



The practice of pre-trial detention in Italy

Research report

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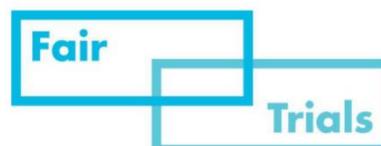
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Antigone is a small Italian NGO born in 1991 in Rome, which deals with human rights protection in the penal and penitentiary system. It contributes to the public debate on these issues through campaigns, education, media, publications and drafting of legal proposals. In 1998 Antigone launched its Observatory on Italian prison conditions, a project involving around 100 monitors working on a voluntary basis, with the help of a small coordinating staff. Every year Antigone receives special authorisations from the Ministry of Justice to visit all Italian prisons. Reports of the visits are published on the organisation's website, and end up in the annual Antigone Observatory Report on Italian prison conditions.

Ten years later Antigone launched the prison Ombudsman service, which receives complaints from detainees in prisons and police stations all over the country. The Ombudsman mediates with the prison administrations in order to solve specific problems.



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I. EXECUTIVE SUMMARY

Italy is among the European countries with the highest percentage of prisoners in pre-trial detention and the frequent violation of Article 5 of the European Convention of Human Rights (ECHR) in the course of pre-trial decision-making is a recognised issue. The European Court of Human Rights (ECtHR) has issued numerous judgments finding such violations especially with regards to the excessive length of pre-trial detention and insufficient safeguards of the defendant's fair trial rights.

The Italian Parliament has recently enacted new laws which have the potential to address these concerns, including, for example, by limiting the offences for which pre-trial detention can be lawfully ordered, and by allowing judges to order the cumulative application of alternative measures. If these laws are implemented effectively, the ECtHR-standards should be more consistently upheld and the number of pre-trial detainees should fall, thereby alleviating the pressure on Italy's overcrowded prisons and enhancing the conditions for those incarcerated. Some of these laws came into effect on May 2015 so the effect has yet to be seen. Despite these complex difficulties, there is little research analysing the nature of pre-trial detention decision-making.

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 pre-trial detention hearings, analysing case files as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Italian research, 19 pre-trial hearings were observed, 43 case files analysed, 35 defence lawyers surveyed, and five judges and three prosecutors interviewed.

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

1. **Decision-making procedure:** Every pre-trial detainee has obligatory legal representation. The equality of arms between the defence and the prosecution is not sufficiently safeguarded, as defence lawyers gain access to the case files only 10 – 30 minutes before the hearing and thus cannot prepare sufficiently, despite having been informed of the hearing 12 – 24 hours in advance. Accordingly the judge places too much reliance on the arguments of the prosecution, and the lack of independent bail advice services is notable. In cases involving foreign defendants, the interpreting is often insufficient.
2. **The substance of decisions:** The reasoning of pre-trial detention orders is very formulaic, relying excessively on previous offences to justify an order based on the ground of re-offending risks but otherwise not tailored to the specific defendant and case. The seriousness of the offence is often the decisive factor used to justify pre-trial detention orders, despite this reason being unlawful according to ECtHR jurisprudence. The researchers observed a notable difference in the treatment of irregular migrants from outside the EU, who will generally be placed in pre-trial detention, while EU-citizens have higher chances of being placed under less restrictive measures. Vulnerable defendants lacking housing and social networks are commonly placed in pre-trial detention, as in such cases, judges are not able to order the common alternative of house arrest.
3. **Use of alternatives to detention:** Judges and prosecutors do not trust alternatives to detention to be effective; in the view of the researchers, such alternative measures are therefore underused. However, house arrest and police supervision are the most commonly used alternatives. Electronic monitoring has not yet been adopted by law as an alternative.

4. **Review of pre-trial detention:** There is no legal requirement for reviews to be conducted at regular intervals. All reviews observed during the research were initiated by the defence. Reviews are often conducted without the defendant being present or heard. Cases involving pre-trial detention are conducted faster than cases which do not involve a detainee.

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

- The defence lawyer should be provided with the case file upon notification of the first judicial hearing, and the implementation of a system of electronic case files could facilitate this. This would meet the requirements of Art. 7(1) of the EU Right to Information Directive which is currently not effectively implemented.
- The recent legislative amendments relating to pre-trial detention should be effectively implemented.
- Independent bail information services should be involved in the pre-trial hearings.
- Pre-trial hearings at all review and appeal levels should always be conducted orally with the defendant being present.
- The EU Directive on the Right to Interpretation and Translation should be effectively implemented, thereby enhancing the standards of interpretation during hearings for non-nationals.
- Funds should be allocated to implement the electronic monitoring of defendants in law and practice, to reduce the use of pre-trial detention for people without a residence suitable for house arrest.
- Guidance and training on the standards of ECtHR-jurisprudence should be delivered to judges, prosecutors and lawyers ensuring that all stakeholders are aware of what factors may and may not be considered when deciding between pre-trial detention or alternative measures.
- The Ministry of Justice should be required to provide reliable and comprehensive statistical data on the use of pre-trial detention and its alternatives.

For a full list of recommendations see chapter X. at page 50.

II. INTRODUCTION

This report “The Practice of pre-trial detention: Monitoring Alternatives and Judicial Decision-making in Italy” is one of 10 country reports outlining the findings of the EU-funded research project that was conducted in 10 different 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 defence 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 decision-making procedures 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 defence 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 rights of suspects facing pre-trial detention. However, 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/>.

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.

1. 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 defence 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 defence 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 for 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 use “stereotyped”¹⁴ forms of words. The arguments for

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.

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

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 continued detention of the “accused” 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.

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 since 2010.

Notwithstanding any possible EU-action on this issue at a later stage, the ultimate responsibility for ensuring that the suspect's 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.

2. Pre-trial detention in Italy

Italy is one of the European countries with the highest number of prisoners in pre-trial detention: in 2010 42% of Italian prisoners were waiting for a final sentence, and 20.8% were waiting for the first sentence (Source: Ministry of Justice). Today the situation has improved slightly (34.5% and 17.1%) but the numbers of prisoners waiting for a final sentence are still alarming.

A book called *The socioeconomic impact of pre-trial detention*⁴¹, and the document called *Excessive use of pre-trial detention runs against human rights*, written by the European Commissioner for Human Rights Thomas Hammarberg in August 2011, state that every year about 10 million people worldwide are incarcerated in pre-trial detention and spend months or years in prison before their guilt is proven. Beyond the legal and humanitarian considerations, the book claims that “locking away millions of people who are presumed innocent is a waste of human potential that undermines economic development”⁴².

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 *The socioeconomic impact of pretrial detention* has been edited and published by Open Society Foundations & United Nations Development Program.

⁴² The book provides empirical evidences to support major limitations of the use of pre-trial detention, quantifying for the first time total costs of the excesses of preventive detention in the world, through the analysis of the adverse effects that misuse of pre-trial detention causes at the level of unemployment and to economic growth, for healthcare costs, and for costs relating to corruption and misuse of state resources.

At regional level, Article 5 of the ECHR provides that every person has the right to liberty and security. No one can be deprived of liberty except in the cases listed explicitly by Art. 5 and in the manner prescribed by law. A number of guarantees are provided regarding information about the accusation, translation before the judicial authorities, the right to be tried within a reasonable time or to be set free during the investigation, access to a prompt and effective remedy and the right to compensation in case of breach of Article 5.

However, such guarantees are not always respected. Art. 5 ECHR has been frequently violated in Italy in the past (See Chapter 4.6), and our research shows how similar violations could be sanctioned also in the future.

In any case, it is appropriate to point out that Italy has recently passed two laws (Law 117/2014 and 47/2015, see Chapter 4.3) that have certainly outlined a more liberal system, theoretically able to reduce significantly the number of suspected or defendants in pre-trial detention and the infringements of Article 5 of the ECHR.

The Antigone Association, which conducted this research in Italy, has for over twenty years been dealing with rights and guarantees within the criminal justice system, with particular attention to the supervision of conditions of detention. Criticism has always been levelled at the excessive use of pre-trial detention and conditions of detention of prisoners on remand, who actually have a less favourable treatment than prisoners with a final sentence (i.e. less access to work opportunities).

Antigone believes that this research could promote a European debate on the homogenisation of domestic legislations with regard to increasing the standard of legal guarantees in the procedures of application of the pre-trial detention.

III. METHODOLOGY OF THE RESEARCH PROJECT

This project was designed to develop an improved understanding of the process of judicial decision-making on pre-trial detention in 10 EU Member States. The 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 economic 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 convicted⁴³ whereas in the Netherlands 39.9% of all prisoners have not yet been convicted⁴⁴). 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 establishing an understanding of the merits in this process of other countries, b) assessing similarities and differences across the different jurisdictions, and c) the development of substantial recommendations that can guide policy makers in their reform efforts.

The five-stages of the research were as follows:

- (1) Desk-based research, in which the partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms.

Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to specific local conditions – explore practice and motivations of pre-trial decisions and capture the perceptions of the stakeholders in all participating countries.

- (2) A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.
- (3) Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.
- (4) Case file reviews, which enabled researchers to get an understanding of the full life of a pre-trial detention case, as opposed to the snapshot obtained through the hearing monitoring.
- (5) Structured interviews with judges and prosecutors, capturing their intentions and motivation in cases involving pre-trial detention decisions. In addition to the common questions that formed the main part of the interviews, the researchers developed country-specific questions based on the previous findings to follow-up on specific local issues.

⁴³ <http://www.prisonstudies.org/country/ireland-republic>, data provided by International Centre for Prison Studies, 18 June 2015.

⁴⁴ <http://www.prisonstudies.org/country/netherlands>, data provided by International Centre for Prison Studies, 18 June 2015.

In Italy

This report is mainly based on the analysis of 35 questionnaires to lawyers, five questionnaires filled in by judges, three questionnaires filled in by prosecutors, 43 case files examined and 19 individual hearings monitored.

Lawyers surveyed come from all over Italy, and we tried to have an as varied sample as possible (including both young lawyers and experienced defence practitioners of criminal law). The survey has been conducted via email and with further telephonic and in presence conversations. Most of the lawyers surveyed were members of Antigone or professionals that made contact with our organisation in the past for other reasons.

The prosecutors and judges interviewed work in different districts and even in this case we tried to have a more varied sample as possible (Supreme Court, *Corte di Assise*, ordinary courts).

The case files mainly concern the courts of Rome, Bologna and Lecce. Again, to have a more varied sample as possible, it was decided to focus attention on the Court in the capital, on one in the North and one in the South of Italy.

The hearings monitored were held in the Court (including the Court of Review) and the Court of Appeal of Rome.

The main problems encountered concerned access to case files and hearings. Although Antigone has been authorised by President of the Court of Rome to access files and hearings since November 2014, in fact, such access was problematic, both because these electronic files contained only partial data (e.g., there are no data on the appeals of precautionary measures), and because the authorisation to access the hearings did not include the option of finding out about the final outcome of the proceedings monitored.

For these reasons, it was decided to examine case files collected mainly from law firms throughout the country; the incomplete data obtained from 15 electronic files examined at the Court in Rome have not been included in the final report.

As for the type of crimes, it was decided to give preference to the offences relating to narcotic drugs as in Italy over 30% of the prison population is incarcerated in relation to this crime.

Our findings are derived mostly from the 43 case files analysed, because the data collected in this case were more comprehensive and included the reasoning of pre-trial detention decisions, reasoning that was not always available for the 19 hearings monitored⁴⁵.

In the next few chapters, after a brief introduction to the (general and legal) context and to the peculiarities of the Italian system, we analyse in detail the findings concerning the procedure of pre-trial decision making, the substance of pre-trial detention decision making, the alternatives to detention, the review and the outcomes.

It is important to bear always in mind that the Italian pre-trial detention system is characterised by the fact that the presumption of innocence (Art. 27, par.2) extends beyond the first instance so that also the second and third instance appellant is considered as not serving a final sentence and therefore subject to the rules of the precautionary measures. Consequently, in the present research, the notion of pre-trial detention refers to a precautionary detention measure applied not only before the first instance, but in general before the final sentence.

Abbreviations used

c.c.p. Code of criminal procedure

ECHR European convention on human rights

ECtHR European court of human rights

EU European Union

⁴⁵ We have been authorised to assist to the hearings, but not to access the case files, and therefore we could not see the reasonings.

IV. CONTEXT

4.1. Background information about Italy

Since 2 June 1946, when the monarchy was abolished by popular referendum, Italy has been a parliamentary, democratic republic with a multi-party political system based on the 1948 Constitution. The Parliament is bicameral (there is a Chamber of Deputies and a Senate), and its members are directly elected for five years by universal suffrage. The President of the Republic is elected for seven years by a joint session of the two chambers and is the formal Head of State. The Prime Minister is usually the leader of the party that has the largest representation in the Chamber of Deputies. He must be endorsed by, and have the confidence of, both houses of parliament.

Since the beginning of the Republic, Italian politics has been characterised by high levels of instability and government turnover, especially during the early 1990s, when persistent government wavering, mounting economic pressure and especially a series of corruption scandals implicating all parties in illegal financing prompted a profound political crisis. Many political leaders were under criminal prosecution (known as the 'Mani Pulite' investigation) by the courts and the whole power structure faltered. After a period of transition, the so-called Second Republic began. New political forces and new coalitions emerged, while a major turnover in the new parliament took place. The new parties developed around two poles: the centre-left and the centre-right. For nearly 15 years, governments tended to alternate between these two poles, until the political crisis of November 2011 following the resignation of then-Prime Minister Silvio Berlusconi. A technocratic government led by former EU commissioner Mario Monti steered the administration for 18 months before elections were held in early 2013. Italy was then governed by a grand coalition government led by Enrico Letta, and after his resignation in early 2014, Italy's current prime minister is the leader of the centre-left Democratic Party, Matteo Renzi.

With around 61 million inhabitants, Italy is the 4th most populous EU member state. Until the early 1980s it was a linguistically and culturally homogeneous society. Then, Italy began to attract substantial flows of foreign immigrants. The present-day figure of about 4.9 million foreign residents, making up some 8.1% of the total population, include more than half a million children born in Italy to foreign nationals, the so-called second generation immigrants, but exclude irregular migrants, whose numbers are very difficult to determine.

Italy has a developed economy and is a founding member of the EU. It is also a member of major multilateral economic organisations such as the Group of Seven Industrialised Countries (G-7), the Group of Eight (G-8), OECD, the World Trade Organisation (WTO) and the International Monetary Fund (IMF). In 2012, according to IMF data, Italy was the ninth largest economy in the world and the fifth largest in Europe in terms of nominal Gross Domestic Product (GDP). Its annual GDP accounts for 12.1% of the European Union's total GDP. Nevertheless, per capita income is nearly 20% lower than the average among European Union countries.

Italy has a civil law system. The codes of the Kingdom of Sardinia in civil and penal affairs were extended to the whole of Italy when it was unified in the mid-19th century. The revised 1988 penal code replaced the old 'inquisitorial' system with an accusatory system similar to that of common law countries. Besides the codes, there are innumerable statutes that integrate the codes and regulate areas of law for which no codes exist, such as public law.

Under the Italian constitution, the judiciary is independent of the legislature and the executive, and therefore jurisdictional functions can be performed only by magistrates and judges cannot be dismissed. The Italian judicial system consists of a series of courts and a body of judges who are civil servants. The judicial system is unified, every

court being part of the national network. The highest court is the Supreme Court of Appeal (*Corte di Cassazione*), which has appellate jurisdiction and gives judgements on points of law only.

4.2. Before pre-trial detention and actors involved in decisions about pre-trial detention.

Arrest and custody are temporary measures restricting personal freedom before pre-trial detention and represent an anticipation of the protection provided for by precautionary measures (Art. 380 to 384 c.c.p.). They differ from those because of the urgency and of the lack of a decision of a judicial authority, which will intervene later in the forms of validation.

Arrest consists of a temporary deprivation of liberty by judiciary police against “those who are caught in the act of committing a crime” (in *flagrante delicto*).

Custody consists of a deprivation of liberty decided by the prosecutor "even not in *flagrante delicto*, when there are specific elements that, also in connection with the inability to identify the suspect, suggest the risk of flight of a person seriously suspected of a serious crime".

The judicial police who carried out the arrest or custody have several information obligations (Art. 386-387 of the c.c.p.) towards the person (for instance to warn the person of having the right to instruct a lawyer of choice; immediately inform the lawyer, or the one appointed *ex officio*, of the arrest or custody). These information requirements have been further expanded with the Legislative Decree 101/2014 implementing the EU Directive 2012/13/EU.

Prerogatives and duties of the prosecutor are listed in articles 388-390 of the c.c.p. (for instance to question the defendant, giving timely notice to his/her lawyer, to inform them of the facts under investigation and of the reasons underlying the decision to detain him/her, to communicate the evidence against him/her and, when this does not compromise the investigations, the sources of this evidence).

The Public prosecutor is not a judge in this respect, and therefore he can only ask for the application, modification or withdrawal of the measure. He can only adopt more urgent and interim measures, together with the police, within the first 24 hours.

According to the Italian Constitution (Art. 13) an arrested person has to be immediately presented to the prosecutor, at the latest within 24 hours from the arrest, otherwise the arrest is invalid. On its part the prosecutor, within 48 hours of the arrest, has to ask the judge to validate it. The arrest is invalid if the judge does not validate it within 48 hours of the request.

The judge of the preliminary investigations (G.I.P.), or the ordinary Judge in some cases (*direttissima*), must hold the validation hearing (Arts. 390-391 c.c.p.) within 48 hours of the validation of the request of the prosecutor, informing, without delay, the prosecutor, the lawyer and the defendant if already released. The hearing takes place in closed session and requires the participation of a lawyer of choice or of a lawyer instructed by the court if he/she cannot be found or has not appeared. The prosecutor, if he/she has appeared (his/her presence is optional), indicates the reasons for the arrest or custody and make his/her requests as regards the application of precautionary measures. The judge questions the defendant, if present, and his/her lawyer. At this point the judge can decide whether or not to validate the order of arrest or custody.

In both cases his/her decision can be challenged before the *Corte di Cassazione* by the defendant or by the prosecutor.

Legal aid is governed by Decree 115/2002 and article 98 of c.p.p. It enables those who lack financial resources to qualify for free legal assistance to promote or defend themselves in civil or criminal proceedings. With legal aid the lawyer fees are paid for by the state.

The *ex officio* lawyer, on the contrary, is a lawyer appointed by the state to defend the accused that has not appointed a lawyer of choice yet, in order to ensure the right to technical defence in any criminal trial. The *ex officio* lawyer must be paid by the accused, and not by the State, but the accused can instruct a lawyer of choice at all times.

The rules concerning legal aid and *ex officio* lawyers apply at all stages, including the proceedings regarding pre-trial measures.

4.3. Precautionary measures

4.3.1. Law

The constitutional principles regarding measures restricting personal freedom are:

- a) personal freedom cannot be restricted except in the cases and in the manner prescribed by the law, and following the decision of a judge (Art. 13 and 14);
- b) the possibility to challenge in court measures limiting personal freedom for violation of the law (Art. 111, par. 7);
- c) the presumption of innocence (Art. 27, par.2).

Personal precautionary measures are custodial or non custodial. Custodial precautionary measures are: pre-trial detention (Art. 285), house arrest (Art. 284 c.c.p.); arrest in a health care facility (Art. 286). These measures are similar to pre-trial detention in several respects: time spent under these measures is subtracted from the final sentence; maximum lengths and procedural rules are the same as pre-trial detention.

Electronic monitoring is not considered an alternative to pre-trial detention, but a possible means of house arrest.

Non-custodial alternatives to detention are: travel ban (Art. 281 c.c.p.), reporting to the police (Art. 282), family restraining order (Art. 282 bis), prohibition of residence (Art. 283 c.c.p.). The judge cannot apply a measure that is more severe than the one requested from the prosecutor.

The Code of Criminal Procedure (from art. 272 to art. 279) outlines the provisions governing pre-trial detention in more detail.

According to the Code of Criminal Procedure (c.c.p.) **a pre-trial measure can be applied only in cases of serious suspicion of guilt (Art. 273 c.c.p.) and of specific precautionary requirements (Art. 274 c.c.p.)**. The latter are indicated by the law and are only danger of escape, of suppression of evidence, of re-offending.

With regard to **the selection of measures**, the judge has to follow the criteria set out in Art. 275 c.c.p. (referred to as constrained discretion): **the measure must be appropriate, proportionate and the least depriving**.

The law says explicitly that imprisonment can be applied only for specific crimes and when all other measures cannot meet the specific precautionary requirements.

In general terms **pre-trial detention cannot be applied for crimes that can be punished with a maximum sentence of less than five years** (note: in the past it was less than 4 years. The amendment to Art. 280 c.c.p. introduced by Decree 94/2013 has a strong impact on drug-related crimes). Exception: illegal financing of political parties.

For offences under this threshold pre-trial detention is possible in case of violation of house arrest.

That said, for more serious offences (more than 5 years) the principles of constrained discretion and of last resort still applies.

The recently introduced **law 47/2015**, came into force on May 8, concerning “Amendments to the Code of criminal procedure relating to precautionary measures”, following the jurisprudence of the Constitutional Court, has severely limited **the presumption of absolute suitability of remand in custody**, that is the cases when only detention is presumed to meet the precautionary requirements, only to three particularly serious crimes: mafia crimes; terrorist association, including international terrorist association, and subversive association.

For other offences (e.g. murder, rape and kidnapping for ransom), pre-trial detention cannot be applied if the precautionary needs can be met with the use of other measures.

According to Art. 278 c.c.p., to determine the seriousness of the offence, and therefore what pre-trial measure can or cannot be used, the code considers the longest term of imprisonment that can be imposed for a given offence (maximum statutory penalty: 5 years). For the determination of the maximum statutory penalty no account is taken of aggravating circumstances such as continuation of the criminal intent, reiteration and other common circumstances, that could increase the length of the sentence, but only of the more serious aggravating circumstances, that could increase the length of the sentence of more than one third.

The recently introduced **law 47/2015**, in line with the requirements with EctHR-jurisprudence, amended Article 275 c.c.p., paragraph 3: pre-trial detention can be ordered only if disqualification or other coercive measures are inadequate; prison, therefore, becomes *extrema ratio* and the other measures, unlike in the past, may now be applied cumulatively to make pre-trial detention further residual. All other measures have to be considered and ruled to be inadequate, even cumulatively, before pre-trial detention can be applied.

Article 274 c.c.p., paragraph 1, lett. b) and c), has also been amended to the effect that to apply pre-trial detention it is required that the danger of escape is not only concrete, but also immediate. It also stipulates that the situations of real and present danger cannot be derived only from the gravity of the offense, but also from other parameters such as previous behaviours, the personality of the accused, etc..

It is no longer possible for the court to justify the application of the precautionary measure *per relationem* (Art. 292 c.p.c., paragraph 2, lett. C and Cbis), by only referring to the file of the prosecutor, whereas an autonomous motivation becomes necessary, that takes into due consideration the arguments of the defence. According to the new version of Art. 274 c.c.p., then, reasoning now has to be more detailed.

The reform limits the discretion of the courts in evaluating the application of the precautionary measures that will guarantee the precautionary requirements pending prosecution, according to both the requirement of the concreteness of the risk of flight or re-offending and to that of their actual presence.

Both requirements cannot be assumed "only from the severity of the offense prosecuted" but need to be assessed case by case by the judge.

The amendments also eliminate the automatic recourse to custody in prison in the event of infringement of house arrest (or other private residence). In these cases, in fact, the court may also decide to continue applying house arrest if the infringement of the measure is considered to be of minor relevance.

Law 117/2014 has recently been approved (08/08/2014) that ratifies decree no. 92/2014 and introduces significant changes in the rules governing the application of the pre-trial detention.

According to Art. 275 c.c.p. para. 2a part one, pre-trial detention or house arrest cannot be used if the judge believes that a suspended sentence will be applied at the end of the trial (which is the case of sentences of less than 2 years, if the judge believes there is no risk of re-offending).

A new period has been added to Art. 275 c.c.p. par. 2-bis, relevant only for pre-trial detention in prison: pre-trial detention cannot be applied if the judge believes that in the actual case (not in the abstract according to the statutory maximum) the final sentence will be less than three years. This provision will not apply in proceedings for offences under Articles 423-bis, 572, 612-bis and 624 bis of the Criminal Code (crimes sensationalised by the media such as breaking and entering or forest arson) and under Article 4 bis of the penitentiary law (serious crimes such as organised crime or sex offences) and when, assuming the inadequacy of any other measure, house arrest cannot be applied due to lack of fixed abode. But there are also a number of other exceptions:

- for offences listed in par. 3 of art. 275 c.c.p. (a long list of other serious offences);
- in case of violation of house arrest (Art. 276 c.c.p., par. 1-ter c.c.p.);
- in case of violation of other pre-trial measures (Art. 280 c.c.p., par. 3 c.c.p.).

The **statutory maximum length of pre-trial detention** is a consequence of Art. 13 par. 5 of the Constitution that states that the law must define a maximum length for pre-trial detention. Several limits define maximum length, from arrest to the moment when the sentence becomes final.

Four stages are identified in Art. 303 c.c.p.: preliminary investigation; first trial; appeal against first sentence; appeal to the Supreme Court (*Corte di Cassazione*).

- Firstly, preliminary investigation: the defendant is released if this stage of the proceeding is not concluded before a time limit that depends on the seriousness of the offence investigated (three months for crimes that can be punished with prison sentences of up to six years, six months for crimes that can be punished with sentences of more than six and up to twenty years, one year for crimes that can be punished with sentences of more than twenty years). The same mechanism applies when precautionary detention continues also during the other stages of the trial (in Italy sentences can only be carried out when they are final). The periods are additional to the previous ones, and start again from the beginning of every new stage, but with different terms:

- during the first trial the terms are: six months if the sentence can be of up to six years, one year if the sentence can be of up to twenty years, one year and a half for more serious offences.
- during the appeal against the first sentence the terms are linked to the actual sentence decided during the first trial (and not to the maximum sentence in abstract). The terms are: nine months for sentences of up to three years, one year in case of a sentence of up to ten years, one year and a half for sentences of more than ten years.
- the same terms imposed as during the appeal period are applied also during the trial before the Supreme Court.
- Besides these staggered terms, the law also sets an overall term for the entire proceedings: pre-trial detention cannot last longer than two years for crimes that can be punished with sentences of up to six years, four years for crimes that can be punished with sentences of up to twenty years, six years for more serious offences.

Because, in some cases, even overall terms can be extended, the legislation provides also for so-called final terms: pre-trial detention cannot last longer than twice the maximum period at each stage of the proceeding, and the overall maximum length cannot be exceeded by more than its half according to Art. 304 par. 6 c.c.p.. In these cases therefore pre-trial detention theoretically could last up to 9 years.

4.3.2 Procedure

Normally, the first judicial hearing about pre-trial detention takes place after the accused is caught in *flagrante delicto* (Art. 382 c.c.p.).

As soon as the decision on confirming the arrest is adopted, the judge decides on the pre-trial measures, after listening to the parties' submissions.

The application of less restrictive measures can be requested by the prosecutor (the judge cannot apply a more restrictive measure than the one requested by the prosecutor), **by the judge** (who for instance denies the request of the prosecutor and then applies a less restrictive measure) **and by the defence**.

As stated above, according to the Italian Constitution (Art. 13) an arrested person has to be immediately presented to the prosecutor, at the latest within 24 hours of arrest, otherwise the arrest is invalid. For his/her part the prosecutor, within 48 hours of arrest, has to ask the judge to validate it. The arrest is invalid if the judge does not validate it within 48 hours from the request.

The suspect in custody, under arrest or under other measure, can talk immediately with a lawyer (Art. 104 c.c.p.); for this purpose a lawyer has to be immediately informed (Art. 293 and 386 c.p.p.). This right can be suspended for a maximum of 5 days for "specific and exceptional precautionary reasons" when the meeting with the lawyer can jeopardise the investigations.

The case file must be provided by the authority that questions the suspect immediately after the arrest. (art. 390 and 391 c.c.p.)

Three main case scenarios have to be considered.

1) If the suspect has been caught in the act of committing a crime the prosecutor, after informing the lawyer, questions the suspect, explaining to him/her why he/she has been arrested, what is the evidence against him/her and, if this poses no threat for the investigations, the sources of this evidence.

At the hearing for the validation, immediately after the decision on validating the arrest, the judge decides on the application of the pre-trial measure. The lawyer can see the file at the hearing or shortly before the hearing and in that occasion can shortly discuss the case confidentially with the suspect.

2) If the measure is requested by the prosecutor and applied by the judge later during the investigations, but before the beginning of the trial, the file is made available to the lawyer after the execution of the measure, but before the validation hearing.

3) when the measure is applied during the trial, the defender has already been able to see the file.

During the entire trial the presence of legal defence is required. If the suspect or accused person does not have a lawyer of choice, a lawyer is instructed *ex officio*.

The withdrawal or the modifications of pre-trial measure can be requested by the defendant or by the Public Prosecutor, during the trial hearings or by filing a specific request at the court offices.

Art. 279 c.c.p.: on the application, withdrawal or modifications of pre-trial measures the decision pertains to the judge in charge of that stage of the trial (during the investigation, the *Giudice per le indagini preliminari* - judge of the preliminary investigations). This strictly follows the Italian Constitution, which at Art. 13 par. 2 stipulates that restriction of personal freedom is only lawful as a consequence of a "justified decision by the court".

Pre-trial detention is re-examined by the proceeding judge (who may or may not be the same judge who applied the measure, depending on the stage of the trial) usually after a request by the defence (at any moment and with no limits in the number of the requests), or *ex officio* when the terms of maximum length are going to expire.

The measure has to be withdrawn immediately (eventually *ex officio*) when serious indicia of guilt or and/or precautionary reasons no longer exist. In addition, at the request of the Public Prosecutor or of the defence, the measure can be revised *in melius*.

If the measure is based on the danger of tampering with evidence, the judge has to fix the expiration date of the measure, bearing in mind the investigative requirements (Art. 292 c.c.p., par. 2 lett. d). If the measure is pre-trial prison detention, as a rule (there are exceptions for the most serious crimes) it cannot last for more than 90 days.

To challenge the first application (*riesame*) of pre-trial detention the defendant can ask for the decision to be reviewed by a different judge. In this case the decision is under the jurisdiction of the *Tribunale del Riesame* (court of review), a special section of the district court, not present in small courts. The court decisions can be challenged at the *Corte di Cassazione*.

This kind of appeal is submitted within 10 days of the application of the measure, and the decision can be challenged both on formal and substantial issues. The submission may or may not be motivated, and it is fully “*devolutivo*”: the competence of the judge is not limited to the complaints raised by the motivations of the defendant. There are peremptory terms before which the prosecutor has to submit the investigation files, and the decision is taken within 10 days. If the term expires the defendant is released.

Once the measure has been applied, on its life course (modification or revocation) it is competent the judge in charge of that stage of the proceeding.

His/her decisions can be challenged before the *Tribunale del riesame* but in this case (so-called “*appello*”) the terms set in the code are not imperative.

4.4. Features of the Italian system

Recent reforms (Law 117/2014 and 47/2015) have certainly put in place a more liberal system, theoretically able to reduce significantly the number of suspected or accused persons in pre-trial detention.

The explicit will of the Italian parliament has been to reduce the number of prisoners (including those on remand) to comply with the ECtHR judgment *Torreggiani v. Italy* (8.1.2013). In that judgment Italy was condemned for violation of Art. 3 of the Charter, due to the conditions of detention of applicants, allocated in cells where they could enjoy less than three square metres each. "The Court deems that the detention conditions in question, also taking the length of the applicants' imprisonment into account, have subjected those concerned to a test that was so intense as to exceed the inevitable level of suffering that is inherent in detention".

The Court in that judgment acknowledged a wider and general problem of overcrowding and urged the Italian government to address it, with the application of sanctions not involving imprisonment and, for what matters here, the adoption of measures to reduce the use of remand in custody.

For instance cases of presumption of suitability of pre-trial detention have been greatly reduced to only three offenses (crimes of mafia, of terrorist association, including international and subversive association) on the basis of several judgments of the Constitutional Court which had considered unlawful such irrebuttable presumption for other cases⁴⁶.

⁴⁶ Decision 26/03/2015 no. 48, on the offence of external support for mafia organisations, decision 23/07/ 2013, no. 232, on the offence under art. 609 octies c.p., decision 8/7/2013, no. 213, on the offence under art. 630 c.p., decision 29/3/2013, no. 57 on the offences committed making use of the conditions of art. 416-bis c.p. or to facilitate the activities of the organisations described in the same article, decision 3/5/2012, no. 110, on the offense under art. 416 c.p., perpetrated to commit the offenses described in art. 473 and 474 c.p., decision 22/7/2011, no. 231, on the offense under art. 74, D.P.R. 9/10/1990 n. 309, decision 12/5/2011, no. 164, on the offense ex art. 575 c.p., decision 21/7/2010, no. 265, on offenses under art 600-bis co. 1, 609-bis and 609 quater c.p. on this see: <http://www.penalecontemporaneo.it/materia/-/-/3797->

With regard to the ECtHR case law on the specific issue of legislation on precautionary measures (see par. 5), the issue is more complex and cannot be fully understood without considering, at least, three particular features of the Italian legislation.

Very briefly, in a comparative European framework, the Italian pre-trial detention system is characterised by the fact that the presumption of innocence (Art. 27, par.2) extends beyond the first instance, so that also the second and third grade appellant is considered as not serving a final sentence and therefore subject to the rules of the precautionary measures.

Closely related to this theoretical aspect is a material one, and an extremely relevant one, confirmed by the data collected in this research. The excessive length of criminal proceedings in Italy inevitably, in practice, entails that the pre-trial detention also acts as an anticipation (or replacement) punishment. This also entails that pre-trial detention also has a retributive function contrary to the law, because it is contrary to the principle of the presumption of innocence mentioned above: the function of pre-trial detention should reside exclusively in the precautionary requirements indicated in Art. 274 c.c.p..

A third peculiarity of the Italian system lies in modifying the mechanism of the precautionary measure. Unlike other European legal systems, modification of the precautionary measure is sought from the proceeding judge and the adversarial nature of the proceedings is only on paper without a prior hearing of the defendant.

4.5. Official statistics on the use of pre-trial detention

The first point to be mentioned here concerns the dramatic lack of data on pre-trial detention in Italy. There are some very basic figures on pre-trial prison detention, but for instance we never managed to get data on the average length of pre-trial detention, and this is a very serious concern for a country, such as Italy, where the time limits for pre-trial detention can be very long (in some cases up to 9 years). But the situation is much worse for alternatives to pre-trial detention. We know they are widely used, but no data is available at all. It is impossible for instance to know how many people in Italy are subject to house arrest, let alone information such as costs or efficacy (rate of violation) of these measures.

We tried all sorts of contacts to get the data, but in the end we had to accept the fact that the data we needed was simply not available. It is therefore with great satisfaction that we realised that law 47/2015 introduced in Art. 15 an obligation for the Government to present, by 31 January of each year, a report to the Parliament containing statistical data on the application of all precautionary measures applied in the last year, broken down by types and outcomes. The first comprehensive set of data should therefore be available by 31 January 2016.

It is usually said that criminal legislation should not be based on purely political or ideological grounds, but when no data are available, it is very difficult to imagine things going in any other way. This research recommends that the Commission should ask for, and coordinate, data collection in all member countries. That would benefit both national and European policies.

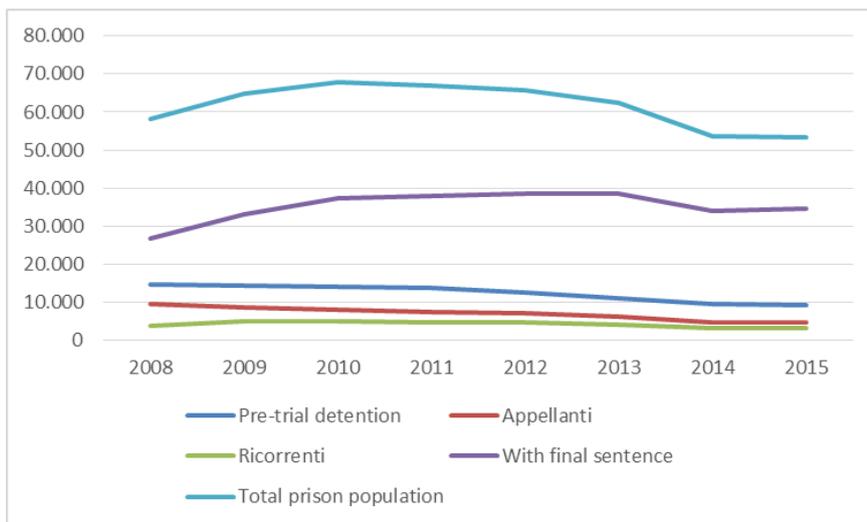
In any case, as shown by the few figures we have, the use of pre-trial detention decreased in Italy in the last few years both in absolute numbers and in percentage terms amongst the prison population. This is due to some reforms to the legislation on pre-trial detention passed after the declaration of a State of national emergency for prison overcrowding (January 2010) and then after the Torreggiani decision of the ECtHR (January 2013).

Prisoners according to their legal status – Years 2008 – 2014

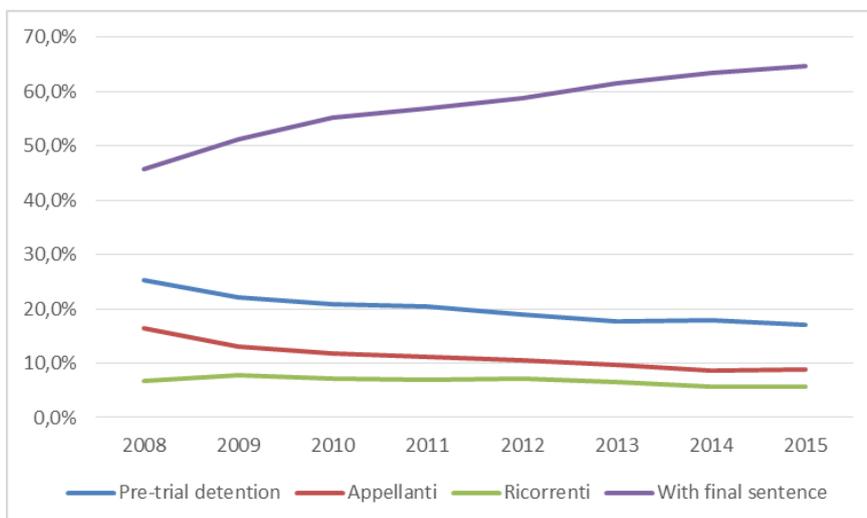
Year*	Prisoners in pre-trial detention		Other prisoners without a final sentence				Prisoners with final sentence	Internee	Unknown	Total		
			Appellanti (2nd grade)		Ricorrenti (3rd grade)	Mixed positions						
2008	14.671	25,2%	9.555	16,4%	3.865	6,6%	1.745	26.587	45,7%	1.639	65	58.127
2009	14.367	22,2%	8.501	13,1%	5.086	7,8%	1.781	33.145	51,2%	1.837	74	64.791
2010	14.112	20,8%	8.005	11,8%	4.855	7,1%	1.720	37.432	55,1%	1.747	90	67.961
2011	13.625	20,4%	7.409	11,1%	4.648	6,9%	1.569	38.023	56,8%	1.549	74	66.897
2012	12.484	19,0%	6.966	10,6%	4.650	7,1%	1.596	38.656	58,8%	1.268	81	65.701
2013	11.108	17,8%	6.065	9,7%	4.080	6,5%	1.578	38.471	61,5%	1.188	46	62.536
2014	9.549	17,8%	4.652	8,7%	3.015	5,6%	1.259	34.033	63,5%	1.072	43	53.623
2015	9.138	17,1%	4.670	8,8%	3.073	5,8%	1.247	34.461	64,7%	647	47	53.283

* 31st December of each year. For 2015, 31st of May.
Source: Ministry of Justice

Prisoners according to their legal status – Years 2008 – 2014



% of prisoners according to their legal status – Years 2008 – 2014



Proportion of pre-trial detention detainees, who are foreign nationals;

30 June 2015	40.7%
31 December 2014	40.9%
31 December 2013	39.7%
31 December 2012	39.9%
31 December 2011	40.4%
31 December 2010	38.6%

Source: Ministry of Justice

It is worth stressing here that, according to the National Institute of Statistics (Istat), as of 1 January 2014, Italy has 4,922,085 legally resident foreign citizens, i.e. 8.1% of the total resident population (60,782,668 people). In prison, as of 30 June 2015, they represented the 32.6% of the prison population, and 40.7% of prisoners in pre-trial detention. Foreign nationals are clearly over represented in prison, but this is particularly true for precautionary detention measures.

Prison occupancy level over the past five years

Date	Capacity	Population	Occupancy rate
30 June 2015	49,552	52,754	106.5%
31 December 2014	49,635	53,623	108.0%
31 December 2013	47,709	62,536	131.1%
31 December 2012	47,040	65,701	139.7%
31 December 2011	45,700	66,897	146.4%
31 December 2010	45,022	67,961	151.0%
31 December 2009	44,073	64,791	147.0%
31 December 2008	43,066	58,127	135.0%

Source: Ministry of Justice

Crimes reported by the police over the past eight years

Year	2006	2007	2008	2009	2010	2011	2012	2013
Mass Murder	26	21	28	23	12	14	18	10
Murders	621	627	611	586	526	550	528	868
Murders consumed for theft or robbery	34	35	31	22	35	28	43	33
Mafia murders	109	119	106	90	69	53	68	52
Terrorism murders	1	0	0	0	0	0	0	0
Attempted murders	1468	1588	1621	1346	1309	1401	1327	1222
Infanticide	4	4	4	4	3	2	2	2
Unintentional homicide (there was intention to harm, but not to kill)	38	54	39	36	38	31	33	37
Manslaughter	2148	2040	1881	1718	1765	1783	1716	1597
Vehicular Manslaughter	1773	1706	1509	1314	1327	1285	1211	1049
Beating	13809	14917	15288	15205	14270	15196	15659	15606
Bodily harm	59143	63602	65791	65611	64866	68500	69527	66317

Threats	71856	81073	83580	83483	81164	83316	86347	86294
Kidnappings	1608	1867	1816	1481	1436	1443	1474	1353
Insults	55361	61737	64453	64479	62230	65370	67213	66414
Sexual violence	4513	4897	4893	4963	4813	4617	4689	4488
Sexual acts with a minor	460	501	474	492	582	489	558	523
Corruption of minors	192	182	168	170	175	143	120	155
Exploitation and abetting prostitution	1422	1466	1484	1311	1586	1505	1306	1170
Child pornography and possession of child pornography	333	412	537	543	380	322	380	489
Theft	1585201	1636656	1392544	1318076	1325013	1460205	1520623	1554777
Robberies	50270	51210	45857	35822	33754	40549	42631	43754
Extortion	5400	6545	6646	6189	5992	6099	6478	6884
Fraud and computer fraud	109059	120710	104174	99366	96442	105692	116767	140614
Cybercrimes	2394	3799	4952	5510	5973	6933	7346	9421
Counterfeiting of trademarks and industrial products	2186	1863	1856	1654	11745	9201	8920	7465
Intellectual property infringement	6469	5601	4499	3438	2560	1935	1522	1075
Receiving stolen goods	30042	31104	27786	23619	23686	23773	25080	25275
Recycling and use of money, goods or assets of unlawful origin	1193	1209	1253	1269	1344	1350	1685	1891
Usury	353	382	375	464	374	352	405	460
Damage	344253	384529	402163	415391	414923	398521	364435	341152
Arson	12659	16716	12662	10921	9622	12980	13170	7388
Forest fires	3688	7049	4499	3734	2770	5870	6105	2035
Damage followed by arson	10104	11762	10728	9797	9721	10499	11209	9815
Drug	32306	34439	34082	34101	32761	34034	33852	33578
Attacks	618	544	447	376	490	439	522	462
Criminal association	1074	1011	871	872	744	906	943	792
Mafia-type association	128	140	125	131	128	93	68	75
Smuggling	1150	1096	1062	1132	1067	1034	1284	1254
Other crimes	363629	388842	415138	420252	409525	403735	410997	459478
Total	2771490	2933146	2709888	2629831	2621019	2763012	2818834	2892155

Source: Ministry of Justice

What the data reported above prove is that crime rates have basically stayed the same in the same period in which the numbers of pre-trial detention decreased significantly.

4.6. ECtHR decisions against Italy regarding precautionary measures.

Decisions of the ECtHR against Italy on the subject of precautionary measures mainly concerned paragraphs 3 and 4 of Article 5 of the Convention. Italy has therefore been repeatedly condemned for the excessive length of pre-trial detention and the lack of guarantees for the accused during the proceedings regarding precautionary measures.

Italy however has also been condemned for violation of Article. 5.1 of the Convention, for arbitrary detention in pre-trial detention. This happened most recently with the judgment *Gallardo Sanchez vs. Italy* (03/24/2015) concerning a case of extradition. The applicant complained about the violation of art. 5.3 for the excessive length of the pre-trial detention (one year and six months) but the Court qualified the fact as a violation of art. 5.1, believing that Italy was not

diligent in the decision to grant the extradition of the person in pre-trial detention, a decision marked by unjustified delays⁴⁷.

In other decisions, such as *Vaccaro v. Italy* (16/2/2001) and *Labita v. Italy* (6/4/2000), the excessive length of pre-trial detention was criticised by the Court that considered that, even though the measure was justified at the beginning, however, with the passage of time, the continuance of the need for precautionary measures has not been verified with due diligence. The passage of time, in the opinion of the Court, entails for the Member States an obligation to check the actual presence both of indicia of guilt and of the precautionary needs⁴⁸.

The *Labita* case is well known in Italy also because our country was condemned for its failure to investigate alleged violence in Pianosa prison. It also offers interesting insights on the subject of precautionary measures. In that decision, the Court ruled against Italy for breach of Article. 5.3, for the illegal prosecution of detention even when serious indicia of guilt had failed. The ruling criticises the use of statements made by informants (the so-called *pentiti*) if not corroborated by any other evidence. In this case, 2 years and 7 months in pre-trial detention seemed excessive given the fact that in the meantime the defendant was acquitted in other related proceedings and the statements made by informants were not confirmed during the investigations⁴⁹.

With regard to the procedure for the application of pre-trial detention and its appeals, the ECtHR ruled against Italy for the excessive length of the proceedings. In particular, it declared a violation of art. 5.1 and 5.4 in its judgment *Picaro v. Italy* (9/6/2005) as the defendant was arbitrarily detained in pre-trial detention for 24 days first, and then it took five months and 20 days for the Supreme Court to decide on the applicant's appeal against house arrest.

In its decision *Marturana v. Italy* (4/3/2008), the Court found a violation of Article. 5.4 in relation to the excessive delay with which the court decided on the lawfulness of pre-trial detention in this case⁵⁰.

In its decision *Rizzotto v. Italy* (24.4.2008), the Court upheld the applicant's complaints on the violation of art. 5.4 for the excessive length of the procedure for the application of pre-trial detention (nearly 4 months to be notified with the decision on his/her request for review of the precautionary measure).

In its decision *Luberti v. Italy* the Court condemned Italy for violation of Article. 5.4 regarding the non-timely decision on the release of an inmate. In fact the court (*Tribunale di Sorveglianza di Roma*), one year and a half after the application, stated it did not have jurisdiction on the case without even entering into the merits of the case.

In the case of *Vittorio and Luigi Mancini* (08/02/2001) the applicants complained about the delay in the execution of the order for their release, which took effect three days after the court decision to release the person. Mancini obtained house arrest, but the measure came into force three days after the decision due to organisational problems of the prison administration: the ECtHR ruled against Italy because of the delays of the penitentiary police in charge of the transfer of the prisoners.

⁴⁷ "In this regard, the Court recalls moreover that, in the context of that provision, only the extradition procedure justifies the deprivation of liberty, and if this procedure is not conducted with due diligence, the detention ceases to be justified". On the subject of extradition and pre-trial detention see also the decision *Sardinas v. Italy* (8.1.2004). Infringement of Article. 5.1 has been declared also in decisions *Saferovic v. Italy* (8.2.2011) and *Hokic and Hrustic v. Italy* (1.12.2009), although these cases regarded the delay in the liberation of persons detained in migrants detention centre.

⁴⁸ In the decision *Vaccaro v. Italia* (16.2.2001) the Court concludes by saying: "the initial relevance of the grounds cited by the national authorities was reduced over time. Having regard also to the unexplained delays which occurred in the course of the proceedings, the Court considers that the period spent by the applicant in detention pending trial exceeded the "reasonable time" laid down in Article 5 § 3."

⁴⁹ In other cases before the Court, however, the terms of preventive detention were deemed reasonable (*Contrada v. Italy*) due to the complexity of the case.

⁵⁰ The decision *Rapacciuolo v. Italia* (19/5/2005) and *Naranjo Hurtado v. Italia* (3/7/2007) are along the same lines.

In its judgment *Fodale v. Italy* (1.6.2006), the Court upheld the appeal stating that the non-communication of the date of the hearing in the Supreme Court, despite the non-irreparable harm suffered by the applicant, violated the judicial nature of the proceedings. In the same judgment it is also criticised the failure to disclose the investigation file⁵¹.

⁵¹ 41. The Court further reiterates that a court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms” between the parties, that is, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order to challenge effectively the lawfulness of his client’s detention. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (see, among other authorities, *Lamy v. Belgium*, 30 March 1989, § 29, Series A no. 151, and *Nikolova*, cited above, § 58). 42. These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the Court’s case-law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of “criminal charge” – that this provision has some application to pre-trial proceedings (see *Imbrioscia v. Switzerland*, 24 November 1993, § 36, Series A no. 275). It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 of the Convention should in principle also meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party will be aware that observations have been filed and will have a real opportunity to comment thereon (see *Garcia Alva v. Germany*, no. 23541/94, § 39, 13 February 2001). 43. In the present case, the Supreme Court set the appeal by the public prosecutor’s office down for a hearing on 15 February 2000. However, no summons to appear was served on the applicant or his counsel. The accused was thus unable to file pleadings or to present oral argument at the hearing, in response to the submissions of the public prosecutor’s office. By contrast, a representative of that office was able to do so before the Supreme Court. 44. In these circumstances the Court is unable to find that the requirements of adversarial proceedings and equality of arms were met. 45. There had therefore been a violation of Article 5 § 4 of the Convention.

V. PROCEDURE FOR PRE-TRIAL DETENTION DECISION-MAKING

Procedural guarantees in case of application of precautionary measures are critical because it is through them that the person can avoid the application of the precautionary measure, or obtain the less restrictive measure among those theoretically possible.

As the ECtHR has emphasised repeatedly, correct and fair procedures in pre-trial detention proceedings are fundamental to ensuring that pre-trial detention is used lawfully.

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly⁵² or “speedily”⁵³ before a judicial authority, and the “scope for flexibility in interpreting and applying the notion of promptness is very limited”.⁵⁴ 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.⁵⁵ Whether this has happened must be determined by considering the individual facts of the case.⁵⁶

According to the ECtHR, the court taking the pre-trial decision must have the authority to release the suspect⁵⁷ and be a body independent from the executive and both parties of the proceedings.⁵⁸ The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to participate effectively.⁵⁹

This section will present our findings concerning the procedures for pre-trial decision-making with a focus on the first judicial decision to detain and the involvement of the defence practitioner, on the opinions of some of the parties involved on the fairness of the procedure, highlighting the most critical aspects and providing recommendations to address them.

5.1. The first judicial decision to detain and the involvement of the defence practitioner. The fairness of the procedure according to the lawyer, judges and prosecutors at this stage

Normally, the first judicial hearing about pre-trial detention takes place after the accused is caught in *flagrante delicto* (Art. 382 c.c.p.).

According to the Italian Constitution an arrested person has to be immediately presented to the prosecutor, at the latest within 24 hours of the arrest, otherwise the arrest is invalid. For his/her part the prosecutor, in the next 24 hours, has to ask the judge to validate the arrest. The arrest is invalid if the judge does not validate it within 48 hours (Art. 13 const.). In our research we found that the average time from the arrest to the first hearing is two days. In 16 out of 43 case files examined the time lapse was one day; in four cases four days.

The Public Prosecutor is not a judge in this respect, and therefore he can only ask for the application, modification or withdrawal of the measure. He/she can adopt only more urgent and interim measures, together with the police, within the first 24 hours (Art. from 379 to 381 c.c.p.).

During the first judicial hearing the presence of legal defence is required. If the suspect or accused person does not have a lawyer of choice, a lawyer is instructed *ex officio*. (Art. 24 Cost., art. 97 et seq. c.c.p.).

⁵² *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.

⁵³ 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).

⁵⁴ *ibid* para 62.

⁵⁵ *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.

⁵⁶ *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

⁵⁷ *Singh v UK*, App 23389/94, 21 February 1996, para 65.

⁵⁸ *Neumeister v Austria*, App 1936/63, 27 June 1968, para 24.

⁵⁹ *Göç v Turkey*, Application No 36590/97, 11 July 2002, para 62.

The file must be provided by the authority that questions the suspect immediately after the arrest. (art. 390, 391 c.c.p.)
As soon as the decision confirming the arrest is adopted, the judge decides on the pre-trial measures, after listening to the parties' submissions.

As explained below, the findings of our research show that the involvement of the defence practitioner at this stage, for instance by challenging the serious evidence of guilt or the precautionary requirements that justify the application of pre-trial detention, is a relevant feature in the decision of application of the pre-trial measures.

In 62% of the surveys the lawyers argue that the defence and prosecution's submissions are treated equally during pre-trial detention decisions. This is confirmed by the findings of the research that showed that lawyers indeed have a strong impact on orders being applied by the judge.

In about 90% of the case files reviewed the lawyer made submissions, and in about 55% of them the judge did not apply pre-trial detention, while when the lawyer chose not to make submissions in 75% of the cases the judge applied pre-trial detention.

In 75% of the case files where the lawyer requested for more time and the judge granted it, the outcome was that the judge did not apply pre-trial detention.

In more than 70% of hearings attended defence practitioners requested that no conditions were applied to their clients: it was granted by the judge in 35%, while the hearings that ended with conditional release are 45%, and only 10% ended with pre-trial detention.

With respect to the lawyers' opinion about the fairness of trials, 83% of the surveyed lawyers said that the lawyer is able to make submissions in pre-trial detention hearings; and most of the lawyers participating in the survey (85%) said the lawyer has access to the case file in advance in order to prepare a defence strategy.

However, 85% of the lawyers surveyed stated they have little time to prepare for the initial pre-trial detention hearing (from less than 10 minutes to less than 30 minutes), while most of them (37%) assert that the average time for notification of date and time of the hearing is 12-24 hours.

However, we can say that most lawyers participating in the survey think that hearings take place in a relatively fair way. But when it comes to the judge's decision, about 55% of the lawyers participating in the survey believe that judges rarely make fair assessments based on evidence, and even more than 70% of the surveyed lawyers find that detention is applied by judges on the basis of unlawful presumptions⁶⁰.

The results of our research do not suggest that the court-appointed lawyers are less efficient than lawyers of choice, but this result is heavily influenced by the sample at our disposal⁶¹. However, in one of the 43 case files examined, one in which at the beginning the defendant was advised by a court-appointed lawyer, a case ended with acquittal thanks to the work later done by the lawyer of choice. At the first hearing the defendant, a non-Italian speaking foreign national, had not only ended up in pre-trial detention, but the lawyer also suggested that he forego his right to the translation of the main acts of the process (Directive 64/2010/EU).

Moving to the analysis of the interviews with judges, 80% of judges interviewed on the fairness of the procedure feel that they have enough time to decide on the application of the precautionary measure.

⁶⁰ The situation on the issue has changed after the adoption of law no. 47/2015.

⁶¹ Almost all case files came from law firms and not from Courts, where we met huge bureaucratic problems. As a consequence, cases advised by court-appointed lawyers are underrepresented in this research project.

Contrary to the findings of the surveys with lawyers, all the judges interviewed believe they take into the same consideration requests and arguments of the prosecution and of the defence. All of the judges interviewed also consider themselves not to be influenced in their choices by the Ministry of Justice, (but 40% of them feel the pressure of public opinion and 20% of judges interviewed feel pressurised from the expectations of the police who carried out the arrest. Unanimously the judges interviewed believe that there are negative consequences (in the press) when freed defendants commit new crimes.

Like lawyers, all judges interviewed believe that when pre-trial detention is applied trials are conducted more quickly, in compliance with the time limits of pre-trial detention.

Moving to the analysis of the interviews of prosecutors, paying particular attention to their perception of the fairness of the procedure, they unanimously believe to have enough time to decide on the application of the precautionary measure and that the defender has enough time to organise the defence.

Contrary to the findings of the interviews with lawyers, and what was said by the judges in the interviews, all of the prosecutors interviewed believe that judges have the same consideration for requests and arguments of the prosecution and of the defence. They believe, like the judges interviewed, that they are not influenced by the Ministry of Justice (100%) but 34 % of the prosecutors interviewed do feel influenced by public opinion. Unanimously they believe that there are no negative consequences when freed defendants commit new crimes.

66% of the prosecutors interviewed do not believe that the application of pre-trial detention has significant positive or negative consequences on the investigation and claim to rely, for the decision on the application of the pre-trial detention, on the information of the police.

5.2. The presence of the defence and the accused at the first hearing and the quality of their relationship from arrest to first hearing on pre-trial detention.

As noted, a key role in the procedure of pre-trial decision-making is played by the defence, by its ability to formulate demands and by its active participation in the hearings. Here we want to focus on the quality of the relationship between the defendant and the lawyer from arrest until the first hearing on pre-trial detention and to the hearing outcome.

With regard to the presence of the accused at the hearing of the application of the precautionary measure, and the contacts between the defendant and the defence before the trial, our research revealed the following: the accused was not present at the first pre-trial detention hearing for determination of conditions in two cases of the files reviewed, both due to health reasons. In 1 of these cases was ordered and in the other the judge ordered an alternative.

In 32 cases reviewed (76%), lawyers were chosen from the very beginning, while in four cases the lawyer was chosen after the first hearing or even after the first judgement in trial. Out of these last four, three ended with an order of pre-trial detention.

In 31 cases reviewed the lawyer met the accused beforehand, in three cases analysed he/she did not; seven case files did not reveal this information. However, the three cases in which there was not a preliminary meeting had two orders of conditional release and one of pre-trial detention.

In 33 cases reviewed defence lawyers were at all pre-trial detention hearings, in three reviewed the lawyer did not attend all the hearings (and the decision of the judge was pre-trial detention for all); again in seven cases this information was not recorded.

In the hearings attended the accused was always present, except in two cases in which he declined to participate⁶². The lawyer was always present. Most of the lawyers (12 out of 17, in three cases this information was unknown) were chosen, four were appointed by the court and one was a legal aid lawyer. The hearings with appointed lawyers ended up with one order of detention, one conditional release (namely house arrest) and two unconditional releases.

In four cases the lawyer did not meet the accused before the hearing: the judges ordered detention in two cases, house arrest in one and check-ins at police in one.

5.3. Special diligence in pre-trial detention proceedings

As is well known the ECtHR case law, interpreting art. 5.3 ECHR, pays particular attention to the duration of pre-trial detention and the special diligence that judicial authorities must have in proceedings in which pre-trial detention is applied.

Special diligence is required both in the criminal trial (art. 111 Cost.) and in the sub-proceedings (art. 299 et seq.) regarding the application and the modifying events of the precautionary measures.

Our research showed that 71% of the lawyers believe that the proceedings in which pre-trial detention is applied proceed more rapidly than those where there is no application of preventive precautionary measures.

71% of the lawyers participating in this survey are of the opinion that defendants who are kept in pre-trial detention are prosecuted with a special diligence. Among these 60% said that, according to the customary routine, investigations sped up in case of pre-trial detention, and 40% said that the trial is conducted with a special diligence because of the deadlines imposed by statutory requirement.

This apparently is at odds with the ECtHR case law that has repeatedly ruled against Italy for its failure to comply with the special diligence (see 4.6.).

In fact the lawyers interviewed have in mind the criminal trial, which is objectively greatly accelerated when there is the application of pre-trial detention, while the decisions of the ECtHR against Italy regard the delay in the definition of sub-proceedings on the precautionary measures.

This aspect (length sub-proceedings on events modifying pre-trial detention) will be discussed below, in the section on the review and events modifying the precautionary measures.

As a consequence, as regards special diligence in the conduct of the criminal trial, if it on average takes five years for criminal trials (source: report of the President of the Supreme Court, inauguration of the 2014 judicial year), in cases of application of pre-trial detention our research proves that the trial takes less time, and that often its length coincides with the quantum of the sentence imposed.

5.4 Conclusion and recommendations

A preliminary analysis of the perception of the fairness of the procedure according to lawyers, judges and prosecutors can lead to the conclusion that for all three categories the procedure for the application of the precautionary measure is basically fair.

The lawyer is able to make submissions in pre-trial detention hearings and has access to the case file in advance and, the possibility of meeting with defendant.

On the other hand, as we said, 85% of the lawyers surveyed stated they have little time to prepare for the initial pre-trial detention hearing (from less than 10 minutes to less than 30 minutes) and more than half of the lawyers surveyed (55%)

⁶² As said above participation of the defendant is compulsory only in the first hearing for the application of precautionary measures. The two hearing mentioned do not regard the first application of the measure.

complain that when it comes to the judge's decision, the judges rarely make fair assessments based on evidence, and even more than 70% of lawyers surveyed find that detention is applied by judges on the basis of unlawful presumptions, that is on presumptions that are not relevant for the law (e.g. status of illegal migrant).

As we will see in the next sections, where our attention will focus on substantive issues related to pre-trial detention, the fear of lawyers is well founded, especially if the defendant is a non-EU citizen. Suffice it for now to consider that the case files showed that in about 85% of cases where the accused is a non-EU citizen the prosecutor asked to apply pre-trial detention, exactly on the ground, in more than 60% of the cases, that the accused was a non-EU citizen. In 69% of our cases pre-trial detention was applied.

We believe that this state of the art is mainly due to the inequality of the means available to the parties (lawyers have little time to prepare for the initial pre-trial detention) and the lack of instruments for the judge to overcome this inequality. We refer, in particular, to the absence of a legal provision requiring that, together with the notification of date of the hearing, the lawyer should also receive the prosecutor case file to have adequate time to prepare the defence. As regards the procedure, the absence in court is also relevant, at the first hearing for the application of the measure, to social services that could bridge the gap between the prosecution and the defence and support the judge in his/her decision. The presence in court, or at least their involvement in the proceedings, of social services professionals could prevent the detention for instance of drug addicts, or of other vulnerable defendant that, with the support of these professionals, could access other alternatives to imprisonment. These figures have a role in the phase of sentence serving. Supervision court, in their decision on alternatives to detention, can rely on specific social services (UEPE), and it is not clear why this same support should not be available when applying pre-trial measures, especially if we take into account the large number of defendants in pre-trial detention in Italy, including for long periods.

To address this problem there is no strict need for new legislation. Notification of the prosecutor case file together with the date of the hearing (via fax or email) and the presence, or the involvement, of social services in the proceedings at this stage, could be guaranteed also by administrative measures.

VI. SUBSTANCE OF PRE-TRIAL DETENTION DECISION MAKING

The quality of the reasoning of the court in the decisions on application or modification of pre-trial detention is paramount. Through an examination of the reasons given by the judges it is in fact possible to say whether the judge has taken into account in equal measure the parties' arguments, if its reasoning uses "stereotyped" forms and, finally, what categories of offenses and people are most likely to end up in pre-trial detention.

The ECtHR has repeatedly emphasised the presumption in favour of release⁶³ and clarified that the state bears the burden of proof of showing that a less intrusive alternative to detention would not serve the respective purpose.⁶⁴ The detention decision must be sufficiently reasoned and should not use "stereotyped"⁶⁵ forms of words. The arguments for and against pre-trial detention must not be "general and abstract".⁶⁶ The court must engage with the reasons for pre-trial detention and for dismissing the application for release.⁶⁷

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;⁶⁸ (2) the risk the suspect will spoil evidence or intimidate witnesses;⁶⁹ (3) the risk that the suspect will commit further offences;⁷⁰ (4) the risk that the release will cause public disorder;⁷¹ or (5) the need to protect the safety of a person under investigation in exceptional cases.⁷² 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.⁷³ Pre-trial detention based on "the need to preserve public order from the disturbance caused by the offence"⁷⁴ 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.⁷⁵

With regard to risk of flight, the ECtHR has clarified that merely the lack of fixed residence⁷⁶ or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.⁷⁷ The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available⁷⁸. Not having a job or local family ties would be insufficient.⁷⁹

This section will present our findings concerning the reasoning of the first decisions applicative of pre-trial measures, the excessive use of pre-trial detention against non-EU citizens and the lack of diligence in the verification of the presence of serious evidence of guilt to justify the continuation of pre-trial detention, highlighting the most critical aspects and providing recommendations to address them.

⁶³ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.

⁶⁴ *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.

⁶⁵ *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.

⁶⁶ *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.

⁶⁷ See above, note 7.

⁶⁸ See above, note 15, para 59.

⁶⁹ *Ibid.*

⁷⁰ *Muller v. France*, App 21802/93, 17 March 1997, para 44.

⁷¹ *I.A. v. France*, App 28213/95, 23 September 1988, para 104.

⁷² *Ibid para 108.*

⁷³ *Tomasi v France*, App 12850/87, 27 August 1992, para 102.

⁷⁴ See above, note 20.

⁷⁵ See above, note 12, para 149.

⁷⁶ *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

⁷⁷ See above, note 22, para 87.

⁷⁸ *Matznetter v Austria*, App 2178/64, 10 November 1969, concurring opinion of Judge Balladore Pallieri, para 1.

⁷⁹ See above, note 25.

6.1 Reasoning on the decisions on the application of pre-trial detention

As already stated in chapter 4.3 the decision on the precautionary measure has always to be motivated by the judge (art. 292 c.c.p.). The reasoning has to include, under penalty of nullity that can arise also from the court *ex officio*, the presentation and the assessment of the **serious suspicion of guilt (Art. 273 c.c.p.) and of the specific precautionary requirements** (Art. 274 c.c.p.: danger of escape, suppression of evidence, re-offending) that justify the measure applied in the specific case.

Law 47/2015 made this rule more effective, implementing thereby the ECtHR jurisprudence, stating that it is no longer possible for the court to justify the application of the precautionary measure *per relationem* (Art. 292, c.c.p. paragraph 2, lett. C, Cbis and 2ter), only referring to the file of the prosecutor, whereas an autonomous motivation becomes necessary, that takes into due consideration the arguments of the defence and all the elements in favour of the defendant. According to the new version of Art. 274 c.c.p. the reasoning now has to be more detailed.

The reform limits the discretion of the courts to evaluate the application of the precautionary measures that will guarantee the precautionary requirements pending prosecution, according to both the requirement of the concreteness of the risk of flight or re-offending, and to that of their actual presence.

Both requirements cannot be assumed “only from the severity of the offense prosecuted” but need to be assessed case by case by the judge.

Judges interviewed during our research say they apply pre-trial detention more often if the defendant has a criminal record (80%), and that the pre-trial detention is used mainly for crimes against the person (40%), against property (20%) or perpetrated by organised crime (20%).

Similarly, prosecutors interviewed (100%) believe that the risk of reoffending is the main reason leading to the request for application of pre-trial detention, and emphasise to base their option for the application of pre-trial detention on the seriousness of the crime (66%) and to apply it more frequently in crimes against the person featured by particular violence (66%) and against the mafia crimes (33%).

The analysis of our case files shows that among 20 cases in which pre-trial detention was applied, 45% were crimes foreseen in the drugs law, the remaining 11 being armed robbery, homicide, mafia, counterfeiting money and extortion. The analysis of the hearings attended shows that pre-trial detention is applied more often, in equal measure, in cases of international drug trafficking, aiding and abetting of illegal immigrants, attempted homicide, bankruptcy fraud.

In 63% of the case files reviewed where the pre-trial detention was ordered the accused in pre-trial detention had a criminal record and the request of the prosecutor, and the motivations of the Judge in the order of application of the measure, was the risk of reoffending.

Again referring to the 43 case files analysed, it should be noted that in the reasons given by the judge in the 20 cases in which pre-trial detention was applied, in nine cases (45%) the judge refers to the existence of at least two of the precautionary requirements provided by art. 274 c.c.p..

In 42% of the case files reviewed where the pre-trial detention was ordered the ground stated by the Judge in the order applying the measure was the risk of flight.

In 31% of the case files reviewed where the pre-trial detention was ordered the ground stated by the Judge in the order applying the measure was danger to the public.

As for the opinions on the quality of the reasons given by the judge to justify the application of pre-trial detention, among the aforementioned 20 cases, in 50% of them motivations are considered formal, in 10% they are believed to be both formal and substantial, while in 6 cases (40%) this figure is unknown.

Interviews with the lawyers finally revealed that more than half of the lawyers surveyed (55%) complain that when it comes to the judge's decision, the judges rarely make fair assessments based on evidence, and more than 70% of lawyers surveyed find that detention is applied by judges on the basis of unlawful presumptions, that is on presumptions that are not relevant for the law (e.g. status of illegal migrant).

Ultimately, the grounds of supervision orders continue to appear formalistic and relying excessively on the existence of a criminal record to justify the existence of the risk of reoffending and the danger to public order.

The recent reform introduced by Law 47 has definitely strengthened the obligation to state reasons. A rigorous implementation of this new law could prevent the grounds of supervision orders from continuing to be merely formalistic and based on the existence of a criminal record.

6.2. The excessive use of pre-trial detention against non-EU citizens and the lack of diligence in the verification of the permanence of serious evidence of guilt to justify the continuation of pre-trial detention

As we stated above, more than half of the lawyers surveyed (55%) complain that when it comes to the judge's decision, the judges rarely make fair assessments based on evidence, and even more than 70% of lawyers surveyed find that detention is applied by judges on the basis of unlawful presumptions, that is on presumptions that are not relevant for the law (e.g. status of illegal migrant).

In fact, looking at the demographic profile of the recipients of pre-trial detention orders, a strong disparity between European and non-EU citizens clearly emerges. In the case files analysed 13 accused were foreign nationals, 11 non EU-citizens four of which illegal migrants, and two had no fixed residence. For these suspects pre-trial detention was requested in 11 cases (about 85%), and the prosecutors justified the request arguing that the accused was a foreign national in six cases. The judge decided for detention in nine cases (69%) and for alternatives in two cases. The final outcomes in these cases were: eight convictions, three acquittals and two cases dropped.

Other demographic features, such as family ties, the lack of dependants, unemployment and health issues, were not used to justify the application of pre-trial detention either in the hearings or in the case files studied. No prosecutor used them as argument to justify the request for detention, but they were widely used by defence lawyers in order to request an alternative measure for their clients.

From the analysis of cases perceived in the files and the hearings emerges, then, that non-EU citizens suffer pre-trial detention more frequently for a number of reasons. First of all, the lack of knowledge of the language and of the law and the lack of professionalism of the interpreters entail enormous difficulties in the relationships with the lawyer and in preparing the defence in the short time available between arrest and the celebration of the first hearing (on average less than 2 days). As a consequence the serious indicia of guilt borne by the prosecution are hardly challenged at the first hearing. (See box 5.1. In this case, the lawyer suggested that the defendant forego his right to the translation of the main acts of the process)

As already stated, Directive 64/2010/EU has been implemented in Italy with great delay. In the implementation act (Legislative Decree 32/2014 of 04.03.2014) it is expressly provided for in Art. 1 (amending art. 104 par. 4 c.c.p.) that the non-Italian speaking foreigner (suspected or accused), in addition to the figure of the expert assisting the judge, is entitled - free of charge - to an interpreter to communicate with his/her lawyer to organise the defence, including in the sub-process on the application of the precautionary measure. Only the practical implementation of this new guarantee would reduce the recourse to pre-trial detention in cases of non-Italian speaking defendants.

In our case in only 23% of the case files examined that regarded non-Italian speaking defendants, such an expert was involved, and in these cases the quality of interpretation was deemed sufficient by the lawyers interviewed. As a consequence, in the remaining cases the person concerned was supposed to understand Italian.

We believe, however, that the decision not to appoint an interpreter in 77% of cases analysed is due to a lack of confidence in the quality of interpretation offered by professionals made available by the court (in Italy there is no official register of interpreters and they have no legal training) and a lack of attention of lawyers and judges to this aspect, an important point according to the Stockholm roadmap mentioned above. It can be assumed that a basic knowledge of Italian does not imply an adequate understanding of the legal jargon and, therefore, the failure to appoint an interpreter in 77% of cases is due to the reasons mentioned above more than to the perfect understanding of the legal jargon by 77% of the foreign defendants involved. This finding is indirectly confirmed by the excessive use of pre-trial detention in cases regarding foreign defendants reported above and by the outcomes.

Secondly, the lack of social networks and of suitable housing mean that at the first hearing the judge chooses pre-trial detention because he cannot apply house arrest and because other measures are (often contrary to law) considered unfit to meet the precautionary needs: illegal migrants and/or homeless people are considered by definition unlikely to comply with the prescription (e.g., reporting to police) issued by the court.

It is therefore no coincidence that in the three case files examined where the defendant suffered unjust pre-trial detention (possibly obtaining reparations later) concerned only non-EU citizens. Reading these case files it is clear that the prosecution evidence were unfounded since the first hearing. However, for the above mentioned problems, during the first hearing and in the first part of the trial, the prosecution's case was not challenged with supporting evidence. In one case, already mentioned in the previous paragraph, the defendant in the first hearing even waived his right to the translation of essential documents.

Another case deserves attention (see box below) because it also shows that the evidence provided by the prosecution against vulnerable people are not critically evaluated by the judge who often not only applies pre-trial detention in the first hearing, but also keeps it in place for an excessive period (in that case for about a year and a half, and the release of the defendant took place after his/her full acquittal during the appeal), without verifying the actual presence of the serious evidence needed to justify the continuation of the custodial measure.

Mr. AHN, an Algerian citizen legally residing in Italy, was arrested on charges of extortion on 13.08.2008. The charge was based on what was reported by the victim and the possession of money on a postal account considered to be incompatible with his earnings (as house worker and illegal car parker). Since the validation of the arrest on 14.8.2008, with application of pre-trial detention, AHN professed his innocence, giving his version of the facts during the questioning. A.H.N., who was detained in Regina Coel prison in Rome asked in September and November 2008 for pre-trial detention to be revoked or replaced with other measures, but both requests were rejected by the proceeding Judge. On 5.2.2009 A.H.N. was condemned to five years of imprisonment and a fine of € 516.00 by the Court of Rome for the offence under Article. 629 of the c.c.p.. The defence appealed and the Court of Appeal on 11.2.2009 absolved Mr. A.H.N. with the full wording “because the fact does not exist”, ordering his immediate release. This reversal of the first decision is clarified in the grounds of the decision: the Court considers on the one hand that the accusations were not supported by evidence. The prosecution case was based solely on the accusation of the victims, contained in a verbal complaint they lodged but who never appeared in court. On the other hand, the defence argument was corroborated by evidence. For 445 days of unjust imprisonment, Mr. A.H.N. received compensation of € 70,000.00.

Unfortunately, this case is not isolated and the failure to find serious evidence of guilt to justify the continuation of pre-trial detention do not regards non-EU citizens only. As stated in the previous chapter, the ECTHR has indeed repeatedly condemned Italy for violation of Article. 5.3 because the judge wrongly assessed the evidence of serious indicia of guilt to maintain pre-trial detention.

In two decisions (Vaccaro v. Italy of 16/2/2001 and Labita v. Italy of 6/4/2000) the excessive length of pre-trial detention was criticised by the Court which took the view that, even though the measure was justified at the beginning, with the passage of time, the verification of the continued existence of the precautionary needs has not been conducted with the due diligence. The passage of time, in the opinion of the Court, entails for the Member States an obligation to check the actual presence both of indicia of guilt and of the precautionary needs⁸⁰.

In that decision, the Court ruled against Italy for breach of Article. 5.3, for the illegal prosecution of detention even when serious indicia of guilt had not been present. The ruling criticises the use of statements made by informants (the so-called *pentiti*) if not corroborated by any other evidence. In this case, two years and seven months in pre-trial detention seemed excessive given the fact that in the meantime the defendant was acquitted in other related proceedings and the statements made by informants were not confirmed during the investigations⁸¹.

6.3. Looking forward: Law 47/2015 and the actuality of the risk of reoffending.

The problems related to the actuality of the risk of reoffending could be overcome following the entry into force of Law 47/2015, which amended Article. 274 of the c.c.p., adding specifications aimed at offering to the judge some criteria for assessing the existence of the risk.

From now on, therefore, the actuality and concreteness of the risk of reoffending cannot simply arise from the (abstract) seriousness of the offense that is persecuted: the specific situations has to be considered in detail and the more time that has passed from the commission of the offence, the more rigorous this assessment should be. This coincided with the standards of the EctHR: the decision on detention must be taken speedily and reasons must be given for the need for continued detention.⁸² Previous decisions should not simply be reproduced.⁸³

This same point had already been clarified by the Constitutional Court with respect to the crime of association for drug dealing (Art. 74 of the drug law), when it said that in case of offences dating back in the time, lacking those traits that are symptomatic of association under art. 416 bis (associative link on a territorial basis, assisted by the threat of violence and subsequent subjugation and silence) the actuality of precautionary requirements must be inferred from specific positive factual elements and by the absence of factual evidence to the contrary, showing for instance the individual withdrawal or the dissolution of the group (see constitutional court judgment no. 231 of 2011).

⁸⁰ In decision Vaccaro v. Italy (16.2.2001) ECHR concludes by saying: “*the initial relevance of the grounds cited by the national authorities was reduced over time. Having regard also to the unexplained delays which occurred in the course of the proceedings, the Court considers that the period spent by the applicant in detention pending trial exceeded the “reasonable time” laid down in Article 5 § 3.*”

⁸¹ It’s worth remembering that in other cases on pre-trial detention the Court decided it’s length was reasonable, giving the complexity of the investigations (Decision Contrada v. Italia).

⁸² *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>

⁸³ *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>.

6.4 Conclusion and recommendations

As stated in chapter 6.1., the reasoning of pre-trial detention orders continue to appear formalistic and relying excessively on the existence of a criminal record to justify the existence of the risk of reoffending and the danger to public order. The recent reform introduced by Law 47/2015 has definitely strengthened the obligation to state reasons. A rigorous implementation of this new law could prevent the reasoning of pre-trial detention orders from continuing to be merely formalistic and based on the existence of a criminal record.

On the other hand, looking at the demographic profile of the recipients of pre-trial detention orders, a strong disparity between European and non-EU citizens clearly emerges.

For these suspects pre-trial detention was requested in 11 cases (about 85%), and the prosecutors justified the request arguing that the accused was a foreign national in six cases. The judge decided in favour of detention in nine cases (69%) and for alternatives in two cases.

The role played by the defender, in these specific cases, was not enough to prevent the application of pre-trial detention, also because of the late and very recent implementation of Directive 64/2010/EU and the lack of specific training for Italian lawyers on the directives for the implementation of the Stockholm roadmap.

Full implementation of Directive 64/2010/EU, in particular as regards the possibility of appointing an interpreter to allow a defence and the non-Italian speaking accused to better organise the defence strategy, the setting up of a register of interpreters, the legal training of experts and interpreters, and specific training for lawyers and judges on the roadmap directives, are all elements required to address the above concerns.

More in general, a specific training on the ECtHR case law is needed, in particular on art. 5, and not only for lawyers, but also for judges and prosecutors: a negative remark that emerges from interviews with prosecutors and judges, is the lack of specific training on the jurisprudence of the ECtHR according to all respondents. However, the judges stated in the interviews that they give great importance to the ECtHR jurisprudence in their decisions on the pre-trial detention (80%).

Finally, our work showed that the lack of social networks and of suitable housing mean that at the first hearing the judge chooses pre-trial detention because he cannot apply house arrest and because other measures are (often contrary to law) considered unfit to meet the precautionary needs: illegal migrants and/or homeless people are considered by definition unlikely to comply with the prescription (e.g., reporting to police) issued by the court.

We therefore believe that the central state and local authorities should allocate funds for suspects and defendants who are not eligible for house arrest simply because they lack the financial resources to afford suitable housing.

VII. ALTERNATIVES TO DETENTION

The possibility to resort to alternatives to detention in the pre-trial phase, and their actual use in practice, are an important aspect of this report. When, in the actual case, the court recognises the existence of serious indicia of guilt and of precautionary requirements, the choice of the measure to be applied in practice, and the respect of the principle of *extreme ratio*, are essential for implementing the provisions of Art. 5 of the ECHR.

The case law of the ECtHR has strongly encouraged the use of pre-trial detention as an exceptional measure. In *Ambruszkiewicz v Poland*⁸⁴, 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 detention⁸⁵, and the authorities must also consider whether the “continued detention of the accused is indispensable”.⁸⁶

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.

This section will present our findings concerning the alternative to detention with a focus on the implementation of the principle of last resort (in the recently law and in the practice), highlighting the most critical aspects and providing recommendations to address them.

7.1. Italy reinforces the principle of last resort: the Law 47/2015

We already mentioned the important changes introduced by Law 47/2015, which came into force on 8 May 2015. On the issue of alternatives to detention, Article 275 c.c.p., as amended, is the core of the reform stressing the absolute *ultima ratio* use of pre-trial detention pre-trial detention It is now explicitly stated that: “Pre-trial detention can be ordered only when other coercive measures or disqualification, even if applied cumulatively, are inadequate”. As a result of the reform, it is now possible to use different measures jointly, offering the court a wider range of operational choices, to be calibrated on the specific case: it is for instance now possible to combine a prohibition of residence with reporting to the police. This innovation responds precisely to the need of permitting the imposition of the least afflictive measure among those that, in the specific case, meet the precautionary requirements.

Additionally article 275 c.c.p. has been amended to include the following provision: “While ordering pre-trial detention the judge must state the specific reasons why it considers unsuitable, in this case, house arrest with the control procedures laid down by Art. 275 bis c.c.p., paragraph 1[Electronic monitoring]”.

House arrest, assisted by electronic control, has now the role of a real alternative to prison, and on this measure the judge now has to provide a concrete and specific reasoning before coming to the conclusion that it is unsuitable for the precautionary requirements of the case⁸⁷.

⁸⁴ *Ambruszkiewicz v Poland*, App 38797/03, 4 May 2006, para 31.

⁸⁵ *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.

⁸⁶ *Ibid*, para 79.

⁸⁷ So far the use of electronic tagging has been very limited. Only around 2000 bracelets are available in the country at the moment.

In case of violation of the measure (automatic replacement with a harsher was abolished. Now the judge has to assess the entity of the violation, and when it is considered to be of mild entity the measure can be kept in place, eventually applying jointly another measure: this is the case of a real abolition of automatic mechanism of aggravation of the measure that in the past was the result of any type of violation.

7.2. Alternative to detention in practice: the results of our research

From our interviews with the five judges emerges that 60% of them always use prison as measure of last resort, preferring house arrest and reporting to the police.

Two of the three prosecutors interviewed, while stating that they implement the principle of prison as a measure of last resort, also said that they have no confidence in alternative measures.

From the analysis of our 43 case files it emerged that the prosecutor asked for an alternative to detention only in 15 occasions while on 28 occasions requested the application of the pre-trial detention and in no cases asked for the defendant to be released without conditions.

The judge applied pre-trial detention in 20 cases (a bit less than 50%), and alternatives to detention in 23 cases.

In 19 cases (83% of the alternatives to detention), the judge applied house arrest, in two cases the obligation to report to the police, in one case the prohibition of residence and in one case admission to a psychiatric facility.

It is quite clear that in the first hearing on the application of pre-trial measures judges tend to accept more often prosecutors' submissions than in later stages. An analysis of the case files shows that in nearly three out of four cases the precautionary measure is later mitigated. In many cases this is due simply to the fact that the defendant provides proof of suitable housing and challenges the serious *indicia* of guilt and the precautionary needs only after the first hearing on the application of the precautionary measure.

It is not by chance that almost 50% of lawyers responded to the questionnaire that in their opinion judges do not trust alternative measures to be effective, so they, especially in the first hearing, rarely consider them before delivering a detention order. This happens also because of the lack of a provision on the presence of professional services at this stage, that could assess the defendant's suitability to access an alternative measure to detention.

Consistently, in the lawyers' survey, 20 lawyers (57% of lawyers surveyed) said that usually judges do not avail themselves of professional services that make assessments of the defendant's suitability to concede an alternative measure to detention. Lawyers participating in the survey believe judges ground their decisions on the available information collected by the police during the investigation and on the most relevant features of the defendant's personality, but often they lean on prejudice and procedure. Finally, 71% of the lawyers responded in the survey that they think that legislation provides for many alternatives but they remain underused because judges often prefer to draw upon detention and the judges tend to underuse alternatives for the above-mentioned reasons.

Lawyers think they really play an important role during hearings, as their participation is effective. But in their opinion judges tend to underuse alternatives.

Moving to the choice of the measure, according to the prevailing opinion of lawyers in the survey the measure most used are house arrest and reporting to the police.

An examination of the case files and hearings revealed the following:

Hearing monitoring: In 14 of the 19 hearings defence practitioners requested that no conditions were applied to their clients: it was granted by the judge in four, in the remaining 10 the hearing ended with an order of conditional release and two with pre-trial detention;

Only one of the lawyers present at the observed hearing was a legal aid lawyer: unconditional release was requested but the judge decided for house arrest.

Six lawyers requested conditional release but five hearings ended up with a pre-trial detention order, while in one case the decision was more favourable as the judge ordered unconditional release.

Case files review → In 17 cases the lawyer requested no condition: 11 judges ordered a pre-trial measure different from detention, in 8 ordered detention;

In 21 cases the defence requested conditional release: in 12 judge's decision was in accordance with the request, in the nine judge ordered pre-trial detention instead;

None of the lawyers working in the case files analysed was a legal aid lawyer.

7.3 Conclusion and recommendations Our research shows that in 20 of the 43 case files examined judges applied pre-trial detention at the first hearing, and in two out of three cases the measure is later mitigated.

Alternatives to detention are underused at the first hearing due to prosecutors' lack of confidence in them, because judges can rely only on the police to get information about the possibility of implementing a measure other than pre-trial detention, and because of the underuse of electronic monitoring.

Law 47/2015 can actually reverse this situation and implement the principle of last resort because it gives the Judge the possibility of using different measures jointly, it forces the Judge to give a specific reasoning when applying pre-trial detention instead of house arrest with electronic monitoring, and because it repealed the automatic replacement *in peius* of the measures in the event of infringement of the obligations imposed.

We recommend therefore the full implementation of law 47/2015 and an effective use of electronic tagging to reduce the use of pre-trial detention.

However, Law 47/2015 implementation is a necessary condition for change, but not a sufficient one because procedural laws have no influence on social issues (read: lack of suitable housing for the accused) and the cultural attitudes of the prosecution (66% of prosecutors interviewed stated they do not trust alternatives) that are the reason for the excessive use of pre-trial detention, especially against vulnerable groups.

Emblematic is a case described in this research, where for a small theft in a supermarket, the defendant, a non-EU citizen, during the first hearing was ordered to regularly report to the police station as a milder alternative to pre-trial detention. As a result of repeated violations, the judge ordered that the measure be toughened and be transformed into house arrest, as long as the defendant's residence was suitable for this purpose. The police who carried out the order considered the accommodation unsuitable (a squat where in the meantime another person had occupied the space previously occupied by the defendant) and the defendant was therefore taken to prison.

As noted earlier, our research showed that alternatives to detention are underused heavily for non-EU citizens. In particular, in the case files analysed, 13 accused were foreign nationals, four of which irregular migrants, and two had no fixed residence. For these suspects pre-trial detention was requested in 11 cases (about 85%), and the prosecutors justified the request arguing that the accused was a foreign national in six cases. The judge decided in favour of detention in nine cases (69%) and for alternatives in two cases. The final outcomes in these cases were: eight convictions, three acquittals and two cases dropped.

Moreover, the quality of the work of the defence does not affect the choice of the measure when the judge considers that house arrest could meet the precautionary needs but the defendant has no suitable accommodation. Of course, the

possibility of using several measures jointly and the use of the electronic monitoring are opportunities that the defence can use also for the vulnerable groups, but the lack of suitable housing remains the main obstacle for equality of the accused at pre-trial stage. If there are no investments to make suitable accommodation available for house arrest the recent reform will hardly affect destitute people accused of offending and a reform of investments for housing is recommended.

Also because of the reasons mentioned above these defendants can end up serving almost all their sentence under a precautionary measure, which is a problem in itself, especially for the prison conditions, that are usually worse for those that are not serving a final sentence. Prisons, or wings of prisons, for pre-trial detention are usually more crowded and poorly equipped than those for prisoners serving a final sentence. Besides, rehabilitative programmes and measures are available only to prisoners that are serving a final sentence, on the assumption that until they are not proven guilty they do not need rehabilitation of any sort (Art. 13 of the penitentiary law). This means that, in most of the cases, suspects end up doing nothing during imprisonment. In this respect, the presumption of innocence and thus late final conviction works against the interests of the defendant.

VIII. REVIEW OF PRE-TRIAL DETENTION

The possibility of requesting the revocation or modification of the precautionary measure in place, or to appeal before a different judge on the application of a precautionary measure, are essential rights of the defendant.

The ECtHR has provided guidance on lawful pre-trial detention reviews. If these standards are complied with, the pre-trial detention order justifies the violation of the suspect's rights:

- (i) Presumption of release: During the pre-trial period there is a presumption in favour of release,⁸⁸ 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”,⁸⁹
- (ii) Regular review: pre-trial detention must be subject to regular review,⁹⁰ and all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate it;⁹¹
- (iii) Proceeding of review hearing: The review of detention must take the form of an adversarial oral hearing with equality of arms of the parties ensured.⁹² This might require access to the case files⁹³ (even before the deadline for transposing the Directive on Access to Information in criminal proceedings, 2 June 2014);
- (iv) Reasoning: The decision on detention must be taken speedily and reasons must be given for the need for continued detention.⁹⁴ Previous decisions should not simply be reproduced.⁹⁵

This section will present our findings concerning specific features of the Italian legislation on revocation, modification and appeal of precautionary measures, our research results about this issue, highlighting the most critical aspects and providing recommendations to address them.

⁸⁸ *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102473>

⁸⁹ *McKay v UK*, App 543/03, 3 October 2006, para 42, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-77177>.

⁹⁰ *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57606>.

⁹¹ *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61414>.

⁹² *Assenov v Bulgaria*, App 24760/94, 28 October 1998, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=002-6773>.

⁹³ *Wloch v Poland*, App 27785/95, 19 October 2000, para 127, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58893>.

⁹⁴ *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>

⁹⁵ *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, available at: Law 47/2015 introduced some amendments that are going in the right direction in the implementation of the principle of special diligence. However, for the appeal, as well as for the *de plano* procedures and for the decisions on applications for revocation or modification of the measure presented before the prosecuting judge, questions remain about the failure to include firm deadlines, and, more generally, other guarantees (effective adversarial proceedings, public hearing, the participation of the accused, etc) for the full exercise of the right to defence.

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57938>.

8.1. Specific features of the Italian legislation on revocation, modification and appeal of precautionary measures.

Italian law does not require a review of the measure *ex officio* at regular intervals, apart when intermediate and final time limits are about to expire and the judge has to intervene to revoke the measure (see Section 4.3).

After the first application of the precautionary measure the accused can ask at any time for the revocation or modification of the measure in place (art. 299 c.c.p.), or within 10 days for the review of the measure, (so called “*riesame*”, art. 309 c.c.p.). The request for revocation or modification of the precautionary measure may come *ex officio* from the judge or can be requested by the parties (defendant and his/her counsel; prosecutor). This request is submitted to the proceeding court (during a hearing or filing an application at the court) and is decided without a hearing. So, once submitted the application (oral or written) the judge gives a reasoned order⁹⁶.

This decision of the prosecuting judge can be appealed within 10 days (so called “*appello*”, art. 310 c.c.p.). Competent to decide on the appeal to the decision of the prosecuting judge is the Court of Review.

The review (“*riesame*”) is a remedy to the first order applying the precautionary measure. The defendant, or his/her lawyer, may lodge a request for review within ten days of being notified of the order of the measure. The court, in a panel, within ten days, if it does not declare the inadmissibility of the request, cancel, reform or confirm the order.

⁹⁶ Art. 299 of the Code of Criminal Procedure (Withdrawal and replacement of measures) provides that:

"1. Disqualifications and coercive measures are immediately revoked when, also due to supervening facts, conditions required by Art. 273, or by the provisions relating to individual measures or to the precautionary needs under Article 274, are no longer in place.

2. With the sole exceptions listed in art. 275, paragraph 3, when the need for precautionary measures diminishes or if the measures applied are no longer proportional to the gravity of the fact or the sanction that can be imposed, the court will substitute the measure with a less severe one or will decide for its prosecution with less severe prescriptions.

2-bis. The decisions of paragraphs 1 and 2 for the measures provided for in Art. 282-bis, 282-ter, 283, 284, 285 and 286, applied in proceedings relating to crimes committed with violence, must be reported immediately by the police to social services, to the victim's lawyer or, failing that, to the victim.

3. The prosecutor and the accused apply for the revocation or replacement of the measures to the judge, who decides within five days of the filing of the request. The request for withdrawal or replacement of the measures provided for in Art. 282-bis, 282-ter, 283, 284, 285 and 286, applied in proceedings referred to in paragraph 2-bis of this Article, which has not been proposed during the first questioning, to be admissible must be simultaneously notified by the requesting party to the defender of the victim or, failing that, to the victim, unless the victim has failed to declare or notify its address. The defender and the victim may, in the two days following the notification, submit statements *ex Art. 121*. On expiry of the said period the judge proceeds. The judge will also proceed *ex officio* when questioning the person under pre-trial detention or when required to extend the time limit for the preliminary investigations or of the assumption of evidence or while proceeding to a preliminary hearing or during trial.

3-bis. The judge, before withdrawing or replacing the measures, *ex officio* or at the request of the accused, has to hear the prosecutor. If the next two days the prosecutor does not express his opinion, the court proceeds.

3-ter. The judge, once he/she has assessed the evidence produced for the withdrawal or replacement of the measures, before deciding, can question the defendant. If the application for revocation or replacement is based on new or different facts from those already assessed, the court must question the accused who has requested it.

4. Without prejudice to the provisions of Art. 276, when precautionary needs are aggravated the court, at the request of the prosecutor, replaces the measure with a stricter one, or provides for its application in a stricter way, or applies in addition a disqualification or another coercive measure.

4-bis. After the end of the preliminary investigation, whether the accused requests the withdrawal of the measure or its replacement with a less severe one, or its application in a less burdensome manner, the judge, if the request is not presented during a hearing, shall inform the prosecutor, who, in the next two days, makes his/her demands. The request for withdrawal or replacement of the measures provided for in Art. 282-bis, 282-ter, 283, 284, 285 and 286, applied in proceedings referred to in paragraph 2-bis of this Article, and to be admissible must be simultaneously notified by the applicant to the defender of the victim or, failing that, to the victim, unless it has failed to declare or notify its address.

4-ter. In every stage of the process, when he/she is not able to decide with the information available the judge, *ex officio* and without formalities, can inquire about the state of health or other conditions or personal qualities of the accused person. The investigations are carried out as soon as possible, and in any case within fifteen days from the date on which the request is received by the court. If the request for revocation or replacement of remand in custody is based on health conditions laid down in Article 275, paragraph 4-bis, or if these health conditions are reported by the prison health service, or are otherwise made known to the judge, if he does not grant the request relying on the available information, the judge orders immediately, and no later than the period specified in paragraph 3, the required health examinations and appoints an expert in accordance with Art. 220 et seq. who must take into account the opinion of the prison doctor and report within five days of the examination, or, in case of urgency, within two days. During the period between the decision ordering the examinations and the deadline for the examinations themselves, the time limit set in paragraph 3 is suspended.

4-quater. Provisions of Article 286-bis, paragraph 3, also applies”.

The appeal (“*appello*”) is the way to challenge the decision of the court proceeding relating to an instance of revocation or amendment of precautionary measure already in place⁹⁷.

The hearings of “*riesame*” and “*appello*” take place in front of the Court of Review in a closed door hearing and, only in the case of “*appello*”, without all the guarantees provided by art. 6 of the ECHR.

This choice of the Italian Parliament might be in contrast with Article. 6.1 of the ECHR. These hearings (“*riesame*” and “*appello*”) take place before the affirmation of criminal responsibility and immediately after the alleged commission of the offence. A moment therefore when, also in light of the principle of presumption of innocence, the suspect must be able to benefit from criminal guarantees as much as possible, and therefore the defendant should have the right for the hearing to be held in public, in compliance with Article. 6.1 ECHR.

On this point there are no decisions of the Constitutional Court or of the European Court yet, but in similar cases both courts (see Constitutional Court judgment no. 109/2015) stated that the defendant may require a the public hearing⁹⁸.

Ultimately, even for the hearings before the Court of Review it shall be deemed possible, despite the silence of the legislation, to ask for the hearing to be public.

Additionally, at the hearing before the Court of Review the presence of the defence is mandatory but not that of the defendant. The point has been partially changed by law 47/2015 and now the person who proposed “*riesame*” can ask to participate in the hearing even if detained in another district.

The new law also greatly expanded the control of the Court of Review on the reasoning of the decisions (art. 309 c.c.p., par. 9). In particular the court can repeal the order that reasons the application of the precautionary measure *per relationem* (Art. 292, c.c.p. paragraph 2, lett. C, Cbis and 2ter), only referring to the file of the prosecutor, or that do not takes into due consideration the arguments of the defence and all the elements in favour of the defendant.

It was also provided by the same amendment that the defendant can ask for a postponement of the hearing to carry out his/her investigations, to be able to fully exercise his/her right to defence.

As regards the principle of special diligence, the decision of the Court of Review must be made within 10 days from the receipt of the files, or the measure will become ineffective. Law 47/2015 introduced a further obligation for the Review Court, that is to file the reasoning within a period (between 30 and 45 days), under penalty of loss of effectiveness of the measure. To avoid violations of this rules both in this case, and in all other situations of loss of effectiveness of the measures, the measure cannot be adopted again unless in case of motivated exceptional precautionary requirements.

As a consequence, even if it has to be recognised that law 47/2015 introduced new and important guarantees for the defendant, the possibility for the defendant to ask for a public hearing with all guarantees provided by art. 6 of the ECHR in the review procedure should be also introduced.

⁹⁷ For an in depth analysis of the means of appeal and, in particular, of the difference between review and appeal, see <http://www.diritto.it/docs/35503-la-differenza-tra-riesame-e-appello>

⁹⁸ Has a particular importance, in this respect, the decision *Lorenzetti v. Italy* (10/04/2012), with which the Strasbourg Court considered “essential” for the compliance with the Article. 6, paragraph 1, of the Convention, that the individuals involved in a procedure for compensation from unjust detention – a procedure that, according to Italian procedural law, shall be held in a closed door hearing – are offered at least the possibility to request a public hearing before the court of appeal (the responsible court). There are no exceptional circumstances which justify, in relation to this procedure, a general exception to the principle of publicity. Also with regard to the procedure for application of preventive measures (*Bocellari and Rizza v. Italy* (13/11/2007); *Paleari v. Italy* (26/07/2011), *Capitani and Campanella vs. Italy* (17/05/2011), *Leone v. Italy* (2/02/2010), *Bongiorno and others v. Italy* (5/01/2010), *Perre and others vs. Italy* (8/07/2008)), the European Court has come to a similar conclusion, recalling its settled case-law according to which the publicity of judicial proceedings protects the individual against secretive justice, a justice beyond public control, and is also a mean to maintain confidence in the courts, thus helping to achieve fair trial, the goal of Art. 6, paragraph 1, of the Convention.

8.2. Events modifying the precautionary measure in practice: our research results

Having clarified that in the Italian language “review” is a broad notion, regarding any procedure on the modification of the precautionary measure (whether arising from a request of revocation or modification of the measure or from an appeal before the Court of Review), now we can look at our case files. In most of our cases, the application was addressed to the court proceeding (Art. 299 c.c.p.). Appeals (Art. 309 and 310 c.c.p.) before the Court of Review are rare.

The first fact that emerges is that in 84% of the cases analysed a modification of the precautionary measure was required, at least once, by the defendant or his/her defender.

Therefore, in only seven cases out of the 43 analysed (16%) the precautionary measures were not challenged at all.

The second important finding is that in 72% of cases analysed⁹⁹ in which a review was requested, the judge allowed an alternative measure to detention after the review. That happened mostly because the defence lawyer that requested the review was able to provide more evidence, such as proof of a fixed residence and a steady job. We think the judge during the review had more chance to examine the defendant’s position and to perceive the lack of the custodial needs.

In all cases in which the defence provided new evidence during the review (broad notion) it has been granted an alternative measure to pre-trial detention (usually house arrest or reporting to the police).

This situation is disturbing because it reveals that a large number of defendants are subject, albeit for a limited period of time, to pre-trial detention only because the defence, in the short time available between arrest and validation hearing, has not enough time to prove that the precautionary needs can be met with measures less restrictive than pre-trial detention.

It is to be noted that, even when the prosecutor provides further evidence to support the need to maintain the measure previously applied, the ability of the defence to challenge the prosecution’s case by providing new evidence lead in over 90% of the cases to the mitigation of the measure. More specifically, in 11 cases analysed, the defence challenged the new evidence provided by the prosecution during the review: in 10 cases an alternative measure was granted, in one case even unconditional release was granted.

Looking at the opinions of the lawyers participating in the survey, more than 90% of respondents believe that there are no obstacles in the submission of applications aimed at modifying the measure or at appealing the decision to apply the measure. Asked whether or not the judge takes into account new facts in respect of the serious evidences of guilt or of the precautionary needs, the responses are divided: 50% believe that this happens often, the other 50% on the contrary thinks it happens rarely.

75% of lawyers stressed in the survey the fact that there is no periodic automatic review of the measure and that an application is always needed. Not surprisingly, the case files show that the measures modifying events have always been solicited by the defence, although in theory the judge could proceed *ex officio*. 42% of respondents to the survey believe that the lack of periodic automatic review of the requirements underlying the measure seriously damages the defendant.

In the five interviews with judges, in reply to the question of what are the main considerations underlying the decision on the review of pre-trial detention, two of them stated that they mostly consider the persistence of serious indicia of guilt and of the precautionary requirements, one that he mostly considers compliance with the formal requirements for

⁹⁹ This data refers to the outcome of every modification event of the precautionary measure ordered for each case file. For this reason it does not take account of the rejections in *medio tempore* of the judicial authority. In various cases, the review was rejected when the first request was presented, and accepted only at second or third request. The modification or the revocation of the measure at first request occurred only in 15 cases (35%). When the judge modified the measure at first request, then he tended to further mitigate the measure at the following requests.

the adoption of the contested measure, one whether there are new facts and one mostly considers the documentation on work and family and the behaviour of the defendant or the time elapsed.

An analysis of the files shows that the decisions of the judges to motivate the gradation of the measure are mainly based on the new evidence provided by the defence (see above), secondly the behaviour in respect of the trial and on the compliance with the measures already in place and, only rarely, on the time elapsed or other factors.

8.3. The decisions of the ECtHR and prospects of modifying events of pre-trial detention after entry into force of Law 47/2015

With regard to the implementation of the principle of special diligence, as already said above, the decision of the Court of Review (Art. 309 c.c.p.) must be made within 10 days from the receipt of the acts, under penalty of loss of effectiveness of the measure. On the contrary, for decisions on instances of revocation and modification of the measure presented before the proceeding judge, and for appeals to those decisions in front of the Court of Review, there are no deadlines that have as a consequence the loss of effectiveness of the measure.

It is no coincidence that Italy, as already stated, has been repeatedly condemned by the ECtHR for failure to comply with the principle of special diligence on the procedures to change or appeal the precautionary measures.

In *Picaro v. Italy* (9/6/2005) it took five months and 20 days for the Supreme Court to decide on the applicant's appeal against house arrest. In its decision *Marturana v. Italy* (4/3/2008), the Court found a violation of Article. 5.4 in relation to the excessive delay with which the court decided on the lawfulness of pre-trial detention in this case¹⁰⁰.

In its decision *Rizzotto v. Italy* (24.4.2008), the Court upheld the applicant's complaints on the violation of art. 5.4 for the excessive length of the procedure for the application of pre-trial detention (nearly 4 months to be notified with the decision on his request for review of his precautionary measure).

In its decision *Luberti v. Italy* the Court condemned Italy for violation of Article. 5.4 regarding the non-timely decision on the release of an inmate. In fact, the court (*Tribunale di Sorveglianza di Roma*), one year and a half after the application, denied its jurisdiction without even discussing the case.

Law 47/2015 introduced the obligation for the Court of Review to file the grounds within a period (between 30 and 45 days), under penalty of loss of effectiveness of the measure. That amendment seems to address the need for the Italian legislation to meet the requirements of art. 5 of the ECHR and to avoid further condemnations for violation of the principle of special diligence.

Law 47/2015 definitely introduced some amendments that are going in the right direction in the implementation of the principle of special diligence. However, for the appeal, as well as for the *de plano* procedures and for the decisions on applications for revocation or modification of the measure presented before the prosecuting judge, questions remain about the failure to include firm deadlines, and, more generally, other guarantees (effective contradictory, public hearing, the participation of the accused, etc) for the full exercise of the right to defence.

8.4 Conclusion and recommendations

As we said in paragraph 8.1, even if it has to be recognised that law 47/2015 introduced new and important guarantees for the defendant, the possibility for the defendant to ask for a public hearing with all guarantees provided by art. 6 of the ECHR in the appeal procedure (“*riesame*” and “*appello*”) should be also introduced.

¹⁰⁰ To the same effect, see also judgment *Rapacciuolo vs. Italy* (of 19/05/2005) and judgment *Naranjo Hurtado vs. Italy* (3/07/2007).

Another issue stressed by the research is the fact that Italian law does not require a review at regular intervals of the measure, apart from when intermediate and final time limits are about to expire and the judge has to intervene to revoke the measure. 75% of lawyers interviewed stressed in the survey the fact that there is no periodic automatic review of the measure and that an application is always needed. Not surprisingly, the case files show that the measures modifying events have always been solicited by the defence, although in theory the judge could proceed *ex officio*.

We recommend therefore to introduce by law an obligation of periodic review by the court proceeding, to assess the actuality of the serious *indicia* of guilt and of the precautionary requirements.

The analysis of the case files also showed how in nearly three out of four cases the precautionary measure applied at the first hearing was later mitigated. In many cases this is due simply to the fact that the defendant provided proof of suitable housing and/or challenged the serious *indicia* of guilt and the precautionary requirements only after the first hearing. In all cases in which the defence provided new evidence during the review it was granted an alternative measure to pre-trial detention.

This situation is disturbing because it reveals that a large number of defendants are subject, albeit for a limited period of time, to pre-trial detention only because the defence, in the short time available between arrest and validation hearing, has not enough time to prove that the precautionary needs can be met with measures less restrictive than pre-trial detention.

It is worth repeating here that the improvement in the guarantees of the first hearing (see 5.4, Conclusion and recommendations) could reduce these dysfunctions. Notification to the lawyer of the prosecutor case file together with the date of the first hearing (via fax or email) and the presence, or the involvement, of social services in the proceedings at the first could reduce the recourse to pre-trial detention.

Finally, for the appeal, as well as for the decisions on applications for revocation or modification of the measure presented before the prosecuting judge, questions remain about the failure to include firm deadlines, and, more generally, other guarantees (effective adversarial proceedings, public hearing, the participation of the accused, etc) for a full exercise of the right to defence. We recommend, as a consequence, a new amendment introducing for these proceedings stronger guarantees, similar to those governing the procedure for the “*riesame*”. In particular, it is necessary to introduce firm deadlines, under penalty of loss of effectiveness of the measure, for the decision in the appeal against the decisions on revocation or modification of the measure before the proceeding judge.

IX. OUTCOMES

This section will present our data and conclusions regarding the outcome of the proceedings at the trial stage.

As regard the outcome of the proceedings, it is important to clarify here that time spent in pre-trial detention (and house arrest) is subtracted from the final sentence.

9.1. The lack of the *non-custodial sentence* in the Italian system and law 67/2014.

Before analyzing the findings of our research about the outcomes of the cases we dealt with, it is essential to mention that in our system, after a conviction for a crime, the only applicable punishment is the custodial sentence in prison. *Non-custodial sentences* as main sanction have a significant role in our system only for misdemeanours, but in these cases precautionary measures cannot be applied.. For crimes only after the final sentence the person concerned can request to serve his/her sentence under a non custodial measure¹⁰¹.

The decree law 78/2013 amended article 656 of the Criminal Procedure Code, concerning the execution of prison sentences. In particular, the 5th clause of the article provides that in case of a prison term of up to 3 years, or up to 6 years pursuant to articles 90 and 94 of the Law on Drugs, or when the person is a drug addict, the prosecutor issues a suspended execution order, in order to allow the convicted and his/her defence lawyer to propose to the Surveillance Court a request to apply an alternative measure. This has to be done within 30 days of the date of the sentence. This procedure was put in place to make it possible for the person who has been sentenced to a short term to gain direct access to alternative measures to detention without entering prison. This mechanism was introduced by the Law 165/2013 to promote the concession *ab initio* of alternatives to detention. The suspension of the execution order is mandatory for the prosecutor. The rule is addressed to the people who were free before the conviction order and also to those under house arrest. With this last provision parliament aimed to allow a convicted person who was already under house arrest to serve out his/her punishment in house detention. Moreover, according to the 10th clause of the same article, people under house arrest do not have to forward any request along these lines. The prosecutor must send all the documents to the Surveillance Court, which will decide whether to apply an alternative measure or not.

The Parliament has recently approved a law (67/2014 which entered into force on 17.05.2014)¹⁰² that delegated the Government to introduce a provision according to which house detention should be the main punishment applied automatically after a conviction sentence for minor offences or for crimes with a maximum penalty of 3 years. If the sentence is from 3 to 5 years, the judge is entitled to decide, basing his/her verdict on the seriousness of the offence and on the risk of reoffending. Moreover, the new law should also provide house detention to be either continuous or applied for some days a week or in certain hours, and electronic monitoring could also be ordered.

In the above mentioned delegated law, for crimes currently punished with arrest or detention up to five years, the judge can also impose a community service order. It is supposed to last at least 10 days and for a maximum of eight hours per day. It will not be paid and will be of benefit to the community.

¹⁰¹ https://www.giustizia.it/giustizia/it/mg_3_8_19.wp?sessionId=DF37C64D14FB1881F9ABE99676B857E8.ajpAL01

¹⁰² <http://www.gazzettaufficiale.it/eli/id/2014/05/02/14G00070/sg>

The Government, however, has not exercised this mandate yet, but it exercised two equally important mandates: the above-mentioned law 67/2014 concerning the non-punishability of particularly tenuous offences¹⁰³ and the institution of probation¹⁰⁴.

9.2. The Outcomes: the findings of our research

The analysis of the 43 case files showed that 14% of the accused (six) were acquitted. In another two cases (concerning extradition and European arrest warrant) the transfer did not take place, but a custodial sentence was applied in Italy. In all the other 35 cases, equal to 81% of the sample, a conviction sentence was issued.

Only in two cases (6%) reviewed did the duration of pre-trial detention cover the whole conviction sentence while in all the remaining cases pre-trial detention was shorter than the sentence ordered and the duration of the sentence was reduced for pre-trial detention (or house arrest)¹⁰⁵.

In 16% of the examined cases, the concerned person spent more than a half of the imposed sentence in pre-trial detention or in house arrest¹⁰⁶.

In the remaining cases pre-trial detention and house arrest together covered less than a half than the imposed sentence. As mentioned in the previous chapter, in 84% of case files a review of the pre-trial detention was requested at least once, and in 72% an alternative measure was granted¹⁰⁷.

Examining the demographic information of the accused in pre-trial detention in relation to the trial outcomes, as already observed, a strong disparity between European and non-EU citizens clearly emerges.

To understand this disparity it is enough to notice that 50% of the acquittals encountered concerned non-EU citizens who suffered pre-trial detention, and that in our case files foreign defendants represent only 30% of the sample considered. In the case files analysed 13 accused were foreign nationals, 11 non EU-citizens four of whom were illegal migrants, and two had no fixed residence. For these suspects pre-trial detention was requested in 11 cases (about 85%), and the prosecutors justified the request arguing that the accused was a foreign national in six cases. The judge decided for detention in nine cases (69%) and for alternatives in two cases. The final outcomes in these cases were: eight convictions, three acquittals and two cases dropped.

Let us examine in detail the three cases of acquittal and the two dropped cases.

- Mr. AHN, an Algerian citizen legally residing in Italy, was arrested on charges of extortion on 13.08.2008. The charge was based on what was reported by the victim and the possession of money on a postal account considered to be incompatible with his earnings (as house worker and illegal car parker). Since the validation of the arrest on 14.8.2008, with application of pre-trial detention, AHN professed his innocence, giving his version of the facts during the questioning. A.H.N., who was detained in Regina Coeli prison in Rome asked in September and November 2008 for

¹⁰³ http://www.questionegiustizia.it/articolo/la-non-punibilita-per-particolare-tenuita-del-fatto_12-06-2015.php

¹⁰⁴ http://www.questionegiustizia.it/articolo/la-messa-alla-prova-per-gli-adulti_29-04-2014.php

¹⁰⁵ In the Italian system the time served in house arrest is considered equal to the time served in pre-trial detention.

¹⁰⁶ Among our case files only in 9 cases out of 43 was specified how long the person concerned spent in pre-trial detention and how long in house arrest. In 7 cases out of these 9 it resulted that the accused spent most of the time in house arrest.

¹⁰⁷ This data refers to the outcome of every modification event of the precautionary measure ordered for each case file. For this reason it does not take into account the rejections in *medio tempore* of the judicial authority. In various cases, the review was rejected when the first request was presented, and accepted only at second or third request. The modification or the revocation of the measure at first request occurred only in 15 cases (35%). When the judge modified the measure at first request, then he tended to further mitigate the measure at the following requests.

pre-trial detention to be revoked or replaced with other measures, but both requests were rejected by the proceeding Judge. On 5.2.2009 A.H.N. was sentenced to five years of imprisonment and a fine of € 516.00 by the Court of Rome for the offence under Article. 629 of the c.c.p.. The defence appealed and the Court of Appeal on 11.2.2009 absolved Mr. A.H.N. with the full wording, “because the fact does not exist”, ordering his immediate release. This reversal of the first decision is clarified in the grounds of the decision: the Court considers on the one hand that the accusations were not supported by evidence. The prosecution case was based solely on the accusation of the victims, contained in a verbal complaint they lodged but who never appeared in court. On the other hand, the defence argument was corroborated by evidence. For 445 days of unjust imprisonment, Mr. A.H.N. received compensation of € 70,000.00.

- Mr. K. was arrested on 9.5.2013 for counterfeiting banknotes and on 11.5.2013 the arrest was validated with the application of pre-trial detention. In the beginning he had an appointed lawyer, who suggested to the defendant to forego the translation of the essential documents of the trial despite the fact that the accused did not understand Italian and claimed to be innocent.

The lawyer of choice, however, instructed on 21.5.2013, was able to obtain a mitigation of the measure. In the beginning the banknotes were not even examined to verify their authenticity, but, after a defence request, it was ascertained that they were genuine (6.6.2013). Nonetheless, the judge ordered house arrest instead of unconditional release. Later (12.06.2013) the measure was further mitigated and transformed into an obligation to report to the police. This last measure was cancelled only on 20.7.2013, after a specific defence request. The accused was then acquitted with the full wording and is about to request a compensation for the unlawful detention of 28 days in pre-trial detention and 6 days in house arrest.

- Mr. N.M.A. was arrested 14.7.2009. On 16.7.09 his arrest was validated and pre-trial detention was applied. The defence lawyer requested a review of the measure on 31.7.2009. The Court in charge revoked the pre-trial detention order. It is noteworthy that on 27.7.2009 the lawyer also made a request before the proceeding judge to mitigate the measure and allow house arrest. The judge rejected the request. In the end, the accused was acquitted and is about to request compensation for unlawful detention for the 17 days spent in pre-trial detention.

- The two cases dropped concerned a Polish citizen subject first to one extradition and later to one European arrest warrant, issued by the Polish authorities in 2010 and in 2014, respectively, in order to execute the punishment inflicted to the man.

In the first case, the accused was arrested on 2.7.2010, after an extradition request, to serve a residual punishment of 334 days followed to a conviction for drug related crimes. On 6.7.2010 the Court of Appeal in Rome validated the temporary arrest while ordering pre-trial detention. On 18.8.2010 the conditional release (house arrest) was ordered after a defence request. Finally, on 1.6.2011 he was released because he served the remaining 334 days in Italy. The Polish authorities never delivered the necessary documents to the Italian authorities.

In the second case, the accused was arrested on 26.3.2014 after a European arrest warrant for a residual punishment of 2 years 2 months and 10 days followed a conviction for drug related crimes. On 27.3.2014 the Court of Appeal in Rome validated the temporary arrest while ordering house arrest. On 7.4.2014, the measure was reviewed after a defence request and check-ins at the police station were ordered. On 22.5.2014 the Court of Appeal rejected the consignment request, ordering that the punishment be served out in Italy and revoked the ongoing measure. The punishment was not served in the end because a general pardon was approved by the Government.

X. CONCLUSIONS AND RECOMMENDATIONS

The results of this work indicate the need for further initiatives of the Italian Authorities (Parliament, Ministry of Justice, Ministry of the Interior, Local Authorities, Bar Association) on pre-trial detention, to strengthen the rights of defendants and to prevent further convictions of Italy for violation of art. 5 of the ECHR.

As regards the first hearing the research showed the inequality of the means available to the parties (lawyers have little time to prepare for the first pre-trial detention hearing and reasoning of decisions continue to appear formalistic and relying excessively on the evidence provided by the prosecutor) and the lack of instruments for the judge to overcome this inequality. We refer, in particular, to the absence of a legal provision requiring that, together with the notification of date of the hearing, the lawyer should also receive the prosecutor case file to have adequate time to prepare the defence.

As regards the procedure, it is also relevant the absence in court, at the first hearing for the application of the measure, of social services that could bridge the gap between the prosecution and the defence and support the judge in his/her decision. The presence of social services could prevent the detention of a vulnerable defendant that, with the support of these professionals, could access other alternatives to imprisonment from the first hearing.

We recommend the Ministry of Justice to:

- introduce notification of the prosecutor's case file together with the date of the hearing (via fax or email);
- provide for the presence, or the involvement, of social services in the proceedings.

On the substance of decision making and alternatives to pre-trial detention the research showed that the reasoning continues to appear formalistic and relies excessively on the existence of a criminal record to justify the risk of reoffending and the danger to public order. The recent reform introduced by Law 47/2015 has definitely strengthened the obligation to state reasons. A rigorous implementation of this new law could improve the quality of the reasoning of pre-trial detention orders.

On the other hand, looking at the demographic profile of the recipients of pre-trial detention orders, a strong disparity between EU and non-EU citizens clearly emerges. In these specific cases the role played by the defender is not enough to prevent the application of pre-trial detention also because of the late and very recent implementation of Directive 64/2010/EU.

Full implementation of Directive 64/2010/EU, in particular as regards the possibility of appointing an interpreter to allow the defence to better organise the defensive strategy, the set up of a register of interpreters, the legal training of experts and interpreters, and a specific training for lawyers and judges on the roadmap directives, are all necessary elements for addressing the above concerns.

More in general, specific training on the ECtHR case law is needed, in particular on art. 5, not only for lawyers, but also for judges and prosecutors.

Besides, our work showed that, in case of vulnerable defendants who lack social networks and suitable housing, the judge opts for pre-trial detention because he cannot apply house arrest. We therefore believe that the central state or local authorities should allocate funds for suspects and defendants who lack suitable housing.

Finally, our work showed that, to address the above concerns, full implementation of Law 47/2015 is paramount, in particular as regards the possibility of using different measures jointly to avoid pre-trial detention, and the obligation to give a specific reasoning when applying pre-trial detention instead of house arrest with electronic monitoring.

We recommend that the Ministry of Justice:

- implement rigorously law 47/2015;
- implement rigorously Directive 64/2010/EU;
- allocate funds for electronic monitoring.

We recommend that the Bar Association of Judges, lawyers, police authorities, experts and interpreters provide compulsory training on the ECtHR case law, with particular reference to that on Art. 5 ECHR and Stockholm roadmap.

We recommend that the central state and local authorities allocate funds for suspects and defendants who are not eligible for home arrest only because they lack the financial resources to afford suitable housing.

As regard the review, the research stressed the fact that Italian law does not require a review of the measure at regular intervals. Not surprisingly, the case files show that the measures modifying events have always been solicited by the defence, although in theory the judge could proceed *ex officio*.

Moreover, for the appeal (Art. 310 c.c.p.), as well as for the decisions on applications for revocation or modification of the measure presented before the prosecuting judge (Art. 299 c.c.p.), questions remain about the failure to include firm deadlines, and, more generally, other guarantees (effective contradictory, public hearing, the participation of the accused, etc) for a full exercise of the right to defence.

We recommend that Parliament:

- introduce an obligation of periodic review of the measure by the court proceeding, to assess the actuality of the serious indicia of guilt and of the precautionary requirements;
- introduce for the appeal (Art. 310 c.c.p.), as well as for the decisions on applications for revocation or modification of the measure presented before the prosecuting judge (Art. 299 c.c.p.), stronger guarantees, similar to those governing the procedure for the review under art. 309 c.c.p. In particular, for appeal (Art. 310 c.c.p.), it is necessary to introduce firm deadlines, under penalty of loss of effectiveness of the measure, for the decision.
- introduce the possibility for the defendant to ask for a public hearing, with all guarantees provided by art. 6 of the ECHR, in the procedure under Art. 309 and 310 c.c.p..

To assess the efficacy of all the measures introduced in the last years to reduce the recourse to pre-trial detention, and eventually of those suggested here, **we recommended that the Ministry of Justice** effectively implement Art. 15 of Law 47/2015, establishing the obligation for the Government to provide **reliable and comprehensive statistical data** on the application of the precautionary measures.