

Abuse of pre-trial detention in the EU: Time for action

By Índigo Uriz Martínez, *Human Rights Without Frontiers*

HRWF (22.10.2019) - On 10 October 2019, Fair Trials hosted a meeting in Brussels to raise awareness of the issue of pre-trial detention in the EU and to advocate for effective legal assistance during pre-trial decision-making. The event brought together more than 60 European criminal justice experts and was the culmination of the two-year project "*Effective Legal Assistance in Pre-Trial Detention Decision-Making*" coordinated by Fair Trials with organizations from different Member States.(1)

Pre-trial detention is an exceptional measure that entails imprisoning individuals under criminal investigation until the time of their trial.(2) It must be used as a last resort and only imposed in strictly limited circumstances when non-custodial measures do not suffice.(3)

Nevertheless, it is extensively used in the EU today. The number of pre-trial detainees in the EU is estimated to be over 100,000 in 2019. This figure comprises of approximately 23% of the total EU prison population, and the percentage per country varies widely from 9.1% in Romania to 31.5% in Italy.(4)

The European Commission and Parliament have repeatedly recognized the need to address pre-trial detention, citing its contribution to over-crowding in prisons as well as the risk of human rights violations.(5) Six directives on criminal procedural rights have been adopted that have led to some changes and promising reforms in different EU Members States:

- The Interpretation and Translation Directive 2010/64/EU;(6)
- The Right to Information Directive 2012/13/EU;(7)
- The Access to a Lawyer Directive 2013/48/EU;(8)
- The Presumption of Innocence Directive 2016/343/EU;(9)
- The Children's Rights Directive 2016/800/EU;(10)
- The Legal Aid Directive 2016/1919/EU.(11)

However, pre-trial detention affects fundamental rights such as the right to the presumption of innocence, liberty, legal defence and to not testify and not incriminate one-self.(12)

Pre-trial detainees are legally presumed innocent until proven guilty. However, in reality they are often treated as if they are already convicted. They frequently share cells with convicted prisoners and are sometimes, held in worse conditions than inmates for months on end. Additionally, they cannot benefit from certain rights such as access to semi-open regime and family visits.(13)

Pre-trial detention also undermines the right to defence, to not testify and to not self-incriminate. Since these individuals are imprisoned, a common challenge is limited access to a lawyer. In some Member States, there is a maximum of 10 five-minute phone calls a week, while a small number of states deny phone calls entirely depending on the case.(14) Detainees' limited ability to receive assistance may result in confessions and premature reactions to the accusation. It is common for prisoners to unknowingly provide information that is then used as evidence to negatively impact their case.(15)

In addition, the reputational damage from pre-trial detention is irreversible, especially in the professional life of the individual when this measure is accompanied by media coverage.(16)

Although pre-trial detention is legally permitted as an exceptional measure, instead it is the most frequently used one. Subsequently, until Member States use alternatives to pre-trial detention, such as house arrest or electronic monitoring, the availability and effectiveness of legal assistance during the initial phase of the process is indispensable.(17)

Research conducted by Fair Trials found that lawyers play a key role in limiting the excessive use of pre-trial detention. European Law grants anyone accused of a crime the right to legal assistance. However, in practice, lawyers typically face serious obstacles in defending their clients effectively. Some of the barriers encountered are the lack of time and confidentiality, the difficulty in accessing files, and the inability to have an interpreter.(18)

In most cases, defence lawyers are appointed to detainees at the last minute which means meeting for the first time on the morning of the pre-trial detention hearing. They do not have enough time to study the case and talk with the individual that they are representing. In some instances, this results in the lawyer and detainee meeting for the first time in the hall of the court before the hearing.(19)

Confidentiality is another issue encountered in the implementation of the law. It is crucial that consultations are confidential to enable the lawyer to effectively prepare the defence and participate in the decision-making process of applicable precautionary measures. However, in many cases, this meeting between lawyer and client takes place in the presence of a police officer.(20)

Additionally, lawyers' abilities to access case files as quickly as possible to develop a defence strategy and challenge pre-trial detention are impeded in practice. Despite this being stipulated by law, many European states violate this right by permitting prosecutors to refuse access to the file or by not properly addressing administrative obstacles.

Transparency regarding why a person has been arrested and their rights are basic principles under EU law. Furthermore, the access to an interpreter during this process is a recognised right under EU Law.(21) However, in many Member States, information about the case is only communicated in the country's official language, or, alternatively in English. In practice, there are many difficulties in accessing interpretation services during the pre-trial stage. It is not abnormal for lawyers to rely on other detainees to help with interpretation due to these challenges.(22)

The six directives mentioned above provide safeguards such as allowing an effective defence during the pre-trial detention phase. It is clear that more action is required and that Member States should allocate more resources into the implementation of EU standards. If lawyers are better equipped and able to effectively defend their clients, then the number of pre-trial detention orders would decrease.

Nevertheless, even if the directives and existing safeguards were fully implemented, 'it would not provide a complete answer to the overuse of pre-trial detention across the EU'.(23) Fair Trials recommends that the EU creates binding legislation directly addressing pre-trial detention so its utilisation could become a true measure of last resort.(24)

Sources

- (1) Fair Trials, <https://fairtrials.org/news/making-legal-assistance-pre-trial-detention-more-effective> accessed 22 October 2019.
- (2) ECtHR, Guide on Article 5 of the European Convention on Human Rights, Right to liberty and security, updated on 31 December 2018, p. 36.
- (3) Penal Reform International, 'Pre-trial detention' https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf accessed 17 October 2019.
- (4) Data gathered from World Prison Brief, International Centre for Prison Studies. Date of recording of actual varies. See <http://www.prisonstudies.org/map/europe> for more detail.
- (5) European Union & Council of Europe, Partnership for Good Governance, *Pre-trial detention assessment tool*.
- (6) European Union, Directive 2010/64 on the right to interpretation and translation in criminal proceedings.
- (7) European Union, Directive 2012/13 on the right to information in criminal proceedings.
- (8) European Union, Directive 2013/48 on the right of access to a lawyer in criminal proceedings.
- (9) European Union, Directive 2016/343 on the presumption of innocence and the right to be present at one's trial.
- (10) European Union, Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.
- (11) European Union, Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrants proceedings.
- (12) Colaboración de abogados contra el abuso de la prisión preventiva en España, 'El abuso de la prisión preventiva', Comunicación al Consejo de Derechos Humanos de las Naciones Unidas, Examen Periódico Universal 2020, España 2019.
- (13) Penal Reform International, 'Pre-trial detention' https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf accessed 17 October 2019.
- (14) Colaboración de abogados contra el abuso de la prisión preventiva en España, 'El abuso de la prisión preventiva', Comunicación al Consejo de Derechos Humanos de las Naciones Unidas, Examen Periódico Universal 2020, España 2019.
- (15) *Ibid.*
- (16) Penal Reform International, 'Pre-trial detention' https://cdn.penalreform.org/wp-content/uploads/2013/11/Factsheet-1-pre-trial-detention-v10_final2.pdf accessed 17 October 2019.
- (17) Fair Trials. 'Effective legal assistance in pre-trial detention decision-making. Regional handbook for lawyers' (2019).
- (18) *Ibid.*
- (19) Fair Trials, Conference on pre-Trial detention, Brussels 10 October 2019.
- (20) Fair Trials, 'Where's my lawyer? Making legal assistance in pre-trial detention effective' (2019).
- (21) European Union, Directive 2010/64 on the right to interpretation and translation in criminal proceedings.
- (22) Fair Trials, 'Where's my lawyer? Making legal assistance in pre-trial detention effective' (2019).
- (23) Fair Trials, 'Where's my lawyer? Making legal assistance in pre-trial detention effective'. Page 30 (2019).
- (24) For more recommendations, please refer to Fair Trials 'A measure of Last Resort? The practice of pre-trial detention decision making in the EU' https://fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf