Source: *Ügyészeti statisztikai tájékoztató (büntetőjogi szakterület) 2013* [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee.

<sup>109</sup> Source: *Ügyészeti statisztikai tájékoztató (büntetőjogi szakterület) 2013* [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], p. 48, Table 56, <http://mklu.hu/repository/mkudok2832.pdf>.

The table above also shows clearly that even though in the last year, following the decrease in the number of prosecutorial motions aimed at ordering pre-trial detention, the number of pre-trial detentions also decreased, the courts did not order more alternative coercive measures instead of pre-trial detention. In addition, as shown by the tables below, there was no increase either in the number of prosecutorial motions explicitly aimed at ordering house arrest or geographical ban in 2014. Thus, the drop in the number of pre-trial detentions ordered has not brought along a more intensive use of alternative coercive measures on behalf of the authorities.

*Table 6 – The number of proposals and prosecutorial motions aimed at ordering geographical ban and court decisions ordering a geographical ban*

Year	Proposals made by the police to the prosecution	Prosecutorial motions put forward upon a proposal	Total number of prosecutorial motions (own initiative and upon police proposal combined)	Court decisions ordering geographical ban
<b>2009</b>	102	85	257	249
<b>2010</b>	98	83	334	325
<b>2011</b>	59	51	236	227
<b>2012</b>	68	51	201	197
<b>2013</b>	83	68	257	241
<b>2014</b>	90	79	209	192

*Source: data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee*

*Table 7 – The number of proposals and prosecutorial motions aimed at ordering house arrest and court decisions ordering a house arrest*

Year	Proposals made by the police to the prosecution	Prosecutorial motions put forward upon a proposal	Total number of prosecutorial (own initiative and upon police proposal combined)	Court decisions ordering house arrest
<b>2009</b>	22	15	70	65
<b>2010</b>	31	24	104	95
<b>2011</b>	39	32	92	83
<b>2012</b>	37	21	94	82
<b>2013</b>	46	33	159	149
<b>2014</b>	83	61	186	154

*Source: data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee*

It shall be added that the changes in the number of motions for pre-trial detention and the detentions ordered on the basis thereof are not explained by the changes in the total number of criminal offences, or, more precisely, in the total number of registered criminal offences. For instance, from 2012 to 2013 the number of registered criminal offences decreased by more than 94,000 (20%), while the number of motions aimed at ordering pre-trial detention increased by 13.9%. In comparison, the number of registered criminal offences dropped by approximately 48,000 (12%) from 2013 to 2014, while the number of pre-trial detention orders decreased by 20-21% (see Table 4 above). (Furthermore, the proper assessment of the data pertaining to the total number of criminal offences is hindered by the fact that the quite large decrease in 2013 may be explained "primarily with legislative changes",<sup>110</sup> for example by an increase in the value limit of petty offences – misdemeanours – as a result of which the number of thefts amounting to a criminal offence dropped.)

*Table 8 – The number of registered criminal offences*

Year	2009	2010	2011	2012	2013	2014
<b>Registered criminal</b>	394,034	447,186	451,371	472,236	377,829	329,575

<sup>110</sup> See: *Tájékoztató a 2013. évi bűnözésről [Information note on crime]*, Legfőbb Ügyészség [Chief Prosecutor's Office], p. 5, <http://www.mklu.hu/repository/mkudok8770.pdf>.



<b>offences</b>					
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Source: Tájékoztató a 2013. évi bűnözésről [Information note on crime], Legfőbb Ügyészség [Chief Prosecutor's Office], p. 5, <http://www.mklu.hu/repository/mkudok8770.pdf>; [https://www.ksh.hu/docs/hun/xstadat/xstadat\\_evkozi/e\\_zij003.html](https://www.ksh.hu/docs/hun/xstadat/xstadat_evkozi/e_zij003.html)

The next table shows the numbers of different coercive measures at two different points in the criminal proceeding: when the bill of indictment is filed and when the first instance judgment is delivered. The table also shows the proportion of remand prisoners compared to the total number of persons accused. (The respective data pertaining to the year 2014 are not yet available.)

Table 9 – Number of coercive measures when the bill of indictment was filed and when the first instance judgment was delivered; proportion of pre-trial detainees as compared to the total number of persons accused

When the bill of indictment was filed					
Year	Number of persons accused	Total number of coercive measures	Type of coercive measure*		
			Pre-trial detention	Geographical ban	House arrest
<b>2009</b>	91,263 (100%)	3,084	2,532 (2.77%)	192	56
<b>2010</b>	90,937 (100%)	3,250	2,668 (2.93%)	182	42
<b>2011</b>	93,592 (100%)	3,322	2,650 (2.83%)	151	47
<b>2012</b>	82,948 (100%)	3,346	2,497 (3.00%)	166	61
<b>2013</b>	79,186 (100%)	3,174	2,509 (3.17%)	161	74
When the first instance judgment was delivered					
Year	Number of persons accused	Total number of coercive measures	Type of coercive measure *		
			Pre-trial detention	Geographical ban	House arrest
<b>2009</b>	91,263 (100%)	2,823	2,413 (2.64%)	187	39
<b>2010</b>	90,937 (100%)	2,954	2,468 (2.73%)	233	32
<b>2011</b>	93,592 (100%)	3,089	2,509 (2.71%)	191	44
<b>2012</b>	82,948 (100%)	3,043	2,270 (2.74%)	211	59
<b>2013</b>	79,186 (100%)	2,925	2,358 (2.98%)	216	54

Source: A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. – 2013. [Main data on prosecutorial activity before criminal courts – Year 2012], Legfőbb Ügyészség [Chief Prosecutor's Office], pp. 51 and 54, <http://www.mklu.hu/repository/mkudok403.pdf>

\*Detailed data on 72-hour 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.

Finally, data on the length of pre-trial detention shall be presented. No statistical data are available as to the average length of pre-trial detention; the table below shows the pre-trial detentions terminated in a given year divided by their length.

Table 10 – Number of pre-trial detentions terminated, divided by their length

Year	Less than one month	Between 1–12 months	Over a year
<b>2009</b>	1,001	4,492	172
<b>2010</b>	1,067	4,878	243
<b>2011</b>	1,090	4,551	274
<b>2012</b>	1,114	4,461	271
<b>2013</b>	1,356	4,968	297
<b>2014</b>	960	4,376	194

Source: data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee

### III. RESEARCH METHOD

This project was designed to develop an improved understanding of the process of the judicial decision-making on pre-trial detention in 10 EU Member States. This research was carried out in 10 Member States with different legal systems (common and civil law), legal traditions and heritage (for example Soviet, Roman and Napoleonic influences), differing economical situations, and importantly strongly varying usage of pre-trial detention in criminal proceedings (for example 12.7% of all detainees in Ireland have not yet been convicted<sup>111</sup> whereas in the Netherlands 39.9% of all prisoners have not yet been convicted<sup>112</sup>). The choice of participating countries allows for identifying good and bad practices, and proposing reform at the national level as well as developing recommendations that would ensure enhanced minimum standards across the EU. The individual country reports focusing on the situation in each participating country will provide in-depth input to the regional report which will outline common problems across the region as well as highlighting examples of good practice, and will provide a comprehensive understanding of pan-EU pre-trial decision-making.

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

The five-stages of the research were as follows:

- (1) Desk-based research, in which the partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms.  
Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to specific local conditions – explore practice and motivations of pre-trial decisions and capture the perceptions of the stakeholders in all participating countries.
- (2) A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.
- (3) Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.
- (4) Case file reviews, which enabled researchers to get an understanding of the full life of a pre-trial detention case, as opposed to the snapshot obtained through the hearing monitoring.
- (5) Structured interviews with judges and prosecutors, capturing their intentions and motivation in cases involving pre-trial detention decisions. In addition to the common questions that formed the main part of the interviews, the researchers developed country-specific questions based on the previous findings to follow-up on specific local issues.

Country-specific features of the research method were applied in Hungary included the following way.

Defence practitioner survey:<sup>113</sup> The request to fill out the questionnaire prepared for attorneys providing defence in criminal procedures was disseminated to 80 attorneys by the Hungarian Helsinki Committee via e-mail, their list having been compiled based on professional contacts and personal recommendations. Finally, 31 attorneys completed the survey, covering 8 counties out of the 19 of Hungary and also Budapest, 60.9% of them submitting that their practice consisted of criminal cases in more than 50%.

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<sup>111</sup> <http://www.prisonstudies.org/country/ireland-republic>, data provided by International Centre for Prison Studies, 18 June 2015.

<sup>112</sup> <http://www.prisonstudies.org/country/netherlands>, data provided by International Centre for Prison Studies, 18 June 2015.

<sup>113</sup> The survey is available here: [http://helsinki.hu/wp-content/uploads/FTI-HHC\\_defence\\_practitioners\\_survey\\_PTD\\_2014.pdf](http://helsinki.hu/wp-content/uploads/FTI-HHC_defence_practitioners_survey_PTD_2014.pdf).



Case file review.<sup>114</sup> In order to enhance the comparability of the data gathered in the course of the case file review with regard to the individual criminal procedures, the plan of the Hungarian Helsinki Committee was to conduct the case file review with regard to criminal procedures complying with the following criteria:

- criminal procedures closed with a final decision in 2013,
- in which the adult defendant
- was convicted for the single count of a simple robbery as included in Article 321 (1) or (2) of Act IV of 1978 on the Criminal Code or Article 365 (1) or (2) of Act C of 2012 of the Criminal Code (new criminal code), without any additional charges, excluding attempted robberies, and
- in which – in any phase of them – the defendant’s pre-trial detention was ordered.

Choosing criminal procedures conducted due to the offence of a simple robbery, punishable with two to eight years of imprisonment, was motivated by the fact that, as also shown by the data submitted to the Hungarian Helsinki Committee pertaining the years 2009–2013 by the Chief Prosecutor’s Office, the number of pre-trial detentions ordered per year is the second highest in criminal procedures conducted due to robbery following theft, both highly outnumbering pre-trial detentions ordered in criminal procedures conducted due to other offences. At the same time it was presumed that, as compared to theft, in the case of robbery there will be a better chance to identify enough cases in which the defendant was convicted for a single act, contributing to the comparability of cases.

According to the original plans the case file review was to be conducted in Békés, Borsod-Abaúj-Zemplén, Fejér and Zala counties, and in the capital Budapest. When selecting the research sites, the success rate of prosecutorial motions aimed at ordering pre-trial detention was taken into account,<sup>115</sup> along with the data gathered in an earlier research pertaining to the harshness of punishments imposed.<sup>116</sup> However, research permissions issued by court presidents and experiences at the research sites revealed that on the one hand, the number of cases complying with the research criteria is lower than expected, and on the other hand the court registry system does not allow to rule out for example cases in which there was an additional charge involved, convictions for more counts of robbery as opposed to a single count, or attempted robberies.

Due to these circumstances the research was on the one hand extended to Hajdú-Bihar and Győr-Moson-Sopron counties and, both in the two latter counties and in Budapest to cases closed with a final decision in 2014. In addition it was decided that not only all case files complying with the above criteria will be reviewed at the research sites, but all other case files to which courts granted access but which did not fully comply with the research criteria (provided that a simple or aggravated robbery was the “primary” criminal offence in the case). Therefore, the final sample included also cases in which defendants were convicted for robbery accumulated with a less serious criminal offence or offences, and also cases in which the perpetrator was convicted for attempted robbery, aggravated robbery or more counts of robbery, and also a few cases in which the defendant was acquitted.

Finally, researchers of the Hungarian Helsinki Committee reviewed the case files of 116 defendants (covering 101 criminal cases), out of which 56 defendants complied with the research criteria fully, and 60 of them complied with the research criteria partly. When presenting the results of the case file review, it will always be indicated whether the results pertain to the sample complying with the initial research criteria (hereafter: “selected sample”) or to the full sample. Along with the 116 initial

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<sup>114</sup> The questionnaire used in the course of the case file review is available here: [http://helsinki.hu/wp-content/uploads/FTI-HHC\\_case\\_file\\_review\\_PTD\\_2015.pdf](http://helsinki.hu/wp-content/uploads/FTI-HHC_case_file_review_PTD_2015.pdf).

<sup>115</sup> For the related data divided by counties for the year 2013, see: *Ügyészégi statisztikai tájékoztató (büntetőjogi szakterület) 2013 [Statistical information note of the prosecution (criminal law)]*, Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor’s Office], p. 49, Table 57, <http://www.mklu.hu/repository/mkudok2832.pdf>.

<sup>116</sup> Mátyás Bencze – Attila Badó: *Területi eltérések a büntetéskiszabási gyakorlat szigorúságát illetően Magyarországon 2003 és 2005 között. [Territorial differences in the harshness of the practice of imposing sanctions in Hungary between 2003 and 2005.]* In: Zoltán Fleck (ed.): *Igazságszolgáltatás a tudomány tükrében. [The justice system in the light of science.]* Budapest, ELTE Eötvös Kiadó, 2010, pp. 125–147. The research examined sanctions imposed for serious bodily harm and theft on the basis of criminal cases closed with a final decision between 1 March 2003 and 30 October 2005. Counties were divided into three equal groups with regard to both indicators on the basis whether its indicators were low, average or high, and one county was chosen from each of these groups on an ad hoc basis. (For example in Borsod-Abaúj-Zemplén county both indicators were high, while in Zala county both indicators were low.) The selection of research sites was also influenced by practicalities: Budapest was included in the research due to availability considerations and the high number of pre-trial decisions.

decisions ordering pre-trial detention or another coercive measure, the case file review covered 354 further decisions concerning coercive measures, delivered before the first instance judgment was reached, and 87 decisions on coercive measures delivered after the first instance judgment was reached.

*Hearing monitoring:* Since hearings on pre-trial detention and coercive measures in general are closed to the public,<sup>117</sup> monitoring these hearings was not possible. Instead, researchers of the Hungarian Helsinki Committee attended trial hearings in a few cases on an ad hoc basis and following recommendations of attorneys, at which, according to the information provided by the attorneys, it was probable that a first instance judgment will be delivered and so, according to the respective legal provisions, the court will have to decide also on coercive measures.

*Interviews:* In addition to the above, interviews were conducted – with the permission of the Chief Prosecutor’s Office – with altogether five prosecutors (three of them working at three district prosecutor’s offices in Budapest and two of them working at county-level prosecutor’s offices). Prosecutor’s offices involved in the research were chosen by the Hungarian Helsinki Committee, while the prosecutors to be interviewed were chosen by the prosecution. The outline of the interviews was submitted in advance to the Chief Prosecutor’s Office, and so, indirectly, to the interviewees.<sup>118</sup>

In the case of judges, the National Judicial Office – after informing the Hungarian Helsinki Committee in March 2015 that in the future it wishes to handle all research requests centrally, through the Hungarian Justice Academy – unfortunately did not allow for conducting personal interviews. However, it was made possible that judges answer the questions in writing, after receiving the Hungarian Helsinki Committee’s questionnaire<sup>119</sup> through the Hungarian Justice Academy, in a way that filled-in questionnaires were sent back to the Hungarian Helsinki Committee via the Hungarian Justice Academy. Questionnaires were filled in by four investigation judges seated in Budapest, and two times three investigation judges seated at two local courts at the county seats of the same counties where the prosecutors were interviewed.<sup>120</sup> (The high proportion of Budapest-based judges involved in the research was considered justified because in 2014, 21% of the decisions ordering pre-trial detention were reached in the capital.<sup>121</sup>) Similarly to prosecutor’s offices, courts involved in the research were chosen by the Hungarian Helsinki Committee, while judges answering the questionnaires were partly chosen by the Hungarian Helsinki Committee and partly by the respective courts.

The Hungarian Helsinki Committee would like to hereby express its gratitude for their important help in conducting the research to the attorneys who completed the survey, forwarded it to their colleagues and helped with hearing monitoring, to the presidents and staff members of courts allowing and helping the case file review, to the judges who filled in the questionnaire, the National Judicial Office, the prosecutors undertaking the interviews, the Chief Prosecutor’s Office, and the researchers conducting the case file review.

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<sup>117</sup> CCP, Article 184 (1)

<sup>118</sup> The template used for the interviews with prosecutors is available here: [http://helsinki.hu/wp-content/uploads/FTI-HHC\\_prosecutors\\_interviews\\_PTD\\_2015.pdf](http://helsinki.hu/wp-content/uploads/FTI-HHC_prosecutors_interviews_PTD_2015.pdf).

<sup>119</sup> The template used for the interviews with judges is available here: [http://helsinki.hu/wp-content/uploads/FTI-HHC\\_judges\\_interviews\\_PTD\\_2015.pdf](http://helsinki.hu/wp-content/uploads/FTI-HHC_judges_interviews_PTD_2015.pdf).

<sup>120</sup> Conducting the research based on questionnaires and written answers was not the best solution also because for example the responses provided by three judges seated at the same local court were almost word by word the same.

<sup>121</sup> Source: data submitted by the Chief Prosecutor’s Office upon the data request of the Hungarian Helsinki Committee.

## IV. RESEARCH RESULTS

### 1. Procedural issues

Correct and fair procedures in pre-trial detention proceedings are fundamental to ensuring that the deprivation of liberty before a judicial sentence on the defendant's guilt is used lawfully. Lawful procedures meeting the fundamental requirements set for judicial proceedings safeguard the rights of the pre-trial detainee to be deprived of liberty only when such a measure is lawful, absolutely necessary and compatible with the presumption of innocence.

#### 1.1. The length of pre-trial detention and the principle of conducting procedures in a timely manner

The trial must take place within "reasonable" time according to Article 5(3) ECHR. The "reasonable" time period is determined by assessing if the period for which the concerned person is deprived of his/her liberty has 'imposed a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed to be innocent'.<sup>122</sup> Generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.<sup>123</sup> Whether this has happened must be determined by considering the individual facts of the case.<sup>124</sup>

In line with these requirements, Article 136 (1) of the CCP sets out that the courts, the prosecutor and the investigation authority shall strive to achieve that pre-trial detention lasts for the shortest time period possible, and it also sets out that if the defendant is in pre-trial detention, the criminal procedure has to be conducted in a timely manner,<sup>125</sup> which complies with the principles established by the ECtHR. In addition, the "principles appearing in the Hungarian individual court decisions and general guidelines are essentially in harmony with [the ECtHR's] system of requirements. The court decision published as BH2009. 43. stresses that courts shall strive to achieve that pre-trial detention lasts for the shortest time period possible, and shall conduct procedures in a timely manner, which also means that conducting examinations falling under the ex officio tasks of courts [...] shall clearly not lead to that at the same time they fail to deal with the substance of the case for months [...]"<sup>126</sup> However, in practice, these principles do not fully prevail, which is also supported by the results of the case file review pertaining to the length of pre-trial detention.

In the cases reviewed there was no significant difference between the two samples with regard to the average length of pre-trial detentions **in the period between ordering the investigation and delivering the first instance judgment**: in the "selected" sample defendants spent on average 271 days in pre-trial detention, while in the full sample the average length of pre-trial detention was 286 days.<sup>127</sup> (The difference between the two samples was much bigger regarding the average length of the procedure lasting up until the first instance judgment: the average length of procedures was 360 days in the selected sample and 429 days in the full sample.) In the selected sample 71.4% of the defendants were in pre-trial detention for over 6 months, while this proportion was 67.5% in the

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<sup>122</sup> *Wemhoff v Germany*, App 2122/64, 27 June 1968, para 5, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57595>

<sup>123</sup> *Stogmüller v Austria*, App 1602/62, 10 November 1969, para 5, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57582>

<sup>124</sup> *Buzadji v. Moldova*, App 23755/07, 16 December 2014, para 31, available at:

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-148659>

<sup>125</sup> CCP, Article 64/A (1) a)

<sup>126</sup> András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.]* Magyar Helsinki Bizottság, 2014, p. 31.

<sup>127</sup> When calculating the length of pre-trial detention and the criminal procedure, cases tried in a so-called expedited hearing procedure were disregarded. (According to Article 517 of the CCP, in the framework of an expedited hearing procedure the prosecutor may take the defendant to court within 30 days of the defendant's interrogation as a suspect if a) the criminal offence in question is punishable with a maximum of eight years of imprisonment, b) the case is simple, and if c) the evidence is at hand, and the defendant was caught in the act or admitted the criminal offence. If the conditions enumerated under sections a)–c) prevail and the defendant was caught in the act, the defendant shall be taken to court within 30 days of the defendant's interrogation as a suspect in the framework of an expedited hearing procedure.)

full sample, and there were also defendants who spent over one year in pre-trial detention: in the selected sample there were 11 such defendants, while in the full sample altogether 23. In the selected sample, the longest pre-trial detentions lasted for 445, 460, 470, 504 and 573 days, while in the full sample there were cases of detention which lasted for 683 and 760 days. While under certain circumstances the ECtHR found detentions longer than these acceptable, one must remember that the selected sample contained cases in which an adult defendant was convicted for a single count of a simple robbery without any additional charges. Since robberies are relatively simple offences from the point of view of evidencing (compared, for instance, to complex economic crimes), and also in these cases the high number of defendants and/or witnesses could not have caused delays, we must conclude that the average length and also these longer detentions do raise an issue of potential non-compliance with the requirements of the ECHR and the Hungarian CCP. On the other end of the scale stood cases in the selected sample in which pre-trial detention lasted for 48, 70, 89, 95 and 104 days, while the shortest periods of pre-trial detention in the full sample lasted for 44, 48, 55, 58 and 70 days.

Since according to the Hungarian regulatory concept, detention in the period between the first instance judgment and the final judgment also qualifies as “pre-trial” detention, the length of pre-trial detention was examined also with regard to the whole criminal procedure. In this case, the average length of pre-trial detention was 429 days in the selected sample and 401 days in the full sample. (The average length of the full procedures was 443 in the selected sample and 571 days in the full sample.) Considering the selected sample, 55.4% of the defendants spent over one year in pre-trial detention, while this proportion was 46.5% in the full sample. Calculating the length of pre-trial detention regarding this period, the longest pre-trial detentions in the selected sample lasted for 650, 800, 806, 890 and 940 days, while the full sample also contained cases in which defendants were in pre-trial detention for 875, 972 and 1 048 days.

Attorneys participating in the survey voiced also strong concerns as to the practical realisation of the **principle of conducting procedures in a timely manner**, which prevails “sometimes with hitches” also according to one of the prosecutors: 23 attorneys (74.2% of those participating in the survey) were of the view that the criminal procedure is not conducted more effectively or more speedily in the cases of pre-trial detainees than in the cases of those who are not detained pending trial or are under an alternative coercive measure, which is clearly against the above quoted ECtHR jurisprudence and also the pertaining provision of the CCP.

The most common general cause of lengthy pre-trial detentions as identified by attorneys (ten of them identified this as a general cause) was that investigation authorities – and/or the justice system in general – is overwhelmed, and there is a high workload. At the same time eight attorneys stated in the questionnaires that it contributes to lengthy pre-trial detentions that it is “simpler” and “more comfortable” for authorities if the defendant is in pre-trial detention, since in that case he/she is surely available, which goes against conducting the procedures speedily. (At other points of the survey it was also submitted that authorities may also be influenced by the consideration that “nothing bad can happen” if the defendant is in pre-trial detention, which does not apply if the defendant is released.) These opinions are in compliance with the view of one of the interviewed prosecutors who submitted that as a negative effect of pre-trial detention, authorities may “lean back, since they have the detainee who will go nowhere, and at that point the investigation authorities take their time a bit” with the investigation. It is obvious that such considerations go against the legitimate purposes lying behind allowing for the deprivation of liberty of a person who is still presumed to be innocent.

In the Hungarian system it is the prosecutor’s task to supervise the investigation when it is conducted by the investigation authority (usually the police).<sup>128</sup> According to the CCP, in these cases the prosecutor inspects whether the investigation is concluded in compliance with the provisions of the CCP, and that the participants of the procedure may exercise their rights. In order to achieve this, the prosecutor may, among others, instruct the investigation authority to conduct certain investigative acts or conclude the investigation within a deadline set by the prosecutor, may be present at investigative acts, may inspect the case file of the investigation, and may obtain the case file.<sup>129</sup>

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<sup>128</sup> CCP, Article 28 (4)

<sup>129</sup> CCP, Article 28 (4)

Furthermore, according to the interviews conducted with prosecutors, the so-called “cases of captives” (i.e. the cases in which the defendant is in pre-trial detention) are under “enhanced” prosecutorial supervision. At the same time more attorneys (seven respondents to the questionnaire) submitted among the general causes of lengthy pre-trial detentions that prosecutorial supervision over investigations is not effective, and protracted procedures have no consequences.

The means of the investigation judge and courts in general are formally restricted in terms of influencing the effectiveness or speed of investigations: the CCP does not allow for judges to e.g. impose a deadline for conducting certain investigative acts. (At the same time three attorneys stated in the survey that they encountered such a judicial step.) Almost half of the attorneys, 14 respondents to the questionnaire submitted that courts apply no measures at all to control the efficiency of the investigations. Some respondents mentioned the method when the judge “sends a message” to the investigation authority or the prosecution by prolonging the pre-trial detention not for the statutory maximum period, but for a shorter time (e.g. not for the maximum three months as requested by the prosecutor, but for two months only). This practice has also been encountered by the Hungarian Helsinki Committee and is considered after all to be in compliance with the case law of the ECtHR.<sup>130</sup> Related examples were also found in the cases affected by the case file review:

„In order to conclude the investigation in the case it is necessary to let the defence examine the case files.<sup>131</sup> According to the standpoint of the court, to carry out the latter, to file the bill of indictment and to take the measures necessary for preparing the trial a time period shorter than the three months included in the prosecutorial motion is also sufficient.”

Furthermore, responses from attorneys participating in the survey included that in these situations it happens that the judge raises the investigation authority’s attention to the content of Article 136 (1) of the CCP, makes a remark at the hearing that “it would be high time that the case was finished”, or, as formulated by one of the attorneys, “threatens” the investigation authority or the prosecution that the next time the court will not prolong the defendant’s pre-trial detention.

In the framework of the survey, only two attorneys brought up that they encountered cases in which pre-trial detention was actually terminated because the investigation got protracted and did not advance with the necessary speed. The low proportion of such statements is also in compliance with the experiences of the Hungarian Helsinki Committee as portrayed in a recent publication: “We encountered cases in which even though the judge remarked in the decision on prolonging pre-trial detention that the investigation authority did not comply with the principle of conducting procedures in a timely manner, and was in delay with carrying out certain investigative acts (even ones included in the motions for months as acts that should be carried out), he/she still prolonged the detention, since in his/her view the general and special grounds otherwise prevailed.”<sup>132</sup>

The following quotes from decisions prolonging pre-trial detention, delivered in cases covered by the case file review, provide examples to the violation of the principle of conducting procedures in a timely manner.

“In the course of his **detention lasting for a year** the suspect was interrogated in November 2011, and, subsequently, in September 2012, twice in total. His motion for carrying out an evidentiary act (examination by polygraph) was rejected without in-merit reasoning. In the past six months since May 2012 the investigation authority has interrogated only one witness, [...]. All this

<sup>130</sup> “The ground for this solution may precisely be the doctrine of »a genuine requirement of public interest« supporting arrest as elaborated in the Labita case, since the pressing public interest substantiating detention makes at the same time of course also necessary to investigate the criminal offence in question as fast as possible.” See: András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.] Magyar Helsinki Bizottság, 2014, p. 31.*

<sup>131</sup> “Examination of the case files” by the defence takes place after the in-merit investigation has been concluded.

<sup>132</sup> András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.] Magyar Helsinki Bizottság, 2014, p. 31.*

**seriously violates the suspect's right to a fair trial**, irrespective of the fact that due to his former lifestyle and criminal history the concrete, fact-based risk of getting unavailable and reoffending may be unequivocally established. [...] However, the most serious omission [with regard to the investigation] is the failure to carry out the confrontation of the **aggrieved parties as to the acts of the defendant**. *(Highlighted as in the original decision. The decision was delivered in a case in which the homeless defendant, identified in the case files as being of Roma origin, was acquitted at the end of the procedure.)*

"The court noted at the same time that according to the files of the investigation, the procedural obligation included in Article 136 (1) of the CCP, according to which in case of a detained defendant [the authorities] shall strive to achieve that pre-trial detention lasts for the shortest time period possible and therefore the procedure shall be conducted in a timely manner, seems to have been violated. Upholding pre-trial detention even further makes it necessary to conclude the investigation as soon as possible, to allow the defence to examine the case files, and to take a stance regarding the indictment, *in accordance with the intention of the prosecution as submitted at the hearing.*" *(Highlighted as in the original decision. The decision was delivered in the case of a defendant who at the time had been in pre-trial detention for over a year.)*

"On the basis of the files of the investigation available, the court concluded that since the last prolongation of the coercive measure no investigative act has been carried out apart from the investigation authority summoning witness X.Y., then allowing the witness to provide a testimony in writing, and prolonging the deadline for submitting the forensic haemogenetics expert opinion. According to Article 136 (1) the court, the prosecutor and investigation authority shall strive to achieve that pre-trial detention lasts for the shortest time period possible. If the defendant is in pre-trial detention, the procedure shall be conducted in a timely manner. In the view of the court, the investigation got unreasonably protracted in the present case. Therefore, the court prompts the investigation authority to comply with the principle of conducting the procedure in a timely manner, to carry out the investigative acts which are still necessary, and to conclude the investigation as soon as possible."

"On the basis of the files of the investigation, the court concluded that the principle of conducting the procedure in a timely manner, set out in Article 136 (1) of the CCP, seems to have been violated; the investigation is practically inactive. Apart from the suspect's continued interrogation on 16 April 2013, no in-merit procedural act bringing the evidentiary procedure forward has been carried out since 30 January 2013. In a decision delivered on 16 January 2013 the investigation authority appointed a forensic haemogenetics expert. [...] In the view of the court, deciding on [the question posed to the expert] has no relevance as to proving the criminal offence examined in the present procedure. The investigation set 16 February 2013 as a deadline for submitting the expert opinion; this deadline has been prolonged three times since then. [...] In the view of the court, these circumstances result that the criminal procedure conducted against the defendant, who confessed to the criminal offence and has been in pre-trial detention for six months, is unreasonably protracted."

As a bad example, it may be mentioned that researchers encountered a decision in which the court completely failed to react to the arguments of the defence counsel claiming that the procedure got protracted and that the defendant was interrogated only once during the time spent in pre-trial detention.

However, to the question whether they take into account the delay on behalf of the investigation authority or the prosecution with regard to procedural acts, altering charges, etc. when deciding on prolonging or upholding pre-trial detention all of the judges filling in the questionnaire replied positively. Responses included for example that they examine whether the investigation authority "did everything it could in order to ensure that pre-trial detention lasts for the shortest period possible [and] whether it committed any omission resulting in the delay in carrying out investigative acts". Judges stated that that they take these factors into account primarily if the prosecutorial motion aimed at the prolongation of the detention refers to the same procedural acts as outstanding tasks as the previous one, and the case files also do not show any progress made in the case. Judges also



claim to look into the due diligence of the authorities, when the prosecutor requests the court to further prolong pre-trial detention with the explanation that he/she needs additional time to compile the bill of indictment and prepare for the trial, even though the investigation has been concluded for some time. In relation to the consequences of violating the requirement of conducting procedures in a timely manner, judges submitted through the questionnaires e.g. the following:

- "In the case of a delay I raise the prosecutor's attention to this, and in the case of a repeated omission, delay, or inactive investigation I order, almost without exception, that a less restrictive coercive measure is to be applied instead of pre-trial detention or I decide to terminate the pre-trial detention of the defendant. Unfortunately, the practice of the second instance court is not consistent in this regard, and many such decisions of mine were altered by them, saying that the violation of the principle of conducting the procedure in a timely manner is not a ground for terminating pre-trial detention."
- "I either prolong the pre-trial detention with a shorter period of time than included in the prosecutorial motion, or I conclude that pre-trial detention [in the case] already qualifies as early punishment, and, therefore, I terminate the pre-trial detention, sometimes along with applying a less restrictive coercive measure."
- "I believe in drastic solutions: if the investigation is not conducted in a timely manner, there will be no pre-trial detention."

While it is not to be doubted that the individual judges proceed in the case of delays as they describe, based on the lengths of the detentions in the sample, the relevant ECtHR decisions against Hungary, and also the above presented statistics on the still very low numbers of alternatives, we can conclude that this approach may not be regarded as widespread among the Hungarian judiciary. (A part of the reason for this may exactly be the conservatism of higher courts criticised by one of the responding judges, namely that on the basis of a very strict grammatical interpretation of the CCP, they claim that the failure to comply with the requirement of a fast track procedure may not be taken into account when deciding about pre-trial detention.)

As some of the quotes submitted in the box show and as it was also raised by one of the interviewed prosecutors, the delay in submitting expert opinions also contributes to protracted procedures, as also mentioned by some of the attorneys participating in the survey as a general reason for lengthy pre-trial detentions. It shall be added that as a reaction to the case of the "Ároktő gang" – where the procedure got protracted, among other things, due to the delay in submitting expert opinions – not only the institution of "unlimited" pre-trial detention was created, but the rules on experts were also altered. As of 1 January 2014 the CCP was amended, resulting that the deadline for submitting an expert opinion may be set in 60 days as a maximum, which may be prolonged once with 30 days if the delay is justified.<sup>133</sup> In addition, it was also set out that a fine shall be imposed on the expert and he/she shall be obliged to cover the related costs if he/she fails to comply with the deadline set for submitting the expert opinion due his/her own fault.<sup>134</sup> It must be added however that unless the heavily understaffed expert institutions are provided with the necessary financial and human resources, the introduction of such sanctions in itself will not speed up the examinations and procedures to the necessary extent.

With regard to the length of pre-trial detention, the institution of **"unlimited" pre-trial detention** as presented among the legal provisions is a Hungarian characteristic necessary to mention. Written responses and interviews showed that the various participants of the criminal procedure are against this new possibility more or less unanimously. 26 attorneys approached (84% of the respondents) submitted a negative opinion with regard to unlimited pre-trial detention, although one of those who deemed it acceptable stated that this possibility "may be necessary due to the current performance level of investigative work". Besides fundamental rights aspects, some of the attorneys pointed out that the provision making unlimited pre-trial detention possible contravenes the principle of conducting procedures in a timely manner, since in this way there is no pressure on the authorities to conclude the investigation, press charges, etc. before the maximum period of pre-trial detention

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<sup>133</sup> CCP, Article 100 (3)

<sup>134</sup> CCP, Article 113 (2)

expires, so these procedures may get even more protracted.<sup>135</sup> Three of the prosecutors interviewed also submitted a negative opinion in relation to the possibility of unlimited pre-trial detention, while another prosecutor chose not to comment on legislative steps. These three prosecutors stated among others that it would be better if the conditions to conduct procedures within a given timeframe would be ensured, that “a criminal procedure is supposed to be concluded” within four years, and that it would be the “European [i.e. civilised] solution” to have an upper time limit. Furthermore, all but one judges submitted that they do not agree with this legislative amendment, and their answers also included the consideration that if there is an upper time limit, then “at least the investigation authority, the prosecution and the court deciding on the merits of the case are forced not to »protract« the case”.

Both the case file research and the interviews have confirmed that the requirement of conducting procedures in a timely manner and with special diligence when the defendant is in custody is not fully respected in the Hungarian criminal justice system, resulting in a number of cases when the length of detention violates the relevant ECHR and CCP provisions. The investigating authorities often do not respect their obligation to conduct fast track investigations when the suspects are deprived of their liberty, the enhanced prosecutorial supervision of such cases does not seem to offer a solution for the problem, and the law does not (or at least not directly) authorise the courts to terminate pre-trial detention on the basis of the delays of the investigating authority and/or the prosecution, which from time to time results in lengthy periods of detention violating the concerned suspects’ right to liberty. In addition, the elimination of the statutory upper limit of pre-trial detention in some cases gives the dangerous message that the legislator is willing to accept serious delays in procedures even when the defendants are deprived of their liberty while the case is going on. In order to remedy these problems, the following steps seem desirable:

- Establishing statutory means for the courts to enforce the principle of conducting procedures in a timely manner (e.g. if the protraction of the investigation also results in a protracted pre-trial detention, the judge should be allowed to determine a deadline for carrying out certain investigative acts; there should be a statutory possibility to terminate the pre-trial detention in the absence of investigative acts, etc.).
- Abolishing the possibility of “unlimited” pre-trial detention: amendment of Article 132 of the CCP in a way that, similarly to the situation earlier, there is an upper time limit for pre-trial detention ordered or upheld before the first instance judgment in every criminal procedure.
- Providing expert institutions with the necessary material and human resources so that expert opinions can be presented in a timely manner.
- Providing training to prosecutors and judges on the ECtHR’s jurisprudence on the reasonable length of pre-trial detention.

## 1.2. Presence of the defence counsel and the performance of the defence

In terms of Article 6(3) of the ECHR, as part of the right to a fair trial, everyone charged with a criminal offence has the right to defend himself/herself through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

The position of the usually not legally trained defendant is characterised by strong imbalance in comparison to the police carrying out the investigation or the prosecutor representing the charges against him/her. This imbalance can only be offset (and thus the true fairness of the procedure guaranteed) if the individual facing the criminal justice apparatus is provided with professional legal assistance, i.e. a counsel helping him/her to challenge the decisions of the authorities, have his/her rights respected, and so on.

The need for such professional assistance is especially acute when the defendant faces remand custody, i.e. a measure that in its de facto impact equals imprisonment, the most serious punishment

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<sup>135</sup> The Hungarian Helsinki Committee also raised this aspect in its letter written to Members of Parliament before the law was amended, asking them not to vote for it. See: [http://helsinki.hu/wp-content/uploads/Helsinki\\_bizottsag\\_level\\_elozetes\\_2013\\_11\\_09.pdf](http://helsinki.hu/wp-content/uploads/Helsinki_bizottsag_level_elozetes_2013_11_09.pdf).



European criminal justice systems apply. Therefore, we have looked into the presence of counsels at the procedural acts in the framework of which decisions on pre-trial detention were made.

According to the results of the case file review, defence counsels were not present in 33% at the **first hearing related to pre-trial detention** in those 88 cases with regard to which the case files included respective data.<sup>136</sup> However, since pre-trial detention was ordered in more than 97% of the cases at the first hearing on coercive measures, no significant correlation could be drawn between the outcome of the hearing and the presence of the defence counsel, or the performance of the defence.

*Table 11 – The performance of the defence at the first hearing related to pre-trial detention*

The defence	Yes (%)	No (%)	Total case number
made a submission	12%	88%	83
presented arguments only orally	96.1%	3.9%	76
submitted arguments	66.7%	33.3%	78
submitted evidence	7.8%	99.2%	77

Both the case file review and the responses of five of the judges filling in the questionnaire showed that in general, defence counsels present their stance on remand only at the hearing (i.e. they do not submit their arguments beforehand). However, the responding judges declared almost unanimously (with one of them not answering the respective question) that even if they are not made aware of the defence's stance in advance, they do not disregard the arguments of the defence, these can substantively influence their decision even if only submitted at the hearing.

When assessing the data on the presence of attorneys and their performance, the time when defence counsels are notified about the hearing on pre-trial detention (in relation to which the CCP does not include any minimum), and the average time they have to prepare for the hearing (e.g. to examine the case files) shall be taken into consideration as an important factor.

Since the case files do not contain any reference to the time of the notification for a particular hearing, in this regard we have to rely on the responses of attorneys participating in the survey. These responses showed that defence counsels were notified about the hearing in a more or less timely manner (if we compare the time of the notification to the 72-hour maximum length of detention before a person has to be taken before a judge), but the time available for studying case files was less than 30 minutes according to almost 45% of the defence counsels, which obviously does not allow the defence counsel to e.g. gather evidence. As far as notifying the defence about the hearing related to ordering pre-trial detention is concerned, proposals from attorneys included the notification's electronic delivery.

*Table 12 – How long on average is the defence counsel given to prepare for the initial hearing related to pre-trial detention? (N<sup>137</sup>=29)*

	Less than 10 minutes	30 minutes or less	One hour or less	More than an hour
<b>N</b>	7	6	3	13
<b>%</b>	24.1%	20.7%	10.3%	44.8%

*Table 13 – How long in advance on average is the defence counsel notified about the hearing on ordering pre-trial detention? (N=30)*

	0–2 hours	2–6 hours	6–12 hours	12–24 hours	More than 24 hours
<b>N</b>	1	3	5	14	7
<b>%</b>	3.3%	10%	16.7%	46.7%	23.3%

<sup>136</sup> Data from the case file review pertaining to the conduct of the defence counsel and to the efficiency of the defence are assessed with regard to the full sample and only with regard to the period up until the first instance judgment was delivered.

<sup>137</sup> N=number of items

In the cases covered by the case file review, defence counsels were not present at 66% of all the further hearings<sup>138</sup> at which decisions on pre-trial detention were made. In addition, only 50.5% of the 95 case files that provided this information showed that the defence counsel attended all hearings where the court delivered a decision on pre-trial detention or coercive measures. (It has to be noted that the presence of the counsel is mandatory at trial hearings and our numbers include those trial hearings at which the court made a decision on pre-trial detention within the framework of the trial hearing. This means that the level of presence of lawyers at remand hearings where it is optional is very low.) In line with the results of the case file research, half of the 28 attorneys responding to the respective question stated that defence counsels are always present at pre-trial detention hearings.

The defence was not more active with regard to further decisions on pre-trial detention than with regard to the first one: in relation to 80.3% of all such decisions the defence did not bring up any counter-argument against prolonging or upholding pre-trial detention, and asked the prosecution altogether three times about the existence of new evidence supporting the prolongation of or upholding the coercive measure.

It has been a recurring topic for previous research in Hungary that the system of ex officio appointed defence counsels shows considerable deficit in terms of presence and performance in the investigative phase as compared to retained defence counsels.<sup>139</sup> Interpreted together with the data on the scarce presence of lawyers at the relevant hearings, the fact that the great majority of defendants concerned by the research had ex officio appointed counsels (out of 116 concerned defendants, 97 had appointed counsels throughout the whole proceeding, and the remaining 18 defendants had appointed counsels at certain phases of the proceeding), seems to support these previous findings.

In summary, it can be said that with the exception of the first remand hearing, ex officio appointed counsels very rarely appear at remand related hearings (where their presence is optional), and when they do appear, their level of activity leaves much to be desired. In light of the importance of the counsel's presence in cases when the deprivation of liberty before a final judgment is at stake, this is a rather alarming finding. To remedy the problem, the following recommendations are made:

- Making the presence of defence counsels mandatory at hearings related to pre-trial detention, but especially at the hearing related to ordering pre-trial detention.
- Establishing a deadline for notifying the defence counsel about the hearings, which makes it realistically possible for the defence counsel to appear at the hearing.
- Establishing a deadline for submitting the prosecutorial motion aimed at pre-trial detention and related files of the investigation to the defence before the hearing or the respective decision, which makes it realistically possible for the defence to get prepared for the hearing, make submissions or motions, obtain documents, etc.
- Considering the possibility of introducing electronic delivery when notifying the defence about the hearing related to ordering pre-trial detention.

### 1.3. Presence and performance of the prosecutor

In the Hungarian criminal justice system the prosecutor is supposed to have a very important role in guaranteeing the lawfulness of the proceeding and the defendant's possibility to effectively exercise his/her procedural rights. In the investigation phase, the prosecutor's motion triggers the procedure potentially leading to the deprivation of the suspect's liberty. Therefore, the presence and the performance of the prosecutor in relation to pre-trial detention are very important from the point of view of compliance with fundamental rights.

At the hearing on ordering pre-trial detention (in the 81 cases in which the respective data was recorded) the prosecutor upheld the content of his/her written submission also orally in 77.8% of the

<sup>138</sup> Hereafter, this category refers to decisions on prolonging, upholding or reviewing pre-trial detention, along with decisions on motions aimed at terminating pre-trial detention.

<sup>139</sup> For a summary on the issue, see for example: András Kristóf Kádár – Nóra Novoszádek – Adrienn Selei: *Ki rendelt itt védőt? Egy alternatív védőkirendelési modell tesztelésének tapasztalatai. [Who Ordered a Counsel Here? – The Experiences of Testing an Alternative Model of Appointing Defence Counsels.]* Magyar Helsinki Bizottság, Budapest, 2012, pp. 7–9, [http://helsinki.hu/wp-content/uploads/MHB\\_Ki\\_rendelt\\_itt\\_vedot\\_2012.pdf](http://helsinki.hu/wp-content/uploads/MHB_Ki_rendelt_itt_vedot_2012.pdf).

cases, added further arguments to it orally in 19.8% of the cases. As far as the evidence presented by the prosecutor in relation to ordering pre-trial detention is concerned, it may be stated that in the cases covered by the case file review these included only evidence aimed at verifying that there was a well-founded suspicion of a criminal offence committed by the defendant and information on the defendant's criminal record, if any. (There was only one case in the sample in which the prosecutor presented already at this point evidence showing that the defendant threatened the aggrieved party, and so there was a risk of intimidating a witness.)

At the further hearings and trial hearings pertaining to pre-trial detention in the period up until the first instance judgment the prosecutor was mostly present: with regard to the selected sample the prosecutor was present in 95.5%, while with regard to the full sample the prosecutor was present in 95% of the hearings. Based on the case files, prosecutors submitted actual new evidence explicitly supporting that the prolonging or upholding of pre-trial detention is necessary in an insignificant proportion: regarding 2.1% of the decisions prolonging, upholding, etc. pre-trial detention in the selected sample and regarding 3.4% of the decisions in the full sample.

This supports the criticism that in many cases prosecutors motion (and courts order) the deprivation of liberty on the basis of generalised and abstract arguments only related to the prospective punishment or the manner in which the criminal offence has been committed.

None of the prosecutors interviewed expressed concerns with regard to the sufficiency of the information provided by the investigation authority, serving to allow them to decide whether they motion the ordering or prolonging pre-trial detention, and three of them added that if they do not possess certain information, then they can instruct the investigation authority to obtain this information. Also the prosecution itself has access to certain registries, e.g. to the registry of the criminal history of defendants, which they can use to supplement data.

As far as the presence of the prosecution at hearings is concerned, one of the judges questioned raised attention to the following problem: "in the capital the prosecutor's office considers the presence of prosecutors at hearings a formality, and, typically, prosecutors delegated to the hearings do not know the case, do not have the case files, and are obliged to uphold the original prosecutorial motion irrespective of what happens at the hearing. Therefore, the adversarial nature of the hearing does not prevail, and the CCP's provision that the prosecutor has to take into consideration circumstances leading to acquittal at every phase of the procedure is also violated, since these circumstances are often revealed at the hearing. This also has a major significance if the prosecutor appeals against the court's decision on pre-trial detention, since such an appeal has a suspending effect. If the presence of the prosecutor who is familiar with the case is not an available option, then the present approach of a »binding mandate« should be discarded, since the present situation is derogatory also for the prosecutors. [...] Presently, the prosecutor submitting a motion does not meet the defendant for months, the principle of immediacy does not prevail, and so there is no chance whatsoever for him/her to overcome his/her preconceptions."

This view was supplemented by another respondent who stated that as a practising judge she knows that the experiences of and statements made at the hearing "may quite often change" her standpoint established beforehand on the basis of the case files, and submitted that she deems it very important for this reason, among others, that "the prosecutor submitting the motion is present at every hearing".

Based on the results and interviews, it can be said that prosecutors rarely put forth actual hard evidence to substantiate the specific grounds for pre-trial detention, and that the frequent replacement at hearings of the prosecutors who actually write the motions with colleagues who are not at all familiar with the case, renders the presence of prosecutors formal. In order to make the presence of the prosecutors meaningful and to enable them to carry out their task of safeguarding procedural rights, it would be desirable to

- ensure through issuing an internal regulation or by taking logistical steps that at the hearings related to pre-trial detention the prosecutor submitting the related motion is present, and if that is not feasible, the prosecutor present is allowed to alter the motion;

- place more emphasis on the right to liberty (including the related ECtHR jurisprudence) in the training of prosecutors.

#### 1.4. Access to the materials of the case

Access to materials of the case is crucial for the defence to be able to effectively argue against the necessity of depriving the defendant of his/her liberty. As the ECtHR put in the case *Nikolova v. Bulgaria* (§ 58): “The proceedings must be adversarial and must always ensure »equality of arms« between the parties, the prosecutor and the detained person [...]. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention [...].”

The same concern lies behind Article 7 of the Right to Information Directive, as set forth by Point (30) of the Preamble, which states that evidence which is “essential to challenging effectively the lawfulness of an arrest or detention of suspects or accused persons [...] should be made available to suspects or accused persons or to their lawyers at the latest before a competent judicial authority is called to decide upon the lawfulness of the arrest or detention in accordance with Article 5(4) ECHR, and in due time to allow the effective exercise of the right to challenge the lawfulness of the arrest or detention”.

As mentioned earlier, Hungary was found in a number of cases to be in breach of Article 5(4) for not providing access to evidence (allegedly) substantiating the deprivation of liberty, but in the process of the Directive’s transposition, significant changes were introduced with regard to the rules on access to the materials of the case as of 1 January 2014 and 1 July 2015. Since the new rules could not be applied yet in the cases affected by the case file review, relevant data could not be gathered in the framework of the research, but both attorneys, prosecutors and judges were asked questions in relation to the new provisions.

In response to the question whether the above amendment widened the scope of case files accessible to the defence in practice, 22 out of the 28 responding attorneys answered with yes, but at the same time it was also pointed out by some of them that since the defence still does not receive the case files before the hearing commences, or receives it not in due time before the hearing, there is no possibility to examine them, which counters the positive effect of the legal amendment.<sup>140</sup> (Currently, the CCP does not set out any deadline as to how long before the hearing the motion and the attached documents shall be submitted to the defence.)

Furthermore, it is an important question and it may be the subject of future research as to how authorities interpret in practice the scope of documents “substantiating the motion”, thus whether the problem – also raised by one of the attorneys – emerges that this way only the documents “selected by the prosecutor to support the criminal liability” of the defendant become accessible for the defence.

In this regard it is worth noting that two of the Budapest-based prosecutors interviewed stated that in the capital the related practice is “broad” – or, from another perspective, “strict” –, thus, “essentially the full case file” is submitted to the defence. (As formulated by one of the interviewees: “This is practically the examination of the case files [as taking place at the end of the investigation] in advance.”) A third interviewee seated not in the capital stated that they submit the “relevant documents” to the defence, and there are cases in which this means that the whole case file is copied. (As far as the technical details are concerned, e.g. in the procedures supervised by the prosecutions

<sup>140</sup> As opposed to this it is a good example that according to an article on the issue, in the procedures supervised by the prosecutions operating in the capital the practice is that the defence shall receive the case files before the hearing at a time allowing the defence also to prepare for the hearing. See: Tamás Matusik: Gondolatok az előzetes letartóztatás hazai gyakorlatát ért kritikák kapcsán. [Thoughts on the critical remarks made with regard to the domestic practice of pre-trial detention.] *Magyar Jog*, 2015/5., pp. 289–293.

operating in the capital, documents are handed over with a register,<sup>141</sup> and the “certificate” on receiving the case materials signed by the defendant and the defence counsel shall be presented to the investigation judge. In addition, on the basis of the respective order of the Chief Prosecutor in effect since 18 January 2014, the prosecutor shall list in the motion for pre-trial detention what evidence he/she provided to the suspect and the defence counsel.<sup>142</sup>)

Prosecutors interviewed were unanimously of the view that the change in the legal provisions widened the scope of documents available to the defence also in practice, and it was submitted many times that as a result, hearings on pre-trial detention became more “substantive”. The latter development was identified as one of the causes of the significant decrease in the number of pre-trial detentions ordered in 2014 by two interviewees.

At the same time, the Hungarian Helsinki Committee also heard the opinion from other sources – requesting anonymity – that a reason for the decrease is that authorities rather do not propose or motion pre-trial detention due to considerations related to investigative tactics, avoiding in this way that they become obliged to submit a significant part of the case materials to the defence, showing that in a large proportion of these cases pre-trial detention would not be necessary anyway. This is an important development, as through these considerations the transposition of the Right to Information Directive indirectly contributes to the decrease of pre-trial detention.

It is an unfavourable development with a view to access to case materials and it undermines the practical effect of the amendment that the Criminal Law Chamber of the Budapest Regional Court took the following standpoint in its chamber opinion 2/2014. (III. 3.) BK: “It is not an obstacle to holding a hearing if the motion is aimed at ordering pre-trial detention and the prosecution fails to submit the copy of the case materials substantiating the motion to the suspect and the defence counsel.” Even though the chamber opinion adds that “in the later phase of the [criminal procedure] it cannot be omitted to examine whether the right to defend oneself and the right to defence fully prevailed or not”, this does not change the fact that according to the chamber opinion a hearing may be held and a decision may be delivered without the defence getting access to the case materials. A similar approach of the courts was detected by an attorney practising outside of Budapest and participating in the survey: the lack of submitting the copy of the case materials was considered only a “procedural mistake” by both a local and a county-level court and was not considered an obstacle of proceeding with the case. This practice renders the obligation to provide access to evidence substantiating the detention devoid of substance, and therefore is in contradiction with Article 7(1) of the Directive, which does not allow for such derogation.

At the same time the lack of a uniform application of the law – which may be deemed fortunate in this instance – is shown by the fact that one of the prosecutors interviewed stated that if the defence did not receive the case materials “the investigation judge would not even hold the hearing”, while according to another interviewee in such a case pre-trial detention would not be ordered. In addition, according to an article written by a judge of the unified Investigation Judge Group covering the capital and operating at the Buda Central District Court, the practice followed by the group is that the “handing over the case files at a time also adequate for preparing for the hearing is a precondition of holding a hearing in the same way as notifying the defence counsel properly”.<sup>143</sup>

In conclusion, we can say that while the amendments of the CCP aimed at transposing Article 7 of the Right to Information Directive have brought along substantial improvement in the defence’s access to evidence related to pre-trial detention, both prosecutorial and judicial practice can pose significant obstacles to the effective exercise of this right. In order to overcome these obstacles the following suggestions are made.

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<sup>141</sup> The source of the information beyond the interviews with prosecutors is the following article: Tamás Matusik: Gondolatok az előzetes letartóztatás hazai gyakorlatát ért kritikák kapcsán. [Thoughts on the critical remarks made with regard to the domestic practice of pre-trial detention.] *Magyar Jog*, 2015/5., pp. 289–293.

<sup>142</sup> Order 11/2003. (ÜK. 7.) LÜ of the Chief Prosecutor on the Prosecutorial Tasks Related to Preparing the Indictment, Supervising the Lawfulness of the Investigation and the Indictment, Article 21 (4)

<sup>143</sup> Tamás Matusik: Gondolatok az előzetes letartóztatás hazai gyakorlatát ért kritikák kapcsán. [Thoughts on the critical remarks made against the domestic practice of pre-trial detention.] *Magyar Jog*, 2015/5., pp. 289–293.

- The legislator should establish a deadline for submitting the prosecutorial motion aimed at pre-trial detention and the related files of the investigation to the defence, which makes it realistically possible for the defence to get prepared for the hearing, make submissions or motions, obtain documents, etc.
- In order to comply with Article 7 of the Right to Information Directive, Article 211 (1) and (1a) of the CCP should be amended in a way that authorities are not only obliged to submit to the defence the files of the investigation substantiating the motion for pre-trial detention, but all documents related to the specific case which are essential to challenging effectively the lawfulness of the detention.
- The legislator should enact in the law that submitting the copy of the files of the investigation related to the motion aimed at pre-trial detention to the defence is a precondition for holding a hearing or reaching a decision related to pre-trial detention; in the absence of this no hearing may be held and no decision may be delivered.

### 1.5. The right to appeal pre-trial detention decisions

The right to appeal is ensured against all decisions pertaining to pre-trial detention, but the case file review showed that these appeals were only successful in a handful of instances.

In the 73 cases in which researchers could record the respective data, the defence appealed against the decision ordering pre-trial detention in 95.9%, but none of these appeals were successful. As compared to the decision ordering pre-trial detention, the defence appealed in a much lower proportion against decisions prolonging, upholding, etc. pre-trial detention in the period up until the first instance judgment, namely in 53.1% in the selected sample and in 54.9% in the full sample. In the selected sample none of these latter appeals were considered well-founded, while in the full sample the court decided in three instances that the appeal was well-founded and terminated the coercive measure.

On the legal level it may be raised as a problem on the one hand that the second instance court does not hear the defendants, so it may happen that while the first instance court decides to refrain from ordering pre-trial detention after hearing the defendant, upon the prosecution's appeal the second instance court orders the defendant's pre-trial detention without hearing him/her, thus, pre-trial detention is decided on by a court before which the defendant cannot appear personally and cannot "defend" himself/herself.

On the other hand, based on the experiences of the case file review it also gives rise to concerns from a procedural perspective that in many cases second instance courts decided on appeals against first instance decisions only months after the latter decision was delivered (and what is more, often with a very short, general reasoning, see in this regard Chapter IV. 2.2.), since – as also pointed out by one of the attorneys involved in the survey – there is no statutory deadline for deciding on appeals. The table below contains examples when the second instance decision was delivered extremely slowly, undermining the efficiency of the appeal. It shall be added that under certain circumstances even one month is too long for delivering a second instance decision, e.g. in the case covered by the case file review when the appeal against the decision prolonging the pre-trial detention with two months, delivered on 5 July 2012, was ruled upon only a month later on 1 August 2012.

*Table 14 – First and second instance decisions*

Date of first instance decision	Date of second instance decision
11 November 2013	24 February 2014
20 June 2013	23 August 2013
18 December 2013	17 February 2014
28 February 2014	17 April 2014
11 March 2013	23 May 2013

In relation to appeals against pre-trial detention decisions in robbery cases, three important points can be underlined. Firstly, although appeals are somewhat more successful in the later stages of the procedures (the decision initially ordering detention in such cases is practically always upheld), defence counsels (the majority of whom are ex officio appointed lawyers) exercise their appeals rights in only about half of the cases. Secondly, due to the particularities of the Hungarian criminal procedure, second instance courts deciding on pre-trial detention never meet the defendant in person, so if the first instance court (which has a direct perception of the defendant appearing before it) does not order or prolong detention (but applies an alternative instead), the deprivation of liberty will be ordered by a court before which the concerned defendant does not have the right to appear, which may be a violation of the relevant ECtHR standards. Thirdly, it sometimes takes a very long time to deliver the second instance decisions, which is a violation of the obligation to proceed with adequate speed in cases where the defendant is deprived of his/her liberty. Therefore we recommend that

- An adequate deadline for ruling on appeals submitted against decisions related to pre-trial detention shall be established.
- Second instance courts, ruling on appeals against decisions on pre-trial detention, should be authorised to hold a hearing. Holding a hearing should be obligatory if the first instance court decided on pre-trial detention at a hearing, and if the first instance decision made on the basis of the personal hearing of the defendant does not order (or uphold) the pre-trial detention, but on the basis of the case files the second instance court – acting upon the prosecutor’s motion – comes to the conclusion that deprivation of liberty may be necessary.
- Counsels providing defence shall be trained by bar associations on the case law of the ECtHR pertaining to coercive measures and especially to pre-trial detention.

## 1.6. Further procedural issues

The CCP allows the investigation judge to conduct the hearing via videoconference. In such cases the participation of the defence counsel is obligatory at the hearing, and the defence counsel shall be at the same premises as the suspect.<sup>144</sup> However, none of the attorneys participating in the survey attended a hearing in the preceding 12 months at which the defendant’s participation would have been ensured via videoconferencing, and some of the attorneys submitted that in the county they work in the technical preconditions for conducting such hearings are not available. (There were also such opinions that personal attendance is more favourable for the defendant than attendance via videoconference.) It shall be added that for example one of the judges filling in the questionnaire submitted that he would introduce videoconferencing for hearings aimed at prolonging pre-trial detention, “which would minimize transfer costs but would still ensure immediacy”.

As mentioned in the Section presenting the research method, pre-trial detention hearings are not public in Hungary.<sup>145</sup> (Yet, trial hearings at which decisions are reached also with regard to coercive measures are open to the public.) All four prosecutors answering to the related question were of the opinion that it would violate the interests of the investigation if these hearings were public, since e.g. it could not be excluded that co-perpetrators not yet identified by the investigation authority or future witnesses listen to the information submitted at the hearing pertaining to the criminal offence. Judges answering the questionnaire also stated unanimously that they consider the present rules appropriate with a view to the interests of the investigation, and six of them also mentioned the defendant’s interests, three of them referring to the principle of the presumption of innocence.

Since, as explained above, hearing monitoring was not possible in the framework of the research the responses of judges had to be taken into account with regard to the hearings’ length. The judges submitted the following as the average lengths of the hearings: 20–40 minutes, 30 minutes, 45–60 minutes, 60 minutes, 30–90 minutes, and 60–90 minutes. Two respondents added that, depending on the underlying case, the hearing may be much longer, 4-5 or 5-6 hours, or may (e.g. if there are more defendants) last for a whole day.

<sup>144</sup> CCP, Article 211 (5)

<sup>145</sup> It shall be mentioned in relation to this that in the *Reinprecht v Austria* case (App 67175/01, 15 November 2005) for example the ECtHR set out that the principle of public trial does not have to prevail for the ordering of the pre-trial detention to comply with the standards of the ECtHR.



In addition, attorneys participating in the survey indicated the problem that the CCP does not set out any deadline as to delivering and communicating the written and reasoned decisions. This is again a violation of the obligation to proceed with adequate speed in cases where the defendant is deprived of his/her liberty, therefore, the legislator should establish an adequately short deadline for delivering and communicating the written and reasoned decisions pertaining to pre-trial detention.

## 2. Judicial decisions on pre-trial detention

Stemming from the fact that in its impact pre-trial detention equals the most severe penal sanction European criminal systems apply (i.e. imprisonment), very strict substantive requirements are set with regard to the contents of the judicial decisions ordering or maintaining this type of deprivation of liberty. Among others, the decisions must be individualised, sufficiently considering the specific circumstances of the defendant and the case, the courts must carefully weigh the arguments of the concerned person, and the reasons for depriving the defendant of his/her liberty shall be clearly articulated in the decisions.

When reviewing the judgments of the ECtHR concerning Hungary in which the violation of Article 5(3) of the ECHR was established, it can be concluded that in all such cases "Hungarian authorities were [condemned] for more or less same reasons [...]: the deprivation of liberty which may be considered justified in the beginning is upheld for an unreasonably long time, in a way that the personal circumstances of the procedure and the defendant are not taken into account, they refer to the risk of frustrating the procedure and/or the risk of absconding automatically (with regard to the latter, usually taking into account exclusively the gravity of the punishment that may be imposed), and do not consider in reality the possibility of applying a less restrictive coercive measure even if the individual circumstances [...] would make it reasonable."<sup>146</sup>

Besides, most judgments of the ECtHR condemning Hungary in relation to pre-trial detention mention among the grounds for establishing the violation of the ECHR that the Hungarian court decisions examined in the given cases "do not reflect to the arguments of the defence counsel, do not provide detailed information on the reasons of dismissing them, on taking into account the individual circumstances of the case and the defendant, and on the way of assessment".<sup>147</sup> This practice results that in many cases the right to a reasoned decision as flowing from Article 5(4) of the ECHR is violated.

Such insufficiently reasoned decisions are not in compliance with the respective Hungarian guidelines either, since chamber opinion 93. BK "on the conduct of the investigation judge with regard to ordering pre-trial detention" (BKv 93.) sets out the following as to the reasoning of decisions on pre-trial detention: "It is not sufficient if the reasoning refers to the content of the prosecutorial motion, instead, it shall present whether the investigation judge concluded that there is a well-founded suspicion against the defendant and whether any of the special grounds for pre-trial detention prevail, the facts on the basis of which he/she came to this conclusion, or what kind of reasonable doubt emerged with regard to the well-founded nature of the motion. In this regard the reasoning shall present the personal circumstances of the suspect examined and the conclusions drawn from them. Flowing from the adversarial nature of the procedure, the reasoning shall cover with regard to every ground for detention the related data available, and the reasoning shall also address the factual and legal arguments of the defence as opposed to the prosecutorial motion and the related standpoint of the investigation judge."

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<sup>146</sup> András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.]* Magyar Helsinki Bizottság, 2014, pp. 31–32.

<sup>147</sup> See for example the *Darvas v Hungary* case (App 19547/07, 11 January 2011), and the cases *A.B. v Hungary*, *Baksza v Hungary*, *Hagyó v Hungary* already mentioned above. In more detail, see: András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.]* Magyar Helsinki Bizottság, 2014, pp. 43–45.



The issues highlighted above came up also in the cases affected by the case file review (see Chapter IV. 2.2. below); and almost half of the attorneys approached for the research (14 persons) submitted that judicial reviews as to whether the grounds for pre-trial detention still prevail are formal, thus, not substantive, real or thorough. Critical remarks included e.g. that decisions “follow the same pattern”, are flat, and one can speak of a “detention factory” rather than of substantive decision-making.

On the other hand, prosecutors interviewed stressed that for example in 2014 the number of pre-trial detentions ordered dropped by 20%, and they were of the view that both the prosecutorial and the judicial practice got stricter (the prosecution motions pre-trial detention “in less and less cases and in more and more justified instances”). In Budapest it was referred to by prosecutors as a positive development that the above mentioned unified Investigation Judge Group was established, operating as part of the Buda Central District Court, and prosecutors were of the view that the obligation applying since 1 January 2014 that case materials substantiating the pre-trial detention shall be submitted to the defence also contributes to decreasing the number of pre-trial detentions.

It is obvious that getting acquainted with the relevant decisions of the ECtHR (especially those delivered in relation to Hungary) could have a positive impact on the quality of judicial decisions. However – while interviews show that both prosecutors and judges receive, either through the institutional system or otherwise, the respective decisions of the ECtHR – only one prosecutor mentioned receiving actual training with regard to the case law of the ECtHR, and only one or two judges mentioned that they participated in a related training organised by the Hungarian judicial system. At the same time it is a positive development that for example the Investigation Judge Group operating at the Buda Central District Court included a lecture on the ECtHR’s case law in its local training material.

## **2.1. Decisions on pre-trial detention in the light of numbers**

The present Chapter describes the most interesting results of the statistical analysis of the researched case files. The numbers presented here serve as a background for and substantiate some of the qualitative conclusions drawn from the interviews and the substantive analysis of the case files.

### *2.1.1. Decisions on ordering pre-trial detention*

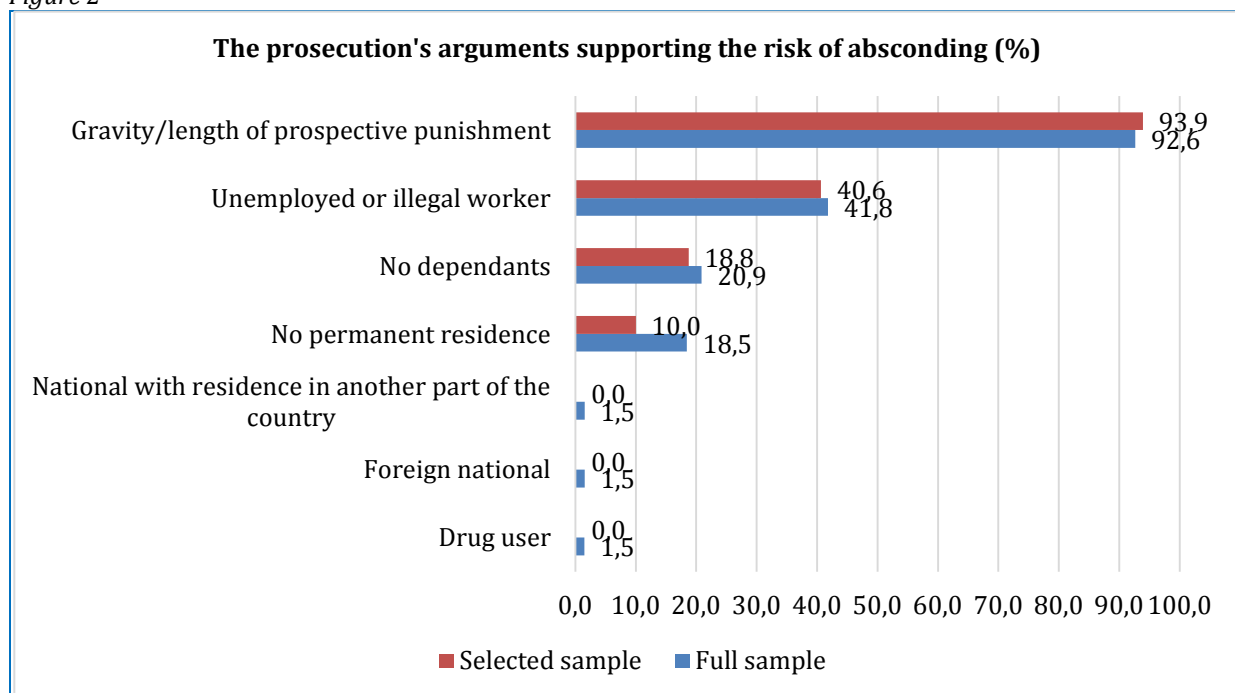
In the cases covered by the case file review, in the selected sample courts ordered pre-trial detention in 94.6% of the first decisions pertaining to coercive measures, alternative coercive measures were ordered only in two cases, and in one case the court decided that the defendant shall be released pending trial (for the time being). (In the full sample, courts decided for pre-trial detention in 97.4% of the cases.)

#### *A) Arguments of the prosecutor and the defence*

As a first step of analysing decisions the success rate of prosecutorial motions was examined, which, in line with the general statistical data, showed that courts order pre-trial detention almost every time if that is motioned by the prosecutor: in the selected sample courts ordered pre-trial detention in 96.2% when motioned by the prosecutor, while in the full sample the success rate was 98.2%.

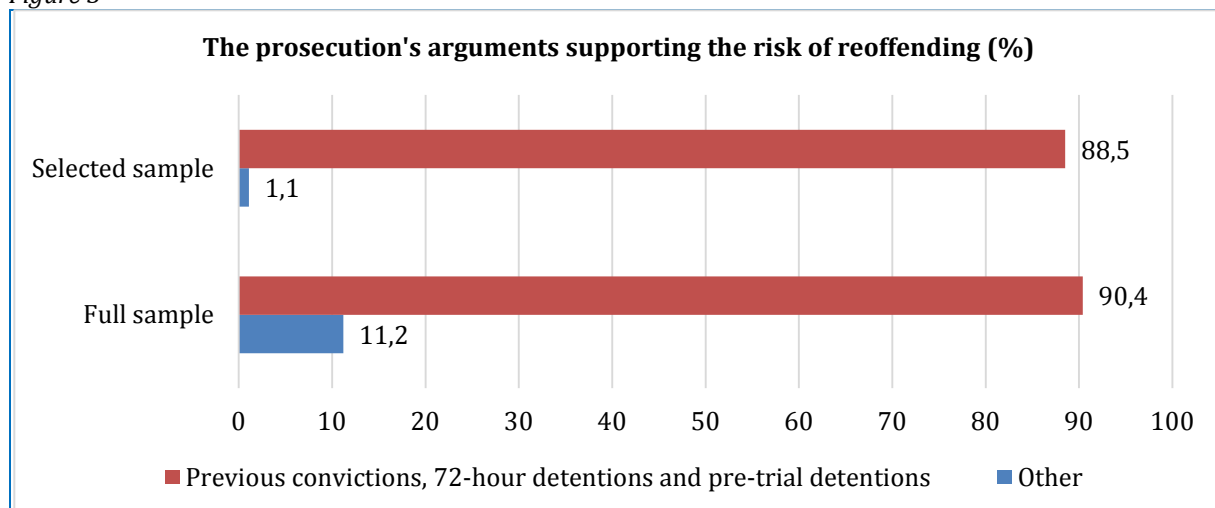
The detailed examination of the prosecution’s arguments show that they refer in an outstandingly high proportion, in over 90% to the gravity or length of the prospective punishment as supporting the risk that the defendant may abscond or hide, i.e. the special ground included in Article 129 (2) b) of the CCP, which is followed by the argument that the defendant is unemployed or is not employed legally (40%).

Figure 2



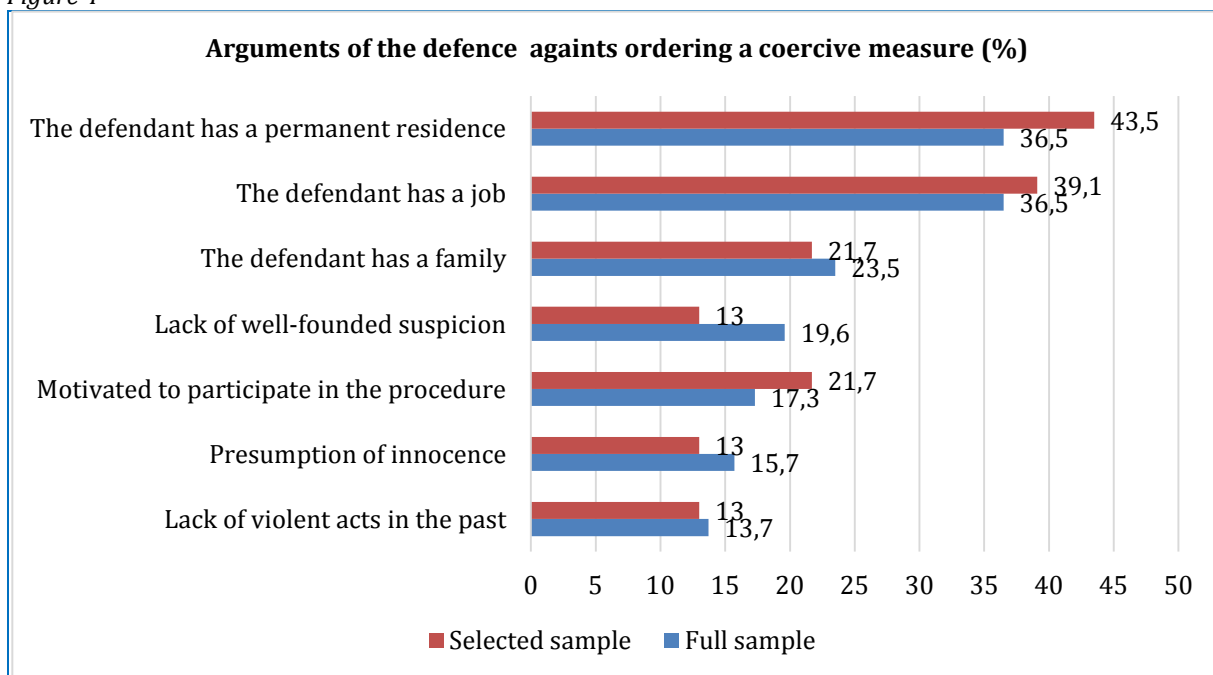
With regard to Article 129 (2) d) of the CCP (risk of reoffending), the prosecution primarily referred to the previous convictions of the defendant or to procedures launched again him/her earlier on, and, especially in the selected sample, the proportion of other arguments supporting this special ground for detention was very low.

Figure 3



The most commonly used arguments of the defence against ordering pre-trial detention were the following:

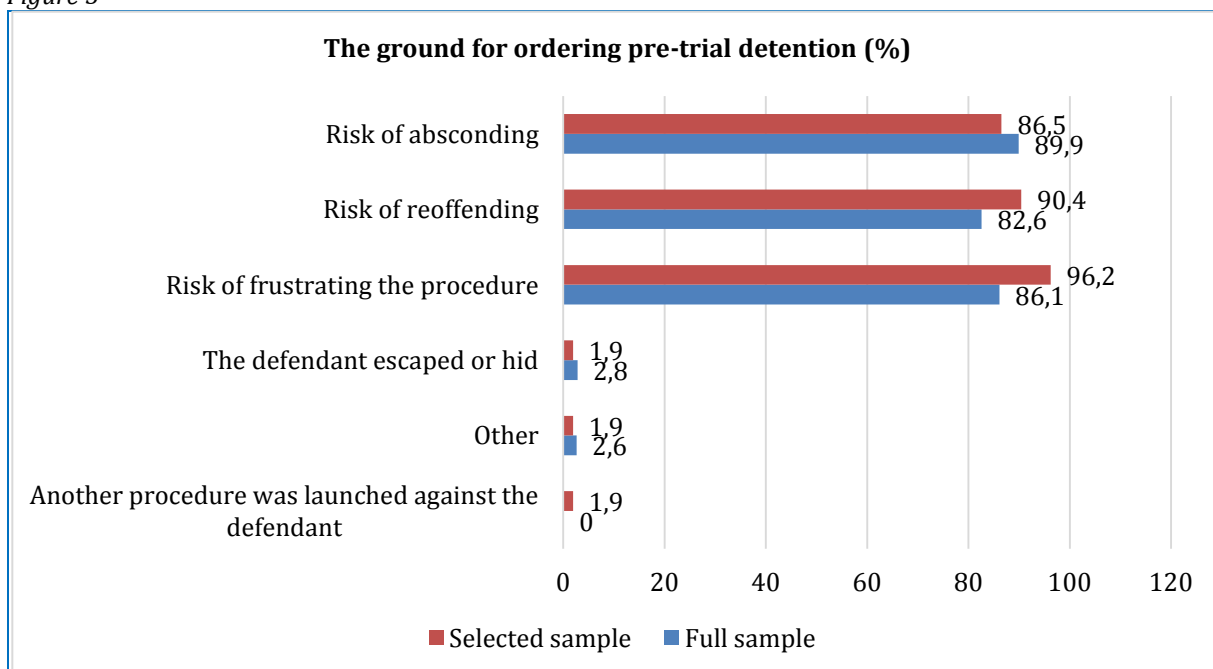
Figure 4



#### B) Content of the judicial decisions

In both samples, decisions ordering pre-trial detention referred to in over 80% to the risk of absconding [CCP, Article 129 (2) b)], to the risk of frustrating the procedure (interfering with the course of justice) [CCP, Article 129 (2) c)] and to the risk of reoffending [CCP, Article 129 (2) d)].<sup>148</sup>

Figure 5



<sup>148</sup> Since Article 129 (2) a) of the CCP (the defendant "has escaped or hidden from the court, the prosecutor or the investigation authority; he/she has attempted to escape, or during the procedure another criminal procedure is launched against him/her for an intentional criminal offence punishable with imprisonment") was referred to in only two decisions in the selected sample and in altogether four decisions in the full sample, this special ground for pre-trial detention is not included in the figures.

With regard to the grounds for pre-trial detention it is another quantitative result that in both samples, courts rarely (in 12.5% in the selected sample and in 13.8% in the full sample) referred to only one ground when ordering pre-trial detention. In a few decisions (seven in the full sample and four in the selected sample) the court failed to identify concretely the special ground for ordering pre-trial detention and after presenting the prosecutorial motion, usually only referred to Article 129 (2) of the CCP (see the category „0 special ground“ in the figures).

Figure 6

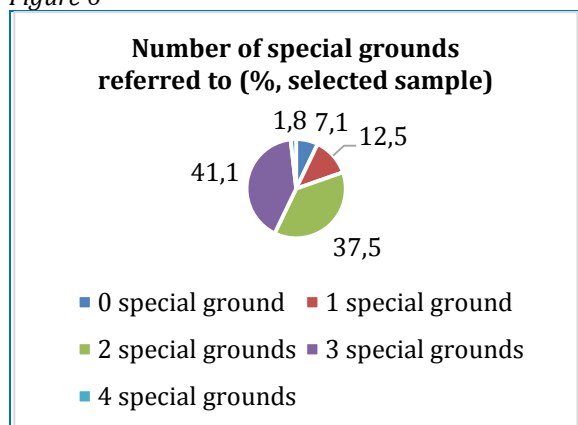
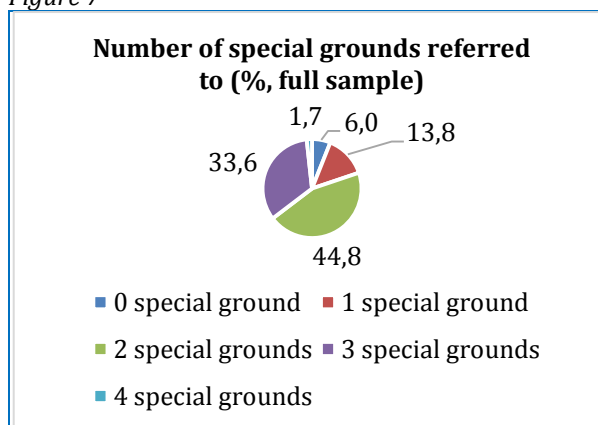


Figure 7



In the full sample courts referred to the evidence or arguments of the prosecution in 92.4% of the cases where information available showed that the prosecution provided arguments to support its motion (N=66). As opposed to this, only in 50% of the cases where the defence submitted arguments against the pre-trial detention (N=48) did the courts refer to the arguments of the defence. This is in line with the result that even though the responses of prosecutors interviewed showed that they do not see any difference between how the court treats the submissions and motions of the defence and the prosecutor, 30 out of the 31 attorneys interviewed were of the view that when reaching decisions with regard to pre-trial detention courts do not attach the same weight to the arguments of the defence and the prosecution. In addition, one third of the attorneys participating in the survey were of the opinion that judges rarely reach a fair and substantiated decision when assessing the risk of absconding, the risk of collusion and the risk of frustrating the procedure, and the risk of reoffending.

Table 15 – In what proportion do judges reach fair and substantiated decisions? (N=31)

	Always	Often	Rarely	Never
<b>N</b>	0	6	23	2
<b>%</b>	0%	19.4%	74.2%	6.5%

In the comments attached to the above question three attorneys mentioned explicitly that in their view judges often accept the standpoint of the prosecution “automatically”. This opinion is not only supported by the high success rate of prosecutorial motions aimed at ordering pre-trial detention as discussed above, but also by the abovementioned fact that the defence’s arguments were often (in 50%) not even mentioned in the decisions.

In the case file review it was also examined whether the reasoning of the court was individualized with regard to the different special grounds for detention, thus whether the decision shows that the court considered the personal circumstances of the defendant (e.g. family relations, legal income, criminal history, etc.) in substance or solely referred to general reasons, such as the gravity of the offence or the prospective length of the punishment. As the figures below show, arguments related to the risk of frustrating the procedure were the least individualized in both samples.

Figure 8

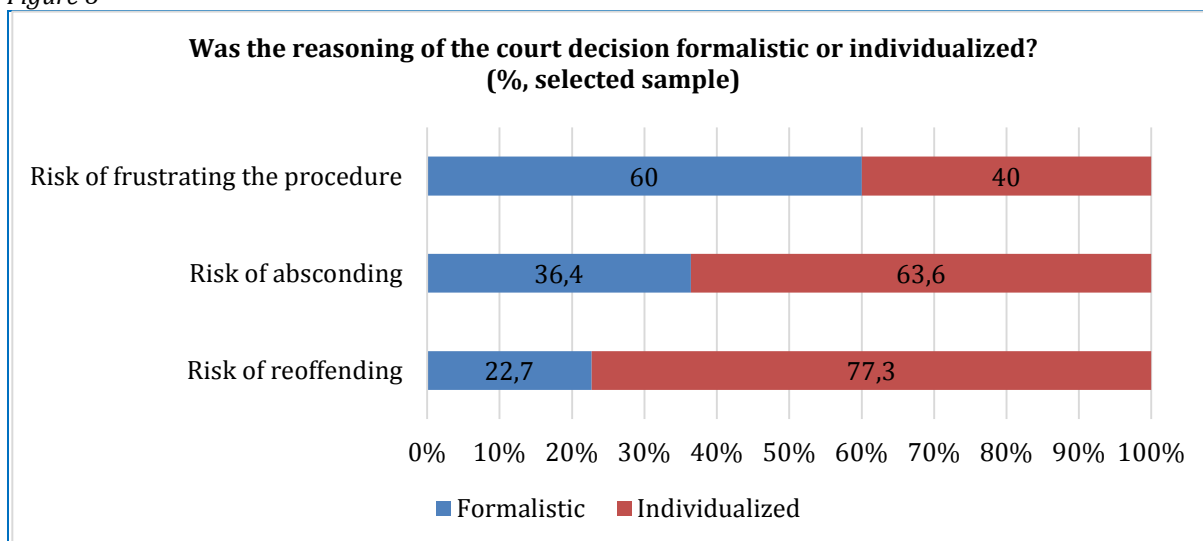
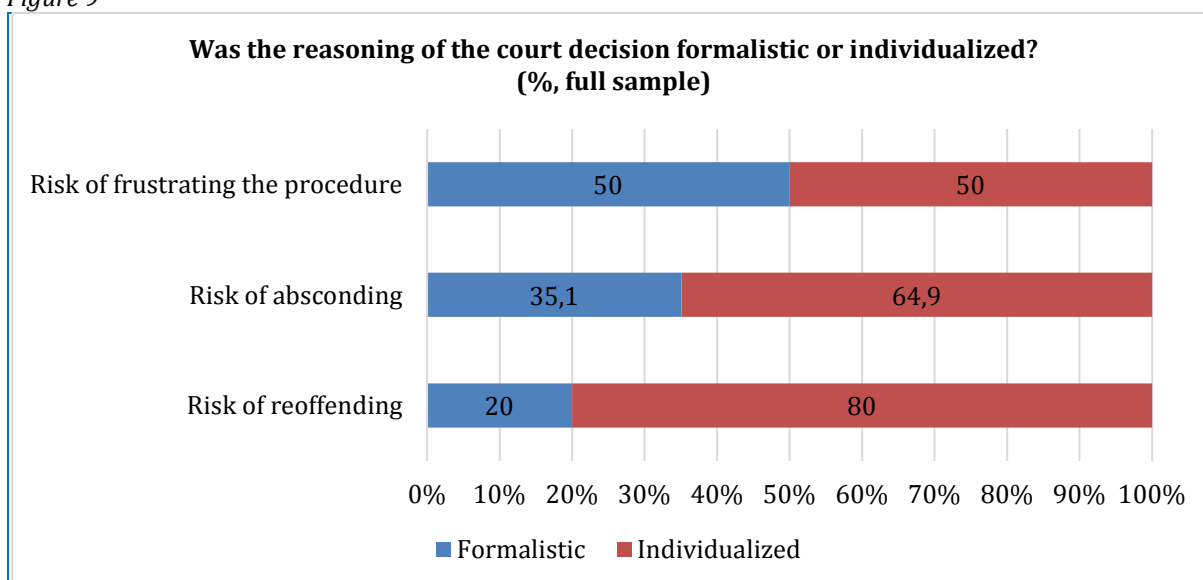


Figure 9



It shall be added that the fact in itself that e.g. with regard to the risk of reoffending the proportion of formalistic reasoning is lower, does not mean that the related judicial practice is without any concerns. As shown by the quotes taken from decisions presented below (see: Chapter IV. 2.2.), a seemingly individualised decision can also be problematic, for instance if it bases the detention on an individual feature of the defendant (e.g. his/her unemployment) which should not necessarily lead to the conclusion that the defendant's pre-trial detention ought to be ordered.

The statistical analysis of the initial pre-trial detention decisions show that in most cases prosecutors refer to rather abstract circumstances to support their motion for detention (such as the prospective punishment of the offence), and these abstract references are in almost all cases accepted by the courts. The analysis of the data supports a long-standing complaint of defence counsels, namely that courts seem to pay no or little attention to the arguments put forth by the defence: in the full sample courts referred to the evidence or arguments of the prosecution in 92.4% of the decisions, and only in 50% did they refer to the arguments of the defence. This raises the necessity of placing much more emphasis on the quality of pre-trial detention decisions – and the related ECtHR requirements – in the course of judicial training.

### 2.1.2. Further decisions related to pre-trial detention

Out of the “further decisions on pre-trial detention” (i.e. all remand-related decisions following the initial ordering of pre-trial detention), primarily those decisions were examined in the framework of the research which were delivered prior to the first instance judgment. Such decisions include: decisions prolonging, upholding, or reviewing pre-trial detention, along with decisions on the defence’s motions aimed at terminating pre-trial detention.

In general, it may be concluded that in the cases covered by the case file review it was uncommon that the pre-trial detention of the defendant was terminated at a later point in the procedure, or even that an alternative was ordered: in the selected sample courts ruled in favour of pre-trial detention in 95.6% of the decisions, and in 96.3% of the decisions in the full sample. As it was explained earlier, in the investigation phase, pre-trial detention must be prolonged at certain intervals, otherwise it expires. After the bill of indictment is submitted, the trial judge delivers a decision on whether the defendant must remain detained until the first instance sentence is delivered. In 100% of the cases in the selected sample and in 97.9% in the full sample, trial judges decided to uphold the detention of the defendant.

A significant part of these further decisions, similarly to the decisions ordering pre-trial detention, referred to more than one special grounds for pre-trial detention (absconding, risk of absconding, risk of interfering with the course of justice and the risk of reoffending) as included in Article 129 (2) of the CCP.

Figure 10

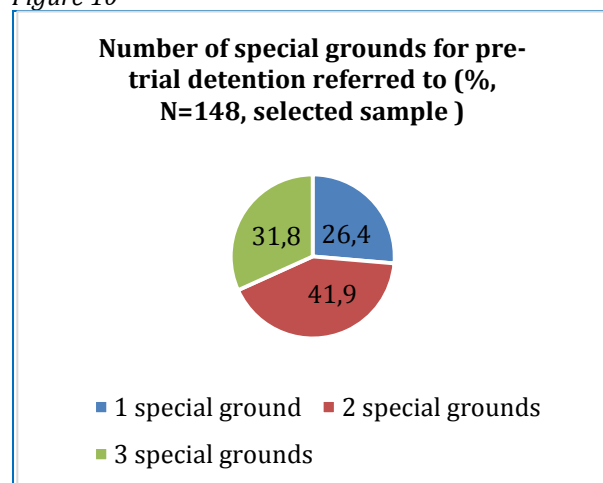
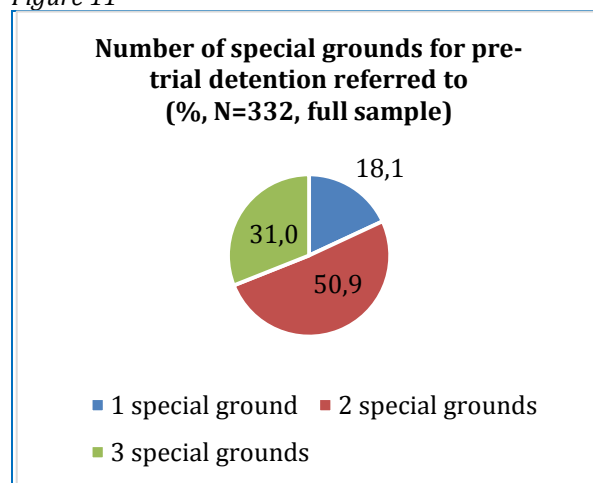


Figure 11



Regarding the grounds for pre-trial detention it is a result to be highlighted that Article 129 (2) c) of the CCP (i.e. that there are well-founded grounds to presume that if not taken into pre-trial detention, the defendant would tamper with evidence or interfere with witnesses) was often (in 43 upholding decisions in the selected sample of 56 cases and in altogether 73 decisions in the full sample of 116 cases) evoked also in the decisions upholding pre-trial detention after the bill of indictment was filed, i.e. after the investigation was concluded.

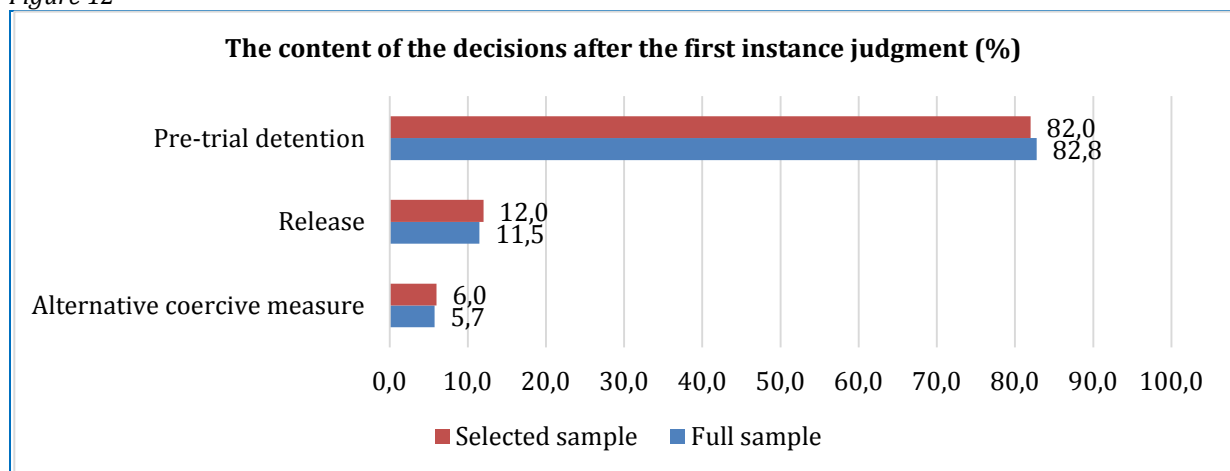
This may also be problematic because the analysis of the decisions ordering pre-trial detention showed that decisions are the least individualized regarding this special ground for pre-trial detention. In addition, since the selected sample covered mainly procedures conducted due to criminal offences committed by the defendant alone, in these cases the risk of collusion could not prevail, and since at this point of the procedure necessary evidence should already be at the disposal of the authorities, the risk of eliminating or forging material evidence or documents cannot prevail either. Therefore, in order to claim at this point (i.e. after the closing of the investigation) that there is still a well-founded risk of frustrating the procedure, concrete data should emerge that there is a risk of influencing or intimidating witnesses, but, as shown by the reasoning of the decisions (see Chapter IV. 2.2.), the special ground under Article 129 (2) c) was often referred to by the courts in the absence of such

concrete data. In relation to this issue, one of the prosecutors interviewed submitted that with regard to Article 129 (2) c) it comes up by all means that as the procedure progresses, this special ground “should disappear”.

It shall be added at the same time that this is the ground for detention that disappears the most often from the courts’ reasoning: if the ordering decision refers to the risk of interfering with the course of justice, there is a high chance that the decision delivered after the submission of the bill of indictment will not contain this ground, whereas other grounds (risk of absconding and of reoffending) are much more likely to “stick”.

As to the decisions on coercive measures delivered after the first instance judgment was made, it can be seen that while a significant part of defendants remained in pre-trial detention for the second instance procedure, six of the defendants were released and alternative coercive measures were applied with regard to three in the full sample.

Figure 12



In these decisions the courts brought up the most often (in 75.7% in the selected sample and in 77.6% in the full sample) as one of the reasons for upholding pre-trial detention that owing to the duration of the imprisonment imposed in the first-instance judgment there is a risk that the accused may abscond or hide.<sup>149</sup> The other most common reference was made to the risk of reoffending (in 78.4% in the selected sample and in 65.7% in the full sample). It shall also be mentioned that there was a significant correlation between whether the pre-trial detention was upheld at this point and whether the defendant had children or other dependants.

The statistical analysis of further decisions again provided evidence of the overuse of abstract reasons for the deprivation of liberty. Interference with the course of justice must be regarded as such in robbery cases, where there is only one defendant, especially after the victim (and potential other witnesses) have already been heard. Nevertheless, a significant number of decisions delivered after the submission of the bill of indictment contained reference to this specific ground for pre-trial detention (without quoting any concrete facts suggesting that this danger is in place). This is a problem that can be primarily dealt with in the framework of judicial and prosecutorial training (containing information on the related ECtHR case law).

## 2.2. The reasoning of decisions on pre-trial detention

As it was outlined above, the clear formulation of the reasons for depriving someone of his/her liberty without a final and binding judicial decision on guilt is a very important safeguard against the arbitrary application of pre-trial detention. Therefore, we have tried to assess the quality of reasoning in the decisions examined in the framework of the case file research.

<sup>149</sup> Upholding pre-trial detention on this basis is allowed for by Article 327 (2) of the CCP.



The content and quality of the reasoning of judicial decisions is relatively hard to assess with statistical methods. Therefore, in the upcoming part of the report, tendencies appearing in the decisions in the cases covered by the case file review will be presented, along with solutions and argumentations qualifying as good and bad practices in the light of the case law of the ECtHR and the decisions of the Curia, supported by quotes from decisions. We are aware that the inadequate or inappropriate argumentation with regard to certain special grounds for detention does not necessarily mean that it would have been all in all reasonable for the defendant to be released pending trial or that alternative coercive measures should have been applied in the case. However, we believe that analysing decisions from this perspective may contribute to enhancing the quality of decision-making pertaining to pre-trial detention, and, accordingly, to decreasing the number of defendants whose pre-trial detention is unjustified.

Firstly, it should be mentioned that although under the CCP a well-founded suspicion that the suspect committed a criminal offence is the general condition for pre-trial detention, domestic practice is not entirely consistent as to whether the existence of a well-founded suspicion may be examined by the investigation judge, and if yes, in what detail. An example for this is that while in the case BH2004. 227. the Supreme Court took the stance that the court deciding on pre-trial detention shall not engage in assessing the evidentiary power of the evidence gathered in relation to the criminal offence, an adverse conclusion may be drawn from BKv 93. Therefore, it shall be stressed that according to the case law of the ECtHR "reaching a decision pertaining to the solid (well-founded) suspicion cannot be omitted: the standpoint that the investigation judge may not assess the evidence submitted by the investigation authority and the prosecutor results in the violation of the [ECHR] in itself, irrespective of whether the special grounds prevail".<sup>150</sup>

#### 2.2.1. The risk of absconding

In its judgment delivered in the *Letellier v France* case,<sup>151</sup> the ECtHR clarified that the danger of absconding "cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial [...]". In accordance with this in its decision published as BH2009. 7., the Hungarian Supreme Court ruled that when examining the grounds for detention, the conclusion that there is a risk that the defendant will abscond or hide shall be based on facts. In the decision, the Supreme Court referred to the case law of the ECtHR according to which a lengthy pre-trial detention may only be justified if, despite the presumption of innocence, the public interest justifying the upholding of the coercive measure weighs more in the concrete case than the requirement of respecting personal liberty. Therefore, the risk of absconding shall be supported by concrete facts, pertaining exclusively to the given case. The fact that the criminal offence the defendant is charged with is of serious gravity and it is punishable with an imprisonment of indeed serious length (in the given case this meant five to 15 years of imprisonment or life-long imprisonment) is undoubtedly such a fact. However, in the view of the Supreme Court it may not be concluded exclusively on the basis of this that the presence of the defendant at the future procedural acts may only be ensured through lengthy pre-trial detention. In order to reach such a conclusion, further circumstances – primarily those related to the person of the defendant – shall also be examined. This standpoint is strengthened also by decision BH2007. 403., according to which the necessity of pre-trial detention can be adjudicated always as a result of the combined examination of the special grounds included in the CCP and the special circumstances of the concrete case. In the decision, the Supreme Court pointed out in relation to examining the justifiability of pre-trial detention that the gravity of the criminal offence, similarly to the time spent in pre-trial detention, is not a suffice argument in itself, but only one aspect.

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<sup>150</sup> For more details, see: András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.]* Magyar Helsinki Bizottság, 2014, pp. 12–14.

<sup>151</sup> App 12369/86, 26 June 1991

Despite the above statements of the Supreme Court, many decisions were found in the course of the case file review in which the courts established the risk of absconding exclusively on the basis of the **outstanding gravity of the criminal offence** included in the suspicion and **the severe punishment that may be imposed for it**, thus on the basis of the gravity of the prospective sanction. After the passing of a certain period of time, basing the deprivation of liberty solely on this argument is a violation of the relevant principles elaborated in the jurisprudence of the ECtHR.

In one of the cases the court established the risk of absconding jointly with regard to the two co-defendants by providing the following reasoning: "with a view to the outstanding gravity of the criminal offence it may also be concluded that there is a well-founded suspicion that [the defendants] would frustrate the criminal procedure by absconding or hiding".

Additionally, court decisions included from time to time as an argument for the gravity of the prospective punishment the defendant's criminal history or the pertaining accumulation rules, and there were decisions in which the court referred to the threat the given criminal offence posed to the society or to the fact that this offence has "become widespread". It also occurred that the gravity of the offence "overrode" even the personal circumstances countering pre-trial detention: for example in one case, the court deemed it justified to uphold pre-trial detention due to the severe punishment that may be imposed for the criminal offence in question, even though it mentioned in one of its decisions that the defendant had a clean criminal record and had begun studies, and mentioned in another that the defendant had a clean criminal record and had a job.

However, it also occurred that the court concluded in its pre-trial detention order that – as opposed to what the prosecutorial motion states – the risk of absconding may not be established solely on the basis of the prospective punishment. In addition, there were also good examples when the court – breaking away from the earlier decisions, which repeated each other's reasoning in this regard – took into account the stadium of the criminal offence included in the suspicion:

In one of the cases covered by the case file review the pre-trial detention of the defendant was ordered on 18 May 2012, with a reference to, among other grounds, Article 129 (2) b) of the CCP (risk of absconding), and the subsequent five decisions all referred to this special ground. However, the sixth decision, delivered on 16 May 2013, prolonging the pre-trial detention – which was a significant positive change compared to the previous decisions in terms of the quality of the arguments – omitted the reference to Article 129 (2) b). The court provided the following reasoning: "The prospective punishment, with regard to which it must be taken into account that the criminal offence remained a remote attempt, the time spent so far in detention [*at the time of the decision, the defendant has been in pre-trial detention for a year, and no bill of indictment was filed in the case*], and the conduct of the defendant in previous procedures – i.e. his constant presence – do not support with sufficient weight any more the presumption that if released, the defendant would abscond or hide from the authorities and that his participation at the acts of the criminal procedure may only be ensured by applying the strictest coercive measure."

However, the next decision delivered in the case, prolonging pre-trial detention, included the reference to Article 129 (2) b) again, and the subsequent decision (delivered in the course of preparing for the trial, thus after the indictment) upheld the pre-trial detention until the first instance judgment by evoking also Article 129 (2) b). In this regard the court referred to the gravity of the criminal offence, and evoked the following arguments in relation to the risk of absconding: the defendant had had a court case earlier, committed the criminal offence while having a suspended sentence and while there were criminal procedures conducted against him, there are more ongoing criminal procedures against him, he "has no permanent job, regular income, and is admittedly a drug user, a drug addict and a medicine addict".

It shall be added that one of the prosecutors interviewed was also of the view that "the sentence the criminal offence is punishable with may in itself already substantiate" the risk of absconding, and another prosecutor interviewed stated that the gravity of the criminal offence is "of course a determining factor in itself".

When we asked the prosecutors and the judges whether there are criminal offences or types of criminal offences in the case of which it is probable that they will motion the ordering of pre-trial detention or will order pre-trial detention, the majority of the respondents identified such criminal offences.<sup>152</sup> From the perspective of the present research it is interesting that only two prosecutors interviewed mentioned explicitly violent criminal offences against the property: in the view of one of them in the case of these offences it is probable that a motion for pre-trial detention will be submitted especially if there is also some aggravating feature (e.g. it is a group robbery, punishable with five to 10 years of imprisonment), while another interviewee stated that motioning pre-trial detention “should at least be considered” with regard to every form of robbery.<sup>153</sup> However, a third prosecutor interviewed mentioned the changes in the related practice: in her view, 10-15 years earlier pre-trial detention was ordered in 95% of those committing robbery, and at that time they would have “snapped” to the question above that robbery was such a criminal offence. But the practice has changed since then, and nowadays even a defendant suspected of committing an armed robbery may be released pending trial or may be placed under an alternative coercive measure.

It occurred several times that, along with evoking the gravity of the offence, decisions referred e.g. to the defendant’s “unsettled livelihood circumstances” in general, or his/her family background which “may not be deemed settled”: in one of the decisions for example the court was of the view that the defendant’s livelihood circumstances raises both the risk of absconding and the risk of reoffending, and the ad hoc jobs and the living arrangements evoked by the defence were not significant enough to weaken the reasons for the coercive measure. Another court decision, repeating the arguments of the prosecution, also referred only – besides the significant gravity of the criminal offence and the gravity of the prospective punishment – to the “unfavourable personal circumstances” and livelihood circumstances in general in the case of a defendant who according to the case files was conducting studies and his accommodation was ensured at his parents’ place, raising serious doubts about how much consideration the court actually gave to the specific circumstances of the individual defendant.

Furthermore, as one of the quotes above from a case covered by the case file review also shows, it was a recurring element in the decisions that besides referring to the outstanding gravity of the offence the courts also evoked **the lack of a job and income** with regard to Article 129 (2) b), even though strong concerns may be raised as to why the lack of financial resources would make it probable that the defendant would abscond or hide. What is more, in many cases the court referred to the lack of a “registered” or “permanent” job, and the lack of “regular” or “legal” income, implying that illegal or ad hoc jobs are not “sufficient” in this regard. Furthermore, in one of the decisions it was also enumerated among the reasons supporting the risk of absconding that the defendant, while having no job and no regular income, lived in the same household as his parents.

The sample also included decisions which referred *exclusively* to the lack of a permanent job and income as a basis for the risk of absconding, which – taking into account that the ECtHR does not accept the lack of a job in itself as a circumstance substantiating the risk of reoffending either<sup>154</sup> – would most probably not comply with the Strasbourg standards.

In one of the decisions ordering pre-trial detention, after enumerating the defendant’s earlier criminal cases and the ongoing procedures against him, the court’s full reasoning was only the following: “The suspect does not have a job and a verified income ensuring his livelihood. With a

<sup>152</sup> Respondents mentioned for example the following: criminal offences of especially serious gravity, criminal offences punishable with life-long imprisonment, criminal offences against life and violent criminal offences against the person, sexual and domestic violence, the criminal offence of drug-trafficking involving a significant amount of drugs, organised criminal offences in general, and criminal offences committed in a flagrantly antisocial way.

<sup>153</sup> This approach is supported by the following statement of a defence counsel made before the court in one of the cases affected by the case file review: “I do not put forward a motion with regard to the pre-trial detention. The charge is robbery, and according to my experience the first instance court is very rarely in the situation to release anyone in a robbery case.” It shall be mentioned that in a previous project of the Hungarian Helsinki Committee a judge of the Curia submitted that since robbery is the most severe criminal offence against property, “there is a very slight chance that a person suspected of [...] or charged with robbery would not be placed in pre-trial detention”. See: Anna Bárdits – András Kristóf Kádár – Nóra Novoszádek – Bori Simonovits – Dóra Szegő – Dániel Vince: *Last Among Equals – The equality before the law of vulnerable groups in the criminal justice system*. Hungarian Helsinki Committee, Budapest, 2014, p. 119, footnote 42, [http://helsinki.hu/wp-content/uploads/HHC\\_Last\\_Among\\_Equals\\_2014.pdf](http://helsinki.hu/wp-content/uploads/HHC_Last_Among_Equals_2014.pdf).

<sup>154</sup> See: *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

view to the [abovementioned circumstances] there are well-founded grounds to presume that if released pending trial he would abscond or hide from the authorities, and would commit another criminal offence punishable with imprisonment."

However, there was also a second instance court which unequivocally criticized such reasoning:

In one of the cases the second instance court, deciding on the appeal against a first instance decision prolonging the pre-trial detention for the first time, stated the following: "The circumstances in themselves that the suspect does not have a registered job and that he lives together with his mother do not yet substantiate that the special ground for pre-trial detention included in Article 129 (2) b) of the CCP prevails." *(It shall be added that the second instance court also deemed the risk of absconding substantiated, but due to other reasons, namely with regard to the prospective punishment applicable against the suspect having a criminal record and with a view to the defendant's "loose connections".)*

The reference to the outstanding gravity of the criminal offence was often accompanied by references to **the defendant not having a permanent, registered address**, or that he/she "does not reside there habitually", "does not live there", and, meanwhile, "has no verified place of residence" or his/her "place of residence is not registered". Other decisions explicitly stated that, together with the gravity of the offence, the fact that the defendant was "homeless" or "conducted a homeless lifestyle" substantiated the risk of absconding.

In one such case the defendant was found by the police after the criminal offence at the homeless shelter where he otherwise regularly resided (including the period before the criminal offence), and to where he returned after the criminal offence. His defence counsel argued in the following way at the first hearing related to ordering pre-trial detention: "I believe that it does not flow from the fact that [this is] a criminal offence of outstanding gravity that there is a risk that [the defendant] will abscond or hide, even in spite of the fact that at the moment he conducts a homeless lifestyle, and has no registered address or place of residence. However, it can be seen from the files of the investigation that he does not conduct a vagrant lifestyle, does not reside in groves or parks, but resides regularly at the homeless shelter under [...] Street Nr. [...] where he is available for the investigation authority and may receive the summons."

Despite the above arguments, the court decided to order the defendant's pre-trial detention, and, after summarizing the arguments of the defence, reasoned its decision in the following way: "Before taken into 72-hour detention the suspect had not resided habitually at his registered address, and had not had a verified place of residence. According to the available data the suspect leads a homeless lifestyle. Having regard to the circumstances above, the outstanding gravity of the criminal offence included in the suspicion, and the gravity of the prospective punishment there are well-founded grounds to presume that the presence of the suspect at the procedural acts may be ensured only by applying the strictest coercive measure."

It occurred furthermore that the reference to the outstanding gravity of the offence was omitted, and when substantiating the risk of absconding, the court argued only that the defendant was homeless, or had no "verified address where he resided habitually", which is clearly in contradiction with the principle elaborated by the ECtHR saying that the lack of a permanent address in itself does not substantiate the risk of absconding.<sup>155</sup>

As counterpoints to the examples above, the interviews with prosecutors may be quoted, since all three prosecutors asked about the issue submitted that the fact in itself that the defendant is homeless does not necessarily result in ordering his/her pre-trial detention. One of the interviewees recalled a homeless defendant who could be summoned via phone, was not placed in pre-trial detention, and showed up at the procedural acts, while another interviewee stated that there are defendants "who submit that they are available in the pedestrian subway of the Eastern railway

<sup>155</sup> See: *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

station, and are really available there". It was also stated that "along with other reasons, e.g. if it is justified by the gravity of the criminal offence, pre-trial detention may be ordered, but in many cases not even the 72-hour detention is ordered by the investigation authority solely because someone is homeless". At the same time one of the interviewees submitted that the practice of the prosecution changes constantly, and 10 years ago it may have been true that homelessness in itself substantiated pre-trial detention, but this is "less and less true" nowadays.

Another group of the decisions referred to both the lack of a permanent job and income and the lack of a permanent address besides the outstanding gravity of the criminal offence. Below, the full (in-merit) reasoning provided in two such decisions is quoted.

"[The defendant] has a clean criminal record, has no registered address or a permanent job, the criminal offence is of outstanding gravity. There are well-founded grounds to presume that if released pending trial, [the defendant] would abscond or hide, and his presence at the procedural acts may be ensured only by a coercive measure."

"[The defendant] does not reside at his permanent address, has no verified place of residence in Budapest, his former place of residence ceased to exist. At the time of the offence he had no occupation, job, or verifiable income. According to the standpoint of the court, with a view to the above circumstances there are well-founded grounds to presume that – taking also into account the gravity of the criminal offence – the presence of the accused may not be ensured in any other way but by upholding the coercive measure. Furthermore, it shall be presumed that if released, the accused would commit another criminal offence punishable with imprisonment."

Former research experiences and the case file review conducted in the present research showed that the fact that a defendant is homeless may result easily that an arrest warrant is issued against him/her. Although in these cases the suspect is often caught within a few days (since e.g. he/she resides regularly in the same neighbourhood or homeless shelter), this may have the consequence that later on in the procedure the court decides to place or keep the defendant in pre-trial detention due to the fact that an arrest warrant had to be issued against the defendant earlier on.

As a good example for this mechanism, the case of an acquitted defendant may be quoted, who was referred to by the files of the investigation as "a homeless person looking Roma". The arrest warrant was issued against the defendant because he "resided at an unknown location", thus, solely because he was homeless. He was caught the day after. However, the decisions ordering and prolonging his pre-trial detention evoked as a reason supporting the necessity of pre-trial detention that an arrest warrant had to be issued against the defendant earlier on.

Both the case file review and the experiences of the Hungarian Helsinki Committee<sup>156</sup> show and it also came up in the attorneys' responses to the questionnaire that it may constitute a problem also in other cases that the courts refer to it automatically – either in relation to Article 129 (2) a) or in relation to Article 129 (2) b) – that **an arrest warrant was issued against the defendant**, and fail to examine the related circumstances.

In one of the cases covered by the case file review, an arrest warrant was issued against a defendant who lived from ad hoc jobs, and, following the job opportunities, "moved" from time to time to a different part of the country. The arrest warrant was issued against him precisely because he could not be found at his previous place of residence. After the defendant became aware that an

<sup>156</sup> Against a 49-year old client of the Hungarian Helsinki Committee for example, a truck driver having a clean criminal record and a registered job (who was acquitted by the first instance court in a final decision later on) the arrest warrant was issued because when the police – without trying to summon him in a postal letter – went to his address (which has been his registered address for 40 years and where he lived with his parents and sick sibling), he was not at home, because he was working abroad. After he got to know that an arrest warrant was issued against him, he reported at the police voluntarily. Despite the latter, the court decided that he shall be placed in pre-trial detention due to the risk of absconding, evoking as a reason in one of the related decisions that "the suspect was arrested on the basis of an arrest warrant, because he resided abroad earlier on". (For the detailed description of the case in Hungarian, see: [http://helsinkifigyelo.blog.hu/2012/08/08/veled\\_is\\_megtortenhet\\_elozetesletartoztatasmagyarorszagon.](http://helsinkifigyelo.blog.hu/2012/08/08/veled_is_megtortenhet_elozetesletartoztatasmagyarorszagon.))

arrest warrant had been issued against him, he reported at the police voluntarily, as also shown by the files of the case, and he also presented this fact at the hearing pertaining to ordering his pre-trial detention: "I reported at the police myself, after I have been in the papers. I stopped a police car and told that I would like to appear before the authorities. [...] I will cooperate with the authorities in the future. I will attend the trial. I ask for my release pending trial. I will reach an agreement with [the aggrieved party], I will pay my dues. If I am placed in pre-trial detention, I will not be able to work abroad."

However, the decision on ordering pre-trial detention did not reflect at all the fact that the defendant had reported at the police himself. With regard to Article 129 (2) a) of the CCP the decision argued that the defendant left to an unknown location in the course of the procedure, while with regard to Article 129 (2) b), besides stating that there is an ongoing procedure against the defendant due to another criminal offence against property, the decision argued in the following way: "On the basis of the above, it may be concluded that the suspect hid from the investigation authority. In the present phase of the procedure there are well-founded grounds to presume that if released pending trial he would abscond or hide from the authorities, so his presence at procedural acts cannot be ensured in any other way."

In the first decision prolonging pre-trial detention in the case the court argued in relation to Article 129 (2) a) that an arrest warrant had to be issued against the defendant and the procedure had to be suspended, while with regard to Article 129 (2) b) it referred to the gravity of the criminal offence and the prospective gravity of the punishment, and stated that "in this regard [the arguments provided for Article 129 (2) a)] shall of course also be taken into account". (The next decision prolonging pre-trial detention repeated the previous decision almost word by word.) In the decision upholding the pre-trial detention until the first instance judgment on the basis of Article 129 (2) a) and b) the court referred again to the gravity of the criminal offence and the prospective gravity of the punishment, and argued that the risk of absconding "is strengthened also by the fact" that in the course of the investigation the procedure had to be suspended and an arrest warrant had to be issued since the defendant's place of residence was unknown. Thus, the fact that the defendant reported at the police voluntarily, did not appear in any of the decisions.

Of course the fact that an arrest warrant was issued against the defendant may be indicative in other cases, as e.g. in the case when in the course of the earlier procedures conducted against a defendant altogether nine warrants of caption were issued against him, or if there are further data beyond the arrest warrant which substantiate the risk of absconding:

"In the view of the court in the case of an accused against whom two arrest warrants had to be issued, who regularly submits new places of residence where he does not reside and one of which is a non-existing address, and who does not appear before the court upon oral summoning, it is not an unfounded presumption at all that he evades the criminal procedure intentionally. The special ground for pre-trial detention included in Article 129 (2) b) is clearly supported by the conduct of the accused shown in the course of the procedure so far and his omissions."

As far as the assessment of the defendants' personal circumstances are concerned, the decisions addressing the fact e.g. that the defendant "has no tight family bonds" or "has no such family bonds which would withhold him from absconding or hiding", may be cited as good practice. On the other hand, there were cases in the sample in which even though it was submitted at the hearing that the defendant raises three minor children alone, the decision did not refer to this fact at all and the court deemed the risk of absconding substantiated on the basis of the defendant's "unsettled livelihood circumstances". However, as a good example it can be quoted that according to one of the decisions, the fact that the defendant was eight months pregnant when the first instance judgment was delivered was a circumstance weakening the risk of absconding to such an extent that it resulted in the termination of the defendant's pre-trial detention.

With regard to the risk of absconding, the decisions on coercive measures reached after delivering the non-final first instance judgment have to be assessed separately, since, as already referred to earlier, in these instances pre-trial detention may be ordered or upheld also owing to the risk that the accused



may abscond or hide **taking into account the duration of the imprisonment imposed in the judgment.**<sup>157</sup> “However, it has to be emphasized that when deciding on pre-trial detention, the court has to assess – beyond the sanction imposed – the defendant’s individual circumstances also in these instances. In accordance with this, decision BH2007. 216. refers to the practice following the guidance given by an earlier decision of the Supreme Court (BH1987. 306.), according to which the risk of absconding or hiding shall always be examined concretely in relation to ordering or terminating pre-trial detention; and the risk of absconding may not be deduced from the gravity of the sanction imposed alone. In line with this, according to decision BH2007. 216., no such national judicial practice has evolved which would claim that imprisonment of over three years would – depending on the nature of the offence – be such a grave sanction which always gives rise to the presumption that the defendant will abscond or hide, despite the defendant’s favourable personal circumstances.”<sup>158</sup>

In the course of the case file review, researchers encountered both decisions assessing the defendants’ personal circumstances in line with the above, and also decisions which examined exclusively the length of the imprisonment imposed, in some cases also taking into account the time defendants spent in pre-trial detention as shown by the quotes below.

“The three years of imprisonment imposed on the defendant – from which [the defendant] spent more than nine months in pre-trial detention – is not considered [by the court] to be of such gravity that would substantiate the risk of absconding or hiding.”

“The first instance court decided lawfully on terminating the accused persons’ pre-trial detention. The second instance court supplements [the respective] reasoning with the following: the ground for pre-trial detention included in Article 327 (2) of the CCP may not be established with regard to the accused persons either, with two years and four months of prison sentence imposed against them in the non-final decision, taking also into account that the accused persons were in pre-trial detention for about a year.”

To sum it up, we can conclude that the risk of absconding is often established solely or primarily on the basis of the gravity of the offence and the prospective punishment. The courts also tend to attribute great relevance to circumstances that according to the jurisprudence of the ECtHR may not (without other facts supporting that the risk of absconding is in place) serve as decisive factors in the ordering of pre-trial detention (e.g. homelessness). These general considerations often outweigh specific circumstances of the defendant that seem capable of refuting the existence of flight risk. To overcome this problem, more intensive judicial training into the relevant ECtHR jurisprudence seems necessary.

### 2.2.2. The risk of frustrating the procedure

The requirement that the risk of frustrating the procedure shall also be supported by specific facts appears both in the case law of the ECtHR<sup>159</sup> and in the Hungarian court decisions.

However, the statistical analysis of the cases covered by the case file review showed that from among the special grounds for pre-trial detention courts tended to provide formalistic, non-individualized reasoning the most often (in 60% with regard to the selected sample and in 50% with regard to the full sample) in their decisions ordering pre-trial detention when they based their measure on the the presumption that if released, the defendant would frustrate, hinder or threaten the evidentiary procedure. In line with these statistics, researchers encountered many decisions which did not contain any specific statement in relation to this special ground, and referred e.g. to the nature of committing the offence in general:

<sup>157</sup> CCP, Article 327 (1)–(2)

<sup>158</sup> András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára.* [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.] Magyar Helsinki Bizottság, 2014, p. 18.

<sup>159</sup> See for example: *Clooth v Belgium*, App 12718/87; *W v Switzerland*, App 14379/88.



"Taking into account the nature of the underlying criminal offence and the circumstances of the perpetration there are well-founded grounds to presume that if released the defendant would, through influencing or intimidating the witnesses, hinder or endanger the evidentiary procedure."

In this case this line of argumentation was also problematic because when the defendant's clothing was searched the two mobile phones taken by him from the two aggrieved parties in the course of the criminal offence were found, and the witnesses to the case were solely the two aggrieved parties, who at that point had already testified. (It has to be added that the photo line-up has not yet taken place in the procedure at that point, but the defendant was caught earlier after he was recognized by one of the aggrieved parties from a police car not long after the perpetration of the offence.) It was therefore not plausible to suggest that any evidence could be tampered with, as the evidence needed to convict had, in the researcher's opinion, already been collected.

On the other hand it occurred that the court did not find the part of the prosecutorial motion pertaining to Article 129 (2) c) of the CCP substantiated due to the lack of concrete statements:

"Reasonable doubts may be raised with regard to the related standpoint of the prosecutorial motion. Currently there is no such, even remotely identifiable person or evidence, on which the defendant could have an influence of such extent or form which would frustrate or hinder the criminal procedure conducted against him."

In the instances when the court delivered an individualized decision, the following circumstances were rightly taken into consideration: the aggrieved party and the defendant know each other; the defendant and the aggrieved party live in the same household; the aggrieved party is the elderly neighbour of the defendant; the defendant threatened the aggrieved party in the course of the criminal offence; the co-defendant in the case resides at an unknown location; or "more data emerged [in the course of the procedure] on attempts aimed at influencing the aggrieved party with regard to [his/her] testimony". At the same time the sample also contained a decision in which Article 129 (2) c) of the CCP was not referred to, even though the aggrieved party was the defendant's mother suffering from severe locomotor disorder and living in the same household as the defendant.

Researchers also encountered decisions which stated – either clearly linked to Article 129 (2) c) or separately – that there is a need to conduct further investigative acts in the procedure. Flagrant examples to this kind of unsatisfactory reasoning are shown by the decisions delivered in the case presented below.

Pre-trial detention was ordered in this particular case with the following reasoning: "Taking into account the data available in the files of the investigation and the nature of the offence there are well-founded grounds to presume that if released, the suspect would, by influencing the persons heard in the case (*sic!* – *in past tense*), frustrate the evidentiary procedure." The decision did not support the latter conclusion with any specific details.

In the first decision prolonging pre-trial detention the court claimed that the investigation is ongoing, and that various procedural acts need to be conducted, such as waiting for the expert opinion to be submitted and conducting a confrontation – however, the latter did never actually take place in the course of the procedure. In addition, the decisions claimed in relation to Article 129 (2) c) of the CCP that "taking into account the nature of the criminal offence underlying the present case, the circumstances of perpetration, and that the investigation is in an early stage", there was a risk of frustrating the procedure, even though at that point both the aggrieved party and the only witness were heard in the case, and the aggrieved party did not know the defendant otherwise.

The next decision delivered in the case, prolonging the defendant's pre-trial detention, the reasoning of which was very poorly individualized, still referred to the fact that the investigation is ongoing, and there is a need to carry out various procedural acts, including the confrontation mentioned earlier and the continued interrogation of the suspect – however, similarly to the confrontation, the continued interrogation of the suspect did not happen in the investigative phase

of the procedure either. In addition, the decision contained only the following general reasoning in relation to Article 129 (2) c) of the CCP: "taking into account the data available from the files of the investigation and the nature of the criminal offence included in the suspicion, there are well-founded grounds to presume that if released the suspect would frustrate the evidentiary procedure by [influencing] the persons to be interrogated in the criminal procedure and by hiding material evidence".

It shall be mentioned at this point that in another decision – separately from the reasoning pertaining to the special grounds for detention – the argument was raised that "the time remaining from [the defendant's] pre-trial detention is not enough for conducting the further investigative acts planned", which is clearly in contradiction with the CCP.

The ECtHR set out with regard to the risk of frustrating the procedure that **if the end of the investigation is approaching, the risk of frustrating the procedure** cannot be the ground for depriving the defendant of his/her liberty any more.<sup>160</sup> In accordance with this standpoint, the Hungarian court decision EBH2009. 2025. also concluded that the risk under Article 129 (2) c) of the CCP is the highest undoubtedly at the beginning of the evidentiary procedure, and, therefore, it is especially important to examine whether the conclusion pertaining to this special ground remains to be rational and purposeful in the later stages of the procedure. It has to be mentioned here that one of the judges filling in the questionnaire also stated that when deciding on whether to prolong pre-trial detention in a given case or not, she also examines whether there is any evidentiary act left which the defendant "could actually influence".

As a good example, the following decision may be cited, which – even though it prolonged the pre-trial detention – omitted the reference to Article 129 (2) c) in spite of the prosecutorial motion, for the following reasons:

"Taking into account that all investigatory acts have been carried out and only the presentation of the case file to the defence is to be carried out before the conclusion of the investigation, no well-founded conclusion may be drawn as to frustrating the evidentiary procedure."

A specific problem – dealt with above, but also to be emphasised here – is when reference to interference with the course of justice is raised as a ground for pre-trial detention after the closing down of the investigation (in the decision delivered by the trial judge on the necessity of pre-trial detention during the first instance court procedure). An example for this may be seen in the quote below, which, in an unusual way, refers to the principle of immediacy in order to support its standpoint.

"The investigation was concluded, but due to the principle of immediacy the court will hear the aggrieved party, the witnesses and the accused, and will possibly confront them in the course of its procedure, therefore, there are well-founded grounds to presume that if released [the defendant] would hinder, endanger or frustrate the evidentiary procedure e.g. by the influencing the aggrieved party participating in the procedure as a witness."

The case file review also covered a case in which the court upheld the pre-trial detention also on the basis of Article 129 (2) c) after the indictment, even though the prosecution did not even refer to the risk of frustrating the procedure in its motion. Finally, in the latter case the court set out in the decision on coercive measures delivered after the first instance judgment that "since the first instance procedure was concluded, and the evidentiary procedure was conducted by the court in the broadest possible range", there was no risk of frustrating the procedure any more. At one of the hearings monitored, the court referred to the risk of collusion even after the first instance judgment was reached, although all three defendants were in pre-trial detention in the course of the whole first instance procedure until the second instance judgment is delivered in the case. (The court also evoked

<sup>160</sup> See for example: *Szeloch v Poland*, App 33079/96, 22 February 2001.

that the defendants do not have a permanent address in Hungary, they are foreign nationals and they do not have any dependants.)

At the same time those decisions shall be mentioned as good examples in which the court provided adequate reasons for omitting Article 129 (2) c) from the grounds for upholding pre-trial detention:

"[The] investigation was concluded, and the evidence is at the disposal [of the authorities], since the indictment of the accused could take place on the basis of this evidence, therefore, in the view of the court in the current phase of the procedure the special ground for pre-trial detention under Article 129 (2) c) of the CCP does not prevail [...]."

In another case, the court, in contradiction with the prosecutorial motion, found that the risk of frustrating the procedure could not be established, "taking into account that the evidentiary procedure was concluded, the investigation was over", and that the prosecution had filed the bill of indictment. In the decision the court stated the following: "In addition, no such data has emerged in the course of the procedure which would imply that the accused person influenced or intimidated the witnesses, and endangered the evidentiary procedure by doing so. Accordingly, complying with the established judicial practice, the court did not establish the ground for pre-trial detention under [Article 129 (2) c] in the phase of preparing for the trial."

In another well-reasoned, individualized decision upholding pre-trial detention the court submitted the following: "At the same time the court does not consider the risk of frustrating or hindering the procedure as included in Article 129 (2) c) of the [CCP], established earlier in the investigative phase, being of such degree or gravity which may be extinguished exclusively by the strictest coercive measure, since in the trial phase the evidentiary procedure should be concluded on a higher level as compared to a well-founded suspicion, on the level of a bill of indictment, thus, [the special ground for pre-trial detention under Article 129 (2) c)] should not be present in the trial phase; in this phase of the procedure the latter ground erodes to a great extent or ceases to exist. Due to the significant decrease of this risk the court has found that [the risk] included in [Article 129 (2) c)] could not be identified as a risk to be countered."

In terms of frustrating the procedure it may have **significance whether the defendant confessed to committing the criminal offence or not**, but at the same time the possible correlations between the confessions made at various points of the procedure and pre-trial detention are hard to measure with statistical methods, thus in this regard we had to rely on the reasoning of the decisions and on the interviews.

Four of the prosecutors interviewed stated that when deciding on motioning the pre-trial detention they attach importance to confessions, and three of them explicitly stated that if the defendant confessed to the criminal offence, the risk of frustrating the procedure does not prevail, or "presumably" will not prevail.

However, three of the judges out of the 10 filling in the questionnaire submitted that they do not attach any importance to the fact whether the defendant confessed to committing the crime or not. One respondent stated that it is "simpler" in terms of establishing the well-founded suspicion of a criminal offence if the defendant confessed to the criminal offence, while three Budapest-based judges submitted that a confession usually excludes establishing the special ground included in Article 129 (2) c), since "confession or voluntary surrender often leads to discarding the risk of collusion". Two judges also submitted that a confession may support the possibility of applying alternative coercive measures. In addition, in some decisions covered by the case file review the court was of the opinion that the special ground for pre-trial detention included in Article 129 (2) c) of the CCP did not prevail because the defendant or defendants confessed.

It has to be added that when attorneys were asked whether they detect that decisions on pre-trial detention are, explicitly or implicitly, based on considerations which could not be taken into account lawfully, almost the half of them, 13 respondents submitted in the written comments that the investigation authority, the prosecutor, but even the judge uses pre-trial detention as a means of

imposing pressure, in order to coerce defendants to plead guilty. (In total, 27 attorneys out of 31 replied that judicial decisions also contain unlawful considerations.) At the same time four judges wrote explicitly that *the lack of a confession* does not influence their decision-making and does not result in pre-trial detention, with one of them remarking that it is true that this consideration may appear in relation to the decisions of the investigation authority and perhaps with regard to the prosecution's decisions, but definitely may not come up with regard to the investigation judge, who is "totally disinterested in the outcome of the case".

To summarise, we have encountered a number of decisions that referred to the risk of interfering with the course of justice on the basis of very abstract arguments and often in phases of the procedure when such risks are minuscule or non-existent (after the closing of the investigation and, in one case, even after the delivery of the first instance decision). We recommend that this issue be dealt with in the course of prosecutorial and judicial trainings also touching upon the relevant case law of the ECtHR.

### 2.2.3. The risk of reoffending

With regard to the risk of reoffending courts referred most often, and often exclusively, to **the defendant's criminal record** in the cases covered by the case file review. In relation to that, supporting the risk of reoffending, courts referred many times to the "lifestyle" of defendants, and – reasonably – to the fact that the defendant committed the criminal offence he/she is suspected or accused of under suspended imprisonment or under probation,<sup>161</sup> or that the defendant committed the criminal offence he/she is suspected or accused of a short time after being released from an earlier imprisonment.

It shall be added that in one of the decisions included in the sample, the risk of reoffending was considered substantiated only on the basis that there was another criminal procedure going on against the defendant, while in another decision the risk of reoffending was established due to another ongoing criminal procedure and because the defendant "already stood before a court", even though he had never been convicted. These references are in contradiction with the principle of the presumption of innocence.

Decisions either assessing the nature of the former criminal offences committed by the defendant – thus for example that the defendant was previously also convicted primarily for offences against the property –, or referring to the fact that **the defendant qualifies as a special or multiple recidivist**<sup>162</sup> constitute a separate group as regards the reference to the defendant's criminal record. These kinds of references – especially references to the defendant being a special recidivist or to former similar offences – essentially comply with the principle elaborated by the ECtHR in the *Clooth v Belgium* case that the plausible possibility of committing offences in the future of comparable nature and degree of seriousness as the offence underlying the pre-trial detention may serve as a ground for pre-trial detention. Accordingly, the case in which the court deemed the special ground under Article 129 (2) d) substantiated on the basis that the defendant had no registered job or regular income and had earlier been convicted for the offences of truculence and vandalism, would not comply with the Strasbourg standards.

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<sup>161</sup> This is in compliance with the decision published as EBH2010. 2217., according to which it may be concluded that the risk of reoffending as a ground for pre-trial detention prevails if the accused person committed the criminal offences of significant gravity against the property and against life or personal integrity under the probation imposed against him/her due to the criminal offence of theft.

<sup>162</sup> Article 459 Section 31 of Act C of 2012 on the Criminal Code sets out the following:

"a recidivist is the perpetrator of an intentional criminal offence, if he/she was earlier sentenced to an executable term of imprisonment for committing an intentional criminal offence, and less than three years have passed since the last day of serving the term of imprisonment or the day when it ceased to be enforceable until committing the new criminal offence;

a) a special recidivist is a recidivist who committed on both occasions the same criminal offence or criminal offences similar in nature;

b) a multiple recidivist is a person who was sentenced to an executable term of imprisonment as a recidivist prior to committing the intentional criminal offence, and less than three years have passed since the last day of serving the term of imprisonment or the day when it ceased to be enforceable until the committing the new criminal offence punishable with imprisonment; [...]"

Some of the attorneys surveyed criticized the practice that courts refer to former convictions even if the defendant was convicted for an entirely different kind of offence (thus e.g. they take into account a conviction for involuntarily causing a traffic accident in relation to the pre-trial detention in a procedure conducted due to an intentional criminal offence against the property), or even if the defendant was convicted 10 or 15 years ago the last time. Thus it may also contribute to establishing the risk of reoffending if the defendant is only a repeat offender, a recidivist in a criminological sense – it shall be added that this approach appeared also in two of the interviews with prosecutors. One of the attorneys concluded in the survey: “If you tripped once that will follow you almost until the end of your life.”

However, we came across examples of good practice in our case file review too. In one case pre-trial detention was ordered by the first instance court on the basis of Article 129 (2) d), referring to a final judgment from 2005 as the defendant’s latest conviction. However, the second instance court omitted the reference to Article 129 (2) d):

“[The defendant] indeed has a criminal record, but the criminal offences underlying the conviction referred to in the first instance were committed almost 10 years ago, on 30 September 2002 and 26 March 2004. Taking into account the latter circumstance, the risk of reoffending – even without certified legal income – is not as approximate which would sufficiently justify ordering the pre-trial detention.”

As also shown by the above quote, courts often intended to strengthen that the risk of reoffending is substantiated by pointing out – connected to the above types of arguments pertaining to the criminal record, etc. of the defendant – that the defendant does not have a (registered) job, a regular or certified income, or, for example, that “[the defendant] does not have a permanent income, ensures his living from ad hoc jobs, and constantly struggles with financial problems”.

Furthermore, as shown by the quotes below, **the lack of a regular income and registered job** substantiated in itself the risk of reoffending in some of the judicial decisions, which is clearly in contradiction with the case law of the ECtHR.<sup>163</sup>

“On the basis of the data available, the defendant does not have a job and a regular income. Taking into account the gravity of the offence it may be presumed that if released the suspect would commit another criminal offence punishable with imprisonment.”

“[The defendant] does not have a permanent registered job and supports himself and his family from ad hoc jobs [...]”

“[The defendant] does not reside at his permanent address, has no verified place of residence in Budapest, his former place of residence ceased to exist. At the time of the offence he had no occupation, job, or verifiable income. According to the standpoint of the court, with a view to the above circumstances there are well-founded grounds to presume that – taking also into account the gravity of the criminal offence – the presence of the accused may not be ensured in any other way but upholding the coercive measure. Furthermore, it shall be presumed that if released, the accused would commit another criminal offence punishable with imprisonment.”

The case below of a defendant with a clean criminal record may also be cited here, in which– besides the outstanding gravity of the criminal offence – it was exclusively the defendant’s social situation that resulted in ordering and, subsequently, upholding his pre-trial detention.

The court ordered the defendant’s pre-trial detention by referring to Article 129 (2) b) and d), due to the following reasons: the defendant has no occupation, has no regular monthly income, leads a homeless lifestyle, has no address, and the criminal offence underlying the suspicion is punishable with five to 10 years of imprisonment. The defendant submitted that he committed the robbery

<sup>163</sup> See e.g.: *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

partly because he had not eaten for days. Also with a view to the latter statement, the court upheld the pre-trial detention until the first instance judgment is delivered with the following reasoning: "Taking into account that the accused has no adequate livelihood, the motivation for the criminal offence underlying the indictment as also submitted by the accused, and also the nature of the criminal offence, there are well-founded grounds to presume that if released, the accused person would commit another criminal offence punishable with imprisonment."

Furthermore, the case below shows that the lack of an income and a job may be sufficient to establish the risk of reoffending even if there are strong arguments and personal circumstances supporting the opposite.

The defendant in the case had a clean criminal record, and was 21 years old at the time when he was taken into 72-hour detention. His pre-trial detention was ordered in August 2012 on the basis that he was unemployed and had no income. The defendant confessed to committing the offence.

The forensic medical expert opinion prepared later on, in October 2012 established that on the days of the criminal offence the defendant got into a crisis state following a family conflict situation and left home with suicidal intentions; the psychiatric examination conducted the day after the criminal offence showed an acute stress reaction. Signs of depression could be detected during the examination in October 2012. The decision prolonging the defendant's pre-trial detention in November 2012 until the first instance judgment is delivered already contained the above circumstance, but, despite the defendant's clean criminal record, was of the view that the circumstance that the defendant had not had a permanent job before he was taken into 72-hour detention substantiated the risk of reoffending. (In addition, the pre-trial detention was upheld with a reference to the risk of absconding due to the serious gravity of the underlying criminal offence.) The same aspects were included in the next decision, ruling in January 2013 on a defence motion aimed at terminating the pre-trial detention, supplemented by the fact that the defendant planned the offence beforehand.

Finally, pre-trial detention was terminated by the second instance court ruling on the appeal against the latter decision, which reasoned its decision by stating that "in the case of the defendant who has a clean criminal record the offence included in the bill of indictment does not show that kind of planning and foresight which would imply the established personality of a criminal, and, through that, the risk of reoffending".

The following decision however serves as an example of good practice. The defendant's pre-trial detention was terminated after the first instance judgment was delivered:

"[The accused] behaved in a way in the penitentiary institution that he became the inmate responsible for his cell; he accomplished a personality management training, the certificate of which he submitted; he has a family and two minor children who are dependent on him. His common-law wife and a further family member attended the trial as members of the audience, from which it may be concluded that, reintegrated in his family, he will lead a law-obeying life in the future. Beyond that, the defence submitted at the trial hearing a statement from X. [...], who would employ the accused as a carpenter underhand."

Decisions referring to convictions that took place long before the suspected perpetration of the offence serving as the basis of the actual proceeding, or convictions of completely different nature, as well as the substantiation of detention with nothing but the lack of regular income are in contradiction with the relevant ECtHR jurisprudence. In this regard judicial and prosecutorial training touching upon the related Strasbourg case law seems desirable.



#### 2.2.4. Repetitive reasoning and the lack of reasoning

It is a recurring critical remark with regard to the Hungarian practice of pre-trial detention that in many cases decisions delivered on pre-trial detention at different points of the procedure match word by word, which may lead to the conclusion that – as put by attorneys surveyed – courts deliver their decisions “on a production line” and as “a routine activity”. Case files covered by the research also contained several decisions which repeated in essence or word by word the reasoning of a previous decision. Of course it may be raised that for example the first decision prolonging pre-trial detention, delivered one month after pre-trial detention was ordered, indeed cannot assess other circumstances in practice than the decision ordering pre-trial detention. However, it gives rise to concerns under any circumstance that in one of the cases covered by the case file review the reasoning of the decision ordering pre-trial detention and the decision upholding pre-trial detention after the bill of indictment was filed was the same (except for a remark in brackets and a conjunctive word), with the word “suspicion” having been replaced by the words “bill of indictment”, or that in another case the decision on prolonging pre-trial detention basically repeated the reasoning of an earlier decision ordering the house arrest of the defendant.

Researchers also encountered decisions which ordered pre-trial detention on the basis of a given special ground for pre-trial detention, but the court failed to attach any reasoning to them – in one of the cases this was detected by the second instance court, which supplemented the reasoning of the first instance decision. In one of the decisions ordering pre-trial detention the third co-defendant in the case was “forgotten” by the court after the ruling on ordering pre-trial detention, and reasons for the ruling were provided only with regard to the first and second co-defendant. One of the attorneys participating in the survey mentioned a case in which the second instance court mixed up the personal circumstances of the co-defendants while upholding the first instance decision.

The right to a reasoned decision<sup>164</sup> is clearly violated when – in certain cases after presenting the prosecutorial motion or the previous judicial decision or decisions in a shorter or longer format – the court “provides reasons” for the necessity of pre-trial detention in only one sentence.

“The court, after balancing the prosecutor’s and the defence counsel’s motion, ordered the pre-trial detention of the suspect due to the reasons above, considering that it did not see any possibility to order a less strict coercive measure and that the diseases of the suspect may be treated within [a penitentiary institution].”

“[O]n the basis of the evidentiary procedure conducted so far no such new fact or circumstance could be identified which would have affected the substantiated nature of the abovementioned final decision upholding pre-trial detention, or would have justified the accused persons’ release [...].”

“In the view of the court no new circumstance has emerged since upholding the accused person’s pre-trial detention; the circumstances referred to in the decision [upholding the pre-trial detention] serving as the basis for upholding the pre-trial detention still prevail, and, therefore, the court decided as included in the operative part of the decision.”

“According to the court’s standpoint, no changes have occurred in the special grounds for pre-trial detention since its ordering and prolonging which would result in terminating the pre-trial detention.”

According to the case law of the ECtHR one of the preconditions of a fair trial with regard to the procedure in which pre-trial detention is decided on is that courts shall examine in merit the relevant arguments raised by the defence and shall detail their related standpoint adequately in their decision.<sup>165</sup> However, as shown for example by the two quotes below (presenting the full reasoning in

<sup>164</sup> CCP, Articles 133, 214 and 257; ECHR, Article 5(4)

<sup>165</sup> In more detail, see: András Kristóf Kádár – Eszter Kirs – Adél Lukovics – Zsófia Moldova – Balázs M. Tóth: *Az Emberi Jogok Európai Bíróságának előzetes letartóztatással kapcsolatos gyakorlata – Kézikönyv ügyvédek számára. [The practice of the European Court of Human Rights related to pre-trial detention – Manual for attorneys.] Magyar Helsinki Bizottság, 2014, pp. 39–40.*



the given decisions), it often occurred in the cases covered by the case file review that the arguments of the defence were not reflected in the decision at all.

"The statutory preconditions of the gravest coercive measure prevail invariably; in the view of the court the reasons above still justify the necessity of applying pre-trial detention and are not overthrown by the circumstances raised by the defence counsel. Therefore, the court did not see any possibility to apply a less restrictive coercive measure."

"In the view of the court the grounds for ordering pre-trial detention as elaborated on in the previous decision still prevail with regard to the accused; the evidentiary procedure conducted so far has not resulted in any new fact which would have caused a change in the ground for ordering pre-trial detention, the risk of reoffending still prevails, and the arguments raised by the defence counsel have not resulted in any change with regard to the grounds for coercive measure upheld earlier on [...]."

In terms of the quality of reasoning, second instance court decisions reviewed in the course of the research, ruling upon appeals, constituted an especially neuralgic point, since with regard to these decisions it was particularly common that their reasoning consisted of only one or two sentences, and did not qualify as an in-merit reasoning under any circumstances. The quotes below show related examples.

"The appeal is ill-founded. The reasons provided by the first instance court are solid."

"The reasons included in the first instance court's decision are solid in every aspect and comply with the statutory provisions."

"The appeals are ill-founded. The reasons included in the first instance court's decision are solid in every aspect. The references to statutory provisions as included in the first instance decision are correct and do not need to be supplemented."

"The appeals are ill-founded. The first instance court was right in establishing that beyond the general ground for pre-trial detention, also the special grounds for pre-trial detention as included in Article 129 (2) b), c) and d) of the CCP prevail with regard to [the suspect]. The statutory conditions for applying a less restrictive coercive measure do not prevail in the current phase of the procedure."

"The appeal is ill-founded. The reasons provided by the first instance court are solid in every aspect. The general ground for ordering and prolonging pre-trial detention and its special statutory grounds under Article 129 (2) b) and d) of the CCP still prevail. Therefore, pre-trial detention was upheld lawfully. Accordingly, the second instance court upheld the first instance court's decision under Article 371 (1) of the CCP."

"The appeals are ill-founded. The reasons included in the first instance court's decision are solid in every aspect. As opposed to the argumentation of the defence counsel, [the court] established lawfully and supported with facts that the special grounds included in Article 129 (2) b) and d) of the CCP prevail, and, therefore, upholding the pre-trial detention is lawful and justified. In the present phase of the procedure, there is no statutory possibility for applying the less restrictive coercive measure motioned by the defence counsel." (*In the case the defence counsel submitted a two-page, reasoned appeal against the first instance decision.*)

It has to be added that some of the second instance decisions containing the type of reasoning as presented above referred to Article 371 (4) of the CCP as the legal provision allowing for a "brief reasoning". (This legal provision sets out that the reasoning of the second instance procedure "shall include the reasons for upholding [the first instance decisions] briefly".) However, in our view providing such a brief reasoning as shown by the examples above, containing practically no substantive reasons – especially if the defence submits its reasons for the appeal in a detailed manner – raises serious concerns in terms of the right to a reasoned decision and the right to appeal.

The above examples substantiate the criticism of many defence counsels about the formal nature of the decisions taken on pre-trial detention. It seems desirable to include this issue as well in the curriculum of the training for judges and prosecutors with special regard to the ECtHR's jurisprudence.

### 3. Alternative coercive measures

In line with the importance of the right to liberty and the exceptional nature of cases in which its limitation will be accepted before a final judgment is delivered about the guilt of a defendant who is to be presumed innocent until such a decision is made, the ECtHR has reiterated that Article 5(3) ECHR encompasses a right to release pending trial, with or without conditions.<sup>166</sup> As a presumption in favour of release exists, the authorities are obliged to consider alternative measures carefully<sup>167</sup> and explain why they are not feasible in this particular case, when deciding whether a person should be released or detained.<sup>168</sup>

As it was already presented earlier (see Chapter 2.1.), alternative coercive measures were ordered in only a few instances in the cases covered by the case file review, both at the first hearing pertaining to coercive measures and later on in the procedure. (Alternative coercive measures applied included house arrest, geographical ban, and geographical ban with an additional requirement that the defence shall report at the police at established intervals.)

Since the defence motioned the ordering of a less restrictive coercive measure at the first hearing pertaining to ordering pre-trial detention in 52.4% of the cases in the full sample (N=84), the above data also mean that the majority of requests for alternative measures submitted by the defendants or defence counsels were unsuccessful.

There was no decision which would have ordered an alternative coercive measure without the defence's motion for it. Alternative coercive measures motioned by the defence included house arrest (in 50% in the full sample) and geographical ban (in 65.8%), and, in an insignificant proportion, restraining order (in 2.6%) and house arrest supervised by an electronic monitoring device (also in 2.6%). Furthermore, researchers noticed in the course of the case file review that defence counsels many times failed to identify precisely the "less restrictive" coercive measure they asked for to be ordered.

According to the case law of the ECtHR, on the basis of Article 5(3) of the ECHR, when deciding on detention, courts are obliged to substantively consider the application of such alternative coercive measures which ensure that the defendant appears at the procedural acts. Article 60 (2) of the CCP<sup>169</sup> and chamber opinion BKv 99 also prescribe that courts examine whether the aims to be achieved may be realised through applying a less restrictive coercive measure. However, in the cases covered by the case file review, decisions touched upon the issue of alternative coercive measures only here and there, and if they did, their reasoning was mostly confined to concluding that the defendant's "personal circumstances do not justify the ordering of a less restrictive coercive measure". 20 out of the 28 attorneys responding to the related question (71.4% of the respondents) were of the view that judges do not have confidence in coercive measures and the majority of them were of the view that judges rarely consider them seriously before ordering detention. As put by one of the attorneys: "Article 60 (2) of the CCP is applied only formally."

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<sup>166</sup> *McKay v UK*, App 543/03, 3 October 2006, para 42, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77177>.

<sup>167</sup> *Wemhoff v Germany*, App 2122/64, 27 June 1968, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57595>

<sup>168</sup> *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57938>.

<sup>169</sup> Article 60 (2) of the CCP sets out the following: "If the present act [the CCP] allows for the restriction of the concerned person's constitutional rights in relation to applying coercive measures, these acts may, even if the further conditions for it prevail, only be ordered if the aim of the procedure may not be ensured through a less restrictive act."

Table 16 – Do judges seriously consider ordering alternative coercive measures before ordering detention?

	Always	Often	Rarely	Never
<b>N</b>	0	4	23	4
<b>%</b>	0	12.9%	74.2%	12.9%

At the same time to the question on what their primary considerations are when deciding whether or not to order pre-trial detention in a particular case, all of the investigation judges seated in Budapest filling in the questionnaire responded that they assess whether the aims to be achieved by the pre-trial detention can be achieved by applying a less restrictive coercive measure. As formulated by one of the judges: "this question shall emerge in the judge deciding on the matter the other way round, namely whether why exclusively pre-trial detention is suitable to ensure the aims of the procedure, why there is no possibility to apply a less restrictive coercive measure".

From among the available coercive measures, Budapest-based prosecutors voiced strong concerns with regard to **geographical ban**: all three of them were of the view that while with regard to a smaller settlement ordering geographical ban may be justified, with regard to Budapest "it has no use", "it may hardly be interpreted", and is a "weak" coercive measure, which they accordingly do not motion for. As formulated by one of the prosecutors: "[W]hat kind of a restriction does it mean if someone must not leave the surroundings of Budapest, even though he/she lives in Budapest, and even committed his/her offence or offences here?" In addition, one of the judges asked also raised the concern that geographical ban is not effective, and "does not guarantee anything" in a larger city and especially in the capital with regard to the risk of reoffending and frustrating the procedure.

In relation to **house arrest** all but one of the prosecutors interviewed mentioned that in the case of house arrest the address, the place of habitation has an outstanding significance (since in the absence of an address neither house arrest, nor geographical ban can be ordered), and that in these instances the emphasis is on revealing "the actual situation". In these cases the investigation authority checks whether the estate identified by the defendant really exists, whether the defendant's relatives etc. really live there, and whether they really undertake to support and take care of the defendant while under a coercive measure, etc. In this sense it also qualifies as an adequate "livelihood" if the defendant does not live at his/her registered address, but lives at one of his/her family member under orderly circumstances. One of the judges participating in the survey was of the view that house arrest is "cumbersome", occupies police forces, and submitted that he/she refrains from applying it also because he/she does not know how much capacity the police have to supervise house arrest.

To the question whether the prosecutors submit less motions aimed at ordering pre-trial detention since it became possible that compliance with the rules of geographical ban and house arrest is supervised by the police also through an **electronic monitoring device tracing the movement of the defendant**, four out of the five prosecutors responded that this fact did not influence their practice.

As it was already mentioned, in their view, the reasons behind the decrease in the number of pre-trial detentions are instead the always stricter and stricter prosecutorial and judicial practice and the legal amendment guaranteeing the defence's access to the evidence. Judges filling in the questionnaire were strongly divided in this regard: while all the responding judges seated in Budapest were of the opinion that this possibility decreased the number of pre-trial detentions ordered by them,<sup>170</sup> all of their colleagues at the county seats submitted that this development did not influence their practice.

One of the prosecutors mentioned that it is a separate issue in these cases whether the application of the monitoring device is possible or not from a technical point of view at a given address, and one of the judges remembered a case when the application of the monitoring device was ordered by the court, but it turned out subsequently that the technical conditions for applying it were not in place.

<sup>170</sup> One of the judges added that even though he knows that it is "more comfortable" for the respective authority to supervise house arrest also through an electronic monitoring device following the movement of the defendant, but he still orders the application of the monitoring device only in highly justified, serious cases, since in his view the law also shows the intent of differentiation in this regard.

It was raised by one of the prosecutors with regard to the **restraining order** that it may be issued and the defendant may be obliged to leave a given apartment only if the defendant can reside elsewhere, since the defendant “cannot be shut out onto the street”. While with regard to **bail** one of the attorneys stated in the survey that “establishing it is only a legal but not an actual possibility”, prosecutors rather claimed that bail would be applicable but the number of motions aimed at establishing bail is “insignificant”.

The research seems to support defence counsels’ view that there is little confidence in alternatives, and that this has not changed significantly with the introduction of electronic tagging. We believe that this is an issue that is worth further examination, which could be done by one of the groups established by the President of the Curia with the aim of analysing jurisprudence in relation to different issues of outstanding importance.

#### 4. Correlations between the judgment and pre-trial detention

In the course of the research we have looked into whether the fact that a person was in pre-trial detention in the course of the procedure and the length of the detention has any potential impact on the sentence that is imposed on them.

As far as the sanctions imposed are concerned, an imprisonment to be executed was imposed on 98.2% of the defendants in the selected sample in the first instance and on 100% of them in the second instance. In the full sample the same proportions were 94.8% and 95.5%. Comparing the average length of imprisonments imposed and the average length of pre-trial detentions results in the following:

*Table 17 – The average length of imprisonments imposed and the average length of pre-trial detentions*

	Average length of imprisonment imposed (months)	Average length of pre-trial detentions (months)
First instance		
- selected sample	50.9	9.0
- full sample	54.4	8.9
Second instance		
- selected sample	49.1	14.3
- full sample	54.1	13.4

With regard to the imprisonment imposed by the first instance judgments there were four defendants in the full sample and two defendants in the selected sample whose imprisonment was shorter than the time they spent in pre-trial detention; while with regard to the second instance judgments there were no such defendants in the selected sample and one defendant in the full sample. On the other hand, there was no such defendant in the sample in the case of whom the length of pre-trial detention equalled the length of the imprisonment imposed, and so the latter would have been considered “served”. It has to be added that from the six judges who could answer the respective question due to their judicial position, five of them stated that the length of time the defendant spent in pre-trial detention does not affect their decision on imposing a sanction in any way.

At this point it is worth mentioning that according to Article 580 (1) of the CCP the defendant is entitled to a compensation for the time spent in pre-trial detention and house arrest e.g. if the court acquits the defendant, and under Article 580 (2) of the CCP also if the court convicts the defendant in a final decision but the length of time spent in pre-trial detention or house arrest exceeds the length of imprisonment imposed in the final decision. According to the interviews conducted with prosecutors, if the defendant is compensated e.g. on the basis of being acquitted the prosecutor delivering the related decisions will be liable also financially for his/her decisions, which may amount at maximum to the prosecutor’s salary for more months. This solution (which does not have a clear statutory ground) raises concerns as it may bring considerations into the decision making of

prosecutors (or judges) that should not play a role in performing their tasks related to pre-trial detention.

## V. RECOMMENDATIONS

### For the legislator and the government:

- Abolish the possibility of “unlimited” pre-trial detention: amend Article 132 of the CCP in a way that, similarly to the situation earlier, there is an upper time limit for pre-trial detention ordered or upheld before the first instance judgment in every criminal procedure.
- Abolish the possibility included in Article 309 (1) of the CCP that if a court hearing has been postponed, the court may decide at a panel meeting, i.e. in the absence of the defendant on a coercive measure involving the deprivation or the restriction of the defendant’s personal liberty.
- Make the presence of defence counsels mandatory at hearings related to pre-trial detention, but especially at the hearing related to ordering pre-trial detention.
- Establish a deadline for notifying the defence counsel about the hearings related to pre-trial detention, which makes it realistically possible for the defence counsel to appear at the hearing.
- Establish a deadline for submitting the prosecutorial motion aimed at pre-trial detention and related files of the investigation to the defence before the hearing or the respective decision, which makes it realistically possible for the defence to get prepared for the hearing, make submissions or motions, obtain documents, etc.
- In order to comply with Article 7 of the Right to Information Directive, amend Article 211 (1) and (1a) of the CCP in a way that authorities are not only obliged to submit to the defence the files of the investigation substantiating the motion for pre-trial detention, but all documents related to the specific case which are essential to challenging effectively the lawfulness of the detention.
- Enact in the law that submitting the copy of the files of the investigation related to the motion aimed at pre-trial detention to the defence is a precondition for holding a hearing or reaching a decision related to pre-trial detention; in the absence of this no hearing may be held and no decision may be delivered.
- Consider the introduction of electronic delivery when notifying the defence about the hearing related to ordering pre-trial detention.
- Establish an adequately short deadline for delivering and communicating the written and reasoned decisions pertaining to pre-trial detention.
- Make it possible also for second instance courts, ruling on appeals against decisions on pre-trial detention, to hold a hearing. Make holding a hearing obligatory if the first instance court decided on pre-trial detention at a hearing, and if the investigation judge holding a hearing or the first instance court hearing the defendant personally did not order (or uphold) the pre-trial detention on the basis of the hearing, but on the basis of the case file it emerges in the second instance judges that the deprivation of the defendant’s liberty may be necessary.
- Establish an adequate deadline for ruling on appeals submitted against decisions related to pre-trial detention.
- Establish on a legal level means for the courts to enforce the principle of conducting procedures in a timely manner (e.g. if the protraction of the investigation also results in a protracted pre-trial detention, the judge should be allowed to determine a deadline for carrying out certain investigative acts; there should be a statutory possibility to terminate the pre-trial detention in the absence of investigative acts, etc.).
- Enact in the law that if the courts do not refer to a given special ground for pre-trial detention included in Article 129 (2) a)–d) of the CCP, or omit the reference to it at a certain point of

the procedure, then courts are allowed to refer to the given special ground in a later stage of the procedure (again) only if there is a new circumstance justifying it.

- Provide expert institutions with the necessary material and human resources so that expert opinions can be presented in a timely manner.

#### **For the courts:**

- Ensure the uniformity of the application of the law in order to guarantee that the court deciding on the issue of pre-trial detention assesses and may assess the evidentiary power of the evidence in order to examine in merit whether the general ground for pre-trial detention prevails.
- Ensure the uniformity of the application of the law in order to ensure that – irrespective of the possible amendment of the law – submitting the copy of the files of the investigation related to the motion aimed at pre-trial detention to the defence in due time is a precondition for holding a hearing or reaching a decision related to pre-trial detention.
- The President of the Curia should establish a judicial group analysing jurisprudence for examining the practice of pre-trial detention and coercive measures in general. (The group should look into the application of alternative measures and why the introduction of electronic tagging has not had a significant positive impact on the degree of use of less restrictive measures.)
- Provide training for judges deciding on pre-trial detention both in the first and in the second instance on the case law of the ECtHR pertaining to coercive measures and especially to pre-trial detention and on the Right to Information Directive.

#### **For the prosecution:**

- Ensure – irrespective of the possible amendment of the law – that proceeding prosecutors interpret Article 211 of the CCP uniformly in a way that they have to submit all documents from among the files of the investigation to the defence which are essential to challenging effectively the lawfulness of the detention, including those which counter the necessity of pre-trial detention.
- Ensure through issuing an internal regulation or by logistical steps that at the hearings related to pre-trial detention the prosecutor submitting the related motion is present, and if that is not feasible, the prosecutor present is allowed to alter the motion.
- Provide training for prosecutors on the case law of the ECtHR pertaining to coercive measures and especially to pre-trial detention and on the Right to Information Directive.

#### **For bar associations:**

- Provide training for attorneys on the case law of the ECtHR pertaining to coercive measures and especially to pre-trial detention and on the Right to Information Directive.