



Asociación Pro Derechos Humanos de España

The practice of Pre-Trial Detention in Spain
Research report

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Asociación Pro Derechos Humanos de España

About the Human Rights Association of Spain

Asociación Pro Derechos Humanos de España (APDHE) is Spain's oldest human rights organization. Since its inception in 1976, APDHE has fought for justice, defending and promoting human rights in Spain, and from Spain to the rest of the world.

The work of APDHE is based on three interrelated pillars

- Enforcement. Defend the rights of individuals and peoples by holding individuals responsible for their violations in court.
- Social Mobilization. Promote the construction of an active, participatory society of individuals aware of their rights, the rights of others, and their duties as part of the global society.
- Advocacy. Working with political parties and lobbies for the adoption of laws and public policies that guarantee human rights.

Among its main lines of work is the promotion of justice for victims of mass violations of human rights, applying for justice and reparation. Since the beginning also promotes the human rights in prisons. Other lines of work are violence against women and trafficking of women, education in human rights and immigration

Among its members there are citizens and activists deeply compromised with the defense of human rights, lawyers and professionals of different areas, as psychologists or politicians.



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I. Executive Summary

Under Spanish law pre-trial detention is a precautionary measure which, in exceptional circumstances where the principle of proportionality is safeguarded, may be ordered for a suspect accused of having committed a serious offence in order to prevent (a) absconding from trial and prosecution, (b) reoffending, (c) further infringement of the victim's rights, or (d) tampering with the evidence.

However, to date little research has been conducted to analyse the nature of pre-trial detention decision-making and to assess whether it is in practice only used proportionally and lawfully in exceptional cases.

As part of an EU funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through the monitoring of PTD hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Spanish research, 12 pre-trial detention hearings were observed, 55 case-files analysed, 31 defence lawyers surveyed, and 5 judges and 4 prosecutors interviewed.

The key findings regarding pre-trial detention decision-making in Spain were as follows:

1. Decision-making procedure: The presence of a defence lawyer is ensured in all PTD hearings and the suspect is always present in the initial pre-trial hearing, but not always in review or extension hearings. The lawyer often has insufficient time to prepare the hearing, as s/he is provided access to the case-file only shortly before the hearing. The case-file is not provided in "secreto de las actuaciones" procedures that are not uncommon in Spain, which is a significant disadvantage for the defence. Generally, arguments put forward by the prosecution are given more weight than those of the defence. Some lawyers commented that the decision is in fact made beforehand in informal discussion between the prosecution and the judge (see pages 19-25)

2. The substance of decisions: Pre-trial detention is most often ordered to prevent flight of the suspect, with the possibility of a long-term prison sentence as a result of the severe offence, a lack of fixed abode and foreign nationality being the predominant reasons for a finding of this risk. Pre-trial detention is often ordered based on very general arguments and assumptions, without due attention to specific circumstances and individualization of the decision to the case at hand (see pages 26-32)

3. Use of alternatives to detention: Alternative measures to pre-trial detention orders are more readily ordered in cases that concern less severe crimes, as judges distrust the alternatives to be sufficiently effective. The most frequently ordered alternatives are summons to appear before court regularly and surrender of the passport followed by release on bail. Some lawyers commented that budgetary constraints appear to limit the use of electronic tagging (see pages 33-35)

4. Review of pre-trial detention: The suspect is not necessarily produced at the review hearing; a review can also take place in writing. In the vast majority of review hearings monitored during this research, the initial decision to detain is upheld. Pre-trial detention is often renewed on the basis of very general arguments and assumptions, without due attention to the specific circumstances of the defendant or the case (see pages 36-38)

5. Case outcomes: Official statistics regarding the outcomes of cases involving pre-trial detainees are not available. In the research the conviction rate was 65%, in most cases to custodial sentences. As pre-trial detainees, do not have the rights to visit their families as convicted detainees can have, long periods of pre-trial detention can incentivise defendants to accept a plea bargain and not appeal against a judgment, in order to be treated like a convicted and not like a pre-trial detainee (see pages 39-40)

The practice of pre-trial detention procedures in some areas in fact falls short of ECtHR standards and suffers from insufficient implementation of binding EU-law.

In light of these findings, the main recommendations are that:

- Through legal reform the EU Directive 2012/13 on the right to information in criminal proceedings is effectively enforced to give defence full access to case files and sufficient time to prepare hearings;
- Ensure that pre-trial decisions at all stages include specific reasoning tailored to the individual case to ensure judges engage with the personal circumstances;
- Electronic monitoring should be provided as an alternative measure in law and in practice;
- More alternative measures should be provided in law and in practice, or reinstate measures such as house arrest which are not currently used;
- The law should be amended to include shorter maximum terms of duration of pre-trial detention, which is known to accelerate investigations and proceedings in other countries;
- The Ministry of Justice should take on the responsibility of ensuring that mechanisms are put in place that record data that concerns pre-trial detention decision-making processes, such as outcomes of trials, usage of alternatives and violations of bail conditions.

A full set of recommendations can be found at the end of the report on pages 41-44.

II. 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 detained pre-trial across the EU. While pre-trial detention has an important part to play in some criminal proceedings, ensuring that certain suspects 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 enjoy fully their right to a fair trial, particularly due to restrictions on their ability to prepare their defense and gain access to a lawyer. Further, prison conditions often endanger the suspect's well-being.¹ 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). These findings will be disseminated among policy-makers, judges, prosecutors and defense lawyers, thereby informing the development of future initiatives aiming at reducing the use of pre-trial detention at domestic and EU-level.

This project also complements the current EU-level developments relating to procedural rights. Under the Procedural Rights Roadmap, adopted in 2009, the EU institutions have examined the 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 (LEAP²) 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 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. But to date, no legislative action has been taken with regards to strengthening the

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

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

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 of this research project.

2. Regional standards

The current regional standards on pre-trial detention-decision making are outlined in Article 5 of the European Convention on Human Rights (“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 defense rights if applied accordingly. These standards have developed over a large corpus of ever-growing case law.

Procedure

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly³ or “speedily”⁴ before a judicial authority, and the “scope for flexibility in interpreting and applying the notion of promptness is very limited”.⁵ The trial must take place within “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.⁶ Whether this has happened must be determined by considering the individual facts of the case.⁷ The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.⁸

According to the ECtHR, the court taking the pre-trial decision, must have the authority to release the suspect⁹ and be a body independent from the executive and both parties of the proceedings.¹⁰ The detention hearing must be an oral and adversarial hearing, in which the defense must be given the opportunity to effectively participate.¹¹

Substance

The ECtHR has repeatedly emphasised the presumption in favour of release¹² 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.¹³ The detention decision must be sufficiently reasoned and should not

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

⁴ 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).

⁵ *ibid* para 62.

⁶ *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.

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

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

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

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

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

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

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

use “stereotyped”¹⁴ forms of words. The arguments for and against pre-trial detention must not be “general and abstract”.¹⁵ The court must engage with the reasons for pre-trial detention and for dismissing the application for release.¹⁶

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;¹⁷ (2) the risk the suspect will spoil evidence or intimidate witnesses;¹⁸ (3) the risk that the suspect will commit further offences;¹⁹ (4) the risk that the release will cause public disorder;²⁰ or (5) the need to protect the safety of a person under investigation in exceptional cases.²¹ Committing an offence is insufficient as a reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.²² Pre-trial detention based on “the need to preserve public order from the disturbance caused by the offence”²³ can only be legitimate if the public order actually remains threatened. Pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.²⁴

With regards to flight risk, the ECtHR has clarified that merely the lack of fixed residence²⁵ or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.²⁶ The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available;²⁷ merely a lack of job or local family ties would be insufficient.²⁸

Alternatives to detention

The case law of the European Court of Human Rights (ECtHR) has strongly encouraged the use of pre-trial detention as an exceptional measure. In *Ambruszkiewicz v Poland*²⁹, 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 detention³⁰, and the authorities must also consider whether the “accused’s continued detention is indispensable”.³¹

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.

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

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

¹⁶ See above, note 7.

¹⁷ See above, note 15, para 59.

¹⁸ Ibid.

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

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

²¹ *Ibid para 108*.

²² *Tomasi v France*, App 12850/87, 27 August 1992, para 102.

²³ See above, note 20.

²⁴ See above, note 12, para 149.

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

²⁶ See above, note 22, para 87.

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

²⁸ See above, note 25.

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

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

³¹ *Ibid*, para 79.

Review of pre-trial detention

Pre-trial detention must be subject to regular judicial review,³² which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.³³ A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.³⁴ This might require access to the case files³⁵, 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.³⁶ Previous decisions should not simply be reproduced.³⁷

When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains³⁸ 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”.³⁹ The authorities remain under an ongoing duty to consider whether alternative measures could be used.⁴⁰

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 - 2014.⁴¹

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 Spain

Under Spanish law, pre-trial detention is regarded as a precautionary measure applied during the period in which an individual is under investigation for alleged involvement in the commitment of a crime⁴² and it pursues the following objectives: to ensure that the accused is present during the investigation; to prevent alteration, concealment or destruction of evidence; to avoid further infringement of the victim’s rights, and to prevent the commitment of further crimes⁴³. The Spanish legal system also provides other less onerous precautionary measures to ensure that the accused is present during the investigation, such as a summons to appear before the court⁴⁴, passport withdrawal or bail.

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

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

³⁴ See above, note 11.

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

³⁶ See above, note 3, para 84.

³⁷ See above, note 13.

³⁸ See above, note 12, para 145.

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

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

⁴¹ http://echr.coe.int/Documents/Overview_19592014_ENG.pdf.

⁴² This period is understood as the time from when an individual is arrested by the police until they stand trial.

⁴³ In other words, to avoid any conduct that may be regarded as a new crime.

⁴⁴ The accused must appear before the court on the days dictated by the judge until they stand trial.

Given that pre-trial detention involves the deprivation of liberty of the individual under investigation and, therefore, the restraint of a fundamental right⁴⁵, the appropriateness of imposing other less onerous precautionary measures that infringe less on the right to freedom should be assessed. In this respect, international law states that pre-trial detention should only be imposed in exceptional circumstances. This is also applicable to Spanish case-law doctrine, where the application of pre-trial detention is governed by the basic principles of exceptionality⁴⁶ and proportionality⁴⁷.

Furthermore, the effects of pre-trial detention on an individual's life are, in many ways, the same or more intense than those produced by serving a sentence, given that, for example, detainees held in pre-trial detention do not have access to the privileges associated with serving a sentence.

However, to date there is no scientific evidence to prove that the use of pre-trial detention is exceptional. There is also a lack of relevant statistics on pre-trial detention in several countries, including Spain. This is highlighted in the European Commission report "A Green Paper on the application of EU criminal justice legislation in the field of detention", which states that most member states provide data on the alternatives available in their domestic legal systems, but do not report on the practical application of such measures⁴⁸.

APDHE is a specialist organisation in fields such as criminal justice and we have always had a heightened awareness on these topics. Among our members supporters and collaborators are lawyers with an expertise in criminal law. In addition, we have also worked in Spanish prisons, with particular emphasis on prison law. We were therefore in a strong position to work with Fair Trials on this project "The Practice of Pre-Trial Detention: Monitoring Alternative and Judicial Decision-Making". Our research results are presented in this report.

The ultimate goal of our research is to help strengthen the protection of fundamental rights through the proposal of improvements and best practices designed to promote greater respect for such rights. Freedom is a fundamental cornerstone of the Spanish Constitution (Article 17) and is a supreme value that must be protected; consequently any deprivation of liberty must be extremely justified in its application in accordance with Article 5 of the European Convention on Human Rights (ECHR).

⁴⁵ The fundamental right to freedom is guaranteed in Article 17 of the Spanish Constitution, which states that everyone has the right to liberty and security. The second paragraph of the article regulates pre-trial detention and provides that the detainee must be released or brought before a judicial authority in a maximum period of seventy-two hours.

In reference to pre-trial detention, the Constitution only refers to the fact that a maximum period will be determined by law. As such, this period is regulated under the Criminal Procedure Act (LECr).

⁴⁶ Principle of exceptionality: "The exceptionality of pre-trial detention means that in the Spanish legal system the general rule must be to always favour the freedom of the accused or defendant during the pendency of the criminal proceedings, consequently detention must always be the exception. Therefore, there can be no more cases of pre-trial detention than those exhaustively and reasonably stipulated beforehand by law". Amendment L.O. 13/2003 to the LECr on pre-trial detention.

⁴⁷ Proportionality requires not only that the measure is appropriate to comply with a constitutionally legitimate purpose, but that the imposed sacrifice of an individual's freedom is reasonable in comparison to the importance of the objective sought by the measure (proportionality in the strictest sense)". Amendment L.O. 13/2003 to the LECr on pre-trial detention.

⁴⁸ A Green Paper on the application of EU criminal justice legislation in the field of detention

III. Research project methodology

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 convicted⁴⁹ whereas in the Netherlands 39.9% of all prisoners have not yet been convicted⁵⁰). 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.
- (2) 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.
- (3) A defense practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.
- (4) 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.
- (5) 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.
- (6) 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.

⁴⁹ <http://www.prisonstudies.org/country/ireland-republic>, data provided by International Centre for Prison Studies, 18 June 2015.

⁵⁰ <http://www.prisonstudies.org/country/netherlands>, data provided by International Centre for Prison Studies, 18 June 2015.

The research team relied on the advice of legal experts from APDHE for the selection of lawyers, judges and public prosecutors. As a result, expert lawyers in criminal law (who practice in every region in Spain), long-serving judges and public prosecutors were selected.

From the total of 45 lawyers who were contacted and asked to collaborate by APDHE, 31 agreed to participate in the Questionnaire for Defence Lawyers, which was sent to them via email.

In order to review case files, we approached the Spanish General Council of the Judiciary, which gave us permission to then approach courts and tribunals to request the respective authorisations. Given that in Spain access to court records is only given to implicated parties and that each individual judicial body is free to decide whether to allow access to third parties, it would have been too much of a risk to approach them without first having the certainty of being granted permission. As a result, APDHE decided to request the case files from the lawyers who had completed the Questionnaire for Defence Lawyers, 16 of whom participated allowing APDHE to analyse 55 cases brought before courts in various Spanish regions. APDHE asked the lawyers to provide cases about offences which carry a sentence of more than two years imprisonment, ; in other words, cases in which pre-trial detention can be implemented. Not all of the cases analysed had a firm sentence passed and pre-trial detention had not been decreed in all cases.

The 55 cases analysed arising from criminal proceedings that were investigated between 2001 and 2014 included 47 Expedited Proceedings, 5 Summaries and 3 Trials by Jury⁵¹. The oldest was started in 2001 and the most recent in 2014. 4 cases commenced in 2004, 1 in 2007, 2 in 2008, 5 in 2009, 5 in 2010, 5 in 2011, 8 in 2012, 8 in 2013, and 11 in 2014.

The lawyers who collaborated in the Questionnaire for Defence Lawyers and the Case File Review practice in various regions around Spain (Madrid, Catalonia, Aragón, the Balearic Islands, Asturias, Galicia, Castilla y León, Castilla-La Mancha, Andalusia, Valencia, Murcia and the Canary Islands). Consequently, the information obtained comes from the application of law in 12 of the 17 autonomous regions in Spain. In addition, their professional experience ranges from 15 to 30 years, and criminal law constitutes over 50% of the cases in which they work. Over the past year 21 of the 31 lawyers exercised the defence in at least 20 criminal cases. A total of 19 of the 31 practice as both private and court appointed lawyers, while the remaining only practice as private lawyers.

In the course of the research five judges and four public prosecutors were interviewed. Four of the judges come from every echelon of the judiciary system in the region of Madrid (Provincial Courts and Courts of Instruction), with the aim of gathering a wide spectrum of opinions from judges whose decisions are based on the detainee's personal circumstances and those who revised their decisions in a geographical and territorial scope. And the other judge from the Spanish High Court, whose powers are limited to certain types of crime⁵². We also interviewed public prosecutors from different echelon in the Autonomous Region of Madrid, also in order to establish general guidelines in such a major judicial district as is the Autonomous Region of Madrid⁵³. The reiterated

⁵¹ Expedited Procedure is provided for the investigation of crimes punishable by up to nine years imprisonment, while the "Ordinary-Summary procedure" is for crimes punishable with a sentence of more than nine years. Trial by Jury is used for the investigation and prosecution of crimes contained in Article 1.2 of the Organic Law of Trial by Jury (Ley Orgánica del Tribunal del Jurado) including homicide and conditional threats.

⁵² The Spanish High Court has power, inter alia, for the investigation and prosecution of terrorist offenses, large-scale offenses against public health and economic crimes that cause serious damage to the domestic economy (Article 65 of the Organic Law of the Judiciary [Ley Orgánica del Poder Judicial]).

⁵³ In connection with the training and experience of the judges interviewed, two had no previous experience in law-related occupations, while the other three did (one had previously practiced as a lawyer for one year and 20 as a legal clerk; another had practiced law for eight years and had served as a court clerk in various courts over a period of 20 years, and in another case had performed the duties of court assistant for two years, legal office manager for five years, legal clerk for seven years and 23 as a judge).

arrangements to interview the chief prosecutor in Madrid, were unsuccessful. Although this has not been a limitation for the research, it would have been desirable to have information from who dictates the guideline of prosecutors in a specific region.

In Spain only the oral trial is conducted publicly; as a result access to hearings dealing with pre-trial detention and alternative measures relied on the personal permissions of individual judges. In this regard, permission was sought from 14 courts of which 9 granted permission, allowing for the monitoring of 12 hearings over 10 days⁵⁴.

We attended courts in Madrid over a period of 10 days to monitor hearings, during which 12 cases were studied. One of the monitoring days was performed in a court of instruction in the outskirts of Madrid (Majadahonda), while the other nine monitoring days were performed in courts of instruction in the city of Madrid. Judges from the same region were selected in order to monitor whether they used homogeneous criteria in the decision-making process. In some cases, more information was obtained via conversations with the judges and, to a lesser extent, with the lawyers.

The demographic profile of the detainees in the 67 cases analysed (55 case files and 12 monitoring of hearings) was: all male except five, mainly between the age of 30 to 40 years. More than 50% were Spanish nationals, among the rest there was a high number of foreign nationals with legal residency in Spain, 50% with romantic attachments and/or with children, 50% unemployed, 50% with a criminal record, and 20% with drug dependency. With regards to their legal defence, more than 80% had a private lawyer. The crime which resulted in the most pre-trial detention orders was drug trafficking (25%), followed by homicide and robbery with violence. In the case analysis, pre-trial detention was requested in 80% of all cases and in nine of the 12 (75%) hearings monitored.

The public prosecutors interviewed had 32, 29, 25 and 11 years of experience, respectively, occupying positions in various echelons in the field of prosecution, but had no previous experience in law-related professions given that when they finished their studies they passed their entrance exams to become prosecutors directly.

⁵⁴ We attended 10 days to courts in Madrid, observing 12 cases. 1 of 10 days hearing monitoring took place in an investigation court at outskirts of Madrid (Majadahonda), and the other 9 days monitoring took place in investigating courts of the city center of Madrid

IV. Context

Spain is a sovereign state with a parliamentary government under a constitutional monarchy. It is the fifth most populated country in the European Union, with a population of 46,464,053 inhabitants as of July 2014. Its territory is organized into 17 autonomous regions and two autonomous cities, which give rise to 50 provinces.

The Spanish Constitution of 1978 is regarded as the supreme law of Spanish legislation and regulates public powers and the fundamental rights of Spanish citizens. Spain operates a Continental European legal system, which is supported by the Constitution in a broad sense (laws and regulations).

Moreover, Spain has signed and ratified the principal international treaties and conventions for the protection of Human Rights, such as the International Covenant on Civil and Political Rights 1966, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 and the European Convention on Human Rights (ECHR) which form part of its Domestic Legal System and can be executed directly.

In the field of criminal law, the law confers powers to the Spanish courts to investigate the causes of crimes and offenses committed in Spanish territory, and onboard Spanish ships and aircraft, subject to the provisions of international treaties to which Spain is party. Together with the principle of territory, the law also confers powers to criminal law to investigate certain cases committed outside of Spain, such as serious international crimes including genocide or crimes against humanity.

Pre-trial detention in Spain is governed by Article 502 et seq. of the Criminal Procedure Act (hereinafter LECr). Although the articles that govern pre-trial detention will be the subject of deep study throughout this report, concisely we anticipate here the provisions of Spanish law:

- In order to decree pre-trial detention the judge must consider not only the sentence that could be passed but also the detainee's personal circumstances. Also, its application must be subsidiary when other less onerous measures do not exist (art. 502).
- Pre-trial detention can only be implemented for crimes which carry a sentence of more than two years imprisonment, its aim must be to ensure the presence of the accused during the hearing, avoid the destruction of evidence, prevent the destruction of evidence, prevent further criminal acts against the victim and prevent other crimes from being committed (art. 503)
- Pre-trial detention should not last longer than is necessary in order to achieve any of the purposes for which it was applied. It must not exceed, depending on the case, six months, one year or two years. However, if the crime cannot be brought to trial within these stipulated timeframes, the court may grant a single extension of six months or up to two years, again depending on the case (art. 504)
- The procedure for decree pre-trial detention is regulated in art. 505. This provision establish that the detained will be assisted by a lawyer, that if the public prosecutor or other prosecution request pre-trial detention then the defence lawyer may make allegations and present evidence, and that the judges can only decree pre-trial detention if the public prosecutor or other prosecution have requested it first.
- Spanish law provides the following alternative measures to pre-trial detention: bail, summons to appear regularly before the court, followed and prohibition to approach certain places and approach and communicate with certain individuals (art. 529 et seq.). It also provides that pre-trial detention can be substituted in the case of serious illness or where the accused is subject to drug (art. 508)

- Pre-trial detention may be revised by judge at any moment during any part of the legal proceedings (art. 539). The judge is obliged to review pre-trial detention when the legal maximum term is reached with the aim of deciding whether to continue with the pre-trial detention or to release the accused. Defence lawyers may request a review whenever they deem it necessary.

Furthermore, the Directive on the right to information in criminal proceedings (Directive 2012/13 / EU of the European Parliament and the Council) was implemented through amendments that come in force on 28 October 2015@ amended article 118 of the Criminal Procedure Act includes the right to information, right of access to the case files, right to have a lawyer and right to translation and interpretation. Article 505(3) was amended (the article concerns the initial PTD hearing and is the basis for PTD hearings in general) to ensure that if detention is requested, the accused's lawyer shall in any case have access to those elements of the file which are essential for challenging the deprivation of liberty.

In order to apply the Directive on the right to interpretation and translation in criminal proceedings (Directive 2010/64 / EU, of 20 October 2010), on 28 May 2015 a new provision has been included in the Criminal Procedure Act (Article 123). In this new provision the rights of the accused who do not speak the language of the court have been regulated. Article 123 provides for mandatory translation of decisions depriving of the suspects of liberty, the indictment and judgment, and essential documents have to be translated.

When we started this research in June 2014, there was a **Criminal Procedure Bill** which promoted, among other amendments, the amendment of the current legislation on pre-trial detention in Spain. This reform bill contemplated a series of positive changes:

- It expressly emphasised the exceptional nature of pre-trial detention, stating that the individual under investigation is presumed innocent and should remain free, with the possibility of being placed under judicial control, and only if and when said control is deemed inadequate may pre-trial detention be exceptionally applied.
- It improved the systematisation in law of less onerous alternative measures, which currently appear in a more diffused way, and introduced new, less severe alternatives. In addition to the current alternative measures (bail, summons to appear before the court and/or passport withdrawal [Article 530], prohibition or obligation of where the accused may reside; prohibiting the accused from approaching or communicating with the victim), new measures will be introduced: prohibition of performing certain activities that may facilitate the opportunity to commit further crimes of a similar nature; the requirement to participate in training, work, cultural, sex or similar education programmes; the obligation to follow external medical treatment or undergo regular medical controls, and placing the accused under the control of a designated individual or institution. Provisional release could also be subject to the concept of reasonable caution, which substitutes bail, as a more general, exclusively personal guarantee. For crimes that carry a sentence of professional disqualification or suspension, the bill contemplates the suspension from public office or employment and profession for the duration the judge deems necessary.
- It also contemplated more lenient prison sentences and the possibility of internment in specialised centres in the interest of the health and safety of the individual, allowing them to remain at home or in a medical, psychiatric, rehabilitation or educational centre (which must not exceed the maximum term provided for in pre-trial detention) for the duration the judge deems necessary. It maintains the existing subsidiary principle set out in the current law, stating that pre-trial detention may be applied only when less onerous measures prove inadequate to fulfil the intended purpose.

- It increased the time limit for the public prosecutor to request pre-trial detention, and reduced the maximum term. Specifically, for crimes punishable by 3-5 years imprisonment, the maximum term of pre-trial detention would be one year.
- It increased the time limit for requesting an extension and reduced the duration of the extension. Specifically, pre-trial detention can only be extended when the crime carries a sentence in excess of five years imprisonment, and the duration of the extension may not exceed one year.

Although during this year have been approved some other amendments to the Criminal Procedure Act, the Criminal Procedure Bill related to the pre-trial detention has not been finally approved

Statistics on pre-trial detention

We requested relevant data from the respective agencies to verify **the existence of data and statistics on pre-trial detention in Spain:** the Ministry of Justice, General Council of the Judiciary, Public Prosecutor's Office and the General Secretariat of Penitentiary Institutions.

The General Secretariat of Penitentiary Institutions at the Ministry of the Interior has statistics on the annual number of prisoners held in pre-trial detention and convicted prisoners. In January 2015 there were 8,544 prisoners held in pre-trial detention and 55,186 convicted prisoners, representing a reduction over previous years:

	Number of individuals held in pre-trial detention over the past 5 years ⁵⁵	Number of individuals sentenced over the past 5 years	Total number of individuals in prison over the past 5 years
January 2010	15,569	59,566	75,135
January 2011	13,708	59,052	72,760
January 2012	11,480	54,111	65,591
January 2013	10,787	56,306	67,093
January 2014	9,149	56,132	65,281
January 2015	8,544	55,186	63,730

	Number pre-trial/remand imprisonment ⁵⁶	in	Percentage of total prison population	Pre-trial/remand population rate (per 100,000 of

⁵⁵ Data obtained from the General Secretariat of Penitentiary Institutions (Prison statistics: prison population depending on the stage of the criminal procedure):

<http://institucionpenitenciaria.es/web/portal/documentos/estadisticas.html>. This link provides the number of preventive and convicted prisoners by year, as well as extract figures by age, sex and regions.

			national population)
2000	9,084	20.2%	23
2005	13,988	22.8%	32
2010	14,980	19.7%	32
2015	8,187	12.5%	18

Statistics show a gradual decrease of people in pre-trial detention and convicted people from 2010 to 2015. One of reasons could be the reduction of offences and crime in Spain, and other could be the approval of amendments to the Criminal Code, which supposed the reduction of penalties for some crimes, such as drug trafficking.

However, it does not exist official statistics of aspects as the data relating to medium and long-term pre-trial detention, the number of individuals in pre-trial detention who are convicted and acquitted, and the number of individuals being investigated who breach alternative measures. Therefore the Spanish General Council of the Judiciary and the Ministry of Justice should provide mechanisms to record this data.

In relation with **the application of international law and knowledge of judges and public prosecutors about pre-trial detention**, 4 of 9 judges and prosecutors interviewed stated they use the Spanish law and Supreme Court case law more than the European Court of Human Rights jurisprudence, or that they do not use at all the international one, and 8 of the 9 stated there are many courses and training about this issue in Spain. For this reason we recommend all judges and prosecutors apply not only the domestic law but also the international law and jurisprudence. And that they received the adequate training to this end.

Regarding the existence of **research on pre-trial detention subject in Spain** there is no much reports and research.

Several government agencies publish reports about the subject of prisons in Spain, but not specifically about pre-trial detention. One of them is the General Secretariat of Penitentiary Institutions (depending on the Ministry of the Interior), the Ombudsman or the National Institute of Statistics (INE). All of them publish annual reports on the prison situation in Spain or on the situation of the detention centers. However none of them specifically addresses the pre-trial detention. The Interior Ministry has statistics on the prison population and the number of people in pre-trial detention, but no relevant data of relevant aspects as for example the percentage of people in pre-trial detention who are finally convicted

International organizations also produce reports on the situation of prisons and detention centers in Spain, but not specifically on the detention as a precautionary measure. This applies, for example, the European Committee for the Prevention of Torture and the Council of Europe, who visited detention centers and prisons in Spain

The Department of Human Rights of the United States Government also conducts an annual report on the situation of human rights in different countries, but focusing in conditions in prisons and detention centers

⁵⁶

Source: ICPS (International Centre of Prison Studies): <http://www.prisonstudies.org/country/spain>

In academia there are many specialized articles by experts in criminal law and prison law, however there are few articles of experts on pre-trial detention and alternatives.

The position of the media in relation to the matter is usually to consider suspects as guilty of a crime, not being very common that the presumption of innocence is respected until the trial and final judgment.

V. Procedure of pre-trial detention decision-making

1. Introduction

Fair procedures in pre-trial detention proceedings are fundamental to ensuring that pre-trial detention is used lawfully. This section therefore focuses on procedural aspects of pre-trial decisions, such as the involvement of the defense practitioner, access to case-file, presence of accused at hearings and length of PTD hearings

The relevant ECtHR-jurisprudence in this context emphasise that a person detained on the grounds of being suspected of an offence must be brought “speedily” before a judicial authority, and the trial must take place within “reasonable” time according to Article 5. The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive. The detention hearing must be an oral and adversarial hearing, and the authority to release the suspect and be a body independent from the executive and both parties of the proceedings.

2. Hearing of pre-trial detention

The LECr stipulates that a detainee must be brought before the court in the shortest possible period of time, which may be extended for the purpose of further investigation. In any event, the stipulated deadline is within 72 hours from the time of arrest, which may be prolonged for a further 48 hours in cases where crimes are committed by armed gangs or terrorists (LECr Article 520 and Article 17 of the Spanish Constitution).

Although the law does not establish that pre-trial detention can be used as a measure to try to get the accused to confess or inform, 2 of the 31 lawyers interviewed stated that in cases involving crimes such as theft or criminal injuries that the police sometimes offer detainees their freedom in exchange for their confession, informing them that if they do not confess that they will remain in custody until they are brought to court, and could be held in pre-trial detention.

When a detainee is brought to court their statement is taken by the investigating judge and, unless the judge decrees their provisional release without bail, the judge will convene a hearing in which the public prosecutor or other prosecuting party may request the pre-trial detention of the accused or their temporary release on bail.

If the public prosecutor or other prosecution request pre-trial detention or release on bail, and if the parties agree, then they may make allegations and present evidence which can be presented in the act or within 72 hours of detention. The judge or court will decide on the admissibility of imprisonment or the imposition of bail conditions. If none of the parties agree then the immediate release of the accused must be made effective (LECr Article 505).

In other words, if the prosecution does not request pre-trial detention the judge cannot decree it.

The judges interviewed expressed their satisfaction with the aforementioned stipulation. However, it should be noted that one of the 31 lawyers interviewed stated that serious limitations stem from the current legislative model given its extremely inquisitorial content, a fact that puts into question the impartiality of the judge in charge of the investigation when it comes to deciding on a detainee’s personal circumstances. This situation coincides with that reported by one of the public prosecutor’s

interviewed, who stated that the investigating judge in Spain is actually an undercover public prosecutor⁵⁷.

In relation to the presence of accused at hearings of pre-trial detention, is always present at the initial hearing of art. 505 LECr. A total of 22 lawyers surveyed stated that videoconferencing can be used at hearings, but only six were involved in such hearings over the past year. However, 3 of the 31 lawyers interviewed indicated that the need for the defendant to be present is usually avoided in ratifications and extensions⁵⁸. So we recommend the defendant always be present at the hearings of ratification and extension of pre-trial detention.

3. Legal representation

Both the taking of the detainee's statement and the hearing must be attended by a lawyer, to this end if the detainee has not hired a private lawyer a lawyer will be appointed by the court⁵⁹. According to LECr Article 384 "From the moment they are detained and unless held incommunicado, the defendant may seek counsel from a lawyer and make use of it to request; the early completion of the investigation, the execution of procedures that interest them, and formulate arguments that affect their situation". The 31 lawyers surveyed stated that the defence lawyer is always present at pre-trial detention hearings.

The needs of the accused in criminal proceedings are covered by free legal aid or a court appointed lawyer, which includes: legal assistance to the detainee when in police custody or a detention centre; provide legal assistance during the taking of the statement and in the hearing stipulated in LECr Article 505 if held; prison visits; proposals for providing evidence and investigation procedures; preparation for and assistance during the oral hearing, and during the execution of the sentence.

In other words, it should cover all the needs of the accused in criminal proceedings. However, the fees paid by the court administrative office to lawyers are very low irrespective of the degree of complexity of the case. These reduced fees for public lawyers may adversely affect the rights of defense, so we recommend the increase of the fees⁶⁰.

A lawyer must assist the detainee at the police station before they are brought to court, which should be no later than 72 hours after their detention. A lawyer must also accompany the detainee when they are brought before the court. Of the 31 lawyers interviewed, 23 indicated that the court notifies them of the assignation of their client's statement, as the defendant, and, if necessary, of the subsequent hearing under LECr Article 505, with a maximum of two hours in advance.

⁵⁷This particular public prosecutor stated that, on many occasions, he was "convinced by the judge to request pre-trial detention", in other words, the judge explicitly put forward arguments in order for the public prosecutor to request pre-trial detention, as judges cannot decree it if the public prosecutor does not request it.

⁵⁸ Ratification: when the competent court has to rule on the confirmation or revocation of pre-trial detention granted by another court.

Extension: when the competent court has to rule on the confirmation or revocation of pre-trial detention, when the maximum term established by law for the duration of the measure has elapsed.

⁵⁹If a lawyer is appointed by the court then free legal aid is provided and includes the following: provide legal assistance to the detainee when in police custody or a detention centre; provide legal assistance during the taking of the statement and in the hearing stipulated in LECr Article 505 if held; prison visits; proposals for providing evidence and investigation procedures; preparation for and assistance during the oral hearing, and during the execution of the sentence.

In other words, it should cover all the needs of the accused in criminal proceedings. However, the fees paid by the court administrative office to lawyers are very low irrespective of the degree of complexity of the case.

⁶⁰ The fees for criminal defense lawyers vary from 150 to 350 euro, depending on the type of proceeding and the region, because every region has different fees. And these fees include all the items in the proceeding, from the detention to the oral judgement, even the actuations related to the execution of the sentence

4. Access to case-file - Equality of arms - Evidence

For the preparation of the detainee's statement before a judge and, where appropriate, the hearing cited in Article 505, the court allows the defence lawyer to consult the statement or police report. As a result lawyers have the right to consult the case file before their client is asked to make a statement for the alleged crime for which they have been arrested and brought to court.

There is only an exception to the access file from the lawyer, when the research judge decide to impose the secrecy of the proceeding. Article 302 of the Criminal Procedure Act provides that the judge may take this decision no longer than a month, but this period can be extended by judge successively. Only with the obligation to remove the secrecy at least ten days before the conclusion of first phase of the investigation. Fortunately, in October 28 of 2015 has come into force the amendment to article 302 of the Criminal Procedure Act, which will involve some positive development, because lawyer will be allowed to access to the files related to the aspects which can have influence in the liberty or the custody of the accused, in order to challenge the application of pre-trial detention, even though the proceedings would have been declared secret⁶¹.

However, access to files is inadequate in order for lawyers to deal with the request and eventual decision regarding pre-trial detention efficiently.

This finding has been deduced from the analytical tools used in the research. Firstly, 27 of the 31 lawyers surveyed stated that prior to the statement and, where applicable, the hearing on pre-trial detention, the defence has access to the file and the relevant facts of the case, unless secreto de las actuaciones has been placed on the case. But 17 stated that in reality access is not adequate in order to effectively deal with the request and eventual decision on pre-trial detention, and 9 stated that access is intermediate. A total of 20 lawyers stated that the average time given to prepare for a hearing (read the statement, interview the defendant, compile or verify the veracity of the evidence) is between 10 minutes and 1 hour, and 7 indicated that the time is insufficient. One lawyer stated that when the police report is read during the hearing it leaves no material time to provide evidence.

Secondly, undertaking the review of the 55 cases we found that in 13% of cases the lawyers did not have access to the files as the cases were placed under "secreto de las actuaciones". The secrecy of the proceedings was enacted in such cases to ensure the purpose of the investigation and avoiding the risk of destruction of evidence. Among the cases in which the secret was disposed are 3 drug trafficking offenses, 1 of a criminal organization involved in money laundering and offences against the public treasure, and 3 of murder and personal injuries

Thirdly, the opinion expressed by the lawyers in relation to file access is similar to the statement provided by two of the five public prosecutors who were interviewed, who stated that although lawyers have the same access to police reports as judges and public prosecutors, the time they are allowed to study the reports is limited, as is access to the information as many investigations are placed under a gagging order and that, ultimately, "there is no equality of arms between the defence and the public prosecutor". One of the public prosecutors stated that the solution would be the application of EU Directive 2012/13 on the right to information in criminal proceedings, so that lawyers are provided with a copy of the report at the police station and not just minutes before the hearing.

In summary, Spanish law provides legislation that, in essence, guarantees the fundamental rights of detainees. It regulates the maximum term allowed before a detainee is brought to court and states that the detainee must be assisted by a lawyer. It also provides for the accusatory principle which implies that if the public prosecutor does not request pre-trial detention then the judge cannot decree it, and a maximum term must be agreed for the precautionary measure.

⁶¹ http://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4605

However there are deficits in the access to files, therefore we recommend the application to EU directive 2012/013 on the right to information in criminal proceedings, which facilitates access for lawyers to statements and reports in the police station and not just minutes before the hearing. It also allows lawyers unlimited time to consult the case file in court.

All 31 lawyers surveyed stated that they were always allowed to make allegations during hearings. However, one lawyer stated that the minutes, which should document the allegations expressed orally in detail, very often do not reflect the exact wording. This could create certain limitations in the case of another lawyer taking over the case for the defence given that they will be unaware of the agreements presented by their predecessor or the public prosecutor⁶². In order to counter the request for pre-trial detention or other preventative measures requested by the public prosecutor, lawyers presented allegations in 65% of cases (in case file review), and in 99% of cases (in hearing monitoring). These allegations were oral and lasted an average of ten minutes. No complaints from the lawyers were registered as regards the time they had to formulate their arguments.

In relation with the equality of arms, a total of 26 of the 31 lawyers stated that the allegations from the defence and the prosecution are not treated equally in the decision-making process, and some of them stated the following reasons:

- There is a certain automatism when it comes to applying pre-trial detention, given that although the defence supports its allegations with evidence, this evidence is often ignored by the judge, who does not take into account the defendant's individual personal circumstances and often sides with the public prosecutor.
- Judges have already decided the criteria before entering the pre-trial detention hearing, and in general, judges and public prosecutors talk in private before the hearing is celebrated. This "old pals club" between judges and public prosecutors violates the adversarial principle laid down in the LECr.
- The public prosecutor's opinion has excessive influence over the decisions of the majority of judges. In 99.9% of cases, if the public prosecutor requests prison the judge will agree.
- In many cases the defence is given less time to present its case than the public prosecutor.

As we will show in the next section of the report, the automatism referred by lawyers has been revealed in the case file research.

In relation to the evidence presented at the hearings monitored and the cases analysed, it was observed that the public prosecutor did not request or present evidence in any of the 67 cases, while evidence was provided by the lawyers in 3 of the 67 cases. However, it should be noted that the minutes that could be reviewed in the case files from LECr Article 505 hearings do not always reflect the exact wording of the allegations presented by the parties nor are they exhaustive, therefore is it possible that evidence was actually presented in some cases.

5. Length of pre-trial detention hearing

A predetermined time is not set for the length of the PTD hearings as it depends on the complexity of the case

This finding has been deduced from the interviews to judges, as they agreed that a predetermined time is not set, and that it depends on the characteristics of the case. And from the 12 hearings monitored by the research team, where the duration of the presentation of the defendant's statement

⁶² If the minutes are not documented in detail then it is impossible to know the content of the arguments of the implicated parties via video or audio, given that pre-trial hearings are not recorded (the Spanish legal system only requires oral proceedings and no other type of legal proceedings to be recorded).

ranged from 10 to 15 minutes, to which must be added another 10 to 15 minutes for the LECr Article 505 hearings, except in one case, a crime relating to sexual assault, which lasted for 45 minutes. In none of the hearings monitored the judge required the parties to stick to a predetermined time.

In relation to the time available to public prosecutors and judges, two of the public prosecutors interviewed stated that in general they have sufficient time unless it is a complex hearing in which case it depends on the flexibility of the judge to grant more time. Specifically, the public prosecutor from the Spanish High Court stated that the time available to them is limited, but that the High Court public prosecutor learns about the cases in advance, which helps them to have prior knowledge about the case. The five judges interviewed stated that they were given sufficient time to make decisions about pre-trial detention, and one indicated that they dedicate “the time required and if need be everything else is put aside, because detainees are given priority”, while the Spanish High Court judge noted that due to the very nature of High Court the number of detainees is far less, and as a result there is enough time to hear their cases and make a decision.

6. Duration of pre-trial detention

LECr Article 504 states the following:

- The time an individual spends in pre-trial detention should be no longer than is necessary to achieve any of the purposes for which it was applied.
- In particular, it cannot exceed one year if the crime carries a prison sentence equal to or not exceeding three years, or two years if the crime carries a prison sentence exceeding three years. However, if the crime cannot be brought to trial within these stipulated timeframes, the court may grant a single extension of up to six months in the first case, or up to two years in the second, according to the crime.
- Pre-trial detention can also be extended up to half of the sentence passed in the case if the detainee is convicted and has filed an appeal against the sentence.
- If pre-trial detention was applied to prevent the concealment or alteration of evidence, then it cannot exceed the period of six months.
- If solitary confinement or a gagging order have been decreed during the investigation but are later lifted then the judge is obliged to justify the reasons for the continuity of the detention.
- When the accused has been in pre-trial detention for two thirds of its maximum term, the judge hearing the case and the public prosecutor must inform the Chair of the Governing Board and the chief prosecutor of the corresponding court, so that they can take the necessary measures to give the matter maximum attention. To this end, the proceedings shall be given precedence over all others.

One of the public prosecutor interviewed stated that the extension of up to four years under current legislation is excessive in his/her opinion, noting that if an extension is agreed then the trial should be held within a limited timeframe.

Once a sentence has been passed and an appeal has been filed against it, the interpretation that a prison sentence implicitly carries the automatic extension of the maximum term of pre-trial detention, i.e. up to half of the sentence passed, is not considered constitutionally reasonable. In this respect, the Constitutional Court stipulates that there must be a specific reason to maintain pre-trial detention. In other words, the automatic extension of pre-trial detention up to half of the prison

sentence decreed collides head-on with the exceptional nature of pre-trial detention and the requirement for specific reasons⁶³.

In case file research the 65% of cases where conviction was disposed (15 of 23), and in the 44% where acquitted (4 of 9), the duration of pre-trial detention was more than one year. In three cases was more than two and a half years; in one convicted sentence was enacted and in other two acquittal sentence was enacted (one for drug trafficking and the other for murder)⁶⁴

European Court of Human Rights jurisprudence states that periods of pre-trial detention between two and a half years and five years are excessive, which implies that three of the cases analysed violate the European Convention⁶⁵

Concerning the question of whether there is a connection between pre-trial detention and a greater agility in the investigation of criminal offences 20 of the 31 lawyers surveyed stated that individuals held in pre-trial detention are not investigated more quickly, while only 9 stated that they are. When asked if individuals who are subject to pre-trial detention are investigated more effectively all of those 20 lawyers agreed that they are not.

In relation to cases of long-term pre-trial detention, Spanish law highlights the complexity of the case as the only reason to justify long-term pre-trial detention. In this respect, while six of the 31 lawyers surveyed stated that long sentences may be due to the complexity of the investigation for the type of crime (so-called mega-trials), another six lawyers stated that the complexity is almost never the real reason. Specifically, they stated that delays are not due to the fact that many procedures are performed, but result from unwarranted delays for a variety of reasons: bureaucracy and slow pace of the justice system. Not all courts have adequate resources for research, lack of use of information technology and new technologies, or excessive workload of the courts. All of which means that at times provisional release has to be decreed due to the impossibility of holding the oral hearing within the time limits of the extension.

To reduce the duration of pre-trial detention we recommend that in cases being investigated in which reasons to ratify pre-trial detention exist, measures are adopted to accelerate the proceedings and hold the hearing as quickly as possible, i.e. establish a deadline to hold hearings. Also the law

⁶³ Inter alia SSTC 98/1998, 4 May, FFJJ 2 and 4; 142/1998, 29 June, FJ 3; 231/2000, 2 October, FJ 5; 272/2000, 13 November, FJ 2; 98/2002, 29 April, FJ 4; 144/2002, 15 July, LC 3; 121/2003, 16 July, LC 3; 22/2004, 23 February, FFJJ 2 4; 99/2005, 18 April, FJ 4 STC 333/2006, 20 November, FJ 4.

⁶⁴ The concrete data are the following:

- In cases where a sentence had been passed we found that in eight cases pre-trial detention had lasted from three months to one year, in ten cases for more than one year, in two cases more than two years and in another two cases more than two and a half years (one of them 2 years and 7 months - one month more than the conviction sentence finally imposed-; other 2 years and 8 months –finally convicted for murder and sexual assault to 25 years of imprisonment).
- In cases where 9 persons were acquitted, the duration of pre-trial detention lasted less than six months in two cases, around one year in three cases, more than one year in one case, more than two years in two cases and more than two and a half years in one case (in this case the person was finally acquitted)

The three cases that had a duration of more than two years pre-trial detention with acquittal were:

- Two years and 27 days (crime against public health)
- Two years and 11 months (crime against public health)
- Two years, three months and 11 days (homicide)
- One year and six months (crime against civil liberties)

⁶⁵ PB v France, App 38781/97, 1 August 2000, para 34, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-63639>

should be amended to include shorter maximum terms of duration of pre-trial detention, which is known to accelerate investigations.

VI. Substance of pre-trial detention decision-making

1. Introduction

Taking into account data collected through all research tools, in this section of the report we analyze the relevant aspects of the orders of pre-trial decisions, as the reasoning and the lawfulness of the decisions.

In this context the ECtHR has repeatedly emphasized that the arguments for and against pre-trial detention must be sufficiently reasoned and not be “general and abstract”, and that committing an offence is insufficient as a reason for ordering pre-trial detention, no matter how serious the offence; the severity of the offence in itself is not a reason to detain. With regards to flight risk, the ECtHR has clarified that merely the lack of fixed residence or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention. The risk of reoffending only justifies PTD if there is evidence of the definite risk. Any financial surety fixed as condition for release must take into account the defendant’s means. It has also clarified that the state bears the burden of proof on showing that a less intrusive alternative to detention would not serve the respective purpose. Furthermore, pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.

2. Legal requirements. Exceptionality, subsidiarity, proportionality

In the domestic law pre-trial detention is applied as a subsidiary as stipulated in LECr Article 502 which states the following:

- Pre-trial detention should only to be adopted when objectively necessary and when no other less onerous measure which restricts the right to freedom exists through which the same goals can be achieved as with pre-trial detention.
- In order to adopt this measure the judge will consider the impact it may have on the accused, taking into consideration their personal circumstances and the crime itself, as well as the severity of the sentence that may be imposed.

Article 503 stipulates the requirements needed in order to decree pre-trial detention:

- The case should state one or more facts that present the characteristics of a crime which is punishable with a sentence equal or superior to two years imprisonment, or reduced deprivation of liberty if the accused already has a criminal record.
- That there are sufficient grounds to believe that the accused could be criminally responsible for the crime (the type of grounds are not given a specific definition in the article).
- That any of the following objectives are pursued: to ensure that the accused is present during the investigation where it can reasonably be inferred that there is a risk of absconding; to prevent alteration, concealment or destruction of relevant evidence; to prevent the accused from acting against the interests of the victim, especially in the cases of victims of coercion within romantic relationships (gender-based crimes) who enjoy special protection, or to prevent the accused from committing other crimes.

When asked what changes they would make to the law as regards pre-trial detention, one of the judges interviewed referred to the need to reserve pre-trial detention only for crimes punishable by more than five years imprisonment, or three years if there are aggravating circumstances. Another, in contrast, highlighted the need to increase the severity by recovering criteria, such as public

concern, which is no longer provided for in law. In this case the judge interviewed understood that pre-trial detention is, in many cases, an anticipated jail sentence, but justified it on the grounds that if pre-trial detention is decreed there must be very strong evidence of guilt

Public concern was removed from Spanish law in 2003 as a basis for imposing pre-trial detention. Until 2003, the argument for using public concern had been the insecurity and social danger. But these statements have no due motivation, as the idea of insecurity is subjective and it was no possible to know if this era was more dangerous than other previous historical periods. So there were a transit from the denominated “Criminal Law based on social security alarm citizens” to a Criminal Procedure Law based on guarantees and fundamental rights.

However, although no longer provided for in law, public concern is still applied in some cases. This is deduced from the affirmation of one of the judges, who stated that although public concern is not provided for in law, it survives in the collective subconscious of the judiciary and is still used indirectly. In case files analysis we found 4 cases where pre-trial detention was imposed arguing the public concern or having criminal records. 20 lawyers surveyed experience similar issues and stated that that explicit or implicit extralegal arguments, such as public concern, are used to justify pre-trial detention.

Both exceptionality and proportionality are reiterated. Since the publication of STC 128/1995, dated 26 July, the Constitutional Court has highlighted that the precautionary measure of imprisonment is of an exceptional nature. It is conceived, both in its application and ratification as an exceptional measure, subsidiary, provisional and proportionate to the execution of the objectives of law enforcement. Pre-trial detention, just as any other restriction placed on the right to personal freedom, is a measure that should only be imposed when strictly necessary and only when other less onerous measures that might achieve the same objectives as pre-trial detention are not available⁶⁶.

In relation to the exceptionality of pre-trial detention, it does not exist unanimity, because two of the five judges interviewed stated that on many occasions detention is unwarranted, indicating that this situation happens more frequently in small provinces, but another two judges stated that the situation should not be generalised, given that not every pre-trial detention decree is considered an anticipated sentence, and that not everyone accused of a crime should be held in pre-trial detention.

In turn, one of the judges interviewed stated that there are also certain sectors that postulate for stricter pre-trial detention, denying that there is overuse and stating that, on the contrary, its application has been substantially restricted having eliminated the criterion of public concern which was previously provided for in law.

None of the public prosecutors interviewed considered that there is an excessive use of pre-trial detention in Spain.

3. Risk of absconding. Personal circumstances. Risk of destruction of evidence

The main criteria taken into account for the pre-trial detention is to prevent the risk of absconding, in cases of more serious offences. In these type of cases the personal circumstances are not taken into due and enough consideration

All of the research tools have been pointing towards this findings.

⁶⁶ SSTC 47/2000, 17 February (FJ 7); SSTC 147/2000 29 May; [98/2002, 29 April](#); SSTC 191/2004, 2 November; 333/2006, 20 November (FJ 3)

On this issue three of the four public prosecutors interviewed stated that the criteria taken into account when requesting pre-trial detention is the seriousness of the crime and that the main benefit of pre-trial detention is to ensure the presence of the accused during the hearing followed by other objectives such as avoid the destruction of evidence or reoffending⁶⁷. The severity of the sentence mentioned by the public prosecutors is also a criterion mentioned by three of the five judges when deciding on whether to decree pre-trial detention. Specifically they alluded to serious crimes such as drug trafficking unless with small amounts, including the *boleros de Barajas*⁶⁸; sexual assault, robbery with violence and terrorism.

The judges also alluded to these crimes as well as others such as homicide and stated that they are more inclined to decree pre-trial detention when the seriousness of a crime carries the risk of absconding. This information coincides with that expressed by the lawyers interviewed given that 14 of the 31 stated that when deciding judges cater mainly to severity of the sentence. One of judges said that persons with capture and arrest, and extradition orders, are also a profile most useful to impose the pre-trial detention.

In turn, the data obtained from the case files analysed and the hearings monitored confirm this theory given that public prosecutors request pre-trial detention in 75 to 80% of cases, the most alleged arguments being the seriousness of the crime or the severity of the sentence as two elements connected to the risk of absconding. Judges decreed pre-trial detention in 66 to 86% of cases the most alleged argument being risk of absconding⁶⁹.

⁶⁷ To guarantee the source of evidence is a secondary benefit, given that 80% of the evidence is collected before the arrest. The objective to “avoid criminal reoffending” in cases of persistent offending or when the victims are children, women or the elderly, and one public prosecutor also mentioned the “calming” effect that pre-trial detention has on society in some cases, while indicating that this was not a deciding factor when requesting pre-trial detention given that it is not an objective stipulated by law. This is the fundamental point that the interview aimed to clarify with the Chief Prosecutor of Madrid

⁶⁸ This is the colloquial name for drug traffickers who swallow drugs balls, and are detained at the airport of Madrid - Barajas. These individuals are often foreign nationals who come to Spain in order to specifically transport substances.

⁶⁹ In the case analysis the most alleged arguments made by the Public Prosecutor’s Office to request pre-trial detention were: the seriousness of the crime (20) ; the severity of the sentence as an element associated with the risk of absconding (13), and the risk of reoffending (10)

The figures are similar to those observed in the hearing monitoring, given that the most popular reason given by public prosecutors to request pre-trial detention was the risk of absconding (six cases). This particular reason is primarily driven by the seriousness of the crime and, in consequence, the severity of the sentence that could be passed (in six cases both elements were mentioned nine times). Moreover, in one case foreign nationality with no fixed abode was used to justify the risk of absconding. The risk of reoffending is on the same level as the above and was mentioned by the public prosecutor in six cases, in other words 50%. The risk of destruction of evidence was also presented in one case. And despite not being provided for in law public concern was alluded to in two cases, one case of sexual assault and one case of public health issues.

To appeal against the requests for pre-trial detention made by the public prosecutors, the most common arguments made by lawyers were that the detainee in fact did have a known address (18 occasions), and family ties (15 occasions). The presumption of innocence in 11 cases was also claimed. Documentary evidence to support requests was provided only in three cases (family register and employment contract). This figure is similar to that observed in the hearings monitored

In relation with the judge decision, in the case analysis judges decreed pre-trial detention requested by public prosecutor in 38 of the 44 cases (86%). Judges decreed pre-trial detention in 66% of the hearings monitored (in six of the nine cases requested by the public prosecutor).

It is important to highlight that in the case pertaining to burglary in an inhabited property that the judge in charge of the case decreed the ratification of pre-trial detention decreed by the previous judge in the case, despite the fact that the public prosecutor was not present and, as a result, did not request the ratification. The judge dismissed the request made by the public prosecutor in three cases (public health, sexual self-determination, and robbery, respectively). In some cases, judges agreed to alternative measures and in others no precautionary measures were decreed.

The reason most often used by judges to decree pre-trial detention was risk of absconding (reflected in 28 decisions). This is followed by risk to the progress of the investigation (including risk of coercing victims and/or witnesses) (reflected in 12 decisions). And third, the risk of reoffending (in 10 decisions).

In this regard it could be said that an excessive use of pre-trial detention has been discovered, although it should be noted that in the cases analysed there is an important number of crimes which carry severe sentences such as drug trafficking or robbery with violence, as a result this excessive use refers to this type of crime.

ECtHR states that the severity of a crime is not a reason to decree pre-trial detention, which implies that this practice violates the law.

Consistent with case-law⁷⁰, the Supreme Court and the Constitutional Court have determined that both the seriousness of the crime and the personal circumstances of the accused should be taken into consideration in the application of pre-trial detention. Pre-trial detention cannot pursue punitive objectives or be used as anticipatory sentencing given that it is a precautionary measure and not an anticipated sentence, thus it cannot serve the purpose of overall prevention⁷¹.

In relation to whether they assessed the circumstances of the accused the judges and public prosecutors interviewed stated that having a fixed abode lessens and counters the risk of absconding. However, only one of the five judges stated that personal circumstances outweigh the severity of the sentence. In contrast, in the case analysis it was confirmed that the lack of a fixed abode was mentioned in many judicial decisions to decree pre-trial detention which, in part, coincides with the opinion expressed by three lawyers who stated that if the detainee is a foreign national then risk of absconding is assumed and becomes the fundamental reason to request pre-trial detention. This is in violation of the European Court of Human Rights case law which stipulates that the lack of fixed abode is not a reason to decree pre-trial detention, and that the judges in these cases should take into account alternative measures⁷²

When asked what information they use in order to request pre-trial detention, without exception public prosecutors stated that they refer to the police report, and two of them also added that they check the defendants' criminal and police records and the certificate of residency to verify permanent residency status, though one noted that they usually obtain the information about permanent residency from the defendant's lawyer, family register or employment contract. The Public Prosecutor at the Spanish High Court stated that, due to the complexity of the cases heard, the reports that are handled are more complete than those of a Court of Instruction, and include many more details about the personal circumstances of detainees. This opinion was repeated by two of the five judges interviewed, who stated that lack of information is one of the one of the major

Reference was made to the allegations made by the implicated parties in 74% of the decisions. Although the arguments made by public prosecutors were referred to twice as often as those made by lawyers, giving more weight to the former.

In the hearings monitored the figures are similar, the main arguments to justify decreeing pre-trial detention being: risk of absconding (used on 5 occasions) and the risk of reoffending (used on 4 occasions), consequently in some cases both elements were argued.

In four cases judges presented reasons that are not provided for in law, such as public concern or having a criminal record.

70 Inter alia, Constitutional Court Ruling (hereinafter STC) SSTC 62/1996, 16 April, FJ 5; 44/1997, 10 April, FJ 5; 66/1997, 7 April, FJ 4; 33/1999, 8 March, FJ 3, and 14/2000, 17 January, FJ 4; STC 207/2000, 24 July, STC 145/2001, 18 June.

71 Several of the lawyers interviewed stated that pre-trial detention is applied in the sense of a complement to be deducted from the final sentence and that this fact is taken for granted. By taking on the role of prevention it becomes an anticipated sentence. The objection is that that this overall objective of prevention is contrary to the presumption of innocence.

72 Sulaoja v Estonia, App 55939/00, 15 February 2005, para 64, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57796>.

Tomasi v France, App 12850/87, 27 August 1992, para 87, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57796>.

Wemhoff v Germany, App 2122/64, 27 June 1968, para 5 of "As regards Article 5(3) of the Convention", available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57595>.

shortcomings of the Spanish legal system, “the automatic way in which the law is applied without understanding the individual or their personal circumstances.

This problem should be addressed by passing specific laws that specify under which circumstances PTD may be ordered, which factors may be considered and which factors should be deemed irrelevant when forming such decision in compliance with ECtHR jurisprudence. This would ensure that international human rights laws is equally and with less ambiguity applied consistently.

4. Risk of reoffending

With regards to reoffending, certain characteristics of detainees can result in enhanced probability of PTD orders

This can be deduced from the affirmation of one the judges and one of the public prosecutors, who coincided in that they consider that there is a risk of absconding when detainees present certain characteristics, for example drug dependency, are marginalised or belong to the Roma community. Regarding the latter, in some cases the crime is a “way of life” and that it is assumed that they will commit new crimes if they are granted provisional release. One of judges said that in this profession “unfortunately works with stereotypes”. This is a discriminatory practice.

It was not possible confirm this practice through the review of case files, as only in 18% of the the risk of reoffending was used to justify a PTD order detention, and only in 1 case the detainee had certain characteristics;: he was drug user.

On the other hand, 12 of the 31 lawyers surveyed stated that judges give excessive weight to criminal records for similar crimes in order to assume that there will be a risk of reoffending. In the case file review it was verified that in half of the cases where risk of reoffending was used to impose pre-trial detention, the detained had criminal records for previous offences⁷³.

5. Reasoning

About half of the judicial decisions imposing pre-trial detention, are not sufficiently reasoned as all research elements have shown.

Firstly, 18 of the 31 lawyers surveyed stated that judges rarely perform adequate and thorough assessment of the assumed grounds to detain. Only 11 of the lawyers surveyed believe that judges present sufficient arguments, and two lawyers stated that they never do. In particular, the lawyers stated that judges formally include an evaluation in the judicial decree, because they did not then their decision would be revoked on appeal, but the argument is only intended to cover requirements from a purely formal perspective. In other words, judges often make the decision about pre-trial detention first and then merely base the reasoning on the legal accusation, without presenting the reasons behind the circumstances of the case in any detail and without assessing the real and concrete situation of the accused. This gives rise to the passing of stereotypical decisions in which the reasons are inadequate and not specific to the individual case.

This data coincides to a large extent with the cases analysed given that specific arguments were only presented in only 10 of the 28 decisions in which pre-trial detention was ordered to avoid the risk of absconding, and the other 10 cases were reasoned only very formalistic. In other words, in most

⁷³ In case file review, in 10 cases pre-trial detention was imposed using argument of risk of reoffending. Of these 10 cases, in 5 the detained had criminal record

decisions the risk of absconding appears to be assumed automatically based on the severity of the crime and sentence expected.

In some cases, the severity of the crime and sentence was much more extensively and emphatically argued than the risk of absconding. Only in a few cases, did a fixed abode, often interpreted as the the existence of family ties, and/or permanent residence and/or employment contract, mitigated the risk of absconding.

The same can be said about the pre-trial orders that use risk to the investigation or risk of reoffending, as only half of them presented detailed and specific arguments. So, the analysis of case file also confirms the affirmation of some lawyers claiming certain automatism when pre-trial detention is imposed.

In the 12 hearings monitored, no information on whether the decision was argued formally or specifically was available given that only the interested parties can access judicial decrees therefore we were not given access⁷⁴.

In addition, the lack of arguments when ordering pre-trial detention also violates ECtHR jurisprudence, which stipulates that the court must justify the implementation of the measure and must not resort to stereotypes⁷⁵.

Spanish case law also stipulates the need to justify pre-trial detention orders as it limits on fundamental human rights. In order for a decision to be considered adequate and reasonable it should be the result of an overall balance of the interests at stake (on the one hand, the freedom of the individual who should always be presumed innocent, and on the other, the execution of criminal justice and avoidance of criminal acts). This balance cannot be arbitrary, but must be based on prevailing logical reasoning and above all the ends must justify the decree of pre-trial detention⁷⁶.

In relation with this issue the STC 94/2001, dated 2 April states: “Among the criteria that the Court considers relevant to judge the adequacy and reasonableness of the reasons to use pre-trial detention are: first, the nature and seriousness of the alleged crime and the sentence it is susceptible to and, second, ‘the specific and personal circumstances of the accused’. However, if the court does not dispose of the information this criterion may not be enforceable in the first instance. Therefore, it has been argued that, if in the first instance pre-trial detention has been justified based on objective criteria, such as the severity of the sentence or type of crime, in due course and at a later stage the situation must be reviewed, not only to determine whether circumstances have changed but also to verify the personal circumstances of the accused at the present time” (FJ 6).

So, it should be a requirement in judicial decisions which decree pre-trial detention to sufficiently argue the reasons and explain why the court believes there is a heightened risk of absconding, destruction of evidence, risk to the victim or reoffending. This requires a more efficient and exhaustive control by the high court which should change those decisions that do not adhere to the standards of adequate reasons. Also the Spanish General Council of the Judiciary should modify the court incentive scheme; favouring the quality of the decisions taken and not the quantity of cases.

⁷⁴ Judges verbally reported the result of their decisions to the research team as they were not allowed to consult the written decisions, given that, as noted above, the law only allows case files to be accessed by the interested parties in person.

⁷⁵ *Buzadj 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>
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>.

Smirnova v Russia, App 46133/99,48183/99, 24 July 2003, para 63, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61262>

⁷⁶ SSTC 60/2001, 26 February and 138/2002, 3 June; STC 62/2005, STC 333/2006 20 November, FJ 3

6. Independence in pre-trial detention decision-making

In relation to possible guidelines or instructions about the decision-making process, the public prosecutors interviewed stated that rules, norms and advice from superiors does exist that are designed to standardise criteria, because “the public prosecutor’s office is a hierarchical body and therefore has guidelines and criteria to ensure unity of action”. One of the public prosecutors stated that upon joining the body they were given an “instruction manual” which, in addition to all the circulars published by the chief prosecutor, contained a matrix of elements that crisscrossed to provide a final result such as: “request detention order” or “do not request a detention order”. The Public Prosecutor’s Office should standardise and make public the criteria used for requesting pre-trial detention in order to guarantee transparency. Four of the five judges interviewed admitted to being pressured over decisions; by the media in cases of particular impact.

However, both public prosecutors and judges interviewed denied having succumbed to orders or pressure that they might have received from their superiors or mass media, inter alia, affirming that they have always maintained their independence. This contrasts greatly with the opinion of one of the lawyers interviewed, who stated that the figure of the investigating judge is communicatively weak in comparison to state institutions which have the advantage of specialised systems and mass media, which implies that a decision taken by a judge against police authorities or state interests is often presented to the public as outrageous or meaningless, which sets public opinion against the decision without allowing the judge to present an effective explanation.

VII. Alternatives to pre-trial detention

Pre-trial detention can be ordered lawfully only if no other measure would safeguard the proceedings in a similar effective way. In this section the analysis will include aspects as the type of offences where alternatives are usually imposed, the measures which are most regularly applied and the reasoning given when imposing alternatives.

The ECtHR has reiterated that a presumption in favour of release pending trial exists, so the authorities are obliged to consider alternative measures carefully and explain why they are not feasible in this particular case.

Domestic law governing this issue provide the following alternative measures to pre-trial detention:

- Bail (Article 529 LECr)
- Compulsory appearance before the court (*apud acta*) (Article 530) understood as the “obligation to appear before the court on the days specified in the respective decree and as many times seen fit by the judge or court responsible for the case. In order to guarantee compliance with this obligation the judge or court may agree to withdraw the detainee’s passport”.
- Prohibition of the right to reside in or visit certain places, or to approach or communicate with certain individuals. These measures are extended to crimes such as homicide, criminal injuries and sexual self-determination, and for crimes involving victims of gender-based violence (Articles 544 bis and 544 ter).

In addition, Article 508 also provides cases where pre-trial detention may be substituted

- Where serious illness poses a danger to health pre-trial detention can be served in the home of the accused with the necessary surveillance measures in place.
- Where the accused is subject to drug rehabilitation and the act of imprisonment might hinder the outcome pre-trial detention can be substituted by entering into a rehabilitation centre.

When asked if judges have access to specific professional services that make recommendations on the suitability of granting provisional release, only five lawyers in the survey replied in the affirmative, although one of them stating that even though they do exist, that the workload of court and penitentiary centre staff often means that they do not always request or provide reports.

In less serious cases, judges are often more receptive to alternatives.

This can be deduced from the lawyers questionnaire: 26 of the 31 lawyers surveyed stated that judges generally do not trust or have confidence in the measures and 20 claimed that judges rarely seriously consider alternatives before agreeing to pre-trial detention, 6 stated that the decision depends on the type of crime, given that if the case is serious or the detainee has a criminal record for similar crimes, alternatives are often ignored as judges do not consider them sufficiently coercive to prevent the risk of absconding. However in less serious cases, judges are often more receptive to alternatives.

The opinion expressed by the lawyers coincided with that expressed by two of the five judges who stated that they are more they are more likely to adopt alternative measures for minor crimes and

when the detainee has a fixed abode, given that the general rule is that if the crime is serious then they usually order pre-trial detention.

In the case analysis and the hearing monitoring, judges decreed alternative measures in 39% of cases⁷⁷.

The most commonly used alternative measures are summons to appear before the court and surrender of the passport followed by release on bail.

This was stated by the majority of the lawyers surveyed as well as judges and public prosecutors interviewed (15 of 28 lawyers, 3 of 5 judges, and 3 of 4 prosecutors). This data was also confirmed in the case study and the hearing monitoring as the alternative measures most commonly used were summons to appear before the court and release on bail. Other lesser used alternative measures are the prohibition to approach and communicate with the victim, and drug rehabilitation⁷⁸.

However it is important to highlight, that one judge interviewed commented that to appear before the court is not practical if there is a real risk of absconding, and that the control exercised by the courts to implement this measure is not effective. We recommend that measures should be adopted in order to supervise the adherence to the regular summons to appear before the court, and as such inspire more confidence in judges and mitigate the risk of absconding also in serious offences.

It is also important to highlight, that two of the five judges stated that bail is ineffective. One of the judges also referred to the negative impact it can have on the detainee's family, who in many cases will have to pay for a financial security. One of the public prosecutors noted that bail should only be applied if the detainee has economic resources.

Although are not expressly regulated in the law, electronic tagging measures are applied sometimes in gender-related violence cases. One of the judges interviewed stated that they believe that these measures are not applied to other crimes due to the lack of availability and high cost.

When asked about other alternative measures that could be incorporated in Spanish law, one of the lawyers stated that house arrest could be reintroduced for minor crimes, if the adequate measures were in place to ensure compliance. However, one of the judges stated that the budgetary burden caused by increasing the number of police officers to ensure the measure would be excessive and as such regarded the measure as unfeasible.

We believe that a lack of resources cannot justify the deprivation of an individual's liberty, so legal reforms should be performed in order to expressly include electronic tagging measures, and include new alternative measures or recover measures as house arrest

⁷⁷ Public prosecutors only sought alternatives to pre-trial detention in 4% of the cases analysed, which indicates patent inertia from the public body when requesting pre-trial detention. In turn, lawyers requested release without bail in 25% of cases, and for the rest requested alternative measures, the most popular being bail (8), followed by restraining order (7).

Finally judges decreed alternative measures in 39% (in the case analysis alternative measures were decreed in 6 of the 44 cases where the public prosecutor had requested pre-trial detention, and in 12 cases where the public prosecutor had not requested pre-trial detention, while in the hearings monitored alternative measures were decreed in 3 of the 12 cases, provisional release was decreed in other three cases without any alternative measures).

The crimes for which provisional release was decreed, with or without alternative measures were: robbery with violence, sexual abuse, burglary with violence in an inhabited property, criminal injury, and public health.

⁷⁸ The most popular alternative measure decreed in most cases was summons to appear before the court (8 occasions). Bail was decreed on two occasions. And on five occasions several alternative measures were decreed simultaneously (summons to appear before the court, prohibition to approach and communicate with the victim, passport withdrawal and a ban on leaving Spain).

As regards the concerns expressed by judges and public prosecutors about the breaching of alternative measures, although the judges stated that there is always a risk they denied that, for example if a detainee granted provisional release absconds, it could have a negative impact on their career. One of these judges admitted that courts can fail, but stated that exists efficient mechanisms to find detained escaped from justice. Prosecutors interviewed expressed more concern explaining they believe that the risk of absconding can frustrate the proceedings and elevate the risk to the victim, especially gender violence victims. However, this risk was not confirmed by the case file review analysis. **In the case analysis only in one case in which alternative measures were decreed were they breached.**

One public prosecutor stated that Spanish law is not as explicit as other European member states concerning alternative measures, and that more explicit instructions are necessary that would clearly outline alternative measures and in which cases each one they should be implemented.

VIII. Pre-trial detention review

In this section we present the findings related to the review processes during pre-trial detention proceedings, and analyze the obstacles for the effectiveness of review mechanisms.

The ECtHR has stated that pre-trial detention must be subject to regular review, and all stakeholders must be able to initiate it; the review must take the form of an adversarial oral hearing with the equality of arms of the parties ensured. The decision on detention must be taken speedily and reasons must be given for the need for continued detention. As during the pre-trial period there is a presumption in favour of release, it also has stated that continued detention can only be justified if there are specific indications of a genuine requirement of public interest.

Spanish law provides that pre-trial orders may be revised at any moment during the legal proceedings. LECr Article 539 provides that “Imprisonment and release decrees may be revised throughout the case”. Specifically the judge has the power to grant freedom if appropriate without responding to a request of the interested party. And on the other hand, the court is obliged to review pre-trial detention when the legal maximum term is reached with the aim of deciding whether to ratify pre-trial detention or grant provisional release.

However, during the analysis we did not encounter any case in which provisional release was requested by a judge, because all requests were issued by defence lawyers or by legal requirement⁷⁹.

The defence lawyer can promote the revision by filing an appeal against a pre-trial detention order to the same judge who decreed the measure or appeal before a different judge. An appeal against a pre-trial detention decree should be resolved within a maximum period of 30 days (LECr Article 507). In addition, the defence lawyer may request provisional release as often as they deem necessary throughout the proceedings.

There are obstacles to an effective review of pre-trial detention as the research as shown.

23 of 31 lawyers participating in the survey stated that despite being able to request a review as many times as they deem necessary in practice there are obstacles which make reviews more a matter of form than substance. Specifically, they stated that judges maintain the pre-trial detention agreed in the first instance and are not usually open to new arguments or circumstances, but continue giving more importance to the severity of the sentence and the subsequently assumed risk of absconding than arguments based on personal circumstances that might counter these assumption. Therefore, the renewal of orders happens almost automatically, which is also evidenced in extensions, given that usually after a maximum term of two years the sentence is extended automatically with the argument that “the same elements that led to pre-trial detention are still current”

This opinion expressed by the lawyers basically coincides with the view expressed by the judges interviewed. Some of them stated that while they decree pre-trial detention in exceptional cases; they agreed that in cases where pre-trial detention has been decreed in first hearing it is uncommon for them to amend the order, unless such elements as the authorship of the crime is in question or a mitigating factor comes to light that could lead to a reduction of the sentence passed. The automatism in extensions can also be deduced from the interview of two prosecutors, because they

⁷⁹ Over 80% of the revisions were requested by the defence lawyers or private prosecution, and 7% were made by legal requirement.

expressed concern about not exceeding the maximum term but did not refer to the review of personal circumstances.

Additionally, the case file analysis confirmed that pre-trial detention reviews are not sufficiently effective, given that among the cases that were subject to a first review provisional release was granted in 25% of cases, but in later reviews (up to four reviews in some cases) Pre-trial detention was ratified in 85% of cases⁸⁰. In 25% of cases provisional release was granted, in half of them the reason was because there were general doubts about the offender who might not be the suspect detained, while in the other half it was considered that there was no a longer flight risk as lawyer had provided evidence of having fix abode, or less severe alternative measure were imposed to mitigate the risk of absconding, such as bail.

The public prosecutor did not provide evidence or new evidence in any of the reviews, while the defence lawyer provided new evidence in two cases.

It is important that the personal circumstances of the individual detained are given more weight than is currently common practice. All judges interviewed explained that often the risk of absconding due to the severity of the offence in question continues to persist and accordingly, there was no need to amend the previous decision to detain. It was also observed in the case file review that **many review decisions simply refer to the previous decision without scrutinizing them in a specific review**. The arguments contained in the third and fourth reviews practically repeated the pattern detected in the previous reviews. Some decrees also alluded to the “short time spent in prison in relation to the sentence that could be given to the detainee” thereby already anticipating the expected sentence. In the case of the pre-trial detention that was reviewed by legal requirement, there was not specific motivation to justify the extension of pre-trial detention. In other words, the resolution according the extension of pre-trial detention only made a reference to the maximum term established by law, four years.

The lack scrutiny of pre-trial detention decisions at the review stage as well as the skeletal reasoning of such decisions, violates European Court of Human right case law⁸¹. We believe it should be mandatory for decisions on pre-trial detention decreed in the first instance to present specific, sufficient and adequate arguments in line with the detainee’s personal circumstances.

Another problem expressed by two lawyers in the questionnaires is the fact that **the high court that decides on the ratification of pre-trial detention or provisional release does not usually hold hearings and as a result the detainee is not present which prevents the high court from formulating an accurate understanding of the suspect and the case**. This issue was confirmed

⁸⁰ The concrete data are the following:

- Over 70% of the cases in which pre-trial detention was decreed in the initial hearing were subject to a first review. Pre-trial detention was ratified in 73% of the cases reviewed, with alternative measures proposed in 25% of them, while in one case pre-trial detention was decreed due to the fact that the previous alternative measures had been breached. The assessment of new evidence submitted by the defence is a common element in most cases where in the first review provisional release is decreed
- In the nine cases in which it was decided to ratify pre-trial detention after the first review (38%), a second review was performed. In every case pre-trial detention was ratified. Six of the nine decisions were appealed by the defence, and another was reviewed by legal requirement based on the duration of pre-trial detention, which led to a third review, whose outcome was also to ratify pre-trial detention.
- A fourth review was requested for seven of the above cases, where pre-trial detention was ratified in six cases and provisional release with alternative measures agreed in one. The pre-trial detention decree was appealed in four cases, but was ratified in all. Provisional release was decreed in one of these four cases in a later review.

⁸¹ *Rehbock v Slovenia*, App 29462/95, 28 November 2000, para 84, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59052>
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>.

through the analysis of the the case files: only one case a hearing was actually held in the court, in other words the detainee was present in only one out of 28cases. The ECtHR provides that the review of the detainee's personal circumstances must be performed in an oral hearing, which indicates that this practice observed might be a violations.⁸²

Therefore the law should be amended to ensure that the detainee is present at all hearings.

Similarly, some lawyers stated in the survey review hearings are also limited sometimes as the **procedure is usually performed in writing** which gives rise to excessive delays and that pre-trial detention decreed by a "three-judge court" cannot be appealed in any other type of court, also that there are obstacles in the way of reviewing those cases under a gagging order. Therefore the law should be reformed so that decisions made by "three-judge courts" may be reviewed by a different court.

⁸² *Assenov v Bulgaria*, App 24760/94, 28 October 1998, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-6773>

IX. Outcomes

In this section of the report we are presenting the data and findings regarding the outcome of the proceedings at the trial stage and looking at the impact pre-trial detention has on sentencing.

In the cases examined, a total of 23 convictions were handed down, in 10 cases the detainee was acquitted, five cases were dismissed for various reasons, and in 17 cases no sentence was passed⁸³.

A total of 56% (13 of the 23) sentences passed carried from 1-3 years imprisonment, followed by 5-10 years imprisonment. Robbery with violence and drug trafficking were the crimes that carried most convictions and acquittals⁸⁴.

Judges and prosecutors interviewed estimated that about 80-90% of previous pre-trial detainees are convicted⁸⁵. However, in the case file review – which is however only a limited sample – the conviction rate was only 65%: of 26 accused who had been in pre-trial detention only 17 were finally declared convicted, while the other 9 were acquitted or the case was dismissed.

As a conviction sentenced was imposed only in the 65% of cases with pre-trial detention, further indicates the need that pre-trial decisions should be effectively reviewed, to ensure that pre-trial detention is not used excessively.

We further recommend that competent authorities establish a system to collect this data, specifically statistics of pre-trial detained who are convicted in order to get a clear understanding of the outcomes of cases that involve pre-trial detention considering that the case file review and assumptions of judges and prosecutors differ so strongly. Furthermore judges who disposed pre-trial detention should be informed about the outcome of the cases in order to enhance the understanding of these cases.

⁸³ Of the 23 defendants convicted, 17 had been held in pre-trial detention while six were on provisional release.

In 17 cases no sentence had been passed because they were: awaiting oral trial; awaiting sentencing, or because access to the sentence was not available.

⁸⁴ Convictions: Murder (3), disobedience, conditional threats, membership of a criminal gang, murder, fraud (2), falsehood, corruption of minors; attempted burglary with violence in an inhabited property, criminal injury, armed robbery with intimidation; attempted murder (2), murder, robbery with violence (5); public health (3); sexual assault.

Acquittals: Fraud, robbery with violence (4), arson, public health, homicide, crimes against civil liberties.

⁸⁵ All of prosecutors stated that they estimate that the percentage of convictions is “very high”, even one indicated that they did not remember any single case in which a detainee who had been held in pre-trial detention had been acquitted.

Some of the prosecutors highlighted that the statistic information could be available in the annual reports from the Public Prosecutor’s Office or in the Judicial Neutral Point, However, it has been verified that the annual held at the Public Prosecutor’s Office did not contain information, and the Judicial Neutral Point is not open access.

One of the public prosecutors stated that this information should not be published given that it could have an adverse affect on the proceedings, contrary to one of judges who said that would be very important to have this information

Judicial Neutral Point “is an online service that provides judicial bodies with the required information for legal proceedings via direct access to applications and databases belonging to the Spanish Governing Council of the Judiciary, the Spanish Public Administration Services and other institutions to facilitate and reduce processing times, increase security, and improve user satisfaction”. Source: <http://www.poderjudicial.es/cgpj/es/Temas/e-Justicia/Servicios-informaticos/Punto-Neutro-Judicial>, accessed on 17 May 2015.

In relation to the questions whether the length of pre-trial detention affects the case decision and sentencing, three of the lawyers surveyed and one of the public prosecutors interviewed stated that pre-trial detention can have an impact: **when a severe sentence is expected pre-trial detention is extended even though there might be no risk of interfering with evidence or absconding, and when the duration of pre-trial detention equals the duration of a possible sentence it is used to induce remorse and conformity and agreements to offered plea bargains that offer them instant liberty.** By not consenting to the proposals pre-trial detention could be extended up to half of the time already passed, which would lead to an even longer prison sentence. Furthermore long pre-trial detention periods discourage detainees from filing an appeal against a judgment as they would continue to suffer in pre-trial detention whereas the conditions for finalised sentences are preferable. This is, in words of a public prosecutor interviewed, a “perverse game” and violates the rights of defence.

Consequently detainees prefer to confess and accept a plea bargain sentence than continuing being a pre-trial detainee until their appeal against their sentence is determined. By confessing to the crime and accepting a sentence the detainee is able to access certain permits or the prison classification system (for example it can be possible to be admitted to an open prison).

This highlights the needs for treating and investigating cases involving pre-trial detention with special diligence.

X. Conclusions and recommendations

1. Conclusions

- 1) A total of 17 of the 31 lawyers interviewed stated that access to case files proved inadequate to some extent in order for them to prepare for the hearing and challenge a detention submission or order effectively. This was confirmed by two of the five public prosecutors interviewed who stated that lawyers are given less time than judges and public prosecutors to analyse the case file and that on many occasions investigations are kept secret due to special procedural provisions. The analysis of the 55 case files confirmed this notions, as in 13% of the cases lawyers did not have access to the files because of “secreto del sumario” proceedings.
- 2) Free legal aid covers provides for a lawyer as required, but fees paid by courts to lawyers are very low, therefore this situation may adversely affect the rights of defense.
- 3) The pre-trial detention is most commonly ordered to prevent the risk of absconding, in cases where the offence is severe. In these cases personal circumstances of the suspect are not taken in enough consideration. In these cases an indication of an excessive use of pre-trial detention could be perceived and, consequently, certain automatic schemes in ordering pre-trial detention.
- 4) 2 of the 9 judges and prosecutors interviewed stated that certain characteristics of detainees favor to appeal to the risk of reiteration of a crime to order a pre-trial detention. In the case file review it was not possible to confirm this practice, as we reviewed only one case involving a drug use.
- 5) In some cases public concern is still justifying the imposition of pre-trial detention. This has been stated by 1 of the 9 judges and prosecutors interviewed, and more than half of lawyers stated that public concern is one of the extra legal arguments which is still used. In the case file review however only in 4 cases pre-trial detention was ordered because of public concern.
- 6) About half of the judicial decisions in which pre-trial detention was ordered were not adequately reasoned.
- 7) In 65% of cases analysed that concerned a detainee who was later convicted and in 44% of the cases where the detainee was later acquitted, the duration of pre-trial detention was more than one year. The duration of pre-trial detention is influenced by the complexity of the case and unwarranted delays in the proceedings.
- 8) Judges do not have confidence in alternative measures to pre-trial detention in cases of serious crimes, but in less serious offences they are more receptive to apply alternative measures. In the case analysis and the hearing monitoring, judges decreed alternative measures in 39% of cases. Only in one case reviewed alternative measures were decreed were they breached.
- 9) The most commonly used alternative measures are summons to appear before the court and passport surrender followed by release on bail.
- 10) However 2 out of 5 judges interviewed believe that regular summons to appear before the court and bail are not seem sufficiently coercive to prevent absconding.

- 11) Other possible measures such as electronic tagging are not provided by law although they are usually applied in cases of gender-based violence.
- 12) There are obstacles in the way of performing effective case reviews. Pre-trial detention orders are usually ratified upon review and again the severity of the sentence and the assumed risk of absconding are given more weight than the detainee's personal circumstances.
- 13) In the case file review, provisional release was agreed in 25% of the cases that were subject to a first review, and during later reviews provisional release was only agreed in 15% of the cases.
- 14) Many judicial decisions that ratified pre-trial detention were not sufficiently specific and tailored to the specific suspects and case but expressly referred to previous decisions without performing a new assessment of the circumstances.
- 15) In the review by the superior court to decide whether to ratify pre-trial detention or grant provisional release the detainee is not always present, so the court cannot get a personal impression of the suspect or his case. In the ratifications and extension of the pre-trial detention of the accused is not always present.
- 16) Decisions on pre-trial detention decreed by "three-judge courts" cannot be appealed, which obstructs effective reviews
- 17) There are no statistics available on the number of individuals held in pre-trial detention that are finally convicted. Although judges and public prosecutors deem around 80%, the case file analysis gave a result of 65%.
- 18) There are no official statistics relating to relevant aspects, as medium and long-term pre-trial detention, or the number of individuals being investigated who breach alternative measures.
- 19) 3 lawyers and 1 public prosecutor expressed that the pre-trial detention is extended when it is assumed that the detainee will be declared convicted, despite there being no real risk of absconding or reoffending. They also expressed that in these cases pre-trial detention is also used to encourage remorse and compliance by detainees, which will allow them to access for better conditions, for example being admitted to an open prison
- 20) The effects of pre-trial detention are sometimes more intense than those produced by the enforcement of a sentence, for example, detainees in pre-trial detention are not eligible for permits.
- 21) 4 of 9 judges and prosecutors interviewed stated they use the Spanish law and Supreme Court case law more than European Court of Human Rights jurisprudence, or that they do not use at all the international one.

2. Recommendations

To the Parliament

- 1) The law should be amended in order to increase the limit which the prosecutor may request pre-trial detention, and set the limit, at least, in 3 years of prison.
- 2) The law should be amended to include shorter maximum terms of duration of pre-trial detention, which is known to accelerate investigations. Also, the law should be modified to establish a deadline to hold hearings.

- 3) The law should be amended to expressly include electronic tagging as alternative measures or recover alternative measures such as house arrest.
- 4) The law should be amended so that all review processes are held with the accused present, in order for the court to have all the required elements needed to formulate and accurate idea about the case. At least, accused always have to be present at hearings of ratification and extension of pre-trial detention
- 5) The law should be reformed so that decisions made by “three-judge courts” can be reviewed by a high court.
- 6) The law should be amended so that the rights of individuals held in pre-trial detention equate, as far as possible, with those enjoyed by condemned prisoners.

To the courts

- 1) In all judicial decisions which order pre-trial detention it should be a requirement to sufficiently explain why the order was given in the specific case, and why alternative measures are not applied. In these judicial decisions it should be also mandatory to take the specific circumstances of the suspect into account, and not simply deduce a risk from the severity of the offence in question.
- 2) Certain characteristics of detainees should not be appeal to presume the risk of reoffending and order pre-trial detention, because this is a discriminatory practice . It should be ensured that all pre-trial detention orders are purely based on the specific case and not on general prejudgments.
- 3) Public concern should not be used to apply pre-trial detention, because it is not covered by the law. It should be ensured that pre-trial detention orders are only and always based on legal grounds
- 4) Should be mandatory for decisions that ratified pre-trial detention to present specific, sufficient and adequate arguments in line with the detainee’s personal circumstances
- 5) Higher courts that review pre-trial detention should do an effective review of decisions of lower courts when these ones do not have the standards of reasonable and enough motivation.
- 6) Cases of long-term pre-trial detention should be reviewed with special diligence. Review should be effective and ensure that pre-trial detention is not applied if it is not necessary, especially taking into consideration that the investigation has revealed that conviction was only imposed in 65% of cases where the person had suffered pre-trial detention.

To the General Council of the Judiciary

- 1) The regular summons to appear before the court should be strictly supervised, as such inspire more confidence in judges and mitigate the risk of absconding also in serious offences.
- 2) It should encourage the work of the courts, promoting the quality of decision making above the quantity of cases resolved.
- 3) Should be promoted seminars and exchange of experiences and best practices with judges of other states where alternative measures are apply more often

To the Ministry of Justice

- 1) Should be established systems to collect, analysis and dissemination of data related to pre-trial detention, specifically those of the number of individuals on pre-trial detention who are finally convicted, and other relevant aspects such as the average length of pre-trial detention.
- 2) In any case, judges who have taken a decision about an accused always should be informed of the outcome of the legal proceeding
- 3) It should be developed a system of compulsory training for judges and prosecutors on international standards of pre-trial detention, specifically on the jurisprudence of the European Court of Human Rights.

To the Ministry of Justice and to the Ministry of the Interior

- 1) Complying with the EU Directive 2012/013 on the right to information in criminal proceedings, which provides for access for lawyers to statements and reports in pre-trial proceedings and not just minutes before the hearing.
- 2) Technical, human and economic resources should be provided to extend and normalise the use of electronic tagging to more cases, not just to cases of gender-based violence. And also to provide the required economic resources to introduce new alternative measures such as house arrest

To the Ministry of Justice, to the competent judicial local authorities, to the General Council of Lawyers and to the Bar Associations of Lawyers

- 1) Fees of defense lawyers should be increased in order to improve the defense of the accused