



Report

Pre-trial detention: *Challenges from the perspective of prison services in Europe*

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PROMOTING
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Table of Contents

1. Introduction: background and purpose	2
2. Legal framework of pre-trial detention in Europe.....	3
3. Definition and scope	3
4. Methods	4
5. Numbers	4
6. Challenges faced by prison services	6
a) Psychosocial services on hold.....	6
b) Non-nationals	6
c) Children and juvenile prisoners	6
d) Visits and family contacts.....	7
e) Activities.....	7
7. Non-custodial sanctions.....	9
a) Obstacles to the use of non-custodial sanctions.....	9
b) Potential to learn from the COVID-19 crisis.....	9
8. Executive summary.....	10



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1. Introduction: background and purpose

This report was produced with the specific purpose to inform the European Commission about experiences from within prison services in relation to pre-trial detention in Europe. EuroPris, a membership organisation of European prison services has been sharing information, challenges and best practices regarding prison related issues since 2012. This report highlights the knowledge available within the organisation on the specific issue of pre-trial detention. By sharing this knowledge with the European Commission, EuroPris aims to contribute to improving the lives of prisoners and their families, enhancing public safety and security; reducing re-offending; and advancing professionalism in the corrections' field.

2. Legal framework of pre-trial detention in Europe

Prison standards in Europe are mainly developed by the Council of Europe, including the ECtHR, the CPT and the Committee of Ministers. The standards contained in the European Prison Rules, whilst non-binding, have largely been endorsed. Within the EU, the Charter of Fundamental Rights of the European Union (CFR) offers important minimum standards.

It has been widely acknowledged that pre-trial detention has harmful effects, including job loss, homelessness, loss of a support network and stigmatization, and should therefore not be overused. In general, detention may only be ordered when it complies with the duty to respect the right to liberty (Article 5 (1) ECHR) and the presumption of innocence (Article 48 (1) CFR and article 6 (2) ECHR). Pre-trial detention is supposed to be a measure of an exceptional nature in all jurisdictions within Europe. It is to be applied only when all other measures are judged to be insufficient. The proportionality principle in criminal matters requires that coercive measures, such as pre-trial detention, are only used when this is absolutely necessary and only for as long as required. It falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time and complies with the principle of the presumption of innocence and the right to liberty whilst meeting the necessities of the investigation of criminal offenses. ECtHR case law establishes that pre-trial detention must be regarded as an exceptional measure and the widest possible use should be made of non-custodial supervision measures. Finally, Council of Europe Recommendation 2006-13 on remands in custody lays down conditions for remands in custody and safeguards against abuse. It recommends measures for periodic review, by a judicial authority, of the justification for remanding someone in custody.

3. Definition and scope

In discussions about pre-trial detention, there are divergences in the understanding of the concept of pre-trial detention. For some, pre-trial detention only refers to untried detainees, whereas for others, it includes the detainees already sentenced by a first instance court or even at the appeal level but still waiting for a final verdict. Pre-trial detention in the context of this report covers the period until the sentence is final.

Membership of EuroPris is open to prison and correctional services within the Council of Europe Region. In 2020, EuroPris had 34 members, including 26 EU countries. Accordingly, the data gathered for this report includes information from non-EU Member States. Although in EuroPris' view, this information is still relevant for all EU Member States, where appropriate and possible, only data from within the EU has been used for this report.

4. Methods

The data used for this report was largely gathered from the European Prison Information System (EPIS) and the EuroPris Knowledge Management System. EPIS was created by EuroPris to provide a central knowledgebase of European prison agency information for the purposes of enhancing transparency and inter-jurisdictional cooperation and to prevent duplication of commonly requested data. EuroPris accepts contributions to EPIS from all European prison agencies regardless of their membership status with EuroPris. In addition, in collaboration with the University of Lausanne, EuroPris has made interactive graphs using data from the SPACE I – Council of Europe Annual Penal Statistics initiative. EuroPris selected a number of key indicators to supplement the European Prison Information System (EPIS). One of those key indicators is the number of prisoners without a final sentence. These statistics are provided by a network of national correspondents working at the prison and probation services of the 47 Council of Europe member States.

KMS supports inter-agency collaboration and supports European Prison Services who want to enquire or benchmark on specific topics with a wide network of European colleagues. EuroPris built a system that allows to digitally share such questions with their European network and to produce a structured report within a very short period. The report is then accessible to all respondents and others having interest in these issues.

For both EPIS and KMS, jurisdictions can choose whether they share information publicly or privately, intended only for other prison services in Europe. Where jurisdiction have chosen to share their information privately, in this report that information has been anonymized, so that it cannot be traced back to the jurisdiction that shared it. Some of the EuroPris data has been supplemented with information from the World Prison Brief. Where further interpretation was required for a better understanding of the meaning of the statistical data, reports of EuroPris expert meetings and workshops were consulted. Finally, a collection of feedback to EuroPris from European prison services about their responses to the COVID-19 crisis was consulted. It should be noted that the information in both EPIS and KMS, as well as the other sources, are entirely based on the contributions of prison jurisdictions and are not independently verified by EuroPris. Accordingly, the same goes for this report.

5. Numbers

Throughout the Council of Europe region, including the EU, between 2010 and 2018, the average percentage of prisoners without a final sentence in the prison population varied between 25 and 28 percent. The average length of pre-trial detention was three months. Within the EU, there are strong variations, with countries that have a very high percentage of pre-trial detainees as well as countries that have a very low percentage of pre-trial detainees. In 2018, the percentage was very high in Denmark (40,5%),

Greece (32,4), Italy (34,5%), Liechtenstein (75%), Luxembourg (44,4%), Malta (31%), and the Netherlands (41,8%). At the other end of the spectrum, the percentage was very low in the Czech Republic (8,2%), Estonia (15,5%), Lithuania (9,3%), Poland (9,8%), the Slovak Republic (15,1%), and Spain (14,3%).

Almost all jurisdictions report that they have specialized, separate prisons for pre-trial prisoners. In total, the EPIS system contains information about 173 specialized pre-trial detention or remand prisons, of which 93 institutions are intended for female prisoners and 166 institutions are intended for male prisoners.

Although overpopulation has been decreasing in Europe in the past decade, from 100.8 prisoners per 100 places in 2010 to 87.6 prisoners per 100 places in 2018, from the above numbers it appears that pre-trial detainees still represent a large part of the population. Arguably, limiting the use of pre-trial detention could contribute to reducing overpopulation in European prisons. Further research into the relationship between pre-trial detention and overpopulation on a country-by country basis is needed to clarify this assumption.

6. Challenges faced by prison services

a) Psychosocial services on hold

A major challenge that prison services are facing is that during pre-trial detention, of which the average length in Europe is three months, almost all psychological, social and rehabilitative services are on hold, while waiting for a final sentence. Most professionals within such services indicate that their impact would be greatest if they could start immediately upon imprisonment. The average length of imprisonment in Europe is eleven months, which in theory would leave an average of eight months for these services. In practice however, professionals indicate that they often have less than six months for their programs, while professionals indicate that a period of six months reflects the absolute minimum for a successful program.

b) Non-nationals

Although exact numbers are not available, EuroPris members report that non-nationals are overrepresented amongst the pre-trial detention population. It appears that non-nationals are often at a disadvantage in obtaining alternatives for detention because they are seen as a greater flight risk than national defendants. This includes pre-trial detainees from within the EU, even though authorities could issue a European Arrest Warrant to ensure the return of someone wanted for trial. This is also in spite of the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

As was acknowledged in the Council of Europe's Recommendations concerning foreign prisoners (CM/Rec (2012) 12) national prison services struggle with meeting the special needs of foreign prisoners, such as reducing feelings of discrimination, grievance and unfair treatment amongst this group, and with the need to give special attention to their regime, equal access to education and work and to alleviate their isolation by enabling contacts with the outside world.

c) Children and juvenile prisoners

Children are in a particularly vulnerable position in relation to pre-trial detention. Deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers their reintegration in society. Within the EU, the minimum age of criminal responsibility varies from 8 years in Scotland to 16 years in Portugal.

A number of measures have been taken at international level to protect the rights of children in criminal proceedings, including as regards detention. Article 37 of the UN Convention on the Rights of the Child provides that arrest and detention of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Children shall be treated in a manner that takes into account the needs of persons of

their age, including being kept separate from adults and have the right to maintain contact with their families.

EuroPris members have expressed concern particularly in relation to children's access to education. In about half of the jurisdictions, pre-trial detained minors have access to education, in particular secondary education. However, most respondents indicated that in practice, pre-trial detainees do not attend education, even if the opportunity does exist. It was considered a challenge to teach pre-trial minors. For example, it was indicated that the learning outcome increased when the education was organized in one to one-sessions with the pupil and the teacher. This learning situation was difficult to provide because there was not enough capacity. Further, it was reported that the population of pre-trial minors was very diverse in terms of education, field of study, school career, foreknowledge, cognitive skills, and interests. And generally, the school career was all but flawless. School fatigue, school shopping, school failure, truancy, school delays and little scholastic perspectives were commonly reported.

d) Visits and family contacts

According to the European Prison Rules (24.1) prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons. Such visits may be subject to restrictions based on ongoing criminal investigations, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact (24.2).

EuroPris data indicates that in almost all European countries, visits are limited for pre-trial prisoners. In about half of the reporting jurisdictions, visits are not allowed at all for pre-trial detainees. In most other countries, there is a maximum number of visits allowed per month. In all countries, pre-trial detainees have access to telephones unless specified otherwise by a judge.

Questions have been asked in the KMS system relating to leave and conjugal visits. In case of a death in the family or other serious family circumstances, some jurisdictions have reported that only sentenced prisoners can request temporary leave to visit the family member concerned or attend the funeral, whereas in other jurisdictions, the rules are the same for sentenced as well as pre-trial prisoners. In about half of jurisdictions, conjugal visits are not allowed for pre-trial prisoners, only for sentenced prisoners.

e) Activities

In countries where semi-open or open prisons are available, these are only used for sentenced prisoners, not for pre-trial detainees. Prisoners in pre-trial detention are hardly ever allowed to leave for specific purposes, such as their employment or education. However, the continuance of such activities is generally greatly impacted by

a pre-trial detention period of on average three months: there is a high risk of unemployment, education drop-out, and homelessness.

Similarly, within prisons, education, vocational training and work are mostly not accessible to pre-trial detainees. Generally, in most European penal systems, sentenced prisoners are offered the possibility of work. This may serve several purposes. One goal is to give a prisoner a meaningful way to occupy their prison time and a possibility of earning some money. It may also play an important role in resocialization as prisoners may acquire skills that can help them to find a job after release. It may also have an important penological function: reducing the monotony of prison life, keeping prisoners busy on productive activities, rather than, for example, potentially violent or antisocial activities, and helping to increase fitness, and decrease physical and mental health problems. Consequences of these activities not being available in pre-trial detention include that pre-trial detainees are missing out on these benefits and that it becomes harder for prison services to maintain a positive atmosphere.

7. Non-custodial sanctions

The European Council adopted conclusions on alternative measures to detention in 2019. One of the conclusions was that alternative measures to detention, such as electronic monitoring, should be considered throughout the whole criminal justice chain, including in the pre-trial stage (2019/C 422/06). This was further stressed by the Finnish Presidency in its report later that year (Council document 15222/19).

a) Obstacles to the use of non-custodial sanctions

EuroPris data indicates that almost all jurisdictions in Europe (53 out of 60 reporting jurisdictions) have the technology available for electronic monitoring, although some of them outsource the monitoring to private companies. In answers to KMS questions regarding obstacles to electronic monitoring, EuroPris members generally point to the lack of knowledge of prosecutors and judges and to legal obstacles, rather than technological ones. In some countries, electronic monitoring is legally only available to convicted prisoners, even when the prison has the technology available and the prison service is in favour of electronic monitoring.

A range of other non-custodial measures are also available in most European countries, including conditional release, bail, confiscation of travel documents, reporting to police or other authorities and submitting to curfews, fines, community sanctions. Since these measures do not necessarily involve the prison service, our data does not reveal why these are not used more. There are indications however, that judicial authorities are increasingly reluctant to use these measures without the additional security of electronic monitoring.

b) Potential to learn from the COVID-19 crisis

During the COVID-19 crisis, many emergency measures were implemented that affected the execution of pre-trial detention. Data shared by prison services with EuroPris indicates that the use of alternatives to custodial sanctions, including electronic monitoring, increased. In some countries, the use of pre-trial detention was suspended almost entirely. Further research into the levels of pre-trial detention, experiences with non-custodial alternatives, as well as the impact on safety and security is required. This could provide valuable knowledge that could inform policy making about pre-trial detention in the future.

8. Executive summary

Throughout the Council of Europe region, including the EU, between 2010 and 2018, the average percentage of prisoners without a final sentence in the prison population varied between 25 and 28 percent. The average length of pre-trial detention was three months. Although overpopulation has been decreasing in Europe in the past decade, pre-trial detainees still represent a large part of the population. Non-nationals, including EU citizens, are overrepresented amongst the pre-trial detention population.

The following challenges faced by prison services in Europe have been identified by EuroPris: during pre-trial detention, almost all psychological, social and rehabilitative services are on hold. The same goes for most of the activities offered in prison, such as prison work, education and vocational training. Furthermore, children in pre-trial detention cannot fully realise their right to education. Non-nationals, including EU citizens, experience feelings of exclusion and isolation. Finally, in almost all European countries, visits are limited for pre-trial prisoners, including with their family members. All of these challenges combined make it difficult for prison services to maintain a supportive atmosphere, contribute to prisoner's physical and mental health, and maintain a calm and safe environment. It can also be questioned whether the damage caused by pre-trial detention is proportionate to the purposes it serves.

For European prison services, it remains unclear why non-custodial alternatives are not used more. A range of such measures are available in most European countries next to electronic monitoring, which is widely available. There are indications that judicial authorities are increasingly reluctant to use non-custodial measures without the additional security of electronic monitoring. For non-national EU-citizens specifically, it is unclear why the mutual recognition of supervision measures as well as the possibility of a European Arrest Warrant appear not to significantly decrease the use of pre-trial detention. The COVID-19 crisis offers a potential learning opportunity, as initial data suggests that in response to the pandemic, non-custodial alternatives were used much more than before.

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