An introductory summary of the study:

"An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU"

JLS/D3/2007/01

Tilburg/Greifswald 2009,
Research Group Pre-trial Detention

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Chapter 1: Introduction

1.1 Starting point

Of all coercive measures before or during a criminal procedure, deprivation of liberty is the most far-reaching. This report focuses on pre-trial/remand detention as a measure to secure the presence of a suspect during investigation and trial, but also discusses police custody. Without the possibility to detain suspects or accused persons provisionally, in many cases, the State would not be able to perform its right and duty to effectively enforce criminal law; it exists in all European jurisdictions. At this stage, however, human rights violations are not unlikely to occur and pre-trial detention is often linked to problems of prison overcrowding. Pre-trial detention must thus be seen as situated in a field of tension between the individual right to liberty, the presumption of innocence, and the need for an effective criminal procedure that follows the rule of law. It is argued throughout Europe that pre-trial detention is ordered too often and too easily, and that it lasts too long; that, therefore, the number of remand prisoners is too high and prison conditions often poor. Further criticism refers to the fact that, in many countries, foreigners are particularly affected by this measure. At the same time, cross-border handling of pre-trial detention is linked to various important issues raised by the European Union in recent years, such as common minimum standards for procedural rights in criminal proceedings,[1] the handling of decisions rendered in *in absentia* proceedings[2] etc. Both aspects – the human rights aspect as well as the aspect of harmonisation – have motivated this comparative study on the law and legal reality of pre-trial detention in the Member States of the European Union.[3]

1.2 Reference frame – European human rights instruments and other European initiatives

Each comparative study has to look for a frame of reference. In this case, various instruments and initiatives of the Council of Europe, the European Parliament and the European Union were taken into account. The European Convention on Human Rights – incorporated into domestic law by all Member States of the European Union – serves as the basis of every human rights issue in Europe. With regard to pre-trial and remand detention, in particular Art. 5, 6 and 3 are relevant. Art. 5(1)(c) describes the reasons that are admissible for depriving a person of his liberty within a criminal procedure before conviction: "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". Art. 5(4) states that everyone who is deprived of his liberty by arrest or detention 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. According to established case-law of the European Court of Human Rights,[4] unacceptable detention conditions may also violate Art. 3 ECHR ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment"), even where there is no evidence of a positive intention of humiliating or debasing the detainee.

Extensive case-law of the European Court of Human Rights has further shaped the guarantees of Art. 5 ECHR over the years.[5] Most of the cases brought before the Court

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1 See footnote 22.

2 See footnote 21.

3 The Council and Commission Action Plan implementing the Hague Programme provided that an "analysis of minimum standards in pre-trial detention procedures and the routines for regular review of the grounds for detention" should be undertaken before the end of 2007. See: Council and Commission: Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198, 12.8.2005, p. 1. and p. 19 of the Action Plan (chapter 4.2. Judicial cooperation in criminal matters, under the heading "approximation", lit. k).

4 Peers vs. Greece, decision of 19 April 2001 (Application No. 28524/95); Kalashnikov vs. Russia, Chamber decision of 15 July 2002 (Application No. 47095/99); http://cmiskp.echr.coe.int.

5 A comprehensive analysis of the Court's case-law is made e.g. by Trechsel, Stefan (2006): *Human Rights in Criminal Proceedings*, Oxford et. al. This study highlights the main lines of the Court's argumentation as well as its shortcomings. The author was a member (and the later president) of the European Commission of Human Rights for almost 25 years.

deal with the length of remand detention. The requirement that the length of detention must be limited and the requirement of a speedy procedure in all detention cases are closely related to the presumption of innocence (Art. 6 (2) ECHR). The Court has, *inter alia*, stressed that this presumption also applies to the legal regime governing the rights of such persons and to the manner in which suspects should be treated by prison guards.[6] According to the convention in its interpretation by the Court, the continuation of remand detention may never be misused as an anticipation of a custodial sentence. Therefore, detention cases must be constantly reviewed; as soon as the continuing detention ceases to be reasonable, release must be ordered. In many decisions, the Court has tried to establish criteria of "reasonableness"; it has argued e. g. that the seriousness of the alleged offence alone, or the needs or requirements of the investigation in itself do not suffice.[7] Case-law has, in particular, established that a decision to remand someone in custody cannot be based solely on the past record of the suspected offender or on the fact that certain (even serious) offences have allegedly been committed.[8] The fact that remand in custody is primarily intended to secure the proper conduct of the criminal proceedings and to prevent further crimes means that it must not be used for punitive reasons.

Although many court decisions on the matter exist, a need for more concrete written standards was felt by the Member States of the Council of Europe, *inter alia*, because of the contradictory character of the procedure before the European Court of Human Rights (Art. 33, 34 ECHR) – its case-law can only partly form truly common minimum standards. The Council of Europe, therefore, developed Recommendation (2006) 13 on the "Use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse" to cast the core content of the established case-law into the form of one single legal instrument. As to this issue, the Committee of Ministers stresses "the importance attaching to the development of international norms regarding the circumstances in which the use of remand in custody is justified, the procedures whereby it is imposed or continued and the conditions in which persons remanded in custody are held, as well as of mechanisms for the effective implementation of such norms". In that regard, it clearly has a certain harmonisation (also for cross-border problems) in mind. In the preamble, the intention of the rules is described as to set strict limits on the use of remand in custody; encourage the use of alternative measures wherever possible; require judicial authority for the imposition and continued use of remand in custody and alternative measures; ensure that persons remanded in custody are held in conditions and subject to a regime appropriate to their legal status, which is based on the presumption of innocence; require the provision of suitable facilities and appropriate management for the holding of persons remanded in custody; and ensure the establishment of effective safeguards against possible breaches of the rules.

In addition to Recommendation 2006 (13), in particular with regard to the problem of overcrowding and the problems concerning the conditions of detention, several other Recommendations and the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[9] have to be mentioned. First, special provisions can be found in the Council of Europe Recommendation (2006) 2 on the "European Prison Rules".[10] Even if they do not form a binding legal instrument, their recognizance and influence throughout Europe is considerable. It should be taken as a positive impulse for harmonisation as well as for the development of common human rights standards that all 47 Member States of the Council of Europe agreed on this detailed and comprehensive instrument. Part 7 of this document has been especially designed for

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6 Iwanzcuk vs. Poland (Application No. 25196/94, decision of 15 November 2004).

7 Tomasi vs. France (Application No. 12850/87, decision of 27 August 1992); Letellier vs. France (Application No. 12369/86, decision of 26 June 1991); Mansur vs. Turkey (Application No. 16026/90, decision of 8 June 1995); Jecius vs. Lithuania (Application No. 34578/97, decision of 31 July 2000); for further references, see Trechsel, op. cit, p. 524 pp.

8 See e.g. Caballero vs. United Kingdom (Application No. 32819/96, decision of 8 February 2000).

9 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2006): The CPT standards - "Substantive" sections of the CPT's General Reports [CPT/Inf/E (2002) 1, Rev. 2006], p. 17"), p. 21. See: http://www.cpt.coe.int/en/docsstandards.htm.

10 For a comprehensive overview, see van Zyl Smit, Dirk/Snacken, Sonja (2009): *Principles of European Prison Law and Policy: Penology and Human Rights*. Oxford University Press. Oxford, New York.

remand prisoners and provides additional safeguards. It is emphasised in No. 95 that the rights of remand prisoners have not been restricted by a criminal sentence yet so that they must be treated accordingly. Secondly, encouragement for "the widest possible use to be made of alternatives to pre-trial detention" can be found in the Appendix to Recommendation No. R (99) 22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation (Art. 10). It should also be noted that Recommendation Rec(2003)20 of the Committee of Ministers to Member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Art. 17) provides that "custodial remand should never be used as a punishment or form of intimidation or as a substitute for child protection or mental health measures". And thirdly, the Standards set in the substantive sections of the Annual Reports of the CPT, developed on the basis of the observations and reports of all the country visits performed by the CPT, form very important guidelines for the enforcing (prison) authorities. They were used as a yardstick for good or, more often, bad practice in this study, too.

In several resolutions, the European Parliament also points out a number of prison-related problems. In its Resolution for 2001,[11] it called on Member States to stress the *ultima ratio* character of all forms of detention by restricting it as far as possible and by completely avoiding taking children into custody. Parliament also demanded rules covering pre-trial orders, in order to guarantee a common level of fundamental rights protection throughout the EU. In its Resolution for 2002,[12] the European Parliament noted that the situation of prisoners in the EU had even deteriorated in some Member States, mainly as a result of prison overcrowding. Parliament considered it essential, especially as the EU was preparing for enlargement, that the Member States, *inter alia*, take far more determined measures with a view to allow prisoners to have access to a lawyer from the outset, ensuring at least minimum standards for the health and living conditions of prisoners and, in particular, examine detention procedures in order to ensure that human rights are not violated, that detention periods are not unnecessarily long and that grounds for detention are reviewed regularly. The European Parliament called on the Council to adopt a Framework Decision on common standards governing procedural law, for example on the rules concerning pre-trial orders, with a view to guaranteeing a uniform level of protection of fundamental rights throughout the EU. A further initiative by the European Parliament, motivated by a report on prisoners' rights and prison conditions,[13] developed the idea of a so-called "Prison Charter", which can be traced back to the commitment of several MEPs. The intention was to create a binding instrument with detailed rules on, *inter alia*, the separation of categories of detained persons (juveniles, persons on remand, convicted criminals) and special protection for juveniles. The recommendation even proposed that, should the European Prison Charter not be completed in the near future, or should the outcome prove unsatisfactory, the European Union draw up a Charter of the rights of persons deprived of their liberty, which is binding on the Member States and which can be invoked before the Court of Justice. This idea, however, was not pursued any further. In 2005, the European Parliament again underlined that "minimum rights of prisoners in any Member State" should have priority, speaking of a judicial culture that should include both the "diversity of legal systems" and "a mechanism of mutual evaluation", which would be necessary "to increase mutual trust and hence boost the principle of mutual recognition".[14]

11 Adopted on 15 January 2003: P5_TA(2003)0012 rapporteur Joke Swiebel (A5-0451/2002).

12 Adopted on 4 September 2003: P5_TA(2003)0376 rapporteur Fodé Sylla (A5-0281/2003).

13 See European Parliament recommendation to the Council on the rights of prisoners in the European Union (2003/2188 (INI)), OJ C 102 E, 28.4.2004, and Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Rapporteur Maurizio Turco (A5-0094/2004) as well as Proposal for a recommendation to the Council by Marco Cappato and Giuseppe Di Lello Finuoli on behalf of the GUR/NGL Group on the rights of prisoners in the European Union (B5-0362/2003/rev.).

14 In a Recommendation to the Council on the quality of criminal justice and the harmonization of criminal law in the Member States (2005/2003(INI), OJ C 304 E, 1.12.2005, p. 109), based on a report Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, rapporteur António Costa (A6-0036/2005).

Furthermore, it should be noted that, in recent years, a growing number of MEPs have asked parliamentary questions with regard to different aspects of imprisonment.[15]

Finally, several activities regarding pre-trial detention, matters relating to detention and alternatives to detention within the framework of the European Union must be mentioned. In 2004, the European Council's Hague Programme[16] mapped out the contours of a more coherent law enforcement and criminal justice policy for the European Union, building on its Tampere predecessor. The European institutions have since begun implementing the programme, in accordance with an Action Plan.[17] The overall policy goal of work under these documents remains within the terms of the Amsterdam Treaty's stated objective: "To provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia" (Art. 29 (6) TEU). In the Area of Freedom, Security and Justice, the Union's activities up to now are dominated by a pragmatic step-by-step approach towards closer co-operation, based on mutual recognition of judicial decisions, rather than approximation of criminal laws, but a common set of minimum standards in criminal procedure is regarded by many as a *sine qua non* for the operation of mutual recognition between criminal justice systems.

This means that, under the present EU Treaty (Art. 33), procedural measures, such as pre-trail detention, as well as their execution are under the exclusive competence of the Member States (Art. 33 TEU). However, even if the "Europeanization of Criminal Law" is sometimes criticised by scholars and practitioners,[18] the EU may take action on minimum standards to "ensure compatibility in rules applicable in the Member States as may be necessary to improve [judicial cooperation in criminal matters]", as Art. 31(1) (c) of the EU Treaty states. "Ensuring compatibility" can also be achieved by providing for some approximation of minimum standards in criminal matters so as to enhance mutual trust and confidence between Member States. Several initiatives in that regard have been started, and Framework Decisions and/or Green Papers have been formulated. The papers relate to, e.g., conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings[19] as well as the presumption of innocence;[20] and to certain procedural rights in criminal proceedings concentrating on rights such as the right to legal advice and to free interpretation and translations.[21] On none of these topics a political agreement yet has been reached. The draft for the Framework Decision relating to the enforcement of decisions rendered in absentia, however, meanwhile has been adopted.[22] By contrast, the Council

15 For details, please refer to the Discussion Paper for the experts' meeting on minimum standards in pre-trial detention procedures on 9 February 2009, European Commission, Directorate-General Justice, Freedom and Security, Unit E3: Criminal Justice.

16 European Council, EU Presidency Conclusions, 4-5 November 2004, Annex I: The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Brussels, 13 December 2004, Council Document 16054/04.

17 See footnote 3.

18 Scepticism can be observed, for instance, in most papers included in Schünemann, Bernd (ed.): *A Programme for European Criminal Justice*, Heymanns, Köln et al., 2006. This volume contains contributions by scholars from ten European countries. Critical remarks can also be found in a Polish-German colloquium; see Joerden, Jan, Szwarc, Andrzej (eds.): *Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen*. Dunker & Humboldt, Berlin. For the Scandinavian countries, see (with further references) Lappi-Seppälä, Tapio (2007): "Penal Policy in Scandinavia", in: Michael Tonry (ed.): Vol. 36, *Crime and Justice: A Review of Research*. The University of Chicago Press, Chicago. Critical monitoring and own initiatives come e.g. from the European Criminal Bar Association, www.ecba.org.

19 Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings [COM(2005) 696 - Not published in the Official Journal], available for download at http://europa.eu/scadplus/leg/en/s22006.htm.

20 Commission Green Paper of 26 April 2006 on the presumption of innocence [COM(2006) 174 final - Not published in the Official Journal], available for download at
http://europa.eu/scadplus/leg/en/s22006.htm.

21 Proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, presented by the Commission, Brussels, 28 April 2004, COM(2004)328 final.

22 Originally an initiative of the Republic of Slovenia, the French Republic, the Czech Republic, The Kingdom of Sweden, the Slovak Republic, the United Kingdom and the Federal Republic of Germany the text was adopted as "Framework Decision amending Framework Decisions 2002/584/JHA,

Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States has not only been adopted but meanwhile implemented into the jurisdiction of the Member States. It has replaced formal extradition practice within the EU. With regard to the subject of this study, the existence of the possibility to request the search, arrest, detention and surrender of a person from the executing State by the issuing State – provided the EAW is implemented properly – should make the easy argument unfeasible that a foreigner is bound to abscond and, therefore, has to be detained on remand; within the EU, a simplified surrender procedure is now possible in almost all cases concerning EU citizens.

The latest concrete result of EU initiatives is the political agreement on a proposal[23] from the Commission, the so-called European supervision order, by the Justice and Home Affairs Council on 27 - 28 November 2008. (Meanwhile, its title has been changed to Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.[24]) The future Framework Decision, which will enable the EU Member States to mutually recognise non-custodial pre-trial supervision measures, has been designed to help reduce the number of non-resident pre-trial detainees in the European Union. At the same time, it aims at reinforcing the right to liberty and the presumption of innocence in the European Union, and at reducing the risk of unequal treatment of non-resident suspected persons.

In the future, pursuant to Art. 83(2) of the Lisbon Treaty, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions as well as police and judicial cooperation in criminal matters having a cross-border dimension. They shall, in the first place, concern (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; but may also include (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament. In this context, Art. 70 of the Lisbon Treaty should also be mentioned. This article allows the adoption of measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in Title V by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. This title concerns, *inter alia*, mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal law (Art. 67(3)).

1.3 Aim and methodology of the study

It is against this background that the European Commission decided to initiate a study on minimum standards in pre-trial detention and the grounds for regular review in the Member States of the European Union. In the tender notice, published in 2007, the following general objectives were highlighted:

- to collect concrete factual and statistical information on law and practice of pre-trial detention in the EU Member States;
- to give an account of potential obstacles to the collection of reliable data in this area (and propose, based on research experience, possible remedies);

2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/909/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial" (doc. 11638/08 COPEN 138) by the Council on 27 February 2009.

23 The proposal is based on the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters of November 2000 (measure 10) as well as the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union (2005). See footnote 3.

24 Council document 17002/08 COPEN 249, Brussels, 12 December 2008.

- to prepare a reference catalogue or bibliography that can be of general use to the field of study;
- to analyse the information collected.

More specifically, the study should clarify the scope and notion(s) of "pre-trial detention" in the Member States; the grounds and other preconditions for pre-trial detention; the conditions for review of pre-trial detention; the length of pre-trial detention as well as other important aspects, such as the treatment of special groups in detention, in particular juveniles.

The research group from the universities of Tilburg, the Netherlands, and Greifswald, Germany, first collected as much material as possible from different sources, mainly by contacting national experts in the respective countries. These experts are affiliated to national governments (mostly at the ministries of justice) as well as to universities and other research institutes and/or NGOs working in relevant fields. Later on, country reports were drafted following a fixed structure that incorporated the aspects mentioned in the tender (and some additional matters, see below); these were then sent out to the national experts, together with detailed questions and the request to answer these questions, to comment on the draft reports and to identify shortcomings and mistakes. The comments of the experts were subsequently discussed bilaterally (mostly via e-mail communications, which proved to be very helpful), in some cases also during visits to the respective countries, and during three expert meetings that took place in Tilburg and Greifswald in October and November 2008, and in January 2009.

1.4 State of research and sources

The researchers were able to profit from several comparative studies carried out before. However, only two of these were directly comparable with regard to scope and topic. As early as 1971, a study[25] was conducted at the Max-Planck-Institute for foreign and international Criminal Law in Freiburg, Germany, covering fifteen European countries in country reports. And in 1994, a comparative study, also based on country reports,[26] with a similar approach (but with a focus on the execution of remand detention) was published, which covered more than 25 European and non-European countries. Also very useful (as it partly covers the same aspects) was a more recent study,[27] including seven country reports, on the general topic of "suspects in Europe". Studies analysing the relevant regulations in the European Convention on Human Rights and the case-law of the European Court of Human Rights[28] proved to be helpful, too, because they contain information relating to several countries combined with a comparative approach. Finally, information relating to certain aspects of the study could be obtained from studies compiling country reports from all over Europe with regard to foreigners in prison,[29] and prison systems and conditions.[30]

More problems than expected emerged with regard to the availability, quality and comparability of empirical background information. In the introductory summary and most of the country reports, the data used (absolute numbers, rates and, sometimes, longitudinal data) exclusively refers to the (remand) prison population. The share of remand prisoners among the overall prison population is highlighted as well as the share of foreigners, women and juveniles. The data was collected from various international

25 Jescheck, Hans-Heinrich, Krümpelmann, Justus (1971): *Die Untersuchungshaft im deutschen, ausländischen und internationalen Recht*. Röhrscheid, Bonn.

26 Dünkel, Frieder/Vagg, Jon (eds.) (1994): *Waiting for trial. International Perspectives on the Use of Pre-Trial Detention and the Rights and Living Conditions of Prisoners Waiting for Trial*. Max-Planck-Institut für ausländisches und internationals Strafrecht, Freiburg.

27 Cape, Ed/Hodgson, Jaqueline/Prakken, Ties/Spronken, Taru (eds.) (2007): *Suspects in Europe. Procedural Rights at the Investigative stage of the Criminal Process in the European Union*. Intersentia. Antwerpen, Oxford.

28 E.g. the study by Trechsel (see footnote 5) or the study by Esser, Robert (2002): *Auf dem Weg zu einem europäischen Strafverfahrensrecht*. De Gruyter Recht, Berlin.

29 van Kalmthout, Anton, Hofstee-van der Meulen, Femke, Dünkel, Frieder (eds.) (2007): *Foreigners in European Prisons*. Wolf Legal Publisher, Nijmegen.

30 Dünkel, Frieder, van Zyl Smit, Dirk: *Imprisonment today and tomorrow*. 2nd edition. Kluwer Law International. The Hague.

sources, the most important being the Council of Europe's SPACE I,[31] and publications of the International Centre for Prison Studies of King's College London.[32] Other European sources that were cross-checked were the Eurostat[33] data and data from the European Sourcebook Project.[34] Information from national sources, mostly from the ministry of justice or the prison department, was used, too, and compared with the other available data.

More details on the problems with respect to the sources used will be given in Chapter 2. However, it should already be highlighted at this point that the research team is well aware of the fact that in several countries, in particular over the past two years, the situation has changed. In some countries, the prison and/or the remand prison population has decreased (e.g. in Austria, the Czech Republic, Germany, Portugal and Romania). However, the SPACE I data that is mainly used for the summary relates to 1 September 2006; currently, this is the only source providing comprehensive and comparable data for the same point in time. Therefore, the reader is requested to also refer to the country reports; these provide more, and more up-to-date, empirical background information for each country.

The research team is also aware of the fact that other methods of measurement would provide a more comprehensive look at the problem of pre-trial detention and would also allow more comparisons, e.g. with regard to a more or less punitive attitude[35] or with regard to the readiness to apply pre-trial detention. This could be done e.g. by comparing the share of persons being detained provisionally among all suspects (police statistics) or among all accused (court statistics). Where data was available in that regard, it was used in the country reports (e.g. in the reports on Austria and Germany).

The primary source for the analysis was, of course, the relevant national legislation; besides the constitutional provisions, mainly the Code of Criminal Procedure, additionally the Penal Code, relevant Prison laws etc. Here, it was much more problematic than expected to obtain translations of these primary sources, even though in the research team English, Dutch, German, French, Spanish and Italian are spoken (or at least read). For several countries, legislation could only be found in the national language – the researchers here depended on their own translation abilities and/or on *ad-hoc* translations provided by the contacted national experts (e.g. in the case of Romania and Slovakia). For other countries, in particular new Member States of the EU such as the Baltic countries, English translations were provided by State agencies or directly authorised by the ministry of justice.[36] Finally, in some cases, translations – not always officially authorised versions – compiled by scientific institutes and research projects could be found on the Internet or in published form.[37]

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31 Aebi, Marcelo/Delgrande, Natalia (2007): Council of Europe Annual Penal Statistics (SPACE I). Survey 2006. Strasbourg. This and earlier surveys can be obtained at:
http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/

32 International Centre for Prison Studies (ICPS), London (World Prison Population List and World Pre-trial/Remand Detention List as well as the Prison Brief for the respective countries; see chapter 2 for more details), http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/.

33 www.epp.eurostat.ec.europa.eu (available e.g. under "Population and social conditions" (Crime and Criminal Justice, see e.g. the publication "Statistics in Focus" ed. 19/2008, table 8 with data for 1995 and 2001-2006).

34 www.europeansourcebook.org, table 4.2, covering the years 2000-2003.

35 In a country with a very harsh sentencing policy and many sentenced (long-term) prisoners, the pre-trial detention rate may be low, although one could not say that the use of pre-trial detention is cautious. A good example in that respect would be the United States of America, with a comparatively low percentage of remand prisoners (around 20%), but a prisoner rate of 756 in 2007. See ICPS, footnote 32.

36 Very helpful were, e.g., the translations provided by the Estonian government, www.legaltext.ee, and the Latvian Translation and Terminology Centre, http://www.ttc.lv/?id=2.

37 A study was conducted on behalf of the European Union to verify the level of adoption of the "acquis communautaire" in the field of the protection of financial interests of the European Union, and to examine the compatibility of the legal provisions already existing or nearing adoption with the legal model. Therefore, a collection of legal texts of the (then) EU candidate countries was compiled at http://www.era.int/domains/corpus-juris/public/texts/legal_text.htm. Another helpful project is the collection of criminal codes of the Max-Planck-Institute in Freiburg ("Sammlung ausländischer

But even where good and up-to-date translations were available, the problem of different terminology was evident. To name only two examples: In most of the country reports, the term "arrest" is used to describe the initial apprehension, the stage before the arrest warrant is issued; the term "detention" (be it "pre-trial", be it "remand") describes the stage following the issuing of the arrest warrant. But in the Latvian translation, the wording is vice-versa – "arrest" being the period after the judicial decision, "detention" the stage before; the same more or less holds true for Romania, where the term "preventive arrest" is used for the period after the issuing of the arrest warrant. Another example concerns "reasonable" suspicion as a precondition for detention. The word "reasonable" is not found in all translations, but this does not mean that the respective Codes do not demand a qualified suspicion; on the other hand, the use of the same wording does not necessarily mean that the degree of suspicion should really be the same.

To be able to assess not only the "law in books" but also the "law in action", other national sources were used, too, such as national case-law and – if available - national research, often provided (and translated) by the national experts. Only in a few countries, extensive research has been carried out on pre-trial detention and most studies date back quite some time – remand detention is obviously not one of the fashionable research topics these days. Sometimes, government reports were available (comprehensive reports on crime and criminal justice, e.g. in Austria and Germany), in some cases with a focus on pre-trial detention (e.g. in France). Quite helpful also to get a notion of practical problems were reports from the Ombudsman or similar institutions (e.g. in Hungary, Poland, Slovenia and the Baltic countries).

Additionally, reports and other materials from national and international NGOs were taken into account, such as human rights monitoring organisations,[38] the European Criminal Bar Association, and the Open Society Justice Initiative.[39] Other important sources were the reports by the CPT and the Council of Europe's Commissioner for Human Rights as well as case-law of the European Court of Human Rights, both referring to single cases and specific situations but always explaining the legal background relevant to the respective period of time. Finally, information from other reports compiled on behalf of the European Union was used.[40]

1.5 Outline of the study

The final report consists of 27 country reports, which are structured according to a fixed format. Each report contains eight paragraphs, starting with a short introduction describing the criminal justice system and criminal procedure of the country under review. In paragraph 2, empirical background information is presented and discussed.

In paragraph 3, the various – and sometimes complex – aspects of the legal basis of pre-trial detention are described and analysed, with special attention to the scope and notion of pre-trial detention. In paragraph 4, emphasis is put on the grounds for pre-trial detention. The grounds for review of pre-trial detention are treated in paragraph 5, and the question of how long pre-trial detention can last according to the law and case-law is dealt with in paragraph 6. The last two paragraphs are reserved for what is called "other relevant aspects" (paragraph 7) and "special groups" (paragraph 8). "Other relevant aspects" are, for instance, the deductibility of pre-trial detention from the final sentence, the right to

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Strafgesetzbücher in deutscher Übersetzung"), which provides translations of the Bulgarian, Dutch and Polish CCP into German. See
http://www.mpicc.de/ww/de/pub/forschung/publikationen/uebersetzungen.htm.

38 For example, the Helsinki Foundation for Human Rights for Poland, the Latvian Centre for Human Rights, and the Hungarian Helsinki Committee.

39 www.ecba.org.

40 E.g. the answers to a questionnaire on pre-trial detention and alternatives to such detention compiled in 2002 (Brussels, 18 July 2002, JAI/B/3(TL); the results of a study on Procedural Rights in Criminal Proceedings: Existing level of safeguards in the European Union by Spronken/Attinger, in the version of 12 December 2005, available for download at
http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/report_proc_safeguards_en.pdf. The project on "Effective Criminal Defence Rights in Europe", available at
http://www.unimaas.nl/default.asp?template=werkveld.htm&id=J67Q4514K4D3230S1SVB&taal=en is taken into consideration, too.

compensation for unlawful or unjustified detention, alternatives to pre-trial detention, and the execution of pre-trial detention (also in relation to the basic rights of pre-trial detainees). The paragraph on "special groups" not only discusses the specific situation of juveniles in pre-trial detention, but also pays attention to other groups that seem to have a weaker position in prison than "regular" prisoners: women, foreigners and alleged terrorists. In this introductory summary, the same structure is adhered to.

1.6 Main problems identified during the research

A thorough analysis of problems identified can be found in the country reports and in the following chapters of this summary. Particular attention is paid to problems linked to the different notions of pre-trial or remand detention within Europe. It also emerges from the reports that – even though many differences with regard to the concept and legal details can be found – the problems the EU Member States face are commonly the same. Law and legal reality differ the most with regard to the length of detention and the conditions under which it is enforced. Problems are mainly linked to overcrowding and/or the lack of meaningful activities for remand prisoners.

With regard to the research, the following points should be emphasised:

- Authorised, reliable and up-to-date translations of primary legislation were often hard to obtain. It is difficult to imagine how true mutual understanding and trust can develop if basic texts cannot be taken into account (this also accounts for practical issues during cross-border procedures, e.g. for defence counsels). It is therefore strongly recommended that authorised translations be provided for all basic legal texts (with regard to the subject matter of this study, mainly the Code of Criminal Procedure, the relevant Prison Act, and the Penal Code) in a database that is kept up-to-date and is easily accessible through the Internet.
- Although for many countries at least some empirical data on remand detention could be obtained, problems remain with regard to comparability (depending on the notion of pre-trial detention in the various countries) and reliability of the available data (for instance, are all provisionally detained persons counted or are suspects in police custody not included?). Detailed data on certain groups of prisoners as well as data that could provide a better insight into the frequency of the use of pre-trial detention (e.g. with regard to the overall number of suspects or accused) are sometimes missing.
- Primary legislation certainly is the key source for understanding and comparing a legal concept such as pre-trial detention. However, it is common knowledge to all legal professionals that legal texts often cannot be understood without knowing basic Supreme Court or Constitutional Court case-law. This has to be kept in mind, too, when using foreign legal texts![41]
- With regard to terminology, the reader has to be aware of the fact that even if certain wording corresponds to his or her own legal understanding, it could mean something different. Therefore, the readiness and ability to develop an independent understanding of concepts rather than terms is crucial.

[41] This holds true, for instance, for one of the grounds for detention: It is commonly accepted that the gravity of the offence or the severity of the sentence cannot be a stand-alone ground for detention. However, this cannot always be deducted from the wording of the law; the reader has to be familiar with its interpretation shaped by the courts and national doctrine.

Chapter 2: Comparative overview number and statistics

2.1 General remarks about sources

Collecting and presenting data from 27 EU countries is a challenging task, especially when it is about penal statistics. There are a number of reasons for this observation. First, countries may use different methods of data-collection. There might be a difference, for example, in the way data are collected by prison services or by national offices for statistics. Secondly, countries may employ different definitions and indicators due to national, cultural and linguistic differences. In some countries people who are detained for administrative reasons, juveniles, and irregular immigrants in detention centres are counted as part of the prison population while in other countries they are not. Finally, most countries use different due dates for recording, for example 1 January of each year. As a result, it can be difficult to obtain, validate and compare data. Comparative data should therefore be read and interpreted carefully.

Although it is difficult to obtain valid and comparable information and data from EU countries, it is very important to have this information in order to receive a good view of the penal situation in the EU. Furthermore, the political and social importance of crime in general, together with public concern about the phenomenon, has made it increasingly important to try to obtain an overview of the situation in the EU. This was also recognised by the European Council with the adoption of the 'The Hague Programme'[42] in 2004. Efforts by the Council of Europe, the International Centre for Prison Studies, the European Sourcebook of Crime and Criminal Justice Statistics and Eurostat to assemble data via surveys and questionnaires are therefore very worthwhile. These efforts should encourage and stimulate individual EU countries to develop and create a more uniform way of data collection, to make use of similar ways of methods of measurement and to use similar definitions. It should also serve as an incentive for the EU as it is within the framework of the EU that different Framework Decisions arise in the field of judicial cooperation in criminal matters. In order to enhance mutual trust in the field of judicial cooperation in criminal matters, it is recommended to have translations of national legislation in the field of criminal law (e.g. the Penal Code and the Criminal Procedure Code) in commonly used languages like English. Also, the Council of Europe, the International Centre for Prison Studies, the European Sourcebook of Crime and Criminal Justice Statistics and Eurostat are invited to publish their underlying questionnaires and/or surveys and to explain the exact meaning of the definitions they use.

In this research into the pre-trial situation in the European Union, data and statistics are used that have been compiled on a national level by national agencies and on a European level. The four European sources that have been used in this research are the Annual Penal Statistics of the Council of Europe (SPACE I), the 'World Prison Brief' by the International Centre for Prison Studies, the European Sourcebook of Crime and Criminal Justice and Eurostat. Data from these sources might differ. This can have various reasons like using not similar definitions, using a different date (time) and a different measure method. In this chapter, the Annual Penal Statistics of the Council of Europe (SPACE) are mainly used because they provide the most detailed information regarding pre-trial prisoners and is the most reliable source for making comparisons. SPACE provides information for all 27 EU countries from the same due date (1 September[43]) over a period (1999-2007). It must be emphasized, however, that in some countries the situation has changed significantly. This is why the reader should also look in the country reports for additional up-to-date information on the respective country.

[42] 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' in the Official Journal of the European Union (3-3-2005) p 11.

[43] For some countries the figures provided for by SPACE I are on another date than 1September 2007; it is mentioned in SPACE I when this is the case. E.g. for Finland, the figures are mostly on 1 May 2007 instead of 1 September 2007.

2.1.1 SPACE (Council of Europe)

The Annual Penal Statistics of the Council of Europe that have been used in this study are named SPACE[44]. The SPACE data have been obtained since 1997 on an annual basis by means of a questionnaire that is sent to all member states of the Council of Europe[45]. All data are based on official national sources. The data relate to the situation of the prison populations on 1 September, the so called 'stock statistics', and provides information on prison capacity, prison population rate per 100,000 inhabitants, occupancy, lengths of imprisonments, characteristics of the prison population, incidents, etc.. Besides 'stock' data there is also information on the flow numbers ('how many people have been submitted during the course of the year?') in one year. The information per country, if available, is set out in tables. In this study the most recent publication of SPACE is used, namely information from the Survey 2007, that was published on 26 January 2009. Information regarding data on pre-trial prisoners is collected under section 'legal structure' and broken down into five different categories. These five categories are selected to serve as a basis for comparing the situations of the various prison populations. The five categories are:

a. Untried prisoners (no court decision yet reached).
b. Convicted prisoners, but not yet sentenced.
c. Sentenced prisoners who have appealed or who are within the statutory time limit to do so.
d. Sentenced prisoners (final sentence).
e. Other cases.

According to the different categories itemised by SPACE, the group 'pre-trial' prisoners consists of prisoners who have not received their final sentence, in other words, category a), b), c) and e). Category d) is excluded, because it contains prisoners who received their 'final sentence'. Category a) is about those prisoners who have not received a court decision yet. Category b) is about prisoners who are convicted but who have not received a sentence yet. Category c) is about the group of prisoners who received a sentence but who have appealed or who are, within the statutory time limit, for doing so. Category e) is about 'other cases' and prisoners in this category vary per country but in general they are labelled as irregular migrants detained for administrative reasons, persons who are failing to pay their administrative fine, prisoners who are waiting to be transferred to a psychiatric treatment centre, detention on the basis of social protection law, etc. Generally speaking their detention is not based on a criminal suspicion or sentence but on another ground outside the scope of criminal law. So in fact, this group of 'other cases' are no pre-trial prisoners. For this reason, category e) has not been counted under 'pre-trial' prisoners in this study. For category d) it is clear that they are not pre-trial because they are sentenced prisoners who received their final sentence.

2.1.2 World Prison Brief (ICPS)

The World Prison Brief Online provides up-to-date information about prison systems around the world via internet[46]. The data are compiled by the International Centre for Prison Studies in London and is updated on a monthly basis by using data from reputable sources like the official statistics from the National Prison Administrations.

The World Prison Brief was launched in 2000. Information is provided on prison populations and prison population rates per 100,000 of the national population, on the use of imprisonment for women and juveniles, on the extent of pre-trial imprisonment and on prison overcrowding, as well as a record of the national ministries responsible for prisons and contact details for prison administrations.[47] Data presented by the World Prison Brief

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[44] The official name is SPACE I. SPACE II is about 'Community Sanctions and Measures' and was published in 1999 and 2001.
[45] Data for SPACE I were collected from 1997-2001 by Pierre Tournier, Director of Research at the CNRS (France) and by Marcelo Aebi and colleagues from University of Lausanne (Switzerland) from 2002 onwards.
[46] www.kcl.ac.uk/depsta/law/research/icps/worldbrief
[47] The latter information can be obtained though the Prison Brief for the respective countries.

is the latest available. Data from a less recent date can be found at the download area of the website.

In January 2008, a special 'World Pre-Trial/Remand Imprisonment List' has been published by Roy Walmsley, director of the World Prison Brief at ICPS. The list refers to those persons who, in connection with an alleged offence or offences, are deprived of their liberty following a judicial or other legal process but have not been definitively sentenced by a court for the offence(s). Pre-trial prisoners fall into one of the following four stages[48]:

1. investigation stage, when they are being interrogated to see if there is justification for bringing a court case against them;
2. the 'trial' stage, while the trial is actually taking place;
3. the stage when they have been convicted by the court but not yet sentenced – the 'convicted unsentenced' stage;
4. the 'awaiting final sentence' stage, when they have been provisionally sentenced by the court but are awaiting the result of an appeal process which occurs before the definitive sentence is confirmed.

The World Pre-Trial/Remand Imprisonment List with data for 194 independent countries was published by the International Centre for Prison Studies in January 2008. According to the data in the list, there are two and a quarter million people to be held in pre-trial detention and other forms of remand imprisonment throughout the world. It is estimated that a further quarter of a million are held in countries on which such information is not available. In a majority of countries (59%) the proportion of pre-trial prisoners on the total prison population is between 10% and 40%. In 60% of the countries the pre-trial population is below 40 per 100,000 of the national population.

2.1.3 European Sourcebook of Crime and Criminal Justice Statistics

The European Sourcebook project started in 1996 when the Council of Europe established a committee to prepare a compendium of crime and criminal justice data for its member states. Information was collected from 36 European countries covering the period 1990 to 1996. It included both statistical data and information on the statistical rules and the definitions behind these figures. The second European Sourcebook, which was sponsored by Switzerland, United Kingdom and the Netherlands, was published in 2003. The publication reports on criminal justice data for 40 European countries covering the period 1995 - 2000. In June 2006, the third edition was published and the fourth edition, covering the years 2003 - 2007, will be published in 2009. Information compiled by the European Sourcebook on pre-trial detention covers the period 2000 to 2003, so it is rather old.

2.1.4 Eurostat

Eurostat is the Statistical Office of the European Communities that was established in 1953. Eurostat gathers and analyses figures from the different European statistics offices in order to provide comparable and harmonised data to the European Institutions, so they can define, implement and analyse Community policies. Information on prison issues are presented in the so-called 'Statistics in Focus'.[49] The data on the prison population, general trend and imprisonment rate is available up to 2006 and therefore only to a limited extent included in this study. Eurostat reflects the fact that the methods and definitions used in the EU member states differ considerably. Eurostat is therefore planning to form, in the coming years, a partnership with the statistical authorities of the Member States and the Commission's Directorate-General for Justice, Freedom and Security to develop a more comparable system of crime and criminal justice statistics, as outlined in the Commission Communication: developing a comprehensive and coherent EU strategy to measure crime and criminal justice: an EU Action Plan 2006-2010.

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[48] Not all legal systems and not all cases will involve all stages.

[49] www.epp.eurostat.ec.europa.eu (available e. g. under "Population and social conditions" (Crime and Criminal Justice, see e. g. the publication "Statistics in Focus" ed. 19/2008, table 8 with data for 1995 and 2001-2006).

2.1.5 Definitions and methods of measurement

In the 'strict' sense of the word the term pre-trial prisoners means prisoners that are untried. However, in most EU Member States, the term is used in a 'broad' sense and includes all prisoners without a final sentence within the criminal procedure. This is why the category of 'other cases', that often concerns administrative detention with regard to administrative offences, is the most problematic. On the other hand, it has to be emphasized that in some cases not all detainees within the criminal procedure are counted because it is doubtful whether all countries have included detainees in police cells and police custody in the official numbers.

In the next paragraphs, data are presented from all 27 EU-countries. Sometimes the same data are presented both in a table and in figures/graphics. This is because tables can contain more information while figures make differences between countries more clear. In principle all sources that are mentioned in the study for comparative research are based on data provided by National Prison Administrations of 27 EU countries.

2.2 General view of the prison populations in the EU

2.2.1 General characteristics

In table 1 the following general characteristics of the prison populations in the 27 EU countries are summarized: national prison population, imprisonment rate, occupancy rate and the number of female, foreign and juvenile prisoners. The three highest values per indicator are underlined and the three lowest values are written in Italic.

Countries with the highest total number of prisoners are Poland, United Kingdom and Germany. The smallest prison populations can be found in Malta, Cyprus and Luxembourg. The total prison population of all 27 European Union countries together is 602.269 on September 1st 2007. However, when the numbers per country are calculated per 100,000 of the national population, the imprisonment rate, the view is completely different. In 2007, the highest imprisonment rates can be found in the Baltic States and Eastern Europe. Latvia, Estonia, Lithuania and Poland have by far the highest imprisonment rates, more than 200 prisoners per 100,000 inhabitants. Denmark, Slovenia and Finland have the lowest imprisonment rates, less than 68 prisoners per 100,000 inhabitants. The average imprisonment rate in the EU is 131 in 2007.

The prison occupancy rate, the number of prisoners in relation to the number of places available in penal institutions, is the highest in Cyprus, Greece and Spain. In these countries prisons are severely overcrowded and on every 100 places available Cyprus accommodates 153 prisoners, Greece 142 prisoners and Spain 137 prisoners. The prison occupancy rate in Belgium, France, Hungary, Poland and Slovenia is above 110. The lowest prison occupancy rates can be found in Latvia, Malta and Slovakia (70, 77 and 78). The European average is 104 in 2007. In this context it has to be clearly underlined that these numbers and rates only reflect the official capacity. This is problematic in two regards: first, the capacity is calculated as an average. This means that densely populated institutions and institutions with few prisoners are taken together, a fact that even in countries where researchers, NGOs and the CPT often report serious overcrowded situations lead to formally not overpopulated prisons. In this regard it would be very helpful if countries would provide separate data for prisons and remand institutions – it can be assumed that in many countries in particular the latter are affected the most by overcrowding. A second point has to be made to the reference size of the cells: although the CPT repeatedly has indicated that the space per prisoner has to be at least $4m^2$, the official capacity in several countries, e.g. Estonia and Poland, is based on 2,5 m^2 per prisoner. If the necessary space laid down by the CPT would be considered, overcrowding would be enormous, also with regard to the numbers.

The highest and lowest numbers of female, foreign and juvenile prisoners logically partly overlap with the highest and lowest numbers of total prisoners, but there are differences. The highest number of female prisoners can be found in Spain, United Kingdom and Germany. Most foreign prisoners can be found in Spain, Germany and Italy. The lowest numbers of female prisoners are found in Malta, Luxembourg and Cyprus, the lowest numbers of foreign prisoners in Lithuania, Latvia and Malta. Regarding

the number of juveniles in EU member states the numbers are less comparable. In most countries there are special treatment institutions were young people can be detained until a certain age. The numbers as shown in the table are often persons under 18 years of age who are held in penitentiary institutions for adults.

Table 1, General characteristic of the total Prison Population in the EU in 2007

1 September 2007	**Total Prison Population**	**Imprisonment Rate**	**Prison Occupancy**	**Female Prisoners**	**Foreign Prisoners**	**Juveniles[50]**
Austria	8887	108	104	443	3917	304
Belgium	9879	95	119	422	4234	23
Bulgaria	11032	151	105	355	211	50
Cyprus	*834*	106	153	32	357	39[51]
Czech Republic	18901	185	98	999	1392	45
Denmark	3624	*66*	90	179	654	25
Estonia	3456	263	91	156	1413	44
Finland	3624	69	101	246	301	10
France	63500	100	125	2415	12341	661
Germany	77868	95	97	4103	20485	780
Greece	10700	100	142	579[52]	5902[53]	…
Hungary	14892	150	132	951	544	173
Ireland	3305	80	92	105	474	107
Italy	45612	78	105	1996	16643	***
Latvia	6452	286	*70*	326	84	85
Lithuania	7842	219	87	339	80	114
Luxembourg	*744*	155	95	26	546	3
Malta[54]	*401*	72	*77*	14	136	25
Netherlands	18746	113	81	979	4246	12
Poland	90199	234	119	2743	629	…
Portugal	11587	109	93	797	2371	24
Romania	31290	140	85	1492	243	582
Slovakia	8235	151	*78*	376	165	52
Slovenia	1336	*67*	122	60	140	9
Spain	66467	127	137	5524	22243	***
Sweden	6770	75	98	391	3769	1
United Kingdom	88632	143	98	4659	11516	2344

Source: Council of Europe, SPACE (2009)
… No data available
*** Concept not found in the penal system of the country concerned, according to SPACE (2009)

On the next pages, the six indicators of table 1 (Total Prison Population, Imprisonment Rate, Prison Occupancy, Female Prisoners, Foreign Prisoners and Juveniles) are visualized in separate figures. In addition to table 1, the figures with female, foreign and juvenile prisoners contain also percentages. Figure 1d 'Female Prisoners' shows that the percentage of female prisoners ranges from 3% in Poland to more than 8% in Spain. The EU average

[50] Prisoners under 18 years old.
[51] Prisoners less than 21 years old.
[52] Number from September 1st, 2006, also because data for 2007 was not made available to SPACE.
[53] Ibidem
[54] Data from September 1st, 2006 since data for 2007 was not made available to SPACE.

is 5,2% in 2007. The percentage of foreign prisoners (figure 1e) differs hugely, from less than 1% (Poland and Romania) to over 73% in Luxembourg, 58% in Greece and 53% in Cyprus. The EU average number of foreigners on the total prison population is 24,5% in 2007. The highest percentage of juvenile prisoners can be found in Austria (3,4%) and Ireland (3,2%). There are twelve countries with a prison population that consists of less than 1% of juveniles. These are: Sweden (0%), the Netherlands and the Czech Republic (0,1%), Belgium and Portugal (0,2%), Finland (0,3%), Luxembourg (0,4%), Bulgaria (0,5%), Slovakia (0,6%), Slovenia and Poland (0,7%) and Romania (0,8%).

Figure 1a

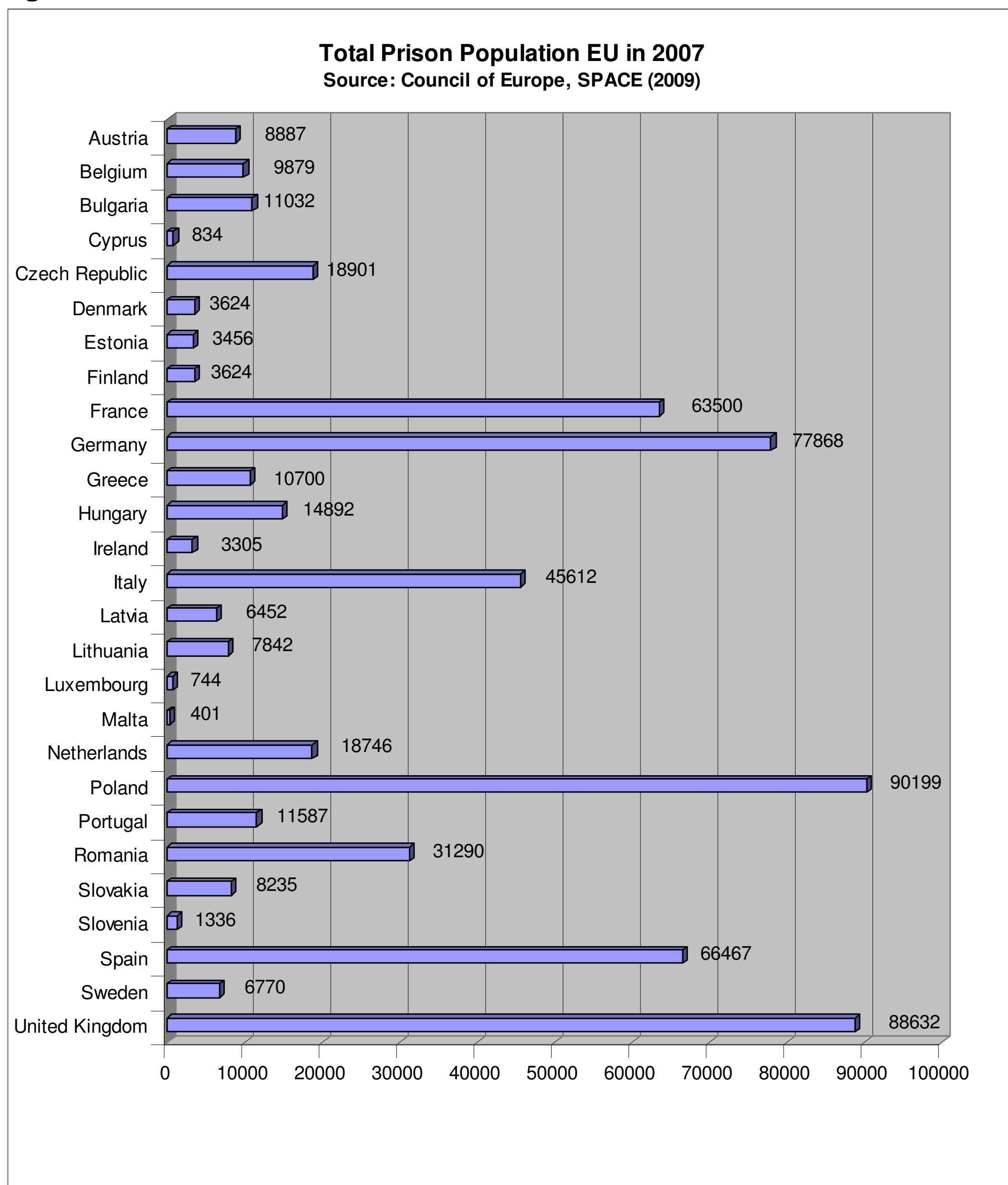


Figure 1b

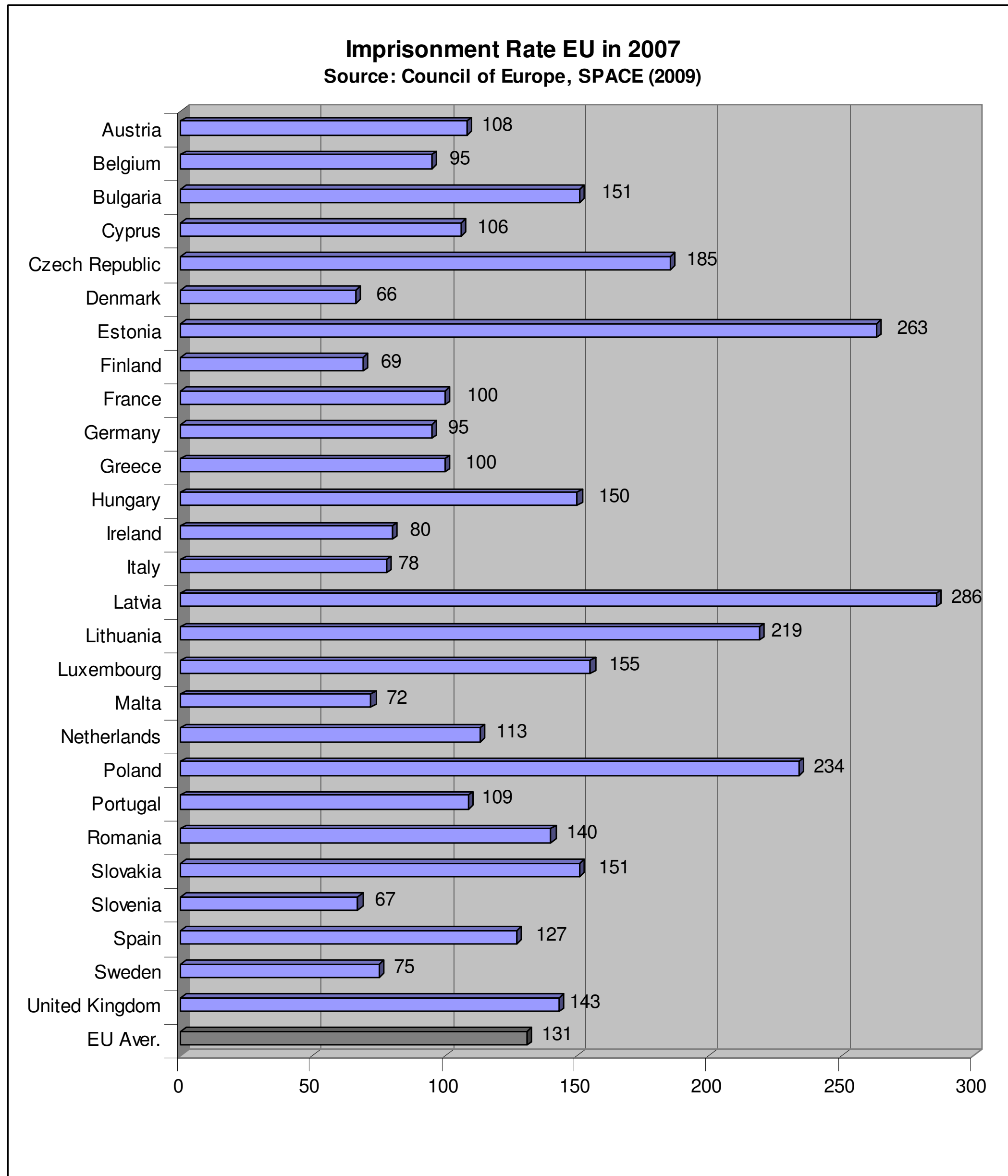


Figure 1c

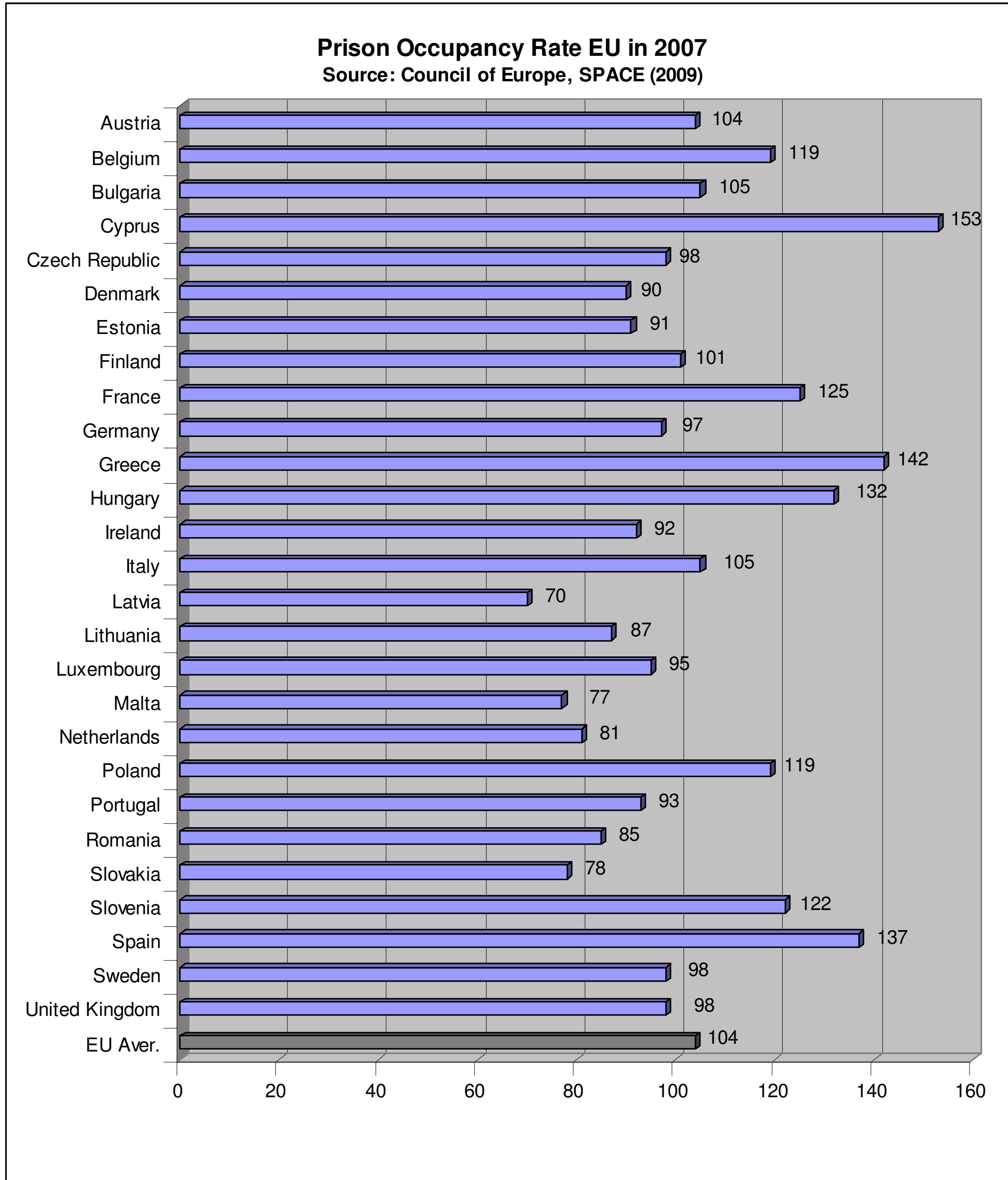


Figure 1d

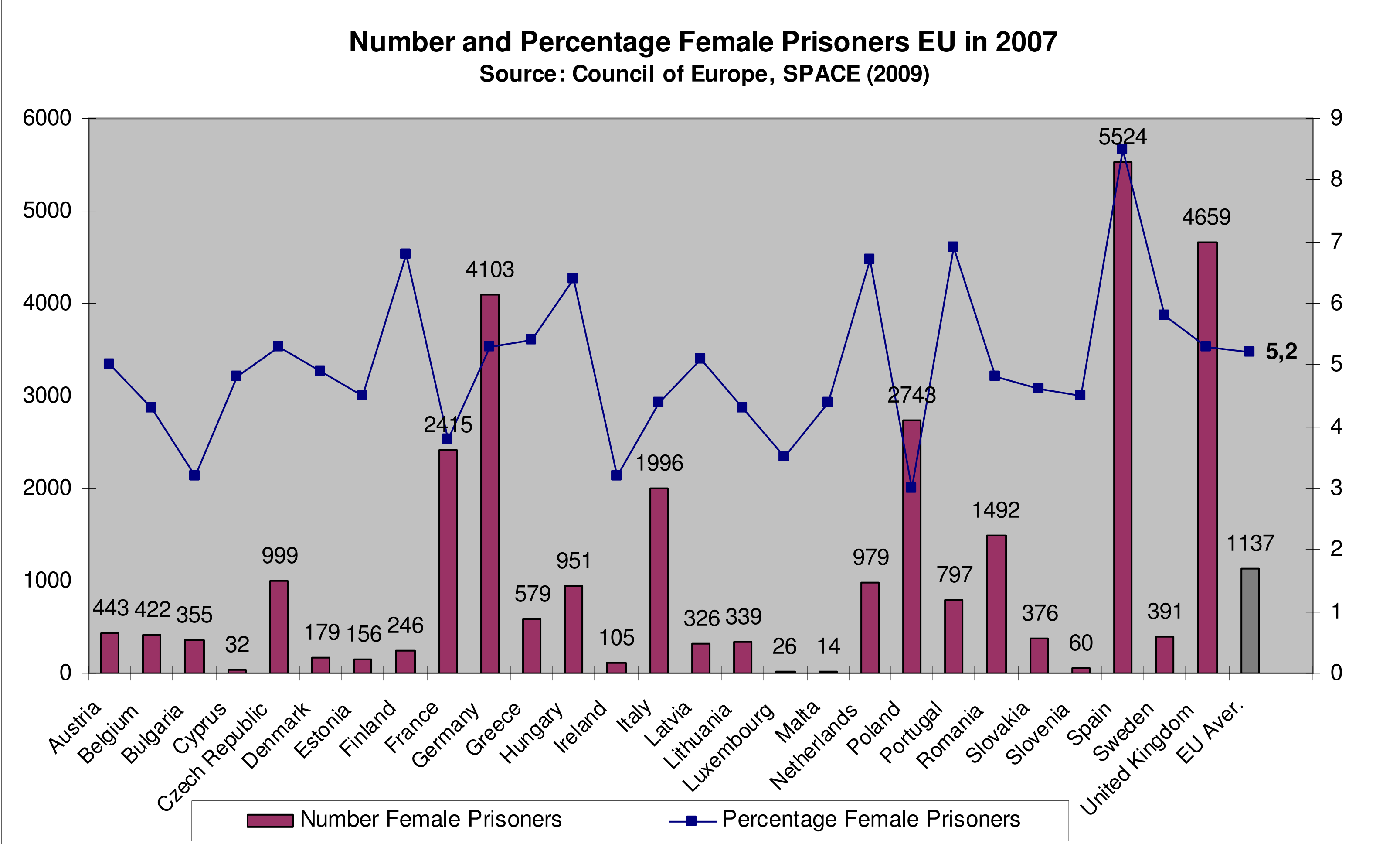


Figure 1e

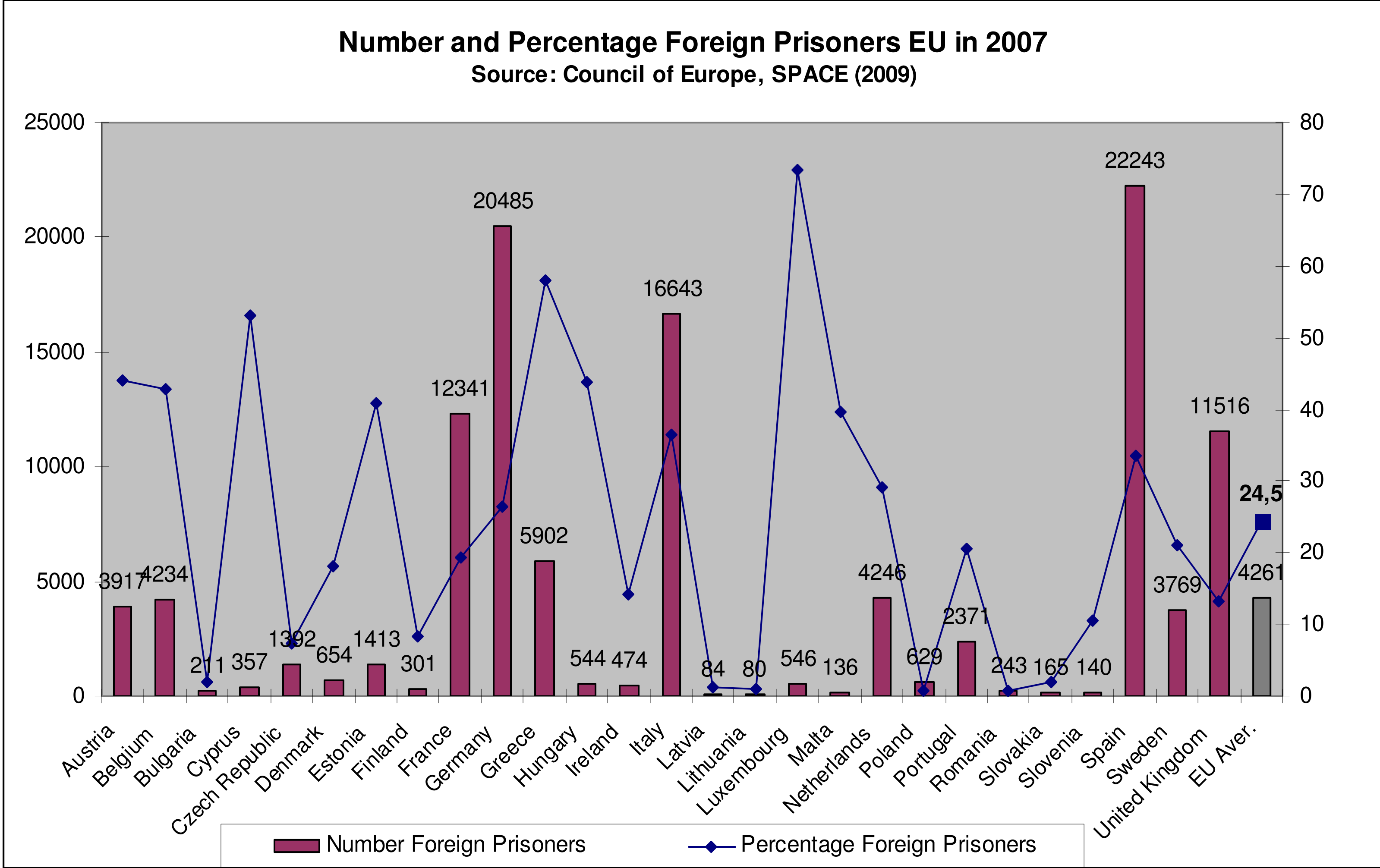
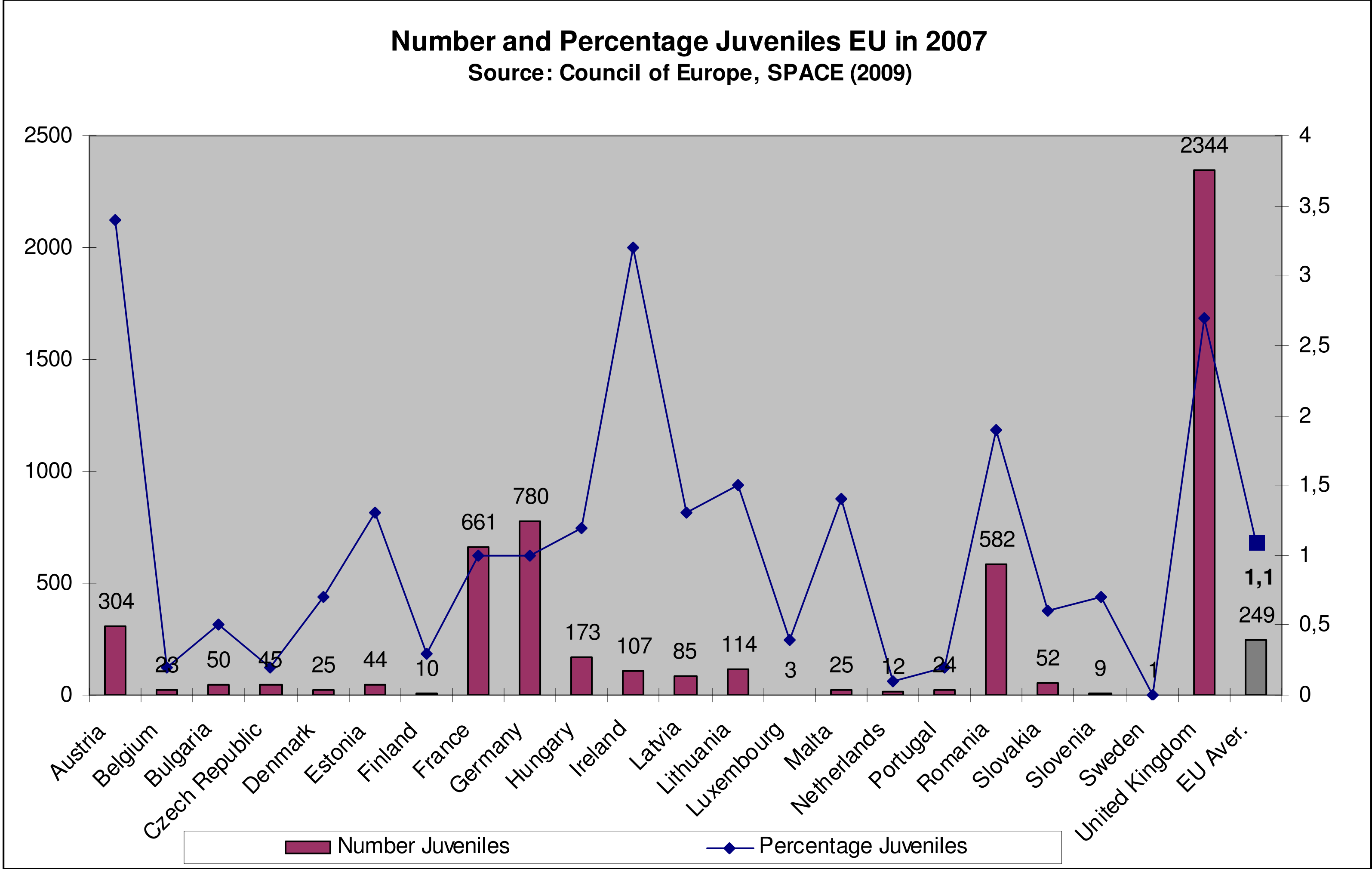


Figure 1f



2.2.2 Pre-trial prisoners

2.2.2.1 Actual Data

Data regarding the total number and percentage of pre-trial prisoners in EU countries often, but not always, differ per source[55]. As stated earlier in this chapter, the Annual Penal Statistics of the Council of Europe (SPACE) are mainly used because they provide the most detailed information and because it is the most reliable source for making comparisons. Besides providing information on similar points in time and over a period of seven years, SPACE statistics provides a differentiation in the legal status of prisoners. Besides a category for untried prisoners (category a) there is also a category for prisoners who are convicted but not yet sentenced (category b) and sentenced prisoners who have appealed or who are within the statutory time limit for doing so (category c). However, it is hard to assess whether the division under the different categories was made in a correct way (e.g. by people in the different EU member states who answered the questionnaire of SPACE).[56]

The World Prison Brief (ICPS) and the European Sourcebook do not present a division in different categories nor does the European Sourcebook clarifies their definition of pre-trial prisoners. Eurostat does not provide information on pre-trial detention at all. What the sources have in common is that it is not clear if their numbers also contain the number of persons in police cells and in remand centres. All data given in the course of this chapter are therefore likely to be and underestimation of the total number of pre-trial prisoners.

The following remarks should be made regarding the information by SPACE on the different categories of pre-trial prisoners. Greece and Malta did not provide information on the legal status of prisoners in the year 2007 to SPACE. For that reason the most recent available data, from September 1st 2006, has been used. The countries Denmark, Finland, Germany and Sweden did not make a distinction between the different categories of pre-trial prisoners and could therefore not provide information per category. Regarding category a) 'untried prisoners', the Czech Republic had no figures available. Regarding category b) 'convicted prisoners, but not yet sentenced', seven countries[57] stated that this concept does not exist in their penal system. In Cyprus, Estonia, the Netherlands, Poland and Slovakia the concept was known but they did not had figures available.

Regarding category c) 'sentenced prisoners who have appealed or who are in the statutory time limit to do so' only ten countries[58] could provide information. In Hungary, the concept was not known and the other countries had no figures available. In SPACE the following remark is made for the countries[59] that had no figures available under category c), 'without any further information being provided'; it is assumed that prisoners in that situation are included among those under category d) 'sentenced prisoners, final sentence'. This means an underestimation of the number of pre-trial prisoners. As explained above, category e) 'other cases' are in fact no pre-trial prisoners. For this reason, category e) has not been counted under 'pre-trial' prisoners in this study. The 'real' pre-trial prisoners are category a), 'untried prisoner where no court decision yet was reached'.

How is the percentage of pre-trial prisoners in the EU being calculated? Since category e) 'other cases' are in fact no pre-trial prisoners, they should in principle not be included in

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[55] SPACE (Council of Europe), World Prison Brief (ICPS), the European Sourcebook and Eurostat.

[56] This is more or less acknowledged by the SPACE statistics as it is said – as a note to Table 5 in connection with Table 4 – that "When there is no data available under heading (c) "sentenced prisoners who have appealed or who are within the statutory time limit for doing so" of Table 4, without any further information being provided, it is assumed that prisoners in that situation are included among those under heading (d) "sentenced prisoners, final sentence". In that case, both indicators are presented between brackets and must be interpreted cautiously." Furthermore, "When there is no data available under heading (b) "prisoners convicted but not yet sentenced" of Table 4, without any further information being provided, it cannot be excluded that prisoners in that situation are included among those under heading (a) "untried prisoners (no court decision yet reached)". In that case, both indicators are presented between brackets and must be interpreted cautiously."

[57] Austria, Belgium, France, Italy, Luxembourg, Portugal and Spain.

[58] Belgium, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal and Slovenia.

[59] Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Poland, Romania, Slovakia, Spain and the United Kingdom.

the calculation. In order to take this fact into consideration, table 2 shows the three different ways to calculate the percentage of pre-trial prisoners by varying in the use of category e) 'other cases'. As expected, different calculations can lead to different results. In this study, pre-trial prisoners are seen as those who are 'untried', those prisoners who are 'convicted but not sentenced' and those who are 'sentence but who have appealed or who are within the statutory limit to do so'.

The first column provides information on the definition of pre-trial prisoners as it is being used in this study. The number of pre-trial prisoners is calculated as the sum of all prisoners who have not received their final sentence. This number is divided by the total prison population minus the 'other cases'. In the second column, the SPACE definition is used. The number of pre-trial prisoners is calculated as the sum of all prisoners who have not received their final sentence plus 'other cases'. This number is divided by the total prison population (incl. 'other cases'). In the last column, the number of pre-trial prisoners is calculated as the sum of all prisoners who have not received their final sentence minus 'other cases' (like in the first column). This number is divided by the total prison population, including 'other cases' (just as in the second column).

Excluding the 'other cases' from the pre-trial prisoners and including them in the total prison population provides the lowest percentages of pre-trial imprisonment in the EU. Using 'other cases', as done by SPACE, results in the highest numbers. In countries without 'other cases', the percentages are equal. For countries with relatively large numbers of 'other cases' the differences are huge. For example, in the Netherlands the percentage varies from 39,4% to 53,6%, in Austria from 22,9% to 33,4% and Belgium from 32% to 41,1%. This shows that differences can exist in percentages between different sources, even when the reference day is the same. Since the World Prison Brief and the European Sourcebook do not clarify their definition of pre-trial prisoners, one should be very careful in assessing and comparing data. Figure 2 provides a view of the different percentages according to the measurement of the different categories of pre-trial prisoners.

Table 2, Percentage of Pre-Trial Prisoners according to three different measurements in 2007

	Definition this study	**SPACE-definition**	**Excl. 'other cases'**
Austria*	25,6	33,4	22,9
Belgium	35,2	41,1	32
Bulgaria*	15,5	15,5	15,5
Cyprus**	15,3	15,4	15,3
Czech Republic*	11,9	11,9	11,9
Denmark	28,5	29,3	28,1
Estonia*	26,5	26,5	26,5
Finland	13,8	17,8	13,8
France	27,6	27,6	27,6
Germany	17	17,5	16,9
Greece[60]*	30,3	30,3	30,3
Hungary	26,9	28,4	26,4
Ireland	18,7	19,3	18,6
Italy	60,4	61,7	58,5
Latvia	17,7	25,4	16
Lithuania	16,1	16,1	16,1
Luxembourg	40,4	43,1	38,6
Malta[61]	35,6	35,6	35,6
Netherlands	46	53,6	39,4
Poland**	14,9	15,3	14,8
Portugal	20,1	20,1	20,1
Romania*	10,4	10,4	10,4
Slovakia**	23,7	23,7	23,7
Slovenia	30,4	32,6	29,4
Spain*	24,6	25,4	23,7
Sweden	21,4	22,1	21,2
United Kingdom*	16,8	18,1	16,6

Source: Council of Europe, SPACE (2009)

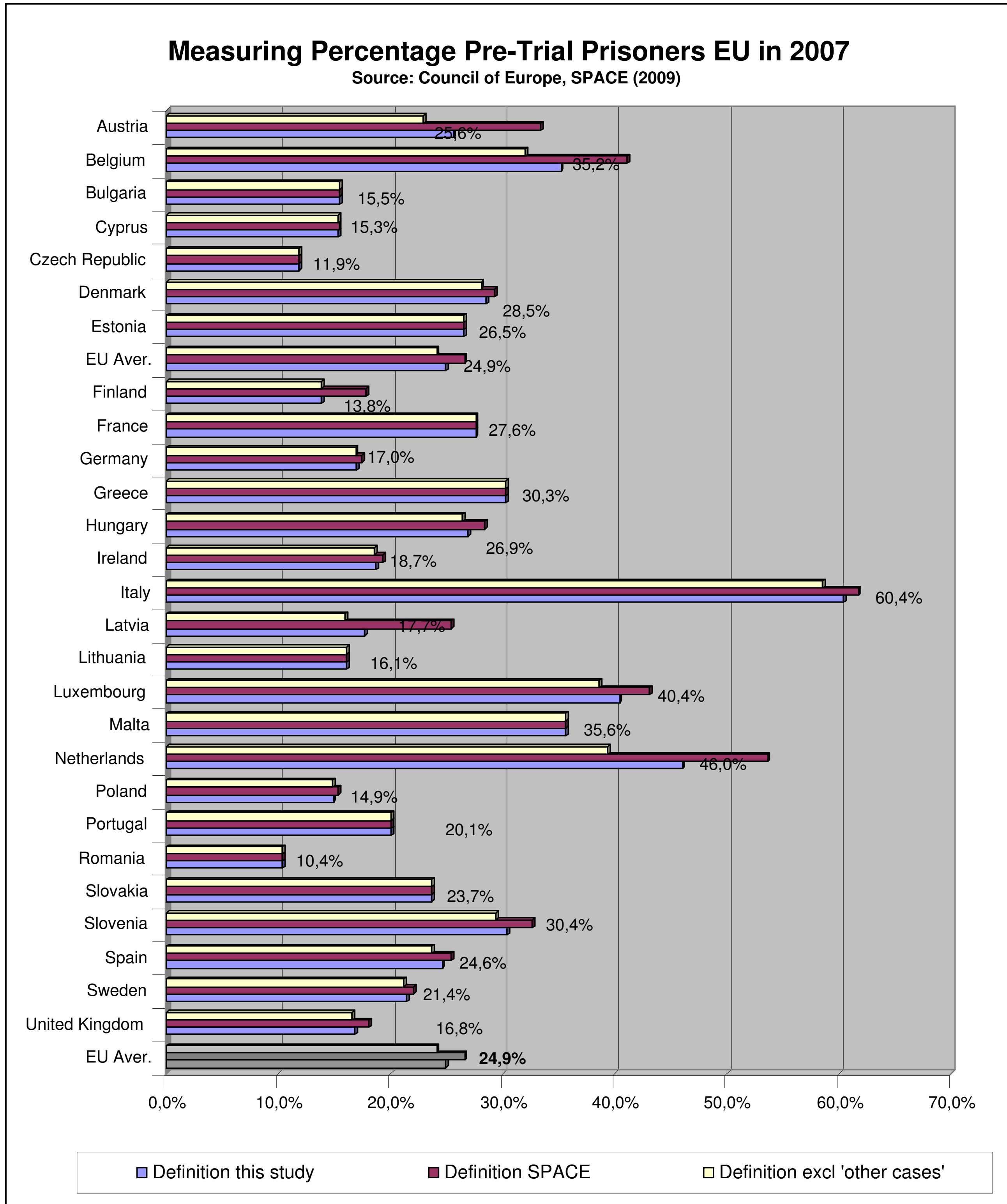
* probably underestimation because category c) might be included in the sentenced prisoners

** only untried prisoners

[60] Data from September 1st, 2006

[61] Data from September 1st, 2006.

Figure 2



* In Austria, Bulgaria, Cyprus, Czech Republic, Estonia, Poland, Romania, Slovakia, Spain and the United Kingdom there might be an underestimation of the number of pre-trial prisoners because the category that is sentenced but who have appealed or who are within the statutory time limit to do so might be included in the group prisoners that received their final sentence.

Column 1 of table 3 contains the most recent numbers on pre-trial prisoners by the World Prison Brief (ICPS)[62]. Column 2 contains information by SPACE from 1 September 2007. The differences between the percentages of ICPS and SPACE can be explained by the different reference dates (31 December 2008 versus 1 September 2007) and perhaps by the usage of different definitions and calculation methods. Assuming that ICPS uses the same definition as used in this study, there seems to be a substantial decline in the percentage of pre-trial prisoners in Austria, Bulgaria, Italy, Lithuania, the Netherlands, Poland and Slovenia. A substantial increase can be seen in Denmark and Latvia. In figure 3 these data are visualised. A more exact view can be found in the country reports in this study.

Table 3, Percentage Pre-Trial Prisoners EU by ICPS and SPACE

	ICPS	Date ICPS	SPACE*: 1-9-2007
Austria	20	1-8-2008	25,6
Belgium	36,1	17-6-2008	35,2
Bulgaria	9,3	1-1-2008	15,5
Cyprus	15,4	31-8-2008	15,3
Czech Republic	11,9	31-12-2007	11,9
Denmark	34,4	4-9-2008	28,5
Estonia	26,4	1-1-2008	26,5
Finland	14	16-5-2007	13,8
France	27,7	1-9-2007	27,6
Germany	16	31-8-2008	17
Greece	28,6	2-9-2008	30,3
Hungary	28,9	2-9-2008	26,9
Ireland	20	26-10-2007	18,7
Italy	52,1	30-6-2008	60,4
Latvia	26,6	1-1-2008	17,7
Lithuania	12,1	1-1-2008	16,1
Luxembourg	42	1-9-2007	40,4
Malta	31,3	10-12-2006	35,6
Netherlands	34,7	31-8-2008	46
Poland	11,2	30-11-2008	14,9
Portugal	19,5	15-12-2008	20,1
Romania	10	31-12-2007	10,4
Slovakia	23,2	31-12-2007	23,7
Slovenia	22,2	1-9-2008	30,4
Spain	23,9	26-12-2008	24,6
Sweden	22,2	1-10-2008	21,4
United Kingdom	16,7	31-10-2008	16,8

* Data from SPACE calculated according to the definition of pre-trial prisoners as used in this study.

[62] 31 December 2008

Figure 3

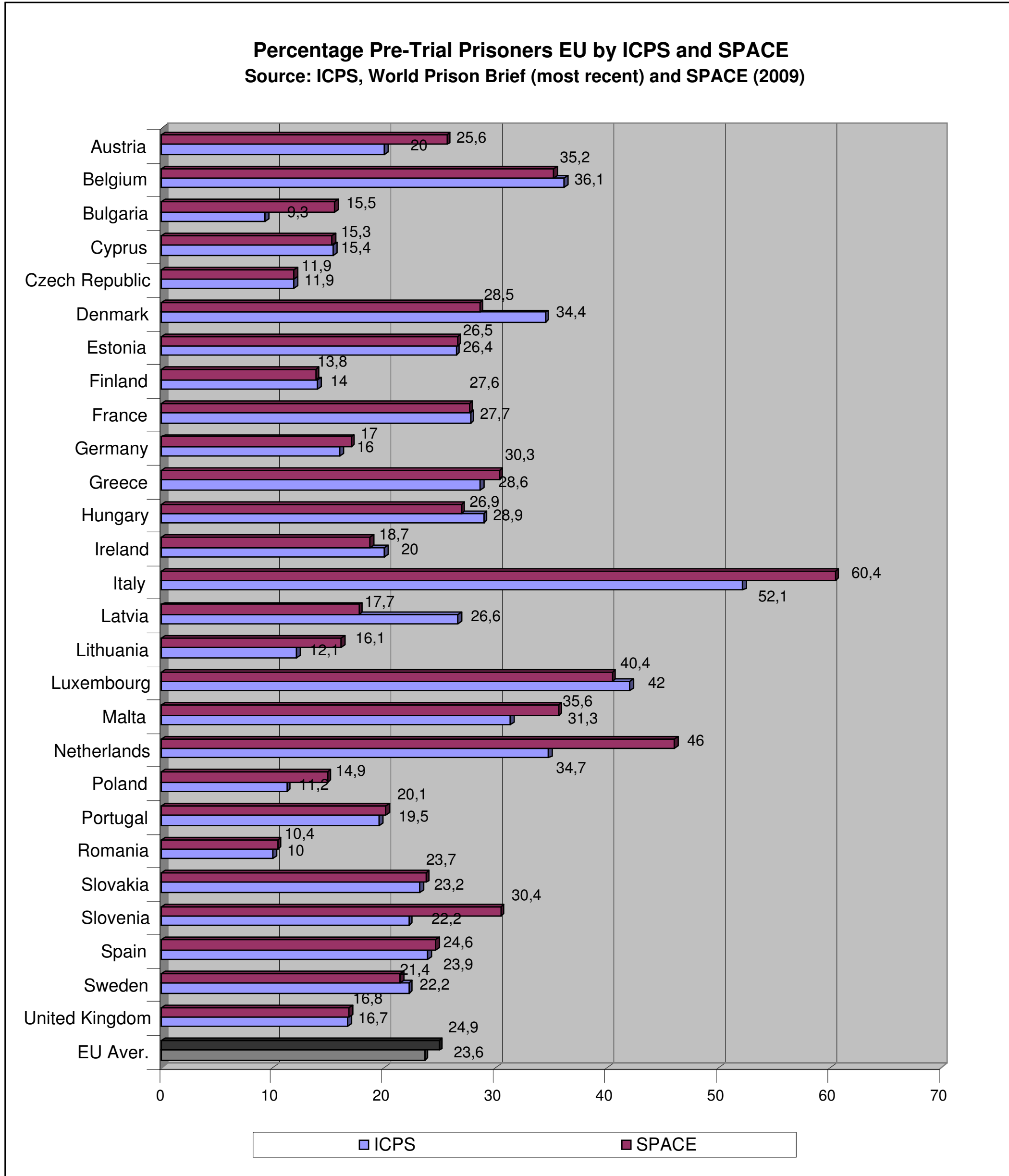


Figure 4 provides an insight in the rate of pre-trial prisoners per 100,000 inhabitants in 2007. The group pre-trial prisoners consists of the extended definition of pre-trial prisoners, namely besides untried prisoners, also prisoners who are convicted but not sentenced and those who are sentenced but who have appealed or who are within the statutory time limit for doing so. The pre-trial imprisonment rate is very high in Estonia (69,6) and Luxembourg (59,8). The lowest rates can be found in Finland (9,6), Cyprus (13,1) and Romania (14,6). The average pre-trial rate in the European Union is 29,8 in 2007.

Figure 4

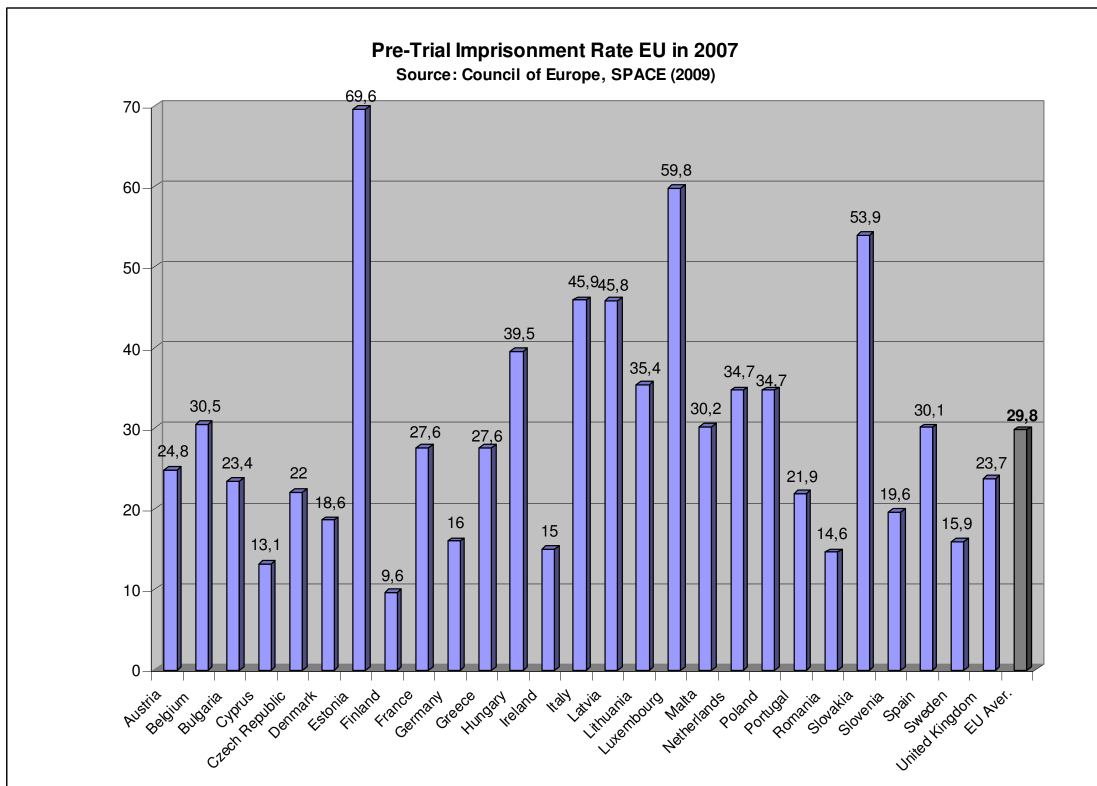
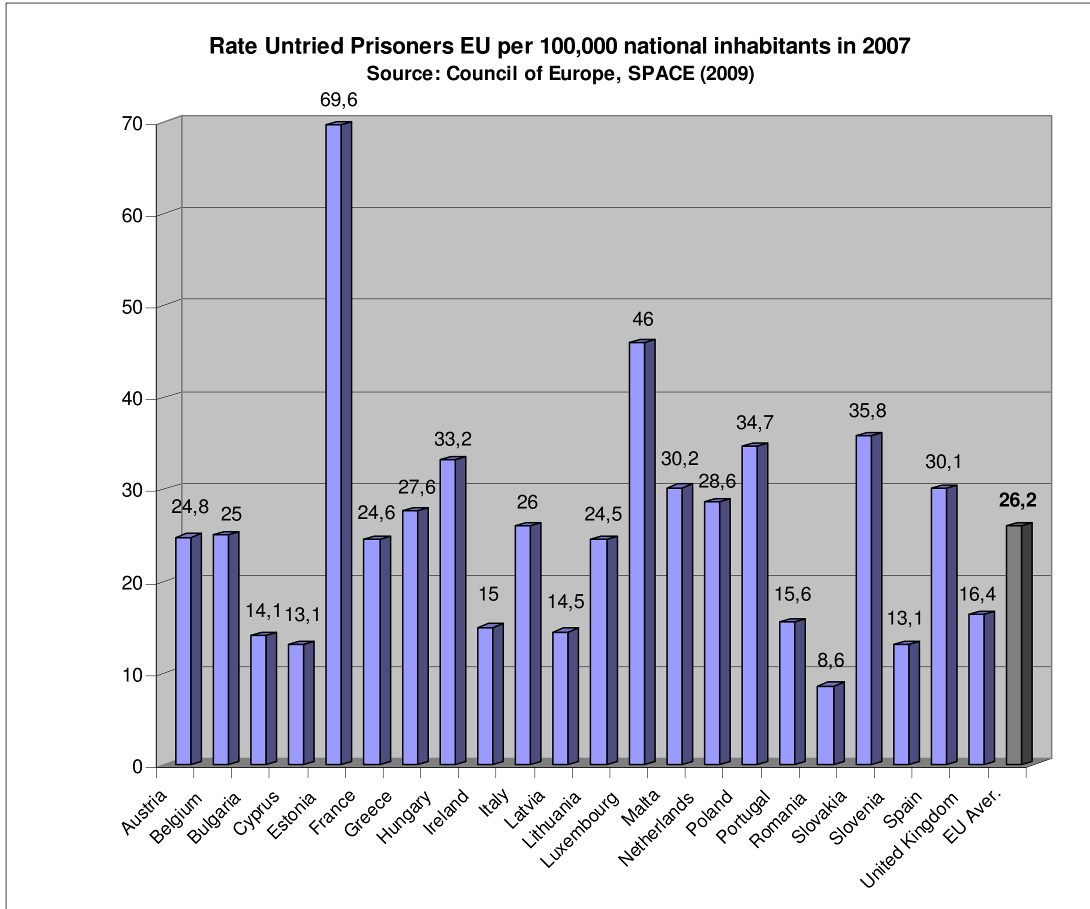


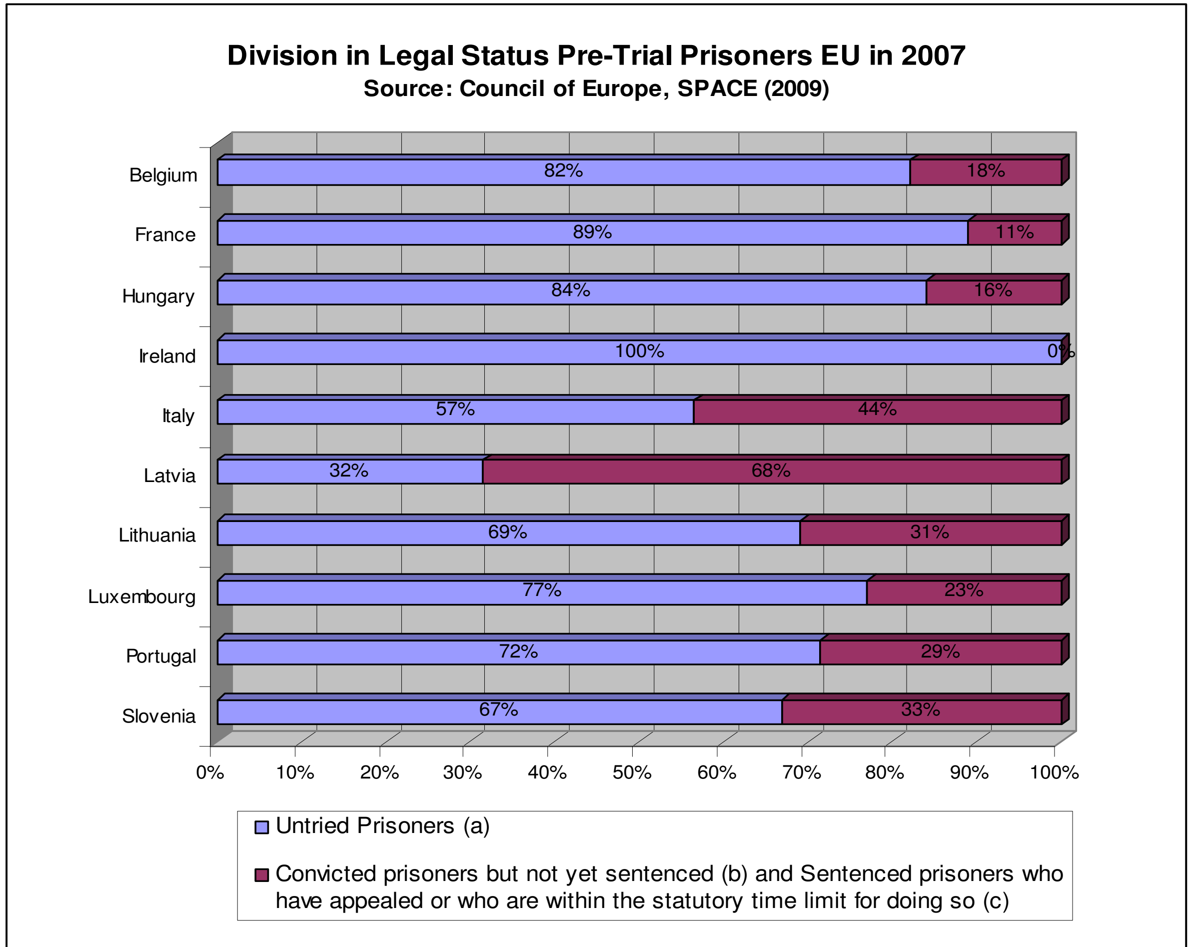
Figure 5 contains the rate of 'real' pre-trial prisoners, those who are untried (no court decision yet reached) per 100,000 inhabitants. For the Scandinavian countries Denmark, Finland and Sweden there is no information available for this particular group as is the case for Germany. For Greece and Malta, data from September 1st 2006 has been used. The highest rate of untried prisoners can be found in Estonia (69,6), Luxembourg (46) and the lowest rates in Romania (8,6), Cyprus (13,1) and Slovenia (13,1). Compared to figure 4, the image of figure 5 looks very different for Italy, Romania and the United Kingdom.

Figure 5



Ten EU countries have provided data to SPACE regarding the division in legal status of pre-trial prisoners (figure 6). In this graphic, a distinction is made between the group untried prisoners in relation to those convicted but not sentenced and those sentenced who have appealed or who are within the statutory time limit for doing so. Some of the concepts do not exist in a member state, for example the category 'convicted prisoners but not yet sentenced' in Austria, Belgium, France, Greece, Italy, Luxembourg, Portugal and Spain. It is hard to assess whether the division under the different categories was made in a correct way and therefore date should be read with caution. Besides Latvia, where only 32% of the prisoners are untried, the group of pre-trial prisoners consists in all countries of a big majority of prisoners that have been untried.

Figure 6



2.2.2.2 Development 1999 - 2007

Table 4 provides information on the number of pre-trial prisoners in the period 1999 to 2007. The last column contains an indicator for the degree of increase/decrease[63]. In ten countries there has been a decrease in the number of pre-trial prisoners and in seventeen countries there has been an increase. In Cyprus this increase is largest due to the small numbers. Also in Ireland, Luxembourg and Spain the increase has been considerable (although there is missing data for Cyprus and Ireland which makes results less reliable). The largest relative decrease is seen in Czech Republic and Romania, having a decrease of more than 50% between 1999/2000 and 2006/2007. Also in Latvia, Lithuania and Portugal there has been a substantial decrease. Over the period 1999 to 2007 there has been an overall increase of the total number of pre-trial prisoners of 8%.

[63] Calculated as: the difference in mean number of the last 2 year minus the mean number of the first 2 (valid) years as a percentage of the mean number of the first 2 years. Example Austria ((2040+2031)/2) minus ((1570+1669)/2) = 416 / (1570+1669) = 26%.

Table 4, Total Number Pre-Trial Prisoners EU 2001 – 2007 (excl. 'other cases')

	1999	2000	2001	2002	2003	2004	2005	2006	2007	In/de-crease
Austria	1570	1669	1723	1947	2193		1970	2040	2031	26%
Belgium	2084	2434	2509	3319	3186		3069	3145	3164	40%
Bulgaria	2222	1528	1563	1906	1862	1928	2802	2323	1713	8%
Cyprus			50	32		96	97	104	103	152%
Czech Republic	6820	6035	5590	3355	3174		2827	2398	2254	-64%
Denmark	904	882	815	1008	1055	1090	1024	1092	1019	18%
Estonia	1304	1374	1426		1544	1096	1024	1045	916	-27%
Finland	370	385	477	501	500	427	549	464	500	28%
France	18786	16562	14927	18477	21278	19760	20228	18444	17546	2%
Germany			17805	18063	16793	15999	15459	14634	13168	-22%
Greece		2229	2282	2008	2439			3068		36%
Hungary	4322	4207	4402	5267	4018	3023	4053	4091	3935	-6%
Ireland	300	379	457	480	432			545	616	71%
Italy	27444	23859	25319	22017	21184	19885	21370	21023	26685	-7%
Latvia	2444	2616	3041	2902	2567	2128	1916	1298	1034	-54%
Lithuania	2533	1948	2264	1532	1570	1583	1525	1405	1266	-40%
Luxembourg	158	179	151	168	217	278	280	315	287	79%
Malta			79	84	92		96	122		34%
Netherlands	4165	4372	5134	5743	5703	6410	6232	5614	5753	33%
Poland	13217	18829	25241	21632	20366	15874	14394	14415	13374	-13%
Portugal			4060	4115	4100		3044	2921	2327	-36%
Romania	10831	10670	11812	10397	8381	5993	5346	4717	3258	-63%
Slovakia	1852	1904	1943	2184	2923	3070	2966	2371	1952	15%
Slovenia	299	369	385	349	338	332	367	432	393	24%
Spain	10781	9084	10201	11543	12267	12688	13988	15017	15751	55%
Sweden	1332	1376	1299	1393	1401	1561	1477	1595	1432	12%
United Kingdom	13967	12744		14569	14752	14291	14521	15245	14454	11%

Source: Council of Europe, SPACE (2009)

Table 5 provides information on the imprisonment rate of pre-trial prisoners in Europe in the period 1999 to 2007. The number is based on the national population per 100,000. There is a high variation in the pre-trial imprisonment rate in Europe, from just under 5 (Cyprus in 2002) to over 100 persons (Estonia and Latvia) per national population of 100,000 inhabitants in the period 1999 to 2007. Over the years, the rate has increased in one third of the countries, decreased in another third of the countries and the rest remained the same or is not certain due to lacking data. The rise has been most significant in Luxembourg where the rate increased from 36,7 in 1999 to 59,8 in 2007. Countries with the highest pre-trial rate in 2007 are Estonia (69,6) and Luxembourg (59,8). In the Baltic States the rate used to be much higher. In Latvia the rate dropped from 102,2 to 45,8 in 2007, in Lithuania the number decreased from 71,9 in 1999 to 35,4 in 2007. In Estonia the decrease was less considerable, from 94,8 in 1999 to 69,6 in 2007. In the Czech Republic the rate decreased, from 66,3 in 1999 to 22 in 2007. The average European pre-trial imprisonment rate was 29,8 in 2007.

Table 5, Pre-Trial Imprisonment Rate EU between 1999-2007

	1999	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**
Austria	19,6	20,8	21,4	23,9	27,2	..	24	24,5	24,8
Belgium	20,4	23,7	24,4	32,3	30,8	..	29,4	30,2	30,5
Bulgaria	27,1	18,7	19,8	24,2	23,8	24,7	36,1	30,2	23,4
Cyprus	..	..	7,1	4,2	..	11,7	11,6	12,3	13,1
Czech Republic	66,3	58,7	54,7	32,7	31,1	..	27,7	23,5	22
Denmark	17,0	16,5	15,2	18,8	19,6	20,2	18,9	20,1	18,6
Estonia	94,8	100,3	104,5	..	114	81,2	76	78	69,6
Finland	7,2	7,4	9,2	9,6	9,6	8,2	10,5	8,8	9,6
France	32,0	28,0	25,1	30,3	34,5	31,8	32,3	29,2	27,6
Germany	..	..	21,6	21,9	20,3	19,4	18,7	17,7	16
Greece	..	20,4	20,8	19	23,1	..	..	27,6	..
Hungary	42,9	42,0	43,2	51,8	39,6	29,9	40,1	40,7	39,5
Ireland	8,0	10,0	11,9	12,4	10,9	..	..	12,9	15
Italy	48,2	41,9	44,4	39,1	37,6	34,4	36,6	35,8	45,9
Latvia	102,2	110,2	129,1	123,7	110,1	91,8	83,1	56,7	45,8
Lithuania	71,9	55,7	65,0	44,1	45,3	45,9	44,5	41,2	35,4
Luxembourg	36,7	41,0	34,2	37,8	48,4	61,6	61,5	68,3	59,8
Malta	..	..	20,5	21,3	23,8	..	23,8	30,2	..
Netherlands	26,3	27,5	32,0	35,6	35,2	39,4	38,2	34,3	34,7
Poland	34,5	49,2	66,0	56	53,3	41,6	37,7	37,8	34,7
Portugal	..	..	39,4	39,8	39,4	..	28,9	27,6	21,9
Romania	48,2	47,6	52,7	46,4	38,5	27,6	24,7	21,9	14,6
Slovakia	34,3	35,3	36,1	40,6	54,3	57,1	55,1	44,0	53,9
Slovenia	15,1	18,5	19,3	17,5	16,9	19,5	18,4	21,6	19,6
Spain	27,0	22,6	25,1	28,6	30,2	30,1	32,5	34,3	30,1
Sweden	15,0	15,5	14,6	15,6	15,7	17,4	16,4	17,6	15,9
United Kingdom	23,8	21,6	..	24,8	24,9	23,9	24,1	25,2	23,7

Source: Council of Europe, SPACE (2009)

* Information on national population (in thousands) in 1999, 2000 and 2001 were not provided by SPACE and therefore collected from the UN Stats (2008).

Table 6, Increase / Decrease of Pre-Trial Imprisonment Rate EU between 1999-2007

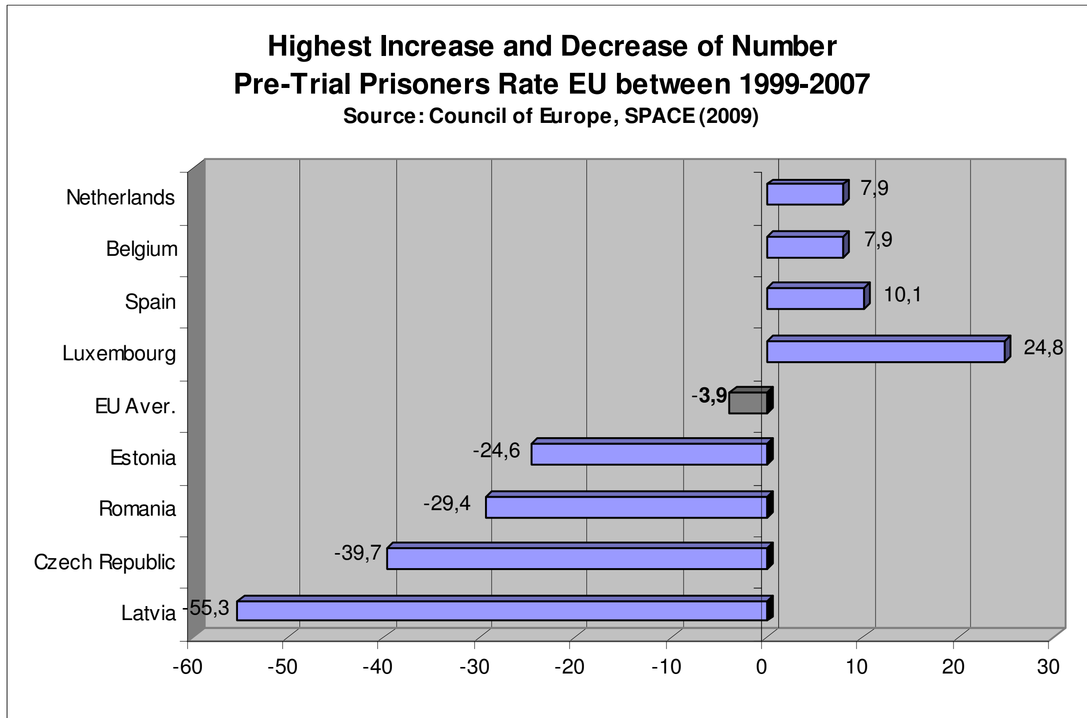
	Number	Percentage
Austria	4,45	22%
Belgium	8,3	38%
Bulgaria	3,9	17%
Cyprus	7,05	125%
Czech Republic	-39,75	-64%
Denmark	2,6	16%
Estonia	-23,75	-24%
Finland	1,9	26%
France	-1,6	-5%
Germany	-4,9	-23%
Greece	7	34%
Hungary	-2,35	-6%
Ireland	4,95	55%
Italy	-4,2	-9%
Latvia	-54,95	-52%
Lithuania	-25,5	-40%
Luxembourg	25,2	65%
Malta	6,5	31%
Netherlands	7,6	28%
Poland	-5,6	-13%
Portugal	-14,85	-38%
Romania	-29,65	-62%
Slovakia	14,15	41%
Slovenia	3,8	23%
Spain	7,4	30%
Sweden	1,5	10%
United Kingdom	1,75	8%

Source: Council of Europe, SPACE (2009)

Increase/decrease is calculated as: the difference in mean number of the last 2 years minus the mean number of the first 2 (valid) years

The data of the table 6 is visualised by figure 7 and figure 8. From figure 7 it appears that the highest increase in numbers of pre-trial imprisonment rates between 1999-2007 can be found in Luxembourg, Estonia, Spain, Belgium and the Netherlands. The highest decrease is to be found in Latvia, Czech Republic, Romania and Estonia. On average, the imprisonment rate number of pre-trial prisoners has decreased by 3,9 persons per 100,o00 national population in the period 1999 to 2007.

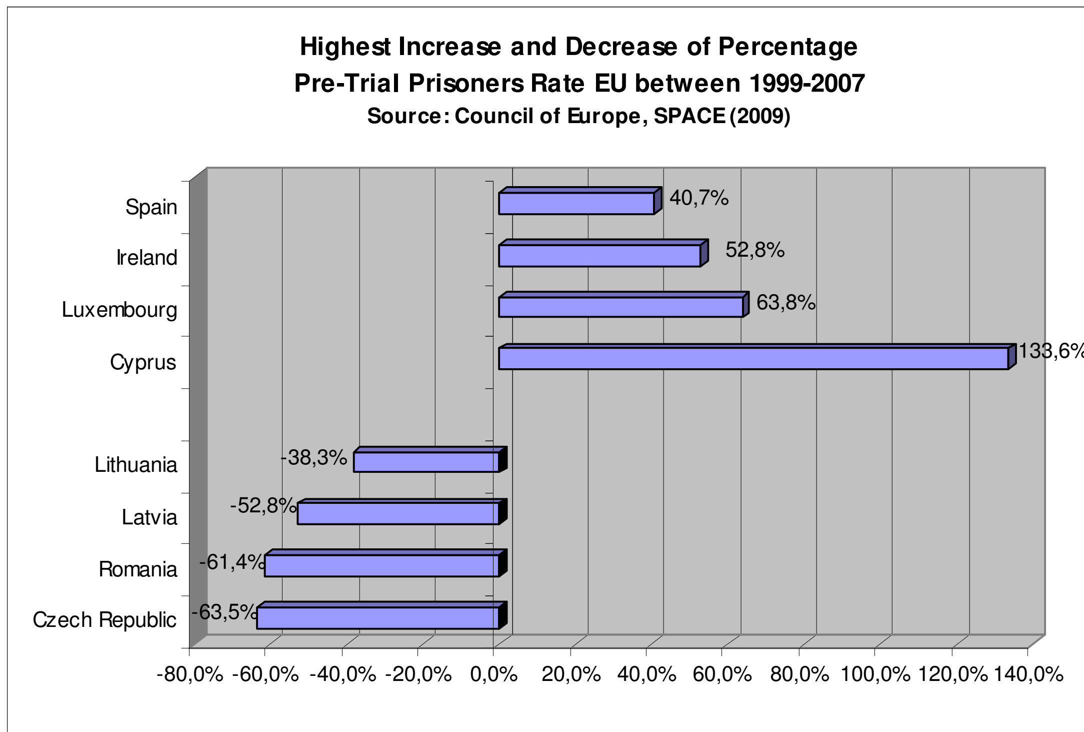
Figure 7



* Increase/decrease is calculated as: the difference in mean number of the last 2 years minus the mean number of the first 2 (valid) years

Figure 8 provides information on four countries with the highest relative increase of the pre-trial imprisonment rate and the lowest percentage between 1999 and 2007. The highest increase as a percentage of the pre-trial imprisonment rate can be found in Cyprus, followed by Luxembourg, Ireland and Spain. The highest decrease can be found in the Czech Republic, Romania, Latvia and Lithuania.

Figure 8



* Increase/decrease is calculated as: the difference in mean number of the last 2 years minus the mean number of the first 2 (valid) years divided by the mean number of the first 2 years.

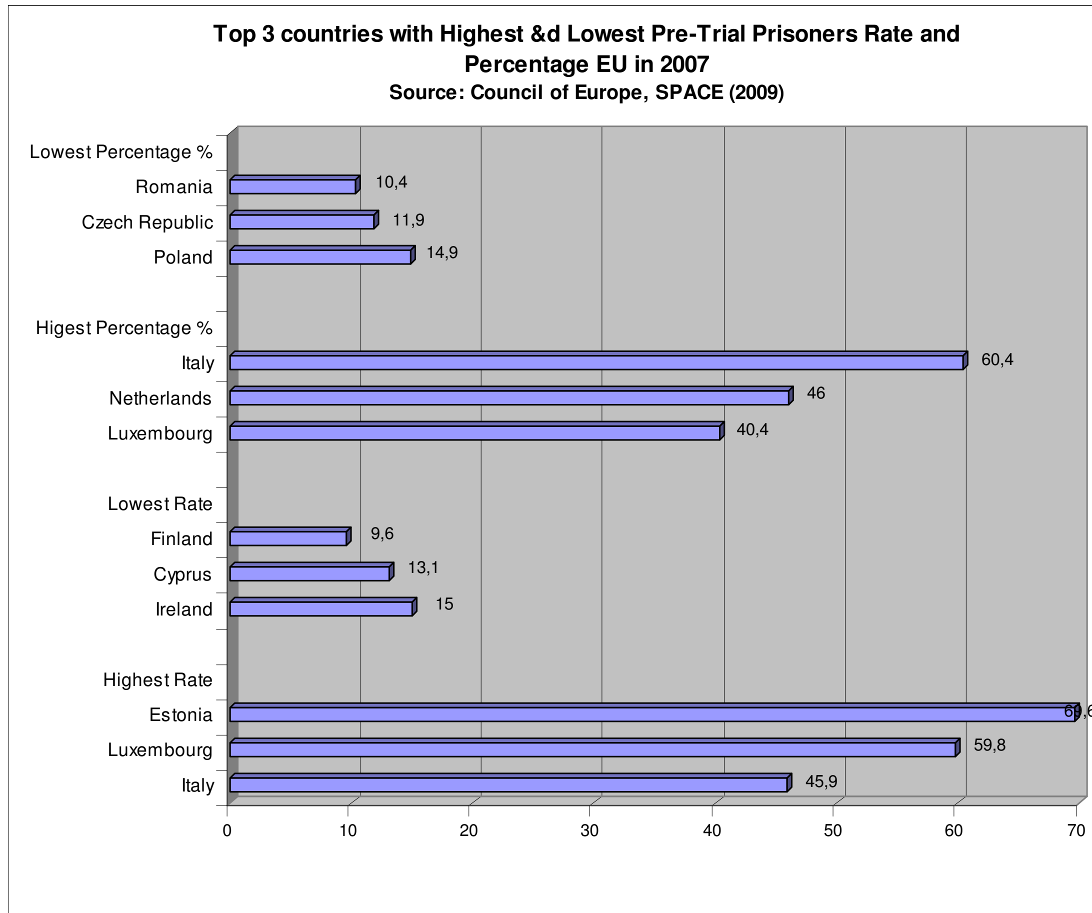
Table 7 contains the percentages of pre-trial prisoners from 1999 to 2007. The data of the table is visualised by figure 9. From figure 9 it appears that the highest pre-trial imprisonment rates can be found in Estonia, Luxembourg and Latvia and the lowest in Finland, Cyprus and Ireland in 2007. The highest percentages of pre-trial prisoners can be found in Italy, the Netherlands and Luxembourg and the lowest in Romania, the Czech Republic and Poland in 2007.

Table 7, Percentage Pre-Trial Prisoners EU from 1999-2007

	1999	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**
Austria	24,9	26,3	27,2	28	30,5		25,1	24,7	25,6
Belgium	28,2	25,4	32,8	40,6	40,2		36,6	35,2	35,2
Bulgaria	20,6	16,2	16,8	19,8	18,5	17,6	22,9	19	15,5
Cyprus			13,6	9,3		17,6	18,3	17,4	15,3
Czech Republic	29,7	27	26,6	20,1	18,8		15	12,7	11,9
Denmark	25,7	27	26,2	29,5	29,7	29,2	25	29,3	28,5
Estonia	30,1	29,1	29,8		32,2	24	23,2	24,2	26,5
Finland	14,8	14,9	16,9	15,3	14,5	12,1	15,1	13,3	13,8
France	35	34	31,8	34,6	37,1	35,1	35,1	31,9	27,6
Germany			23,8	23	21,4	20,2	19,7	18,6	17
Greece		27,7	27,4	24,2	28,5			30,3	..
Hungary	28,8	27,1	26,2	28,3	24	19,7	25,5	26,7	26,9
Ireland	10,9	13,1	17,8	15,9	14,5			17,7	18,7
Italy	50,4	44,6	45,9	40	37,8	36,2	36,5	56,9	60,4
Latvia	31	34,2	38	37,9	34,7	30,1	28,3	21,2	17,7
Lithuania	17,8	22,5	21,1	12,8	15,8	20,2	19,1	17,4	16,1
Luxembourg	42	47,5	43,5	47	46,8	55	43,6	43,8	40,4
Malta			30,7	42,2	33,1		32,2	35,6	..
Netherlands	46,3	46,6	49,3	51,3	49,5	44,9	41,7	41,8	46
Poland	24,3	29,1	31,5	26,8	33,8	20,1	17,5	16,3	14,9
Portugal			30,5	30	29,3		23,6	23,1	20,1
Romania	21,1	21,6	23,8	20,6	18,5	15	14,1	13,1	10,4
Slovakia	26,8	36,5	25,9	27,8	33,1	32,3	31,9	27,4	23,7
Slovenia	34,2	35,1	34,4	33,1	32	31,1	33	33,2	30,4
Spain	24	20,2	21,8	21,5	22,6	21,8	23,2	23,8	24,6
Sweden	24,5	24,4	21,4	21,9	20,9	21,4	21,1	22,4	21,4
United Kingdom	19,6	17,8		18,7	18,5	17,5	17,5	17,9	25,6

Source: Council of Europe, SPACE (2009)

Figure 9



2.2.2.3 Stock and flow numbers

Stock number are about 'how many people are in detention at a given time?'. Flow numbers are about 'how many people have been submitted during the course of the year?'. The figures relate to the number of events (entries) and not to the number of individuals. The same individual may enter prison several times in the same year for the same case. This applies, for instance, to an individual who is placed in pre-trial detention during the year (first entry), released by the investigating judge at the pre-trial investigation stage, tried without being re-detained, convicted and sentenced to a term of imprisonment exceeding the period of pre-trial detention, and re-imprisoned during the same year to serve the remainder of the sentence (second entry). A fortiori, the same individual may enter prison several times in the same year for different cases[64].

Stock percentages are used to calculate the ratio of flow divided by stock. The ratio shows in which way the detention period of pre-trial prisoners is shorter or longer compared to other prisoners. If the ratio is exactly 1 it means that the rate of circulation of pre-trial prisoners and other prisoners is the same. If the ratio is higher than 1, the rate of circulation of pre-trial prisoners is higher and therefore the detention period shorter. If the ratio is between 0 and 1 the rate of circulation of pre-trial prisoners is larger and thus the detention period longer.

Table 8 shows that there is no country with a ratio smaller than 1. This means that there are no pre-trial prisoners in EU countries that spend on average more time in prison than other prisoners. The highest ratios are found in Bulgaria, Cyprus, Ireland and the United Kingdom. Relatively low ratios (below 2) are found in Czech Republic, Latvia, Portugal and Slovakia. It is not possible to draw conclusions about the length of pre-trial detention period. A high ratio can mean that the period of detention of pre-trial prisoners is short, but it can also be the result of high numbers of prisoners with a long sentence in a country.

[64] Explanation by the Council of Europe, SPACE (2009)

Table 8, Percentage of Pre-Trial Prisoners in the Total Flow in 2007

	Flow[65]		Stock		Ratio Flow / Stock	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**
Austria	11351	9910	2040	2031	5,6	4,9
Belgium	11176	11978	3145	3164	3,6	3,8
Bulgaria	34151	30713	2323	1713	14,7	17,9
Cyprus	1026	1095	104	103	9,9	10,6
Czech Republic	2860	2399	2398	2254	1,2	1,1
Denmark	…	…	1092	1019	…	…
Estonia	…	…	1045	916	…	…
Finland	1930	1598	464	500	4,2	3,2
France	60948	56752	18444	17546	3,3	3,2
Germany	53668	45103	14634	13168	3,7	3,4
Greece	…	…	3068	…	…	…
Hungary	6197	9313	4091	3935	1,5	2,4
Ireland	4722	5496	545	616	8,7	8,9
Italy	75615	79047	21023	26685	3,6	3
Latvia	…	1131	1298	1034	…	1,1
Lithuania	7624	6779	1405	1266	5,4	5,35
Luxembourg	693	1096	315	287	2,2	3,8
Malta	254	...	122	…	…	…
Netherlands	20994	20320	5614	5753	3,7	3,5
Poland	34473	33764	14415	13374	2,4	2,5
Portugal	3148	3091	2921	2327	1,1	1,3
Romania	…	…	4717	3258	…	…
Slovakia	3900	3170	2371	1952	1,7	1,6
Slovenia	860	955	432	393	2	2,4
Spain	…	30882	15017	15751	…	2
Sweden	…	…	1595	1432	…	…
United Kingdom	100437	126110	15245	14454	6,6	8,7

Source: Council of Europe, SPACE (2009)
… No numbers available.

2.3 Special groups

2.3.1 Foreign prisoners

Table 9 provides information on the total number and percentage of foreign prisoners on the total prison population and on the number and percentage of foreigners on the pre-trial prison population in 2007[66]. In general, the proportion of foreigners in both the pre-trial and the total prison population is relatively high compared to the number of foreigners in the national population.

The highest numbers of foreigners on the total prison population can be found in Spain, Germany and Italy and the lowest numbers in Lithuania, Latvia, Slovenia and Slovakia. The fact that there is a relatively high number of foreigner prisoners in Estonia can be explained by the fact that this group consists of Russian speaking Estonians who have not been granted

[65] Entries before final sentence

[66] The percentages are calculated on numbers including 'other cases' because only these numbers are known. This concerns both the numerator and the denominator of the fraction, so there should not necessarily be an under- or overestimation of percentages.

citizenship but who live in Estonia[67]. It is noteworthy that Latvian authorities, that basically have the same situation as Estonia, did obviously not report their residents with an unclear citizenship under the category 'foreigners'. The highest percentages of foreign prisoners on the total prison populations can be found in small West European countries like Luxembourg and Cyprus. Unfortunately, there is no recent data for Greece and Malta because in these countries the percentage of foreigners on the prison population is normally around 50%. Countries with a prison population that consist of around 40% foreigners are Austria, Belgium, Estonia and Italy.

The highest numbers of pre-trial foreign prisoners can be found in Germany and Italy and the lowest in Bulgaria, Romania and Lithuania. The percentage of foreign pre-trial prisoners is highest in Italy, Slovakia, Poland and Slovenia. In Italy, the percentage of foreigners on the pre-trial prison population is 72,5% compared to 36,5% on the total prison population; for Poland this is even more extreme: from 0,7 % of the pre-trial prison population to 51,5 % of the pre-trial population. A high variation in the representation can also be found in the Czech Republic, Ireland, Portugal, Romania, Slovakia, Slovenia and Scotland. The opposite is true for Austria, Cyprus, Estonia and Luxembourg. Figure 10 provides this information in a graphic.

[67] van Kalmthout, Anton, Hofstee-van der Meulen, Femke, Dünkel, Frieder (eds.) (2007): Foreigners in European Prisons. Wolf Legal Publisher, Nijmegen, p. 264.

Table 9, Foreign Prisoners EU in 2007

1-sep-07	Foreign prisoners			
	Total number	**Percentage**	**Number Pre-Trial Foreign Prisoners**	**Percentage Foreign Pre-Trial Prisoners**
Austria	3917	44,1	1310	33,4
Belgium	4234	42,9	1753	41,4
Bulgaria	211	1,9	9	4,3
Cyprus	357	53,2	39	10,9
Czech Republic	1392	7,4	541	38,9
Denmark	654	18,0	…	…
Estonia	1413	40,9	423	29,9
Finland	301	8,3	86	28,6
France	12341	19,4	…	…
Germany	20485	26,3	5569	27,2
Greece				
Hungary	544	3,7	…	…
Ireland	474	14,3	214	45,1
Italy	16643	36,5	12067	72,5
Latvia	84	1,3	…	…
Lithuania	80	1,0	26	32,5
Luxembourg	546	73,4	255	46,7
Malta				
Netherlands	4246	29,1	1315	31,0
Poland	629	0,7	324	51,5
Portugal	2371	20,5	878	37,0
Romania	243	0,8	23	9,5
Slovakia	165	2,0	102	61,8
Slovenia	140	10,5	68	48,6
Spain	18474	32,4	7151	38,7
Spain: Catalonia	3769	40,1	1343	35,6
Sweden	1424	21,0	…	…
United Kingdom	11310	14,2	1602	14,2
UK: Scotland	206	2,8	93	45,1

Source: Council of Europe, SPACE (2009)

Figure 10

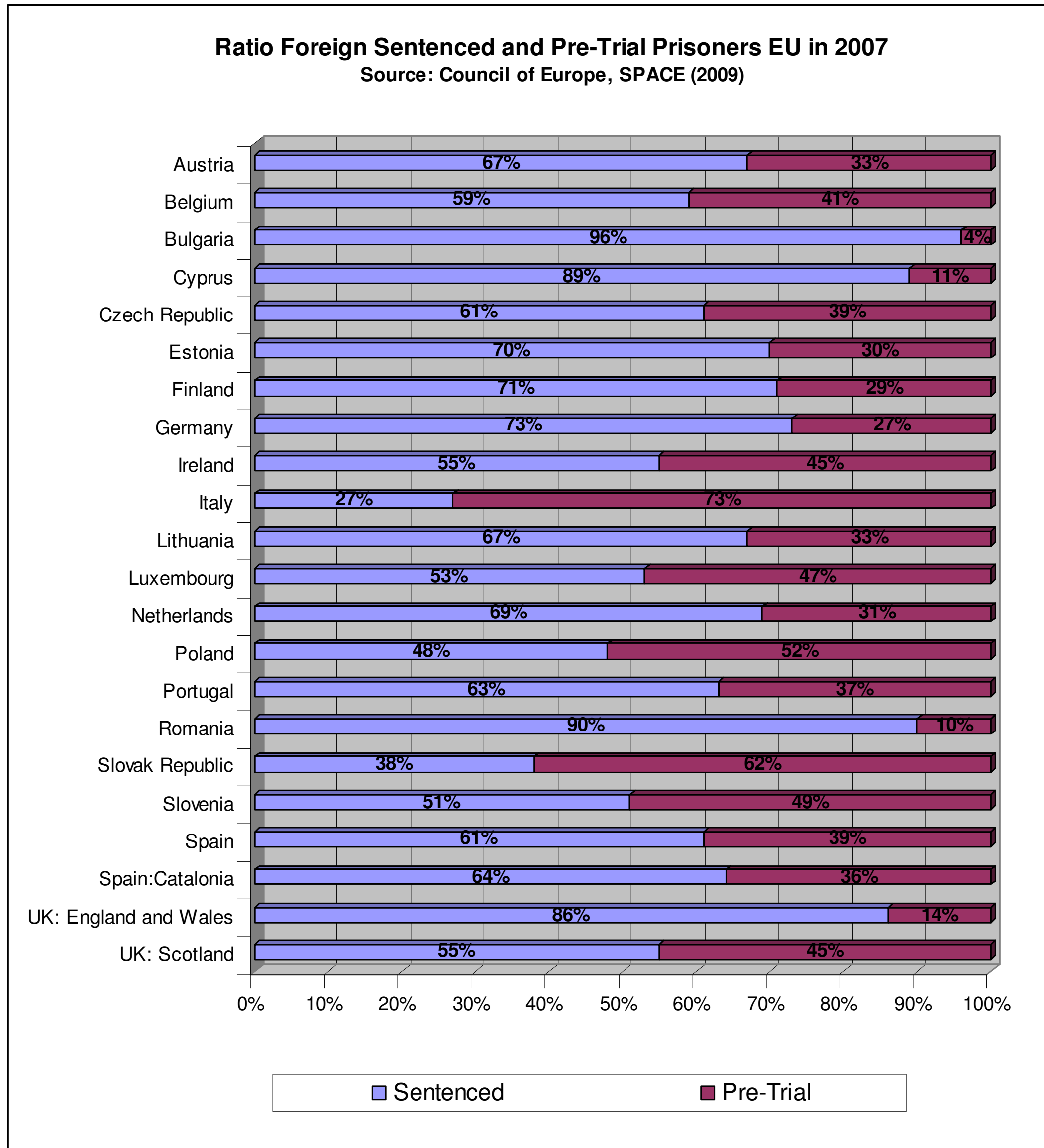
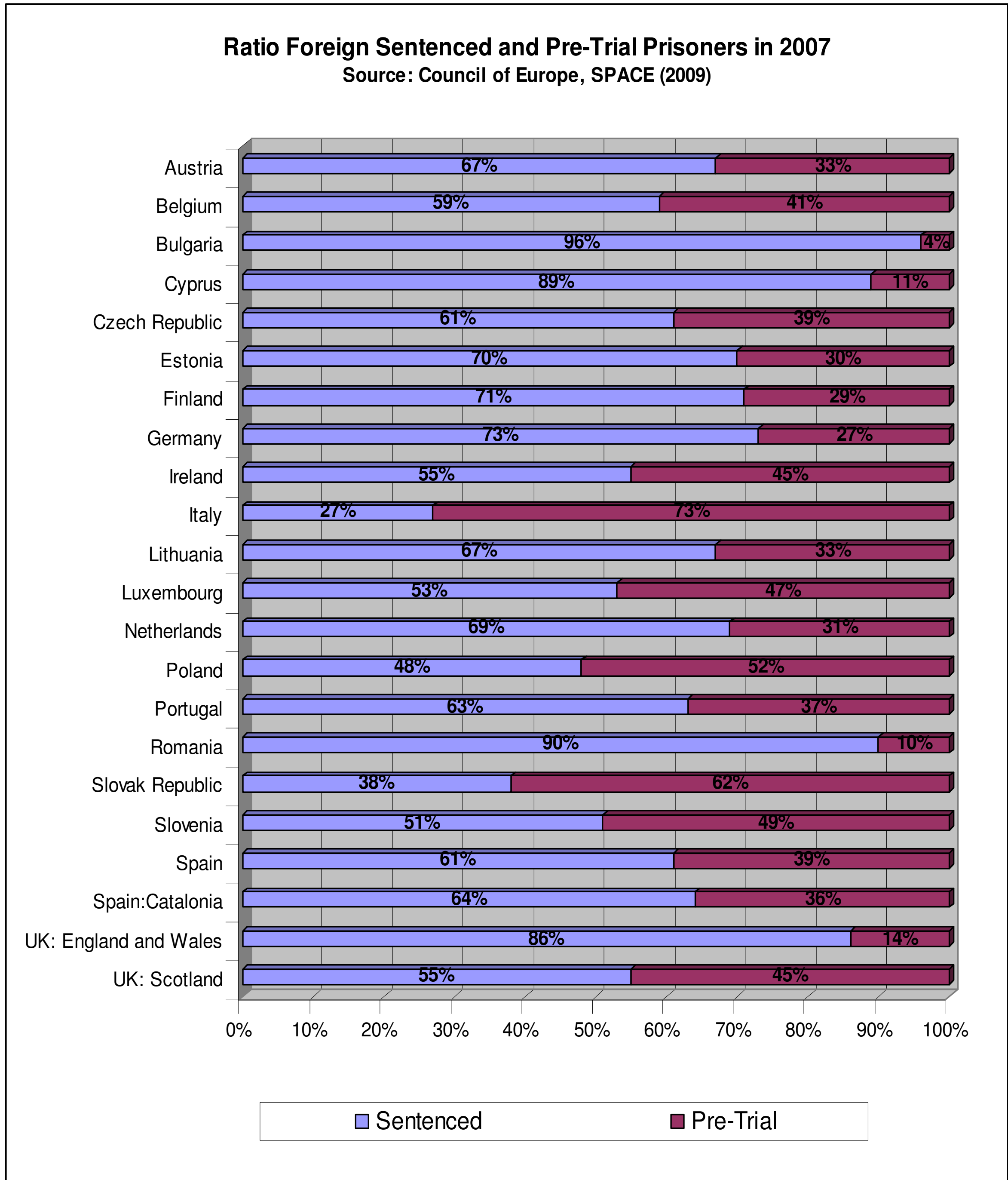


Figure 11 shows the division of the total foreign prison population per country into pre-trial and sentenced prisoners. In general, the proportion of sentenced foreigners is larger than the proportion of pre-trial detained foreigners. This is most extreme in Bulgaria, Cyprus, Romania and England & Wales where at least 85% of the foreign prisoners are sentenced prisoners. Only in Italy, the group of foreign prisoners consists of substantially more pre-trial prisoners (73%) than sentenced ones. In Poland, the proportion of pre-trial detained foreigners is slightly larger than the proportions sentenced (52%-48%) and in Ireland, Luxembourg and Slovenia the ratio is also about 50-50. Only four[68] countries provide information about the countries of origin of the foreign prisons: Austria, Germany, the Netherlands and Poland.[69] In Austria, in 2005, 14,1% (± 170) of the pre-trial foreign prisoners comes from other EU-countries; in Germany, in 2008, 15,8% of the pre-trial foreign prisoners comes from other EU-countries; in the Netherlands this percentage is 41,3% (799) in 2006. In Poland, 33,8% (183) from *all* foreign prisoners came for other EU-countries.

[68] England & Wales provides information about the ethnic group.
[69] It is advisable to look at the country reports of the respective countries for more detailed information on this topic.

Figure 11, Ratio Foreign Sentenced and Pre-Trial Prisoners in 2007

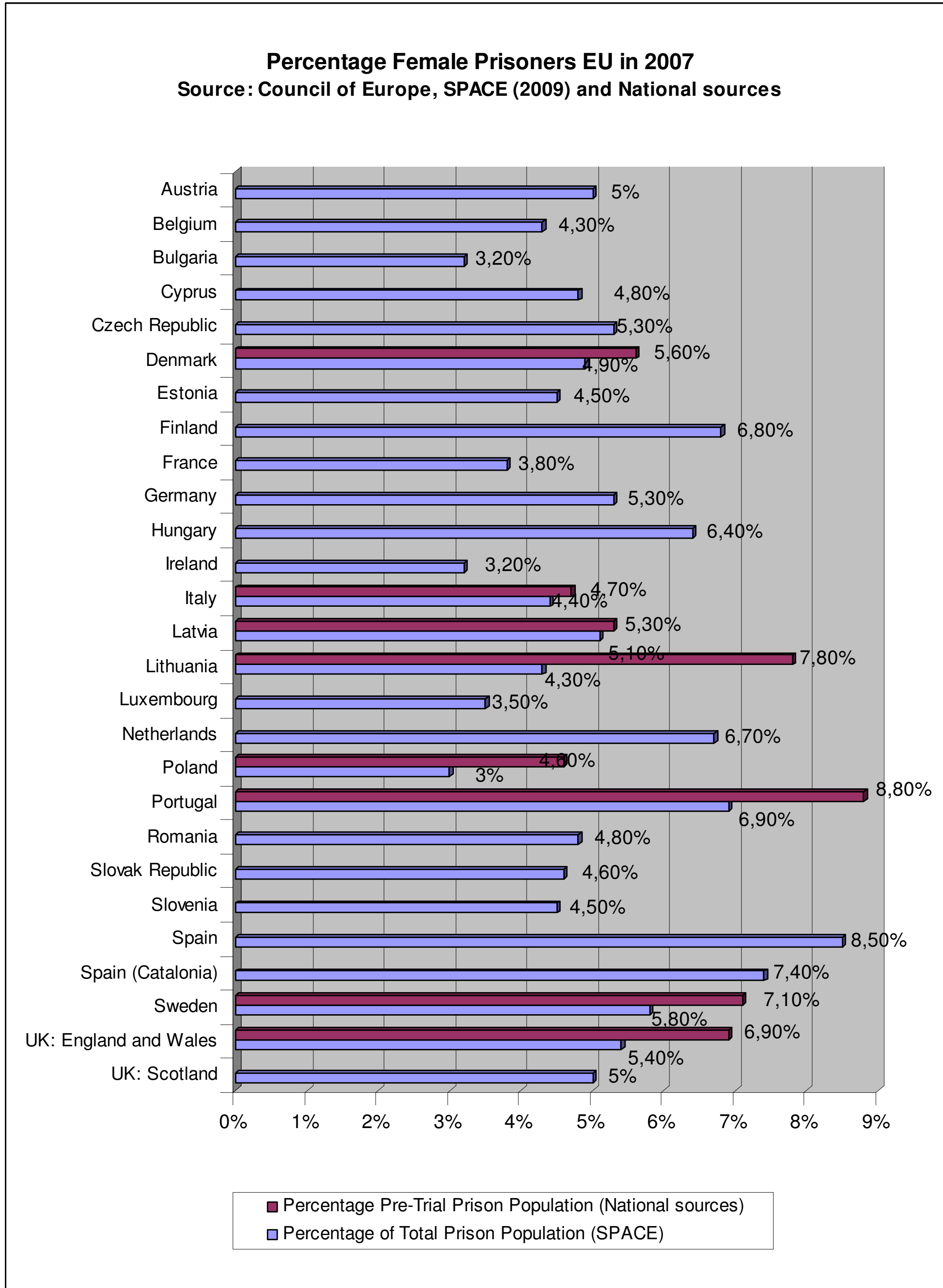


2.3.2 Female prisoners

Figure 12 shows the proportion of female prisoners on the total prison population and, available for only nine countries, the proportion of females in the group pre-trial prisoners.[70] The proportion of females in the group of pre-trial prisoners varies from 4,6% in Poland to 8,8 in Portugal. The proportion of female prisoners under the pre-trial prisoners is in none of the nine countries where the information is available lower than the proportion of females in the total prison population.

[70] According to the draft country reports in January 2009; after this date information on this topic could have been added to the reports. It is therefore advisable to have a look at the reports of the respective countries.

Figure 12

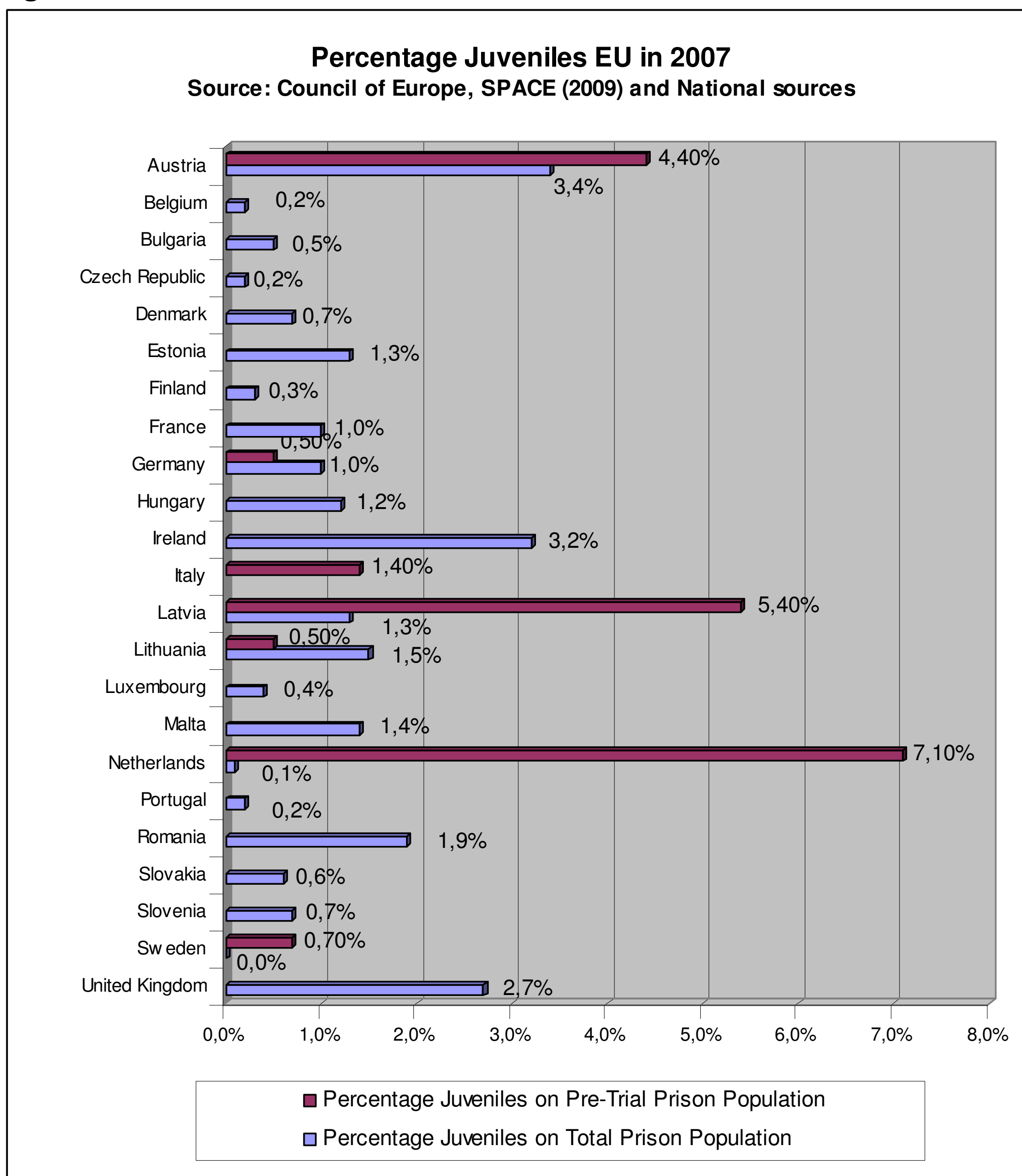


* Data comes from different national sources (see country reports). The reference dates vary from 1-7-2006 to 1-3-2008.

2.3.3 Juvenile prisoners

Figure 14 shows the proportion of juvenile prisoners in the total prison population and, available for only seven countries, the proportion of juveniles in the group pre-trial prisoners.[71] This is to a certain extent due to the fact that in part of the countries the juveniles are not detained under the authority of prison service. Therefore, they are not included in de prison numbers or numbers are low. In 19 of the 23 countries the proportion of juveniles in the total prison population is less than 2%. In two of the seven countries with data available the proportion of juveniles in the pre-trial population is substantially lower than in the total prison population. These countries are Germany (0,5% versus 1%) and Lithuania 0,5% versus 1,5%. For countries the opposite is true; especially in the Netherlands (7,1% versus 0,1%), Austria (4,4% versus 3,4%) and Latvia (5,4% versus 1,3%).

Figure 14



* Data comes from different national sources (see country reports) the reference dates vary from 1-1-2007 to 1-1-2008.

[71] According to the draft country reports in January 2009; after this date information on this topic could have been added to the reports. It is therefore advisable to have a look at the reports of the respective countries.

2.4. Conclusion

Collecting, analysing and interpreting data on penal statistics in all 27 EU countries is not an easy task. Luckily, since a few years the Council of Europe presents the Annual Penal Statistics (SPACE) and ICPS's World Prison Brief provides on internet up-to-date data on various prison issues. These efforts to present comparable data should stimulate EU countries to develop and create a more uniform way of data collection, to present data on one particular reference day (for example first of January) and to use similar definitions. Also, it could be an impetus for the EU to set up a database with translated Laws concerning legislation in the field of judicial cooperation in criminal matters. Ways could be developed in keeping such a database up-to-date and according the latest amendments. The gathering of laws into one database and translating them into languages most commonly used in the EU could moreover stimulate the debate on definitions and terminology as it forces us to translate and thus to think about words/definitions/meaning of concepts/etc.

Data from SPACE is mainly used in this comparative overview because it provides the most detailed information about the different categories of pre-trial prisoners from all 27 EU countries over the period (1999-2007) and from a similar point in time (September 1st). SPACE uses a broad definition of pre-trial prisoners, namely all those prisoners that have not received their final sentence. This group is divided into four categories: those who are untried, those who are convicted but not yet sentenced, those who are sentenced but who have appealed or who are within the statutory time limit to do so and other cases. Strictly speaking, only untried prisoners (no court decision yet reached) are pre-trial prisoners. The group 'other cases' are not calculated in this study since this group is detained on criminal grounds.

The total prison population in the EU countries is just over 600,000 in 2007. Countries with the largest prison populations are Poland, United Kingdom and Germany and the smallest populations can be found in Malta, Cyprus and Luxembourg. When the prison population is related to the number of inhabitants per country (imprisonment rate), the view is completely different. The highest imprisonment rates are found in Latvia, Estonia, Lithuania and Poland with more than 230 prisoners per 100,000 inhabitants. Denmark, Slovenia and Finland have the lowest imprisonment rates with less than 68 prisoners per 100,000 inhabitants. The average imprisonment rate in the EU is 131 in 2007.

Occupancy rates differ per country but on average there is overpopulation. Especially when taking into account that the numbers are calculated as an average; this means that densely populated institutions and institutions with few prisoners are taken together. Furthermore, it is noteworthy to mention that the cell seizes are not everywhere according to the CPT standards of $4m^2$ per person. The highest overcrowding can be found in prisons in Cyprus, Greece and Spain but also in Belgium, France, Hungary, Poland and Slovenia. Low prison occupancy rates can be found in Latvia, Malta and Slovakia.

The percentage of foreigners on the prison population and on the pre-trial populations is above 40% in Austria, Belgium, Cyprus, Estonia, Greece, Luxembourg and Malta. The highest number of female prisoners can be found in Spain, United Kingdom and Germany and most foreigners in Spain, Germany and Italy.

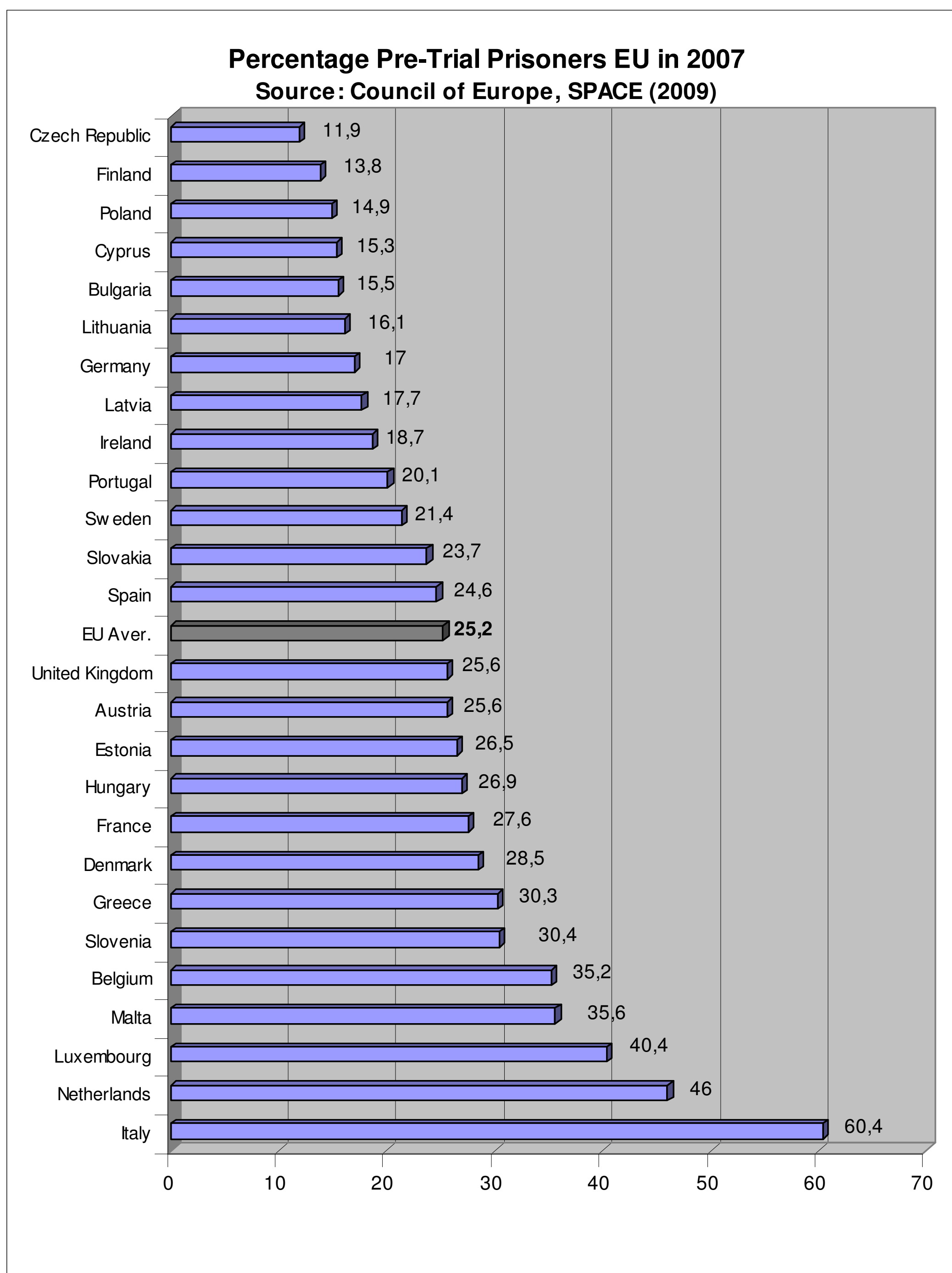
Data for juveniles (under 18 years of age) are more difficult to compare because countries use different terminology for treatment places in a closed setting.

Looking at data on pre-trial prisoners in EU countries the figures differ, even if the data come from an official national source[72]. What the sources have in common is that data do not contain the number of persons in police cells and in remand centres. Thus, the data are underestimations of the total number of pre-trial prisoners.

Figure 15 contains data by SPACE on the percentage of pre-trial prisoners in EU countries on the total prison population[73]. The average percentage of pre-trial prisoners on the total prison population in the EU is 25,2% in 2007. For Greece and Malta the numbers of September 1st 2006 have been used since they were the most recent published data.

[72] SPACE (Council of Europe), World Prison Brief (ICPS) and the European Sourcebook.
[73] The group 'other cases' is taken out of the calculation as explained above.

Figure 15, Percentage Pre-Trial Prisoners EU in 2007



The highest percentages of pre-trial prisoners on the total prison population can be found in Italy (60,4%), followed by the Netherlands (46%) and Luxembourg (40,4%). The lowest percentages of pre-trial prisoners can be found in Romania (10,4%), the Czech Republic (11,9%) and Poland (14,9%). When looking at absolute numbers of pre-trial prisoners, the highest amounts can be found in 2007 in Italy (26685), France (17546) and Spain (15751). The lowest numbers are in Cyprus (103).

In 2007 the pre-trial imprisonment rate in the EU per 100,000 inhabitants per country provides a different view. The highest pre-trial imprisonment rates can be found Estonia (69,6) and Luxembourg (59,8). The lowest rates can be found in Finland (9,6), Cyprus (13,1) and

Ireland (15). The average rate of pre-trial prisoners in the EU 29,8 in 2007. The highest rate of 'real' pre-trial prisoners, those who are untried (no court decision yet reached) per 100.000 inhabitants, can be found in Estonia (69,2) and Luxembourg (46). The lowest rate of untried prisoners can be found in Romania (8,6), Slovenia (13,1) and Cyprus (13,1). Less than half of the EU countries provide data on the three different kinds of categories of pre-trial prisoners. Besides Latvia, where only 32% of the prisoners are untried, the group of pre-trial prisoners consists in all countries of a big majority of prisoners that have been untried.

What are trends in the number or pre-trial prisoners in the period 1999 to 2007? In ten countries the total number of pre-trial prisoners decreases and in seventeen countries there has been an increase. The largest relative decrease is seen in Czech Republic and Romania having a decrease of more than 50% between 1999/2000 and 2006/2007. Overall, there has been an increase of 8% of the total number of pre-trial prisoners in the period 1999 to 2007. The highest increase in the pre-trial imprisonment rate over the period 1999-2007 can be found in Luxembourg and the highest decrease in Latvia. On average, the imprisonment rate number of pre-trial prisoners has decreased by 3,9 persons per 100,000 national population in the period 1999 to 2007. Over the period 1999 to 2007 the highest increase as a percentage of the pre-trial imprisonment rate can be found in Cyprus, followed by Luxembourg, Ireland and Spain. The highest decrease can be found in the Czech Republic, Romania, Latvia and Lithuania.

With regard to flow and stock data, the data show us that in all EU countries pre-trial prisoners do not spend on average more time in prison than other prisoners. Despite the numbers available, it is not possible to draw conclusions about the length of pre-trial detention period. A high ratio can mean that the period of detention of pre-trial prisoners is short, but it can also be the result of high numbers of prisoners with a long sentence in a country.

In general the proportion of foreigners in both the pre-trial and the total prison population is relatively high compared to the number of foreigners in the national population. The highest numbers of foreign prisoners can be found in Spain, Germany and Italy. In the Baltic States (except for Estonia) and Eastern European countries the number is relatively low. There is a large overrepresentation of foreigners in the prison population of Luxembourg (75%) and Cyprus. The percentage of foreigners on the pre-trial prison population is highest in Italy, Slovakia, Poland and Slovenia. Information on the nationality of foreign prisoners is often not registered by prison services or in national penal statistics. Anticipating on forthcoming new EU legislation, where EU nationals can be returned automatically to their EU country of origin, this information would be very helpful and welcome. In only four countries information about the countries of origin of the foreign prisons is available.

Female prisoners are underrepresented on prison populations. Their proportion varies from 4,6% in Poland to 8,8 in Portugal. The proportion of female prisoners under the pre-trial prisoners is in none of the nine countries where the information is available lower than the proportion of females in the total prison population. Except for a few countries, there is no information available on female pre-trial prisoners. Also for juveniles there is hardly any information available.

In conclusion, it would be beneficial if EU countries would use a more uniform way of data collection, using a similar reference day and use as much as possible similar definitions and concepts. Efforts to provide valid, up-to-date and comparable data could be coordinated by the Council of Europe (SPACE) and/or by the European Union. This should be of special interest to the European Union in order to get a better understanding of the penal situation in the EU and to oversee and measure the effects of implementing penal policies and legislation like the forthcoming Framework Decision on the Transfer of EU nationals and European Supervision Order in Pre-Trial Procedures.

Chapter 3: Legal basis: scope and notion of pre-trial detention

3.1 Definition of pre-trial detention

In order to analyse and compare the development of the pre-trial prison population in the different Member States of the European Union, one should first clarify the scope and the notion of the research subject, namely "pre-trial detention". In addition, it should be noted that the term "pre-trial detention" is not commonly used among Member States. Instead, many national sources of law (e.g. Constitution, Code of Criminal Procedure and other relevant criminal legislation) often use the term "remand in custody" or "preventive detention" as an equivalent of pre-trial detention. "Remand in custody" is also commonly used in the legal tools of the Council of Europe dealing with this topic, for instance: Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, and Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules.

The term "pre-trial detention" can nonetheless be found in several legal documents issued by organs of the European Union in the area of freedom, security and justice, such as the Green Paper on mutual recognition of non-custodial pre-trial supervision measures (COM(2004) 562 final) and the Proposal for a Council Framework Decision on the European Supervision Order (COM(2006) 468 final). International statistical sources such as SPACE (Annual Penal Statistics of the Council of Europe), the European Sourcebook of Crime and Criminal Justice, and the International Centre for Prison Studies (ICPS) also use the term "pre-trial detention" for describing the group of prisoners detained without a final sentence.

The use of several terms, with possibly different meanings, can be a major obstacle when trying to clarify the notion and scope of pre-trial detention. Therefore, there are two main questions that need to be answered at this stage. First of all, what is (or should be) understood by Member States by the term "pre-trial detention" (notion of pre-trial detention)? And, secondly, which categories of prisoners are (or should be) considered "pre-trial detainees" by Member States (scope of pre-trial detention)?

Regarding the notion of pre-trial detention, it should be noted that pre-trial detention (remand custody or preventive detention) is as such not defined in the national legislation of many Member States. Countries that do give a definition of pre-trial detention mostly define it by its purpose, which is: preventing the suspect or accused person from absconding, from committing a crime or from frustrating the execution of a sentence that has entered into force. However, all EU Member States recognise pre-trial detention as being a remand/precautionary measure which entails deprivation of liberty of the suspect or accused person. This "common ground" gives rise to the following question: When does a person who has been deprived of his/her liberty get or keep the status of a "pre-trial detainee"? In other words: Which categories of prisoners are seen as pre-trial detainees by Member States? To answer this question, a distinction should be drawn between four categories of prisoners, namely:[74]

- prisoners held in detention following initial police arrest. In such cases, no detention order has yet been issued by a judicial authority;
- prisoners held in detention following a judicial order, but still awaiting trial or a sentence in first instance. In some countries, this may also include the time between conviction and sentence;
- prisoners held in detention after being convicted in first instance, but still awaiting a decision on appeal or cassation;
- prisoners held in detention following a final sentence.

[74] In fact, there is also a fifth category: a "rest category". The type of prisoners included in this category varies per country, for instance: prisoners who are detained pending their expulsion, prisoners who are failing to pay their administrative fine, prisoners who are waiting to be transferred to a psychiatric treatment centre, prisoners who are detained on the basis of social protection laws etc. Generally speaking, their detention is not based on a criminal suspicion or sentence but on another ground, outside the scope of criminal law. So in fact, this category does not include pre-trial prisoners. For this reason, the "rest category" has not been further examined in this study.

In almost all Member States, the first and the fourth categories of prisoners mentioned above are not considered pre-trial detainees (remand prisoners). Pre-trial detainees are thus untried prisoners and prisoners without a final sentence who are deprived of their liberty following a (written) order of a judicial authority, usually a court or a judge. Consequently, the question that can be posed, is whether the scope of pre-trial detention, by excluding the first and fourth groups of prisoners, has not been narrowed down too much by Member States. To be able to answer this question, one should first consider some authoritative legal documents dealing with this subject, for instance, the Recommendations Rec(2006)13 and Rec(2006)2, and of course, the European Convention on the Human Rights and the case-law of the European Court of Human Rights.

First of all, Sec. 94.1 of Recommendation Rec(2006)2 on the European Prison Rules explicitly states that "for the purpose of these rules, untried prisoners are prisoners who have been remanded in custody by a judicial authority prior to trial, conviction or sentence". However, "a state may elect to regard who have been convicted and sentenced as untried prisoners if their appeals have not been disposed of finally" (Sec. 94.2 Rec(2006)2). The above-mentioned recommendation seems to leave the decision on who should be regarded and kept as a remand prisoner to the national jurisdiction. More clarity about the scope of pre-trial detention could perhaps be found in Recommendation Rec(2006)13. According to Art. 1(1) of this Recommendation, "remand in custody is any period of detention of a suspected offender ordered by a judicial authority and prior to conviction. It also includes any period of detention pursuant to rules relating to international judicial co-operation and extradition, subject to their specific requirements. It does not include the initial deprivation of liberty by a police or a law enforcement officer (or by anyone else so authorised to act) for the purpose of questioning." Furthermore, "remand in custody also includes any period after conviction whenever persons awaiting either a sentence or the confirmation of conviction or sentence continue to be treated as unconvicted persons" (Art. 1(2) Rec(2006)13). Finally, the third paragraph of the same article states that remand prisoners are also "persons who have been remanded in custody and who are not already serving a prison sentence or are detained under any other instrument".

The explanatory memorandum[75] on Recommendation Rec(2006)13 further explains that "remand in custody is defined in a way that excludes any period of in the custody of the police or other law enforcement officers following an initial short deprivation of liberty by them or by anyone else entitled to effect such a measure (e.g. under power of citizen's arrest) for the purpose of questioning before charge as well as any prolongation of that detention approved by a judicial authority". Moreover, it states that "remand in custody will be thus ordered by a judicial authority at a later stage in the criminal justice process and it may also be ordered in respect of someone who has not actually been deprived of his liberty by the police or other law enforcement officers or anyone else so entitled to act. The need for the imposition of this loss of liberty to be ordered by a judicial authority reflects the combined requirements of Articles 5(1) and (3) of the European Convention on the Human Rights."

The wording of Art. 1 of Recommendation Rec(2006)13 as well as the explanatory memorandum on this Recommendation make it clear that the first category of prisoners, i.e. prisoners held in detention following initial police arrest (including persons whose detention has been prolonged following the approval of a judicial authority) should not be considered pre-trial detainees. However, both Recommendation Rec(2006)2 and Recommendation Rec(2006)13 – be it in different words – leave room for countries to choose whether they regard convicted and sentenced persons whose appeals have not been disposed of finally as pre-trial detainees. While Sec. 94.2 of Rec(2006)2 explicitly states that a country may choose to regard convicted and sentenced prisoners whose appeals have not been disposed of finally as untried/remand prisoners, Art. 1(2) of Rec(2006)13 makes it clear that persons who are remanded or kept in custody after conviction but who are still awaiting a sentence or the confirmation of conviction should be seen as remand prisoners, whenever they continue to be treated as unconvicted persons.

[75] See European Committee on Crime Problems (CDPC) - c. Draft Recommendation Rec(2006)… of the Committee of Ministers to Member States on the use of remand in custody and its explanatory memorandum [974 meeting] (CM(2006)122addE / 30 August 2006).

As mentioned above, almost all Member States of the European Union have chosen to regard this category of prisoners as pre-trial detainees. However, when analysing the existing case-law of the European Court of Human Rights, the impression arises that prisoners who have already been convicted, even though they are awaiting a sentence or the confirmation of conviction, should not be seen as remand prisoners under Art. 5(3) of the Convention. For instance, in its judgement of 27 June 1968 (case of Wemhoff vs. Germany), the Court explicitly states that "it remains to ascertain whether the end of a period of detention with which Article 5(3) is concerned is the day on which a conviction becomes final or simply that on which the charge is determined, even if only by a court of first instance. The Court finds for the latter interpretation."[76] Moreover, "a person who has cause to complain of the continuation of his detention after conviction because of delay in determining his appeal cannot avail himself of Article 5(3) but could possibly allege a disregard of the 'reasonable time' provided for by Article 6(1)."[77]

From these words of the Court, it can be deduced that "a person detained on remand is to be considered, from the moment of his conviction by a court of first instance as a detainee 'after conviction', so that from that moment and during appeal proceedings the lawfulness of that detention must be reviewed by reference to the provision under 5(a) and no longer by reference to that under (c)".[78] Put differently, detention on remand ends when a person is convicted by a court in first instance, even if the person concerned files an appeal and remains, according to domestic law, detained on remand as the judgement is not final.[79] In addition, it should be noted that the Court's view of remand custody is opposed by several scholars.[80]

Because of the different terms used by the parties concerned, as well as the contradictory interpretations given to these terms, it is very difficult to establish one common definition of pre-trial detention in Europe. To be able to harmonise the legal rules applicable to pre-trial detainees, it is recommended to first harmonise the notion and the scope of this term. One step in this direction may be filling up the room left to the Member States for deciding whether convicted prisoners who are still awaiting a decision on an appeal are regarded as remand/pre-trial prisoners or not. However, the question whether this room should be filled up in line with the case-law of the Court goes beyond the nature and scope of this comparative study. It will have to be addressed by the decision and policy makers at the European level.

3.2 Primary objective and underlying principles of pre-trial detention

All Member States recognise that pre-trial detention should always serve a purpose and, consequently, should be based on justifiable grounds. The grounds that are commonly seen as justifiable under domestic laws will be discussed below. However, the fact that pre-trial detention can be based on a justifiable ground is not enough to justify this measure. In addition, all Member States acknowledge that pre-trial detention may not be imposed if the measure is disproportional to the seriousness of the committed offence and/or the sentence to be likely imposed. While some countries have explicitly codified the principle of proportionality in their Constitution or Code of Criminal Procedure, others have incorporated this principle in domestic law through specific provisions restricting the use of pre-trial detention for less severe offences and by highlighting the application of pre-trial detention as a measure of last resort. That pre-trial detention should remain an *ultimum remedium* is thus also commonly acknowledged by Member States. However, as is the case with the principle of proportionality, this principle, too, is not always codified in domestic law. By contrast, all Member States have explicitly incorporated the principle of presumption of innocence in their

[76] ECtHR 27 June 1968, Application No. 2122/64 (case of Wemhoff vs. Germany), paragraph 9. See also ECtHR 6 April 2000, Application No. 26772/95 (case of Labita vs. Italy), paragraphs 145 and 147; and ECtHR 30 November 2004, Application No. 46082/99 (case of Klyakhin vs. Russia), paragraph 57.

[77] ECtHR 27 June 1968, Application No. 2122/64 (case of Wemhoff vs. Germany), paragraph 9.

[78] See Pieter van Dijk et al (eds.), *Theory and practice of the European Convention on Human rights*, Antwerp: Intersentia 2006, pp.467.

[79] See Pieter van Dijk et al (eds.), *Theory and practice of the European Convention on Human rights*, Antwerp: Intersentia 2006, pp. 473, and S. Trechsel, *Human rights in criminal proceedings*, Oxford: University Press 2005, pp. 519.

[80] See e.g. S. Trechsel, *Human rights in criminal proceedings*, Oxford: University Press 2005, pp. 519.

domestic laws; usually, it is prescribed that a suspect or an accused person shall be presumed innocent until final judgement.

3.3 Procedural rights of the suspect and/or accused person

According to Recommendation Rec(2006)13, a person who has been remanded in custody is entitled to several procedural rights. These rights can be listed as follows:

- the right to be informed of the grounds of arrest/detention in a language the person concerned understands;
- the right to be assisted by a counsel/lawyer and to consult with the counsel/lawyer (in private) in order to prepare the defence;
- the right to be informed of the right to be assisted by a lawyer and to consult with him in private;
- the right to legal assistance at the public expense if the person concerned cannot afford legal representation (right to legal aid);
- the right to have access to documents relevant to the decision on remand in custody of the person concerned;
- the right to adequate interpretation services before the judicial authority;
- the right to remain silent;
- the right to inform family members or other (close) relatives of the arrest;
- the right to medical examination.

Almost all Member States acknowledge that persons remanded in custody are entitled to these procedural rights. Some countries have explicitly codified these rights in their Code of Criminal Procedure or, in some cases, in specific regulations on remand in custody. Moreover, the material and procedural rights of remand prisoners can also be found in domestic regulations on prison rules. However, a main observation that can be made is that, although these rights are to a large extent guaranteed by domestic law, they are not always safeguarded in practice.

In short, it can be stated that in almost all Member States, some remarks can be made about the way procedural rights of remand prisoners are guaranteed in practice. For instance, the CPT reports show that, in many countries, pre-trial detainees are not duly informed of their rights. Moreover, these reports often point out that, in many countries, the right to access to a lawyer is not guaranteed from the very outset of deprivation of liberty, i.e. from the moment a person is obliged to remain with a law enforcement agency. The right to medical examination (including access to a doctor) is also often neglected by many Member States. Furthermore, many countries have been criticised by the European Court of Human Rights for impeding the right of suspects or accused persons to contest the reasons for their arrest or detention by denying access to files. More information on the procedural rights of remand prisoners and the way these rights are guaranteed in practice in each Member State can be found in the country reports.

3.4 Beginning and end of pre-trial detention according to law

As regards the beginning of pre-trial detention, it should be noted that in all Member States pre-trial detention starts with an order issued by a court or a judge. This means that a person who has been apprehended has to be brought before the court/judge within a period stipulated by domestic law. Subsequently, the court/judge before whom the person concerned has been brought must decide whether the person is released or remanded in custody. The following table lists the country-specific time limits for appearance before a court/judge and for the court/judge to take a decision.

	Appearance before a court/judge	Decision by the court/judge to remand in custody/pre-trial detention (starting from the moment of the appearance)
AT	48 hours	48 hours
BE	24 hours	
BG	24 hours	N.a.
CYP	24 hours	72 hours
CZ	24 hours	24 hours
DK	24 hours	The judge shall decide without delay, at the latest within three days, and state the grounds for custody
EE	As soon as possible; on the day after the arrest at the latest	48 hours
FI	24 hours	No later than noon on the third day after the apprehension
FR	24 hours	N.a.
DE	As soon as possible; on the day after the arrest at the latest	48 hours
GR	24 hours	72 hours
HU	72 hours	
IE	24 hours – 7 days	
IT	96 hours*	
LV	48 hours	24 hours
LT	48 hours	N.a.
LU	24 hours	N.a.
MT	48 hours	
NL	3 days and 15 hours	
PL	48 hours	72 hours
PT	24 – 48 hours	
RO	24 hours	
SK	48 hours	48 hours/72 hours
SL	48 hours	
ES	72 hours	72 hours
SE	No later than noon on the third day after the apprehension	No later than 4 days after the apprehension
UK	24 hours	N.a.

N.a. Not available

Both the appearance before a court/judge and the decision by the court/judge to remand in custody/pre-trial detention must take place within this period.

* In Italy, the time limit of 96 hours should be taken from the moment of apprehension. Within this period, a court order for pre-trial detention should be decreed. However, the time limit of 96 hours is only applicable in case the person concerned has been arrested and a validation hearing has been held. In addition, it should be noted that pre-trial detention can also be decreed on the basis of written information only, without the suspect being arrested yet. In such cases, the judge is not obliged to see the suspect before issuing the detention order. However, if the judge has authorised the detention of the suspect pending trial, he must interrogate the person to whom the measure is applied within five days of the execution of the measure.

There are several ways in which pre-trial detention may end. In most countries, the grounds for ending pre-trial detention are prescribed in the Criminal Procedure Code or in other relevant domestic laws. In general, it can be said that pre-trial detention ends if the grounds for (further) detention cease to exist, if the maximum time limits for pre-trial detention as prescribed by law have been reached, and if, during the course of the investigation, sufficient material has been collected indicating that the person concerned is not guilty of the offence under investigation. Apart from these grounds, in most countries, there are also some procedural acts that can end pre-trial detention. Pre-trial detention will normally end if:

- it has been revoked;
- it has been replaced with another precautionary measure;
- the public prosecution service has dropped the case, or the investigating/examining judge has ruled that there are no grounds for (further) prosecution;
- the trial judge has pronounced an acquittal;
- the trial judge has pronounced a conviction, but the imposed sentence is equal to or shorter than the period spent in pre-trial detention;
- the trial judge has pronounced a conviction, but the sentence is suspended.

Once pre-trial detention has ended, the person concerned should be released immediately.

Chapter 4: Grounds for pre-trial detention

4.1 Introduction

One of the relevant questions dealt with in the country reports is: On what grounds may a person be subjected to pre-trial detention? Closely related to this question is a second question: Are there are any prerequisites for pre-trial detention, such as a (degree) of suspicion or a threshold? An overview of the regulations/practices of the EU Member States with regard to these issues will be given below, but before doing so, it is useful to briefly outline a common legal framework concerning the grounds for pre-trial detention. It is beyond the scope of this chapter to discuss in detail all relevant legislation; that is why we will restrict ourselves to two important instruments: the European Convention on Human Rights, and Recommendation Rec(2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse from the Committee of Ministers of the Council of Europe.

Art. 5 of the European Convention on Human Rights concerns the right to liberty and security of a person.[81] The underlying aim of this relevant article is to "ensure that no one shall be dispossessed of his liberty in an arbitrary fashion",[82] that every arrest or detention is lawful, both procedurally and substantially, and that it has been carried out for one of the six reasons specified in subparagraphs 5.1 (a)-(f). With regard to the topic of pre-trial detention, subparagraph c is of specific importance. This subparagraph states the following:

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   (c) The lawful arrest or detention of a person effected for the purpose of bringing before the competent 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.

What is meant by "reasonable suspicion" is clarified by the European Court of Human Rights:

> Presupposing the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence although what may be regarded as "reasonable" will, however, depend on all the circumstances.[83]

As a "reasonable suspicion" is the essential precondition for the initial loss of liberty of a suspect, it is not sufficient for the prolongation of detention after a lapse of time. The same holds true for the other initial grounds for arrest or detention mentioned in subparagraph c. The detention must be subjected to judicial scrutiny, which should not only consider whether the arrest/detention was justified in the first place, but also whether deprivation of liberty is still appropriate.[84] Although the reasonable suspicion that the suspect has committed the offence in question is a sine qua non for continued detention, one or more relevant and sufficient special grounds for continued detention must also be established. Concerning these special grounds for detention, the Court has recognised four reasons: the risk of flight (absconding), the risk of an interference with the course of justice, prevention of further offences, and the need to preserve public order.[85]

Based on the case-law of the Court, the Recommendation, in Principle 7, gives a number of cumulative conditions under which a person may be remanded in custody:

a. there is reasonable suspicion that he or she committed an offence; and

b. there are substantial reasons for believing that, if released, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order; and

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[81] *For a detailed explanation of Art. 5 ECHR, see,* inter alia*, "The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights", M. Macovei, Human rights handbooks, No. 5, Council of Europe 2002.*

[82] *See European Court of Human Rights: Engel vs. Netherlands, 8 June 1967; Winterwerp vs. Netherlands, 20 October 1979; Guzzardi vs. Italy, 2 October 1980.*

[83] *European Court of Human Rights: Fox, Campbell and Hartley vs. UK, 13 August 1990.*

[84] *In this respect, see Art. 5.3 ECHR, which provides additional protection for persons detained under Art. 5.1 (c).*

[85] *For more information on these grounds, see "Chapter 19. The Special Rights of Persons Detained on Remand", in* Human Rights in Criminal Proceedings, *S. Treschel, Oxford University Press 2006, p. 524 et seq.*

c. there is no possibility of using alternative measures to address the concerns referred to in b.; and
d. this is a step taken as part of the criminal justice process.
The four criteria prescribed in b are similar to the ones established by the Court; there is no requirement that all of them be implemented in a particular country. In c, it is made clear that remand in custody is only to be used when strictly necessary and as a measure of last resort.

Principle 6 of the Recommendation prescribes that remand in custody shall generally be available only in respect of persons suspected of having committed an imprisonable offence. The European Convention on Human Rights does not contain any rules on a common threshold for pre-trial detention linked to the penalty for the offence in question. How the laws of the EU Member States deal with this issue, is shown in Table 4.1. Besides the presence of a threshold, this table also gives an overview of the degree of suspicion needed in order to apply pre-trial detention.

4.2 Preconditions for pre-trial detention

Table 4.1: Preconditions for pre-trial detention

Member State	Degree of suspicion	Explicit threshold
Austria	Exigent suspicion (“dringender Tatverdacht”)	- In the case of the ground of reoffending, the offence must carry a penalty of more than six months of imprisonment. - If a person who is fully integrated into society is suspected of a crime that carries a maximum penalty of five years of imprisonment, the ground of absconding may not be used, unless the suspect has taken concrete steps to prepare his flight. - A conditional mandatory ground for detention is used for crimes that carry a minimum penalty of ten years of imprisonment, unless certain facts indicate that none of the reasons for detention apply in the case.
Belgium	“Serious indications of guilt”	- The offence must carry a penalty of at least one year of imprisonment and preventive detention must be absolutely necessary for public safety. - If the possible prison sentence >15 years, detention must be absolutely necessary; if the sentence <15 years, additional grounds are needed.
Bulgaria	Reasonable assumption	The offence must be punishable by deprivation of liberty or another, severer punishment.
Cyprus	Reasonable suspicion	The offence does not need to carry a penalty of imprisonment.
Czech Republic	Obvious grounds	Pre-trial detention is not applied for intentional criminal offences that carry a maximum penalty of two years of imprisonment or less and for negligence offences that carry a maximum penalty of three years or less (Art. 68.3 CPC mentions some exceptions).
Denmark	- Grounds to suspect - Strong grounds to suspect	- An offence is subject to public prosecution, if under the law, the offence may carry a penalty of imprisonment of one year and six months or more, and if one of the conditions in Sec. 762.1 of the AJA applies. - The offence can result in imprisonment of six years or more and the needs of law enforcement require detention, or an unconditional prison sentence of at least sixty days is expected and the needs of law enforcement require detention.
Estonia	Not explicitly mentioned; a suspect is	No explicit threshold; it can be any offence.

Member State	Degree of suspicion	Explicit threshold
	defined as a person who is detained on sufficient grounds for suspicion of a criminal offence	
Finland	"Probable" suspicion	- An offence that carries a penalty of imprisonment of two years or more. - An offence for which a less severe penalty than imprisonment for two years has been provided for, but the most severe penalty exceeds imprisonment for one year (thus between one and two years) and one of the grounds (see Table 4.2) is fulfilled. - Pre-trial detention may also be applied if it is not probable that the accused has committed the offence, but the other prerequisites for detention provided in Sec. 3 (1) Coercive Measures Act are fulfilled and the detention is of utmost importance in view of anticipated additional evidence.
France	Serious indications ("indices graves")	- In the case of the most serious crimes ("crimes"): an offence that carries a custodial sentence between fifteen and thirty years or life imprisonment. - In the case of "délits": an offence for which imprisonment of at least three years can be imposed
Germany	Exigent suspicion ("dringender Tatverdacht")	If the ground for detention is the risk of collusion or obscuring evidence, the offence must carry a penalty of imprisonment of more than six months
Greece	Serious indications of guilt	- In the case of felonies. - Also applicable for misdemeanour cases of reckless manslaughter of two persons or more.
Hungary	Not applicable	Offences punishable with imprisonment.
Ireland	Reasonable grounds	Depends on which section of the legislation a person is being detained under: -Section 4 of the Criminal Justice Act 1974; -Section 42 of the Criminal Justice Act 1999; -Section 30 of the Offences Against the State Act 1939; -Section 2 of the Criminal Justice (Drug Trafficking) Act 1996; -Section 50 of the Criminal Justice Act 2007.
Italy	Serious indications of guilt	Offences punishable with life imprisonment or with a prison sentence equal to or higher than four years (exceptions can be found in Art. 280 (1) and (3) CPC).
Latvia	Justified suspicion	- Only if the Penal Code provides for a penalty of deprivation of liberty and other security measures do not suffice to achieve the goal. - If, for instance, the suspect's identity is unclear or the suspect has no job/permanent residence in Latvia, no threshold applies.
Lithuania	Reasonable ground (but "probable cause" with	The offence must carry a penalty of more than one year of imprisonment.

Member State	Degree of suspicion	Explicit threshold
	regard to the risk of absconding)	
Luxembourg	Serious indications	- The offence must carry a penalty of at least two years of imprisonment. - No particular threshold exists in the case of a foreigner who has committed an offence punishable with a custodial sentence.
Malta	Reasonable suspicion	The offence does not need to carry a penalty of imprisonment.
Netherlands	Grave presumptions (not imperative when the suspicion concerns a terrorist crime)	The offence must carry a penalty of four years of imprisonment or more. However, there are exceptions.
Poland	"High probability" that the suspect committed the offence	- No pre-trial detention is applied if the offence carries a penalty of imprisonment not exceeding one year, or if the trial will probably not result in a custodial sentence or in a very short custodial sentence. - Both restrictions are irrelevant if the accused has remained in hiding or failed to appear when summoned, or if his/her identity is unclear.
Portugal	Strong indication	- The offence must be punishable by a prison sentence longer than the statutory maximum of five years. - The committed offence is an act of terrorism, violent crime or highly organised crime punishable by a prison sentence of more than three years. - Pre-trial detention is also permissible if the person concerned has unlawfully entered Portugal or is unlawfully staying there, or is the subject of ongoing expulsion/extradition proceedings.
Romania	Evidence or reasonable indications	The offence must carry a penalty of life imprisonment or imprisonment of more than four years (this is one of the conditions (seven in total) listed in Sec. 148 of the CPC).
Slovakia	Reasonable grounds	- It must be a crime according to the Criminal Code. - If the identity of the suspect is unknown and the other conditions for pre-trial detention are met.
Slovenia	Well-grounded suspicion	Prosecuted ex officio.
Spain	Serious reasons to believe that the person concerned is criminally liable	The offence must carry a penalty of imprisonment of two years or more. Exceptions are listed in Art. 503 (1)(3)(a), 503 (1)(3)(c), and 503 (2) LECrim).
Sweden	- Probable cause - Reasonably	- The offence must be punishable by imprisonment for a term of one year or more. - If the suspect's identity is unknown, or if he/she does not reside in Sweden and there is a reasonable risk he/she will avoid legal proceedings or a penalty by fleeing the country. - A person who is only reasonably suspected of an offence, may (...) be detained if 1) the conditions for detention stated

Member State	Degree of suspicion	Explicit threshold
	suspected	in Sec. 1 par. 1, 3 and 4, or Sec. 2 are otherwise satisfied, and 2) it is of extraordinarily importance that he be detained pending further investigation of the offence.
United Kingdom	Substantial grounds	No threshold has to be taken into account.

Main preliminary observations with respect to the degree of suspicion and the threshold:

- In paragraph 4.1, it was stated that a "reasonable suspicion" that the accused has committed the offence is an essential precondition for ordering pre-trial detention. Except for Hungary and Estonia, all other EU Member States prescribe a particular level of suspicion as a prerequisite for pre-trial detention. Although the Estonian Code of Criminal Procedure does not explicitly mention a certain degree of suspicion as a prerequisite, a hint can be found in the article defining a suspect: someone who is detained "on sufficient grounds for suspicion of a criminal offence".

- Among the EU Member States, the necessary degree of suspicion differs. A number of countries use the term "reasonable suspicion" (e.g. Cyprus and Malta), but alternative wordings, such as "serious indications of guilt" (Belgium, France, Greece and Italy), "obvious grounds" (Czech Republic), "exigent suspicion" ("dringender Tatverdacht"; Austria and Germany), "probable" (Finland), "high probability" (Poland), "grave presumptions" (Netherlands), "evidence or reasonable indications" (Romania), "serious reasons" (Spain), and "substantial grounds" (UK), are also used.

- In Denmark and Sweden, two degrees of suspicion are prescribed, depending on the severity of the crime possibly committed. These are "reasonable suspicion" and "particularly strong suspicion" (Denmark), and "probable cause" and "reasonably suspected" (Sweden).

- The question remains whether the variety of terms used is linked to difficulties in translating the original texts into English or to a real difference in content. The relevant point, here, is that all countries require a certain degree of suspicion as a precondition.

- Principle 6 of the Recommendation prescribes that remand in custody shall generally be available only in respect of persons suspected of having committed an offence punishable by imprisonment. Most countries, but not all (e.g. Cyprus, Malta and the UK), link the possibility of pre-trial detention to the penalty of imprisonment. The thresholds vary from country to country: Some have a general threshold (any offence punishable by imprisonment), while others require the period of imprisonment provided by law for an offence to be of a certain minimum length in order to be able to apply pre-trial detention.

- Countries with a general threshold prescribe pre-trial detention for "offences punishable by imprisonment" (e.g. Bulgaria, Hungary and Latvia). In Latvia, this threshold is quite symbolic, as almost all offences are punishable by imprisonment. Compared to the other EU Member States, Austria has a low threshold with respect to the risk of reoffending: Its law prescribes that an offence must be punishable by a penalty of more than six months of imprisonment.

- Countries with a threshold of one year or more are, inter alia, Lithuania, Sweden, Belgium and Poland. Like in Latvia, in Lithuania, too, the threshold does not really offer any added value, as almost all offences carry a possible penalty of more than one year of imprisonment. With regard to Belgium, a special remark has to be made: In

addition to the one-year threshold, the law also requires pre-trial detention to be absolutely necessary for public safety – this is automatically assumed in the case of a prison sentence of more than fifteen years; otherwise, an additional ground is needed.

- Luxembourg, Finland and Spain have a threshold of two years or more (but a number of exceptions apply). In the Netherlands, Romania and Italy, the offence must carry a penalty of four years of imprisonment or more (or life imprisonment in the case of Italy and Romania). The threshold in Portugal is more than five years of imprisonment.

- In France, the threshold depends on the severity of the crime: In the case of the most serious crimes ("crimes"), the threshold is between fifteen and thirty years or life imprisonment; in the case of less serious crimes ("délits"), the threshold is three years of imprisonment or more. In Greece, to be able to apply pre-trial detention, the offence should be a felony or the misdemeanour of reckless manslaughter of two or more persons.

- Estonia and Slovakia do not mention an explicit threshold; any offence may result in pre-trial detention.

- Although in most countries the law contains a certain threshold as a precondition for ordering pre-trial detention, this does not mean it is absolute. There are situations in which the threshold does not apply, e.g.:
    - the identity of the suspect is unclear or he/she has no permanent residence (e.g. Latvia, Finland, Sweden and Poland);
    - the offence is punishable by a custodial sentence and the suspect is a foreigner (Luxembourg);
    - the suspect has unlawfully entered the country or is unlawfully staying there, or is the subject of expulsion proceedings (Portugal).

4.3. Grounds for pre-trial detention

As mentioned above, both the European Court of Human Rights and the Committee of Ministers recognise four grounds for pre-trial detention: the risk of flight (absconding), the risk of an interference with the course of justice, prevention of further offences, and the need to preserve public order. In addition to the reasonable suspicion that the person detained has committed the offence, at least one of these grounds must be applicable in order to justify continued detention. Table 4.2 gives an overview of the grounds used in the EU Member States.

Table 4.2: General legal grounds for pre-trial detention

	AT	BE	BG	CYP	CZ	DK	EE	FI	FR	DE	GR	HU	IE	IT	LV	LT	LU	MT	NL	PL	PT	RO	SK	SL	ES	SE	UK
(Risk of) absconding	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Risk of interference with the course of justice, including the risk of collusion/obscuring evidence	X	X		X	X	X		X	X	X		X		X	X	X	X	X	X	X	X	X	X	X	X	X	X
Risk of reoffending (crime of certain gravity)	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Risk of posing a serious threat to public order									X										X		X	X					
Gravity of the offence	X					X				X					X	X											
Severity of the possible penalty																				X							
Others			X			X					X											X					

AT = Austria; BE = Belgium; BG = Bulgaria; CYP = Cyprus; CZ = the Czech Republic; DK = Denmark; EE = Estonia; FI = Finland; FR = France; DE = Germany; GR = Greece; HU = Hungary; IE = Ireland; IT = Italy; LV = Latvia; LT = Lithuania; LU = Luxembourg; MT = Malta; NL = the Netherlands; PL = Poland; PT = Portugal; RO = Romania; SK = Slovakia; SL = Slovenia; ES = Spain; SE = Sweden; UK = United Kingdom

Main preliminary observations with regard to the grounds for pre-trial detention:

- According to the European Court of Human Rights as well as the Recommendation, pre-trial detention shall be used when it is strictly necessary and only as a measure of last resort. All of the EU Member States possess alternatives to pre-trial detention, but only some (e.g. the Czech Republic, Greece and Latvia) have explicitly prescribed in law that the starting point should be that pre-trial detention is only considered if its purposes cannot be achieved by other, less severe measures. In other countries (e.g. Cyprus, Malta and the UK), bail is the starting point. Only if there are grounds not to grant bail, pre-trial detention comes into the picture; in these countries, detention is the alternative.

- Of the four grounds identified by the Court, the most dominant are the risk of absconding and the risk of reoffending – all EU countries make use of these grounds. As to the ground of reoffending, there are Member States that take into account the severity of the crime that might be committed. Germany and France, for example, have incorporated an explicit and exhaustive list of certain serious crimes in their relevant criminal legislation. Hungarian law prescribes that the criminal offence must be punishable by imprisonment.

- The ground of interference with the course of justice is applied by a large number of Member States (e.g. Cyprus, Denmark, Finland, Hungary, Italy, Portugal, Spain and Sweden). Interference with the course of justice includes, inter alia, tipping off other persons who might also be under investigation, colluding with other persons involved in the case over a response to the proceedings, and destroying documents and other material forms of evidence. There are countries where the two last-mentioned aspects of "the risk of collusion/obscuring evidence" are used as a ground in itself. As "the ground of interference with the course of justice" also includes these aspects, they have been combined in the table.

- The risk of posing a serious threat to public order is one of the grounds defined by the Court, but not often prescribed by the Member States. The only countries that make use of it are France, the Netherlands, Portugal and Romania. Usually, this ground is exclusively linked to very serious offences, such as terrorist attacks etc.

- With regard to the gravity of the offence and the severity of the possible penalty, it can be stated that most countries take these grounds into account when deciding on pre-trial detention, but do not use them as stand-alone grounds. As can be seen in Table 4.2, there are only a few countries (Denmark, Latvia, Austria, Germany and Lithuania) where, according to the wording of the law, the gravity of the offence may be sufficient ground for imposing pre-trial detention. In Germany, certain crimes are listed in the law for this purpose ("Schwere der Tat"), but the case-law of the Constitutional Court (which has legislative force) has made it clear that, contrary to the words of the law, this ground cannot stand alone – it has to be linked (at least) to the possibility that the suspect or accused might abscond or tamper with evidence. In Lithuania, the gravity of the offence and the seriousness of the possible sanction may be sufficient ground, but in practice, detention is not automatically ordered after a serious offence. Other relevant factors, such as prior convictions, source of living, the suspect's relations with his/her relatives etc., have to be taken into account as well.

- In some Member States, other grounds for pre-trial detention exist (labelled "others" in Table 4.2), additional to the grounds listed. Examples of other grounds are: the accused has no known residence in the country, has been a fugitive in the past, has

been found guilty of helping a prisoner escape, or has violated restrictions concerning his/her place of residence (Greece); the accused has willingly ignored the obligation not to leave town or the country (Romania); or the accused is frustrating the execution of a sentence that has entered into force (Bulgaria).

Chapter 5: Review of pre-trial detention[86]

5.1 Documents of the Council of Europe and the European Union

In all country reports, attention is paid to the review of pre-trial detention. Everyone who is deprived of his liberty by arrest or detention 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 (Art. 5(4) ECHR). Art. 5(4) of the ECHR confers the right to periodic review of loss of liberty on the basis that the initial grounds for detention may no longer exist.[87] In Bezicheri vs. Italy, the European Court of Human Rights ruled that there was a violation when five-and-a-half months were taken to consider a second application for bail. The Court mentioned that since new issues might arise after the first consideration of bail, an opportunity to take proceedings to review the lawfulness of pre-trial detention must be provided at reasonable intervals. But what is "reasonable"? Given the nature of pre-trial detention, such intervals should be short. In the wording of the Court: "The nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration (…), because its *raison d'etre* is essentially related to the requirements of an investigation which is to be conducted with expedition."[88]

In addition to the relevance of the ECHR within this field, the Council of Europe adopted a Recommendation with regard to remand in custody on 27 September 2006.[89] This instrument leaves the decision as to who should be regarded and kept as a remand prisoner to the national jurisdictions.[90]

The European Union itself conducted important work within the field of pre-trial detention/remand in custody and distributed a questionnaire on pre-trial detention to its Member States. In the "Background Paper to the questionnaire on pre-trial detention and alternatives to such detention",[91] it is said that the ECHR is of special interest to the EU. The Background Paper sums up other important protective measures adopted under the Council of Europe system and the United Nations system, ensuring that individuals are not arbitrarily deprived of their liberty and establishing safeguards against abuse by State authorities.

The question whether we need another set of European (Minimum) Standards is of considerable relevance. Discussions between experts coming from different EU Member States show that opposing opinions exist.[92] In this respect, the question of added value is addressed regularly.

According to the Council of Europe's "Explanatory memorandum to the recommendation on the use of remand in custody (...)", the responsibility of initiating a periodic review is

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[86] "(..) the term 'pre-trial detention' in effect is too narrow with regard to the broader understanding of most of the European countries, 'remand detention' is usually more to the point." See: C. Morgenstern, "Pre-trial detention in Europe: Facts and Figures and the need for common minimum standards", to be published in Trier: *Europäische Rechtsakademie* (ERA)/Forum 4/2008, available at www.era.int, p. 4-5.

87 Murdoch, J., *The treatment of prisoners, European Standards*, Strasbourg: Council of Europe publishing 2006, p. 177.

88 Bezicheri vs. Italy, judgment of 25 October 1989, series A No. 164, paragraph 21, in: Murdoch, J., *The treatment of prisoners, European Standards*, Strasbourg: Council of Europe publishing 2006, p. 197.

[89] Recommendation R (2006) 13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. See also the explanatory memorandum to this recommendation. A compendium of conventions, recommendations and resolutions relating to penitentiary questions is available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/ID5603-Compendium%20of%20texts%20relating%20to%20penitentiary%20questions.pdf

[90] C. Morgenstern, "Pre-trial detention in Europe: Facts and Figures and the need for common minimum standards", to be published in Trier: *Europäische Rechtsakademie* (ERA)/Forum 4/2008, available at www.era.int, p. 6.

91 JAI/B/TL D(2002) 4345, Brussels 18 July 2002.

[92] Meeting of experts on minimum standards in pre-trial detention procedures, Brussels Friday 9 June 2006, Charlemagne 1, available at http://ec.europa.eu/justice_home/news/events/expert_pre_trial/meeting_report_en.pdf

placed on the prosecutor or the investigating judicial authority, since they have to prove that there is still sufficient justification for either remand in custody or alternative measures. In principle, a monthly interval between such reviews ought to be observed. The Council recognises, however, that the objective of reviews can be fulfilled by the existence of the possibility for persons remanded in custody to apply to court for release at any time during the remand in custody.[93] It is also recognised "that the authorities may provide for restrictions on the ability to apply for release on account of the shortness of the time elapsing from a previous application or failure to adduce any new basis for ordering his or her release".[94]

The aim of reviewing pre-trial detention/remand in custody should be that the lawfulness of detaining an unconvicted person is verified at reasonable intervals, as the initial grounds for detention may have ceased to exist. This reasoning is in line with the Court's well-established case-law. This objective can be reached by different means, namely periodic review on the initiative of the investigating authority or prosecutor, or on the initiative of the detained person or his/her defence lawyer. Furthermore, the aim can be reached if national legislation provides an opportunity for the detained person to apply to court for release at any time, while (a) restriction(s) regarding when and how to apply for release (e.g. not immediately after a previous application for release has been turned down, but only after fourteen days) should be possible.

All countries have certain legal provisions that fulfil the objective of the review within the national jurisdictions, but the rules regarding review differ a lot as to how (e.g. review *ex officio*, at the same (e.g. monthly) or different intervals), when (from the initial deprivation of liberty or from the initial imposition of pre-trial detention), and by whom ((investigating) judge, court, public prosecutor).[95]

Not one legal system is the same with regard to the topic of review of pre-trial detention; within one legal system the law may also differ from the practice. Here, detention conditions should be mentioned, too, as the place of detention will make a difference. Some countries provide for special Acts for unconvicted persons, which entail their legal rights and obligations (e.g. Finland, Slovakia) and at least on paper their legal position is what it ought to be like under European and international (human rights) standards.

Review and length of pre-trial detention are often interrelated subjects. Some countries, e.g. Finland and Sweden, have not set any time limits with regard to pre-trial detention; at the same time, they do not have prolonged periods of pre-trial detention. The average time spent in pre-trial detention in these Scandinavian countries is fairly short – the consistent use of reviews guarantees that periods of pre-trial detention do not become too long. The fact that some countries have set maximum time limits with regard to pre-trial detention while others have chosen not to do so, is motivated by various reasons, among which culture-related aspects. Although a smoothly functioning review mechanism could lead to humane (or not too long) periods of pre-trial detention, more guarantees are required, e.g. speedy access to a defence lawyer.

The Council of Europe emphasises the fact that there should be provisions enabling persons to appeal to a higher judicial authority against decisions concerning remand in custody or alternative measures, and stresses that "the responsibility of the prosecuting authority or the investigating judicial authority for ensuring there is a periodic review of the imposition of remand in custody ought not to be confused with the independent right that any person deprived of liberty has under article 5(4) to challenge the lawfulness of such action".[96] This challenge should be heard and determined upon by a court, and can entail

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[93] Explanatory memorandum to Recommendation R (2006)13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, paragraph 17.
[94] Ibidem.
[95] See the country reports for more detailed information on this issue.
[96] Explanatory memorandum to Recommendation R (2006)13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, paragraphs 18 and 19.

more than the existence of grounds justifying remand, as Art. 5(4) of the ECHR requires that the judicial review includes all the conditions essential to the lawfulness of the particular deprivation of liberty. In this respect, the Council recognises "that in certain cases the periodic review may be of sufficient scope to preclude the need for a separate lawfulness challenge at a particular time".[97] To conclude, the Council underlines that decisions to remand a person in custody should be reasoned and that these reasons should be provided in a timely manner. This working method is crucial to the effective exercise of the right of appeal against the imposition of remand in custody or alternative measures.[98]

Table 5.1 shows when the first *ex officio* review by a judge or court takes place (if such a provision is available), to indicate when the judge on his/her own initiative must evaluate the necessity of detention. In some countries, reviews take place on an automatic basis, meaning that after the lapse of a certain period the judge/court/public prosecutor has to decide whether the initial grounds for detention are still valid. Automatic review is sometimes performed on the basis of identical intervals, whilst in other countries it is carried out at different intervals. Some scholars argue that automatic review can turn into a purely bureaucratic process and that the law should also provide for the possibility of review at the request of the accused or his/her defence lawyer.[99] If the review is initiated by the accused or his/her defence lawyer, the judge will probably strive to decide whether or not to *terminate* pre-trial detention; if the review takes place on the initiative of the investigating authority/prosecutor, the judge will probably try to answer the question whether or not to *prolong* detention. This could result in different approaches – one line of thinking may be more favourable to the detained person than the other.

Table 5.1: Moment of first *ex officio* review and nature of reviews

	First *ex officio* review by judge/court	Review based on identical intervals	Review based on different intervals	Automatic review
Austria	After 14 days	-	X	X
Belgium	Within 5 days	-	X	X
Bulgaria	-	-	-	-
Cyprus	Within 8 days	X	-	X
Czech Republic	In preliminary proceedings: by the prosecutor after 3 months	X	-	X
Denmark	At least every 4 weeks	X	-	X
Estonia	After 6 months, at least once a month	X	-	X
Finland	After 2 weeks	X	-	X
France	-	-	X	X
Germany	After 3 months	-	X	-
Greece	After 6 months	X	-	X
Hungary	After 6 months	-	X	X
Ireland	After 8 days	-	X	X

[97] Ibidem.
[98] Explanatory memorandum to Recommendation R (2006)13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, paragraph 21.
[99] See the Minutes and Conclusions of the Meeting on minimum standards in pre-trial detention procedures, Brussels, Monday 9 February 2009, Borschette 1A.

	First *ex officio* review by judge/court	Review based on identical intervals	Review based on different intervals	Automatic review
Italy	-	-	-	-
Latvia	After 2 months	-	-	X
Lithuania	After 3 months	X	-	X
Luxembourg	After 2 months	X	-	X
Malta	-	X	-	-
Netherlands	-	-	-	-
Poland	After 3 months	-	-	X
Portugal	After 3 months	X	-	X
Romania	Within 60 days	X	-	X
Slovakia	-	-	-	-
Slovenia	After 2 months	X	-	X
Spain	-	-	-	-
Sweden	At least after 2 weeks	X	-	X
United Kingdom				
England & Wales	After 28 days	-	X	X
Scotland	-	-	-	-
Northern Ireland	After 8 days	-	X	X

Table 5.2 shows in which countries persons remanded in custody can apply to court for release. It also indicates where such applications can be restricted (because, for example, insufficient time has passed since the previous application, or no new facts supporting the application for release are brought forward) and where an appeal can be lodged to a higher judicial authority against decisions concerning remand in custody.

Table 5.2: Request for release, restrictions and appeal

	Request for release	Restrictions on requests for release	Appeal
Austria	X	-	X
Belgium	X	X	X
Bulgaria	X	X	X
Cyprus	-	-	X
Czech Republic	X	X	-
Denmark	X	X	X
Estonia	X	X	X
Finland	X	X	-
France	X	-	X
Germany	X	-	X
Greece	-	-	X
Hungary	-	-	X
Ireland	-	-	X
Italy	X	X	X
Latvia	X	X	X
Lithuania	X	-	X
Luxembourg	X	-	-
Malta	X	-	-
Netherlands	X	X	X
Poland	-	-	X
Portugal	X	-	X
Romania	X	-	X

	Request for release	Restrictions on requests for release	Appeal
Slovakia	X	X	X
Slovenia	X	-	X
Spain	-	-	X
Sweden	X	-	-
United Kingdom			
England & Wales	X	X	X
Scotland	X	-	X
Northern Ireland	-	-	X

5.2 Main preliminary observations:

- There is a terminology problem when analyzing relevant information. Some sources use the term "pre-trial detention" in a narrow sense, while others do not. Moreover, the term "remand in custody" is often used to refer to detention at both the pre-trial and the trial stages. Mutual understanding in general, but certainly with regard to this issue, could be enhanced by making legislation available in more languages (e.g. English, French, Spanish etc.). This would also stimulate the debate on terminology, as it would force us to think about how to best describe certain legal instruments such as pre-trial detention, remand in custody etc.

- Most countries provide for an opportunity for the suspected offender to apply to a court/judge for release or transformation of the remand in custody. However, some Member States impose restrictions related to, *inter alia*, the minimum time after which a person may put forward a second (third, fourth etc.) application.

- In most countries, detainees can appeal against the decision of remand in custody. However, there are some countries where no appeal is possible against the prolongation of pre-trial detention (e.g. Finland).

- The legal systems of some countries do not provide for periodical review of remand in custody. In these countries, the aim of reviews is secured by other means: the suspected offender can either apply to court for release or transformation of remand in custody with or without restrictions, appeal against the remand decision, or undertake both these actions.

- Most countries provide for an automatic periodical review based on identical intervals. In a few countries, the review is initiated by the prosecutor. In yet other countries, the suspected offender has to ask for review of his detention.

- The rules regarding periodical reviews seem to vary a lot as to when, who and how (see the country reports for more detailed information).

- The criminal procedure systems of Finland and Sweden provide for automatic single review periods and do not contain time limits with respect to the overall length of remand in custody (see Chapter 6).

- In Austria, after the bill of indictment has been delivered to the court, the detained person must apply for a hearing, during which the reasons for detention will be verified.

- Some countries have *ex officio* periodical reviews, but only after a lapse of time or with a threshold (e.g. Austria, Germany, Greece, Hungary, Estonia, Latvia and Poland). *Ex officio* reviews, for instance, take place if there has been no request for review by the detainee for a certain period (e.g. Latvia and Germany) or up until a

specified moment (e.g. delivery of the bill of indictment in Austria). In Poland, there is one *ex officio* review; in Hungary, Estonia and Greece, *ex officio* reviews are held after some months have passed.

- Some countries have dedicated pre-trial detention judges.

- In some countries (e.g. the Netherlands and Greece), the suspected offender has no further right of appeal/cassation against the first-instance court's decision on the appeal.

- In Lithuania, the judge must adopt an order to terminate detention if he discovers that, during the last two months of detention, no pre-trial investigative actions were performed and the prosecutor fails to give any objective reasons for this.

- In Luxembourg, a request for conditional release can be filed at any stage of the criminal procedure. It must be addressed to the chamber of the competent court.

- In Poland, the court that issued the decision on the preventive measure is also competent to decide on the interlocutory appeal.

- Other remedies to challenge (prolonged) pre-trial detention are "complain" (e.g. Finland, the Czech Republic, Latvia), "make a statement" (e.g. Austria, Denmark), "apply for bail" (e.g. England and Wales, Scotland), "request appearance in a public hearing" (e.g. Belgium), "apply for judicial review" (e.g. Germany, Italy).

Chapter 6: Length of pre-trial detention

6.1 Time limits

In all country reports, attention is paid to the length of pre-trial detention. Art. 5(3) ECHR ensures that "anyone remanded in custody is tried within a reasonable time and this requires that the proceedings in such cases be handled in an especially expeditious manner".[100] The issue of the length of pre-trial detention is closely related to the discussion of the grounds for review of pre-trial detention. According to the ECHR, the length of detention must be limited. This requirement is closely linked to the presumption of innocence (Art. 6 (2) ECHR).

The length of pre-trial detention in the European countries should be considered in the context of the domestic criminal procedural framework. According to the ECHR, everyone is entitled to a fair and public hearing within a "reasonable time". The ECHR does not provide for any specific maximum time limit for pre-trial detention, but "the European Court of Human Rights has continuously stated that the concept 'reasonable time' cannot be translated into a fixed number of days, weeks, months or years or into various periods depending on the gravity of the offence".[101]

At the national level, some countries have set maximum time limits for pre-trial detention. The Terms of Reference for this study indicate: "The existence of such time limits might be said to act as both an impetus to the prosecution to proceed swiftly to trial and as a protection to the accused in the sense that unnecessary delays will be minimized."[102] It is also said that the setting of maximum time limits could enhance "a degree of certainty and security to the accused in that he is aware of the very outset of how long his deprivation of liberty will last".[103] However, others are of the opinion that maximum time limits could rush proceedings and the Council of Europe explains in its "Memorandum to the Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse" that "although the fulfilment of the requirements regarding the duration of remand in custody may be facilitated by the specification in legislation of a maximum period of remand in custody, the need to consider the particular circumstances of a given case means that such a period should not be automatically applied to all cases where remand in custody is justified".[104]

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[100] Explanatory memorandum to Recommendation R (2006)13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, paragraph 22.

[101] Terms of Reference, Tender No JLS/D3/2007/01, "Study: An analysis of minimum standards in pre-trial detention and the grounds for regular review in the Member States of the EU", available at http://ec.europa.eu/justice_home/funding/tenders/2007_S093_113581/annex_1_en.pdf

[102] Ibidem.

[103] Ibidem.

[104] Explanatory memorandum to Recommendation R (2006)13 of the Committee of Ministers to the Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, paragraph 23.

Table 6.1 shows which Member States have maximum time limits. Although it is quite common to use the term "time limit" in this context, we suggest using the term "time restriction" instead, as most of the limits are not absolute. Research has revealed that most countries that have set time limits also have a provision within their national legislation enabling prolongation of detention, after the expiration of the set time limit. As can be seen in Table 6.1, some countries have set time restrictions only for the moment up until the commencement of the trial stage, other countries have set restrictions up until the moment of the conclusion of the trial stage, while others have not set time restrictions at all.

Table 6.1: Time restrictions

	Time restrictions up until the beginning of the trial stage	Time restrictions up until the conclusion of the trial stage
Austria	X (up to 2 years, depending on the gravity of the offence)	-
Belgium	-	-
Bulgaria	X (up to 2 years, depending on the gravity of the offence)	-
Cyprus	X (3 months)	-
Czech Republic	-	X (up to 4 years, depending on the gravity of the offence)
Denmark	-	-
Estonia	X (6 months)	-
Finland	-	-
France	-	X (up to 4 years, depending on the gravity of the offence and on the place where the offence was committed)
Germany	-	X (6 months)
Greece	X (up to 1 year, depending on the gravity of the offence)	-
Hungary	-	X (3 years)
Ireland	X (from 24 hours up to 7 days, depending on the applicable law)	-
Italy	-	X (6 years, depending on the gravity of the offence)
Latvia	-	X (up to 24 months, depending on the gravity of the offence)
Lithuania	X (up to 18 months, depending on the complexity of the case)	-
Luxembourg	-	-
Malta	-	-
Netherlands	X (104 days)	-
Poland	-	X (2 years)
Portugal	-	X (18 months)
Romania	X (180 days)	X (the duration is limited to half the maximum period of imprisonment laid down by law for the offence)
Slovakia	X (up to 25 months, depending on the gravity of the offence)	X (up to 48 months, depending on the gravity of the offence)
Slovenia	-	X (2 years)
Spain		X (if sentenced: up to half the period of the imposed sentence)
Sweden	-	-
United Kingdom		
England & Wales	X	-
Scotland	X	-
Northern Ireland	-	-

6.2 Main preliminary observations:

- The terminology problem seems to deal with itself with respect to the issue of the length of pre-trial detention. When analysing the period of pre-trial detention, it becomes clear that some Member States set time restrictions either relating to the pre-trial stage alone (up until the moment the trial starts), or to the pre-trial and the trial stages taken together (up until the moment of the conclusion of the trial stage); or they set no time limits at all. To describe the period of detention during both the pre-trial and the trial stages, most countries use the term "remand in custody".

- Especially with regard to the length of pre-trial detention, there is a gap between the law and practice. Most of the case-law of the European Court of Human Rights deals with duration-related issues.

- The domestic law of e.g. Belgium, Finland, Luxembourg, Malta and Sweden does not mention any specific overall time restrictions relating to the period of remand in custody.

- In Denmark and Sweden, the principle of proportionality is leading with respect to the period of remand in custody. In e.g. Luxembourg and Romania, remand in custody will be terminated as soon as it equals the imposed punishment.

- Some countries (e.g. Austria, Romania, the Netherlands, England and Wales, Greece, Bulgaria, Estonia) have time restrictions relating to the moment up until the commencement of the trial (in other words: they do not have set time limits for the trial stage).

- Spain, Italy, France, Germany, Latvia, Portugal, Poland, Slovakia, Slovenia, Hungary and the Czech Republic have time restrictions relating to the moment up until the conclusion of the trial. In some countries, these limits are not absolute (e.g. in Latvia, Hungary, Poland, Spain). In Poland, for instance, the possibility of further extensions is not restricted during an appeals procedure.

- In some countries, the total period of remand in custody depends on the gravity of the crime (e.g. in the Czech Republic, France, Spain), while e.g. in Lithuania it is not the gravity of the crime but the complexity of the case that is crucial to the possibility of extension. The period of remand in custody may also depend on the grounds on which detention has been decreed (Spain).

- In most of the countries that have time restrictions, there are also time limits with regard to the investigation.

- In some countries (e.g. Slovakia), the total period of remand in custody is divided into a period for the pre-trial stage and a period for the trial stage. The prosecutor must request the judge for an extension of the custody period during the pre-trial stage, if he needs more time for his investigation.

- It is very difficult, if not impossible, to compare the average time spent in remand in custody. The numbers available in Member States are often from different years and, in many cases, it is not clear which categories of detainees are included: Only untried prisoners (meaning: persons remanded during the investigation and trial phases)? Convicted but not yet sentenced prisoners? Convicted and sentenced prisoners during the appeals procedure or within the time limit to appeal? Despite the difficulty of comparing the information, we found that, for instance, in Finland, in 2002, the average time spent in remand in custody was fifteen days, while e.g. in Estonia, in the same year, this was ten months.

- The fact that time restrictions exist does not mean that pre-trial detention is kept short – usually, prolongations are possible. In some countries, the restrictions only relate to the period up until the moment the trial starts; this may result in long periods of pre-trial detention (sometimes even years). E.g. in the Netherlands, an accused may be taken into pre-trial detention (the definition is used here in the narrow sense of the term – detention up until the moment the trial starts) for 104 days, but as soon as the trial stage begins, there are no more time restrictions.

- Time restrictions do not tell us anything about the actual length of pre-trial detention. In some European countries, no time limits/restrictions exist (i.e. Finland and Sweden), without this resulting (in general) in prolonged periods of pre-trial detention.

Chapter 7: Other relevant aspects

Several elements in relation to pre-trial detention have already been dealt with in the previous paragraphs. In this paragraph, some remaining issues will be discussed, such as whether the time spent in pre-trial detention will be deducted from the final sentence, whether there is a mechanism for compensation if the accused is not sentenced, and which alternatives to pre-trial detention have been introduced in the various countries. At the end, some headlines of the practice regarding the execution of pre-trial detention will be described too.

7.1 Deduction of pre-trial detention.

Art. 26 of the Framework Decision on the European arrest warrant and the surrender procedures between Member States with respect to the deduction of the period of detention served in the executing Member State prescribes:

1. the issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed;
2. to that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender.

In this context, it is also important to refer to Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, which recommends the following with respect to the deduction of pre-conviction custody from the sentence (Art. 33):

1. the period of remand in custody prior to conviction, wherever spent, shall be deducted from the length of any sentence of imprisonment subsequently imposed;
2. any period of remand in custody could be taken into account in establishing the penalty imposed where it is not one of imprisonment;
3. the nature and duration of alternative measures previously imposed could equally be taken into account in determining the sentence.

The following table gives an overview on how far these provisions have already been implemented in the various jurisdictions.

Table 7.1: Deduction of pre-trial detention

	Pre-trial deductible	**Pre-trial abroad deductible**	**Pre-trial deductible from non-custodial sentences**
Austria	X	X	-
Belgium	X	X	-
Bulgaria	X	X	X
Cyprus	X	Y	Y
Czech Republic	X	X	-
Denmark	X	X	X
Estonia	X	X	X
Finland	X	X	X
France	X	Y	-
Germany	X	X	X
Greece	X	Y	-
Hungary	X	X	X
Ireland	X	Y	Y
Italy	X	X	X
Latvia	X	Y	-
Lithuania	X	X	X
Luxembourg	X	X	-
Malta	X	Y	-
Netherlands	X	X	X
Poland	X	-	-
Portugal	X	X	X
Romania	X	X	-
Slovakia	X	X	X
Slovenia	X	X	X
Spain	X	X	X
Sweden	X	X	X
United Kingdom	X (not obligatory)	X	-

Y = information is not (yet) available

Main observations

- As this table shows, the time spent in pre-trial detention is in principle deductible from the final sentence, at least when this final sentence is a temporary custodial sentence. The usual deduction rate is that one day of pre-trial detention is equal to one day of imprisonment. In some countries, the deduction is not restricted to the period spent in pre-trial detention but also includes the time spent in arrest or police custody. This is, for example, the case in Germany, Greece, Latvia, the Netherlands and Poland. In some legislation, the deduction is not restricted to the time spent in pre-trial detention. In Denmark, for example, a particular provision in the CCP states that, in addition to the deduction of pre-trial detention in the case of isolation, "a number of days are furthermore deducted corresponding to one day for every commenced period of 72 hours during which the convicted person has been isolated". In Latvia and Portugal also, the period that a person was placed under house arrest, imposed as an alternative to pre-trial detention, will be deducted from the term of imprisonment. In Germany and the UK, the deduction is not always obligatory. This follows from § 51 (1) German PC, which states that no deduction has to be made if it "is not justified because of the behaviour of the convict during trial". However, German case-law has restricted this

possibility to very serious incidents, e.g. escape or an attempt to escape during the trial that indeed leads to a deferral of the trial. In the UK, the court has the discretion to decide that the time spent in a remand centre shall not be deducted from the sentence, if it is in the interest of justice not to do so.

- From most of the countries, information could be collected concerning the deductibility of the time that a suspect spent in (pre-trial) detention abroad. This does not mean that in the other countries a specific provision on this topic is missing, but it is very difficult to get reliable information on this subject. As far as we could find this information, we have to conclude that sometimes these provisions contain certain restrictions concerning the deduction of the time that a suspect spent in detention in another country. The Dutch Penal Code, for example, restricts the obligatory deduction of detention undergone in another country to detention imposed because of a Dutch request for extradition. On the other hand in Belgium every detention undergone abroad following an offence that has given rise to a conviction will always be deducted of the prison sentence. Noteworthy is also the provision in the German Penal Code, which generally stipulates that foreign detention has to be taken into account in the same way as German detention, but that the ratio could be different: According to the law, another (but usually more favourable) ratio can be chosen at the court's discretion. This must be based on some facts, e.g. reported bad living conditions in the foreign prison that impose a heavier burden on the detainee than German detention would have done.

- In many countries, the possibilities to reduce the final sentence by deduction of the time spent in pre-trial detention are restricted to final sentences that involve a temporary imprisonment. In some countries, deduction is also possible in case of (some) non-custodial sentences, such as fines (Czech Republic, Estonia, Finland, Italy, Lithuania, the Netherlands, Portugal, Slovakia and Spain) or community sanctions (Lithuania, the Netherlands and Spain). No provisions could be found allowing deduction of the time spent in pre-trial detention from many other penalties and penal measures, except the deduction from probation in Bulgaria and from suspended sentences. Suspended sentences are particularly important in this respect, especially if the law does not provide for the deduction of pre-trial detention from non-custodial sentences. This problem is often circumvented by splitting the suspended sentence into a suspended part and a non-suspended part, with the non-suspended part covering the time spent in pre-trial detention. However, as was mentioned in various country reports, even in countries where the possibilities for deduction are very restricted and the time spent in custody cannot be deducted, the court always has the freedom to take this fact into consideration when determining the type of sentence or its duration.

7.2 Compensation for unlawful pre-trial detention

Art. 5, subsection 5 of the European Convention of Human Rights states that everyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. This fundamental principle is also laid down in Art. 34 of Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody. According to this article, "Consideration shall be given to the provision of compensation to persons remanded in custody who are not subsequently convicted of the offence in respect of which they were so remanded; this compensation might cover loss of income, loss of opportunities and moral damage" (34,1). It further states that "Compensation shall not be required where it is established that either the person remanded had, by his or her behaviour, actively contributed to the reasonableness of the suspicion that he or she had committed an offence or he or she had deliberately obstructed the investigation of the alleged offence".

As Table 7.2 shows, almost all countries, except England and Wales, have provided legal arrangements for compensating persons who were unlawfully remanded in custody.

Table 7.2: Compensation for unlawful pre-trial detention

	Legal provisions for compensation of unlawful pre-trial detention	Legal provisions for unjustified detention
Austria	X	X
Belgium	X	X
Bulgaria	X	-
Cyprus	X	-
Czech Republic	X	-
Denmark	X	X
Estonia	X	-
Finland	X	X
France	X	-
Germany	X	X
Greece	X	X
Hungary	X	X
Ireland	Y	Y
Italy	X	X
Latvia	X	X
Lithuania	X	-
Luxembourg	X	Y
Malta	X	-
Netherlands	X	X
Poland	X	X
Portugal	X	X
Romania	X	-
Slovakia	X	X
Slovenia	X	-
Spain	X	X
Sweden	X	X
United Kingdom	X	-

Y = information is not (yet) available

With respect to the information presented in the various country reports on the topic of compensation, the following observations can be made:

- Generally speaking, the current provisions on compensation, in essence, refer to the situation that a former suspect is found not-guilty, or that the deed does not constitute a criminal offence or is not classified as a criminal offence by law. In some countries, such as Austria, Belgium, the Netherlands and Spain, the legislator has extended the right to compensation for unlawful arrest or detention (*ex ante*) to the right to compensation for unjustified detention (*ex post*) in those cases where the applicant was later acquitted or the proceedings were discontinued. Belgium law can serve as an example, because in this country a clear distinction is made between compensation for unlawful detention and for unnecessary detention. Unlawful detention occurs when the deprivation of liberty is in violation of Art. 5 of the ECHR. The claim for compensation that arises from this is a claim under civil law that must be submitted to the civil courts. Unnecessary detention occurs when a person is held in pre-trial detention for more than eight days without this being attributable to his personal behaviour. This may, for instance, concern an accused person whose case has been dismissed and who can prove his innocence, or who has been released, or whose case turns out to be statute-barred. This does not actually involve full compensation, but compensation allocated in all fairness. The claim is not submitted to the civil court, but is directed in an application to the Minister of Justice. If the Minister refuses to

grant the application or does not decide on it within six months, the applicant can appeal to an administrative commission, installed especially to that aim, consisting of two high magistrates and the (vice) dean of the Bar Association.

- As far as we could deduct from the available information, it seems that the rates according to which the amount of compensation is determined, vary strongly. In Austria, no fixed rates can be found in the law, but amounts of around 100 Euros per day do not seem to be unusual. In Germany, the amount of compensation amounts to no more than 11 Euros per day. In addition, financial losses can be compensated if they were caused by the detention. As the costs for accommodation and food during the detention might be deducted, the actual sum that is paid might be even smaller. In Latvia and Poland, too, the amounts of compensation are rather low. In Latvia, for example, a person who was unemployed before the arrest and detention can receive only 50 Lats (70 Euros) as compensation for one month of incarceration. In Poland, the amount is limited to 10,000 PLN (Polish Złoty) (223 Euros), while on the other hand, the compensation in Italy may amount to 516,456 Euros. In Finland the average compensation for personal suffering has been 100 Euros per day, to be paid by the State Treasury. In the Netherlands, apart from financial loss (loss of income as a result of detention), the former suspect may also be compensated for immaterial damage. The norm for compensation for immaterial damages is about 90 Euros per day of deprivation of liberty. In 2007, more than 6,500 claims were accepted and an amount of almost 23 million Euros was paid – almost twice as much as in 2000. It has to be noted here that the compensation does not always have to consist of an amount of money. The Dutch Code of Criminal Procedure allows that compensation can consist of reducing the duration of an unconditional prison sentence imposed for another criminal offence, or it can be balanced with fines and other financial sanctions to be paid.

- In some countries, the time limits for lodging a claim are very short. In the Netherlands, a request for compensation must be submitted by the former accused person or his beneficiaries before the court within three months of the termination of the case. In Portugal, the request for compensation should be submitted within one year of the conclusive judgement or release of the person concerned. On the other hand, in Italy a claim for compensation can be submitted within two years of the conclusive judgement.

- The question whether the claim for compensation will be honoured and to which extent, in many countries, belongs to the discretionary power of the deciding authority. Claims will normally be judged on grounds of equity and fairness. Important reasons to reject a claim or to reduce the compensation are, for example, that the pre-trial detention is due to negligence or own fault of the person concerned. In Greece, for example, compensation can be denied if the suspect or accused himself gave reason to the investigations by contradictory behaviour (false confessions etc.). Until 2001, the Greek CCP explicitly stated that "the State should be obliged to compensate a former pre-trial detainee if, whether intentionally or by gross negligence, he was responsible for his own detention". Courts were also allowed to decide *proprio motu* the question of compensation for unlawful detention without a hearing and with inadequate reasoning. Following the European Court's judgments in cases versus Greece (Tsirlis and Kouloumpas vs. Greece, Georgiadis vs. Greece, Sinneal vs. Greece, Goutsos vs. Greece, and Karakasis vs. Greece), these articles were amended by Law 2915/2001. The new provisions no longer exclude the possibility of compensation in cases of detention due to the detainee's "gross negligence" and obligate criminal courts to give reasons for their decisions, having heard the person concerned and the public prosecutor.

- The instances to which the claim can be lodged vary from civil courts (e.g. Belgium, Lithuania) and criminal courts (e.g. France) to the Ministry of Justice or a special

commission for the Compensation of Detention, as far as the claim is aiming at compensation for unnecessary detention (e.g. Belgium).

7.3 Alternatives to pre-trial detention

The principle that pre-trial detention should be applied only as a last resort implies the availability of a range of non-custodial alternatives. Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody presents, in Art. 2(1), an illustrative and not exhaustive list of alternatives that are already available in the Member States.

Table 7.3 shows that, in practice, many alternatives have been developed and are applied in the various countries. The table is based on information that could be found in the relevant legislations and completed with data provided by experts from the respective countries. Although this table is more comprehensive than the summary in the above-mentioned Recommendation, it, too, is not meant as an exhaustive list. In many countries where the alternatives are not specified by law, the public prosecutor, the investigating judge or the court often have the discretionary power to conditionally suspend pre-trial detention, to decide not to issue a remand warrant, to bail or conditionally release a suspect. It is up to the deciding authority to attach conditions to this decision. Such conditions are not always explicitly listed in the law. In practice, they are similar to the conditions that can be attached to a conditional or suspended sentence, or to a conditional waiver. In some countries, bail entails more than just the obligation to deposit an amount of money as a guarantee; it can also include many other requirements that, in other countries, can be attached to suspended pre-trial detention, conditional freedom etc., such as to reside at a specific address, to be placed under supervision, to undergo treatment, house arrest, electronic tagging, etc.

Table 7.3: Alternatives to pre-trial detention

Alternatives to pre-trial detention	**AT**	**BE**	**BG**	**CYP**	**CZ**	**DK**	**EE**	**FI**	**FR**	**DE**	**GR**	**HU**	**IE**	**IT**	**LV**	**LT**	**LU**	**MT**	**NL**	**PL**	**PT**	**RO**	**SK**	**SL**	**ES**	**SE**	**UK**
Undertakings to appear before a judicial authority	X		X			X			X		X								X			X	X	X	X		X
Undertakings not to interfere with the course of justice	X				X				X									Y				Y					
Undertakings not to engage in particular conduct, including that involved in a profession, or requirements to accept supervision by an agency or trusted person appointed by the judicial authority					X	X	X		X						X	X	X			X						X	
Electronic monitoring									X			X							X	X	X			X			X
The requirement to reside at a specific address or place /not to change residence without permission	X					X	X	X	X			X		X			X	X	X		X	X	X	X		X	X
The requirement not to leave a specific place or the country without authorisation (travel ban)	X							X	X	X	X	X		X	X	X	X		X	X	X	X	X	X	X	X	X
The requirement not to meet specified persons or to be at specified places without authorisation	X					X			X	X	X	X		X			X		X		X		X	X	X	X	X
The requirement to surrender passports or other identification documents	X					X			X	X						X								X	X		X
The requirement to provide or secure financial or other forms of guarantee as to conduct pending trial (bail)	X	X	X	X	X	X	X	X	X	X	X		X		X	X	X	X	X	X	X	X	X	X	X		X
The requirement to comply with certain orders (for instance, not to use alcohol or drugs)	X				X	X											X										
The requirement to undergo medical or other treatment	X					X		X	X								X		X								

Alternatives to pre-trial detention	**AT**	**BE**	**BG**	**CYP**	**CZ**	**DK**	**EE**	**FI**	**FR**	**DE**	**GR**	**HU**	**IE**	**IT**	**LV**	**LT**	**LU**	**MT**	**NL**	**PL**	**PT**	**RO**	**SK**	**SL**	**ES**	**SE**	**UK**
Preliminary probation	X				X													Y			X						
Freedom under conditions		X																	X		X				X		
House arrest		X	X									X		X	X	X			X		X						
The requirement to report to the police					X	X		X		X				X	X		X		X		X		X	X		X	X
Controlled freedom/judicial supervision						X			X								X										
The prohibition to carry a weapon																	X					X	X				
The requirement to refrain from driving vehicles (handing over of driving licence)									X								X					X	X		X		X
Conditional suspension of pre-trial detention/conditional release		X			X					X							X		X			X					
The requirement to leave the country															X												
The requirement not to exercise a certain job															X								X				
The requirement to live separate from the victim/not to approach the victim														X			X					X			X		
Victim-offender mediation																	X										
Guarantee by a responsible person																				X							
Guarantee by a social entity																				X							
Temporary ban on engaging in a given activity																				X		X	X				
Suspension from the exercise of functions, occupations and rights														X							X						

AT = Austria, BE = Belgium, BG = Bulgaria, CYP = Cyprus, CZ = the Czech Republic, DK = Denmark, EE = Estonia, FI = Finland, FR = France, DE = Germany, GR = Greece, HU = Hungary, IE = Ireland, IT = Italy, LV = Latvia, LT = Lithuania, LU = Luxembourg, MT = Malta, NL = the Netherlands, PL = Poland, PT = Portugal, RO = Romania, SK = Slovakia, SL = Slovenia, ES = Spain, SE = Sweden, UK = United Kingdom

Main observations

Looking at the practical meaning of these alternatives, one has to conclude that, generally speaking, there is little evidence that the introduction of alternatives to pre-trial detention has resulted in a reduction of the percentage of pre-trial detainees in the prisons. A study by An Raes and Sonja Snacken (Belgium) can serve as an example. This study shows that in most cases public prosecutors requested the investigating judge to impose remand custody (92%) and that these requests were frequently granted: 63% resulted in remand custody, 30% in a simple release, and only 8% in freedom under conditions. According to this study, in the case of certain accused persons and offences, the judge is too quick to rule that pre-trial detention is the safest measure to protect society. Judges' decisions are influenced by the opinions of organisations such as the police, who are in favour of pre-trial detention. Likewise, judges must make their decisions within twenty-four hours, which places them under enormous work pressure. That is why they often opt for the safe way: pre-trial detention. Finally, the many practical problems involved in organising and monitoring freedom under conditions make it more attractive for judges to choose pre-trial detention. The researchers suggest setting up a Court House Service as a possible solution. This service would advise the judge in his choice of alternatives to pre-trial detention. It would have to be established in the court, so the judge could access it directly. The service would ensure that specialists in this field provide advice and that the pressure on judges is reduced.

The Hungarian report also refers to the little support that alternatives, especially the recently introduced home curfew and house arrest, enjoy from the judiciary and public prosecutors. Between 2000 and 2006, the judge ordered house arrest 705 times and the prosecutor proposed it – within the same period – 158 times. The numbers increased every year (from 2000 until 2006), but still it has to be said that this alternative to pre-trial detention is unpopular, especially compared to the number of pre-trial detainees. According to some authors, a reason for choosing pre-trial detention instead of (one of) its alternative(s) could be that, in the case of pre-trial detention, the presence of the defendant in the criminal proceedings is more or less guaranteed. The fragile issue with regard to house arrest is the dwelling, as most offenders do not have one.

Another example of the conclusion that alternatives do not play an important role in practice can be found in Latvia and Poland. In Latvia, security measures were applied 10,484 times in 2006; house arrest was ordered thirteen times, a security deposit only twice. In 2007, security measures were applied 16,791 times; among which house arrest twice and a security deposit thirty times. In Poland, statistics show that pre-trial detention is not used as *ultima ratio*, but that it is the second most common preventive measure – police supervision being the most common. In 90% of all applications by the public prosecutor, detention is granted by the court.

Another problem that can be observed is that even in countries where alternative measures are explicitly mentioned in the law, in some cases, the law itself does not give an explicit objective of these alternatives. Not rarely, even the conditions under which they might be applied are lacking. For that reason, in at least two cases, the European Court of Human Rights criticised the Estonian authorities for not having considered any alternative means of ensuring the applicants' appearance at court and thus applied detention without the necessary restraint.

Finally, it is remarkable that in contrast to the UK, bail, in the sense of a financial security, does not seem to be very popular in continental Europe. In many countries, the possibility of bail is disputed with regard to the principle of equality before the law. Some country reports mention that bail – if it is applied at all – is granted exclusively to wealthy suspects.

7.4 Enforcement of pre-trial detention

In all country reports, the enforcement of pre-trial detention is described in headlines. The information on this topic is partly based on relevant legislation, case-law and law books, and partly on reports written by national and international supervisory bodies and non-governmental human rights organisations. Generally speaking, these reports do not give a full

picture of the way pre-trial detention is enforced in the respective countries. The visits upon which the reports are normally based do not cover all penitentiary institutions or police stations, but refer only to a selection of the establishments. The dates of visits also vary, which makes it difficult to compare the findings and to draw general and far-reaching conclusions.

Another aspect that we should keep in mind is that, in the reports and prison studies, a distinction between pre-trial detainees and convicted prisoners is not always made. Therefore, some of the following findings have wider implications than the enforcement of pre-trial detention alone. This is, for instance, the case with the issue of overcrowding. This does not only occur in pre-trial institutions; its consequences can be seen in other penitentiary institutions as well. We tried to look at the relevance for pre-trial detention in selecting the subjects that will be discussed below.

- In most of the countries, the enforcement of remand detention is governed by the same legal provisions that are applied to sentenced prisoners. As this might be regarded as problematic with respect to the presumption of innocence, some Codes of Criminal Procedure or Penitentiary Acts contain basic rules for the treatment of remand detainees, underlining, *inter alia*, that the above-mentioned principle must always be borne in mind while executing pre-trial detention. In Belgium, for instance, the Penitentiary Principles Act explicitly stipulates that remand prisoners must be considered innocent as long as they have not been convicted without appeal. In Germany, the CCP contains the principle of segregation (as far as possible) and a provision stating that the detainee may only be subject to such restrictions that are required by the objective of pre-trial detention and the maintenance of the order of the institution. Far-reaching restrictions such as captivation can only be ordered by a judge. Similar provisions can be found in Portugal, where the Law on Enforcement of Sanctions stresses that "remand prisoners must benefit from the presumption of innocence and be treated accordingly". Moreover, it states that "remand in custody must be executed in such a way as to exclude any restriction of liberty that is not strictly indispensable to the aims for remand, to ensure discipline, security and order in prison". For instance, pre-trial detainees should have the possibility to receive visitors every day, as long as this is possible and in accordance with the internal rules. Pre-trial detainees also have the right to use their own clothes and to receive food from outside the prison, provided they bear the expenses themselves. Furthermore, pre-trial detainees are not obliged to work, but they may, at their own request, be authorised to work, to follow education and training courses or other courses, and to participate in other cultural, recreational or sport activities organised in prison. In some other countries, specific provisions that can be found with respect to the principle of innocence are more restrictive and refer only to the right to wear own clothing or the right – not the duty – to work. Sometimes, but not in all countries, pre-trial detainees are allowed more visiting hours than sentenced prisoners. In Belgium, for instance, they can receive visitors every day; in Austria and Bulgaria (at least), twice a week. This contrasts with a country like the Czech Republic, where visits are restricted to three times a month. In Latvia, the maximum visiting time is three hours a month. In Lithuania, according to the Law on Pre-trial Detention, untried prisoners shall be permitted to receive visits, from relatives or other persons, only with the consent of the officer investigating the case or the court in whose jurisdiction the case is investigated. This means that no minimum number and duration of visits is laid down by law; the internal regulations even restrict visits by specifying that only one visit every two weeks is allowed.

- In most of the countries, the rules regulating the prison regime and prisoners' rights and duties are applicable to untried and sentenced prisoners alike. Only in a few countries (e.g. Finland and Lithuania), specific laws exist on the enforcement of pre-trial detention. Many of the general penitentiary laws and ordinances have recently been revised, in particular in the Central and Eastern European countries. Generally speaking, one can say that the existing prison rules are compatible with international and European

standards such as the revised European Prison rules. However, this does not mean that these rules are always applied in the way they are meant. Generally, it can be said that the discrepancy between the legal provisions and legal reality with regard to detention is the biggest when it comes to the practical living conditions. Particularly problematic points are the overall living conditions, the right to file complaints, and the right to have contact with the outside world (receiving visits as well as parcels, sending letters and making phone calls) – in remand prisons, but particularly in police detention facilities. One of the countries where the legal position of pre-trial detainees is explicitly based on the equality principle is Finland. This means that, in principle, there should be no difference between pre-trial and sentenced prisoners and that remand prisoners should have the same rights with respect to outdoor exercise, accommodation and allocation in the prison, activities, own work, property and income, social rehabilitation, childbirth, religious practice, library, correspondence and visits. This is not the case in all countries.

- As a rule, the enforcement of pre-trial detention in the Member States of the EU takes place in court prisons, remand prisons or separate wings/sections of regular prisons. Usually, legal provisions prescribe that remand prisoners are kept separated from sentenced prisoners. An exception can be found in the Netherlands, where it is possible (since 2006) to transfer pre-trial detainees to regular prisons as soon as they have been convicted in first instance to a prison sentence of at least three months. In some countries, like Denmark, pre-trial detainees can be detained in penitentiary institutions designed to accommodate persons awaiting trial, sentenced persons serving a short sentence (of six months or less), and sentenced persons awaiting placement in a prison.

- A particular problem that can be observed in a large number of countries is related to the accommodation of remand prisoners in police cells even after their first appearance in court (Finland, Hungary and Latvia). In these countries, suspects can be held in police custody for a long period. In Hungary, for example, it is possible to execute pre-trial detention in police establishments for a maximum of sixty days. In Romania, the CPT found a large number of remand prisoners – and even some sentenced persons – subject to criminal investigations, who were in police establishments for prolonged periods. Some had been there for six months or, in a few exceptional cases, even for one and a half year. During its last visit to the Netherlands (2007), the CPT noted that a significant number of persons spent between ten and fourteen days detained in police cells. This particularly appeared to be the case for juveniles between 16 and 18 years of age. According to the CPT delegation, apparently this was due to capacity problems in juvenile detention facilities, which suggested that police cells were being used as surplus capacity for remand prisons and alien holding facilities. The CPT noted that "a shortage of remand capacity, combined with a policy of keeping prison occupation rates below 100% (…) may encourage prolonged detention in police facilities". However, the fact remains, as was repeated by the CPT in various reports, that police facilities do not offer suitable accommodation for lengthy periods of detention, particularly as concerns juveniles. Cases of ill-treatment have been encountered by the CPT many times, especially with respect to detention in police stations. In many reports, the CPT particularly criticised the lack of indoor and outdoor activities in police stations, the material conditions of police premises, the lack of contact with the outside world, the monitoring of correspondence and conversations, the internal procedures and regime in police units, and the fact that juveniles are not always kept separated from adults. Many reports also show that persons deprived of their liberty by the police are not from the very outset of deprivation of liberty informed – systematically and in writing – of their right to notify a relative/friend of their custody, of their right of access to a defence counsel, and of their right to be seen by a doctor.

- Similar shortcomings can be observed in remand prisons. In many countries, the lack of meaningful activities while being detained on remand is a problem for most remand prisoners. In various countries, it is more the rule than the exception that prisoners stay

in their cells for 23 hours a day without anything to do. This is, for instance, the case in Austria, Bulgaria, Estonia, Latvia, Romania, Slovakia, Poland and Sweden, where remand prisoners spend only one hour a day out of their cells/rooms. In England and Wales, the out-of-cell time for remand prisoners can be as little as two hours a day. In Malta, on the other hand, remand prisoners are out of their cells for over eleven hours; in Cyprus, for 17-18 hours a day.

- In many reports, there is mention of one of the most urgent problems with respect to remand prisons: overcrowding. Many countries are confronted with it, such as Austria. Bulgaria, the Czech Republic, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal and the UK. The problem of overcrowding has negative consequences for the material and living conditions: multi-occupancy cells with a living space per prisoner of less than 3 m^2, reduced possibilities to work or to attend educational/vocational activities, and a limited choice of other out-of-cell activities. Overcrowded prisons entail, *inter alia*, cramped and unhygienic accommodations, a constant lack of privacy, overburdened health-care services, and increased tension – resulting in more violence – between prisoners as well as between prisoners and staff.

- Point of concern is also the possibility, existing for example in Spain, Portugal and Estonia to subject remand prisoners to a regime of total incommunication or to a regime of restricted communication.

Chapter 8: Special groups

In all country reports, attention is paid to specific categories of detainees who, generally speaking, are considered particularly vulnerable: juveniles, women, and foreigners. In addition, the reports also outline what provisions exist with respect to persons suspected of having committed a "terrorist crime".

8.1 Juveniles

Table 8.1 gives an overview of the most relevant topics with respect to pre-trial detention for juveniles: the age of criminal responsibility, the existence of specific laws for juveniles, the question whether countries have established specific rules for reducing the period that a juvenile can be kept in pre-trial detention, and whether there are specific grounds allowing the application of pre-trial detention to juveniles. The table also shows in which countries specific alternatives to pre-trial detention for juveniles are available and mentions whether the regulations entail special provisions with respect to the involvement of parents/guardians during the pre-trial investigation.

Table 8.1

	Age of criminal responsibility	Specific laws for juveniles	Specific rules for the reduction of the pre-trial detention period for juveniles	Specific grounds for pre-trial detention for juveniles	Specific alternatives to pre-trial detention for juveniles	Specific provisions with respect to parents, guardians etc.
Austria	14	X	X	X	-	X
Belgium	16*/**18	X	X	X	X	X
Bulgaria	14	X	X	X	X	X
Cyprus	14	X	-	-	X	-
Czech Republic	15	X	X	-	X	-
Denmark	15	X	-	-	X	-
Estonia	14	-	-	-	-	-
Finland	15	-	-	-	-	-
France	10 ***/13	X	X	-	-	-
Germany	14	X	X	X	X	-
Greece	8***/13	-	X	X	-	-
Hungary	14	-	X	-	X	-
Ireland	12	X	-	-	X	-
Italy	14	X	X	X	X	X
Latvia	14	-	X	X	X	X
Lithuania	14**/16	-	X	-	X	X
Luxembourg	18 *****	-	-	-	-	-
Malta	9	-	-	-	-	-
Netherlands	12	-	X	-	X	X
Poland	13	X	X	-	X	X
Portugal	12****/16	X	-	-	-	-
Romania	14******/16	X	-	X	-	X
Slovakia	14/15	-	-	-	-	X
Slovenia	14	-	X	-	X	-
Spain	14	X	X	X	X	X
Sweden	15	X	X	X	X	X
England and Wales	10 8 (Scotland)	X	X	X	X	-

* only for traffic offences — ** only for specific serious crimes
*** only educational measures — **** special juvenile protection law applied
***** with certain exceptions — ******14<16 only if proven that the minor committed the offence with discernment

Main observations with respect to juveniles:

- The legal possibilities to apply pre-trial detention to juveniles to a large extent depend on the age of criminal responsibility. The current age limits of criminal responsibility in the EU Member States show a broad variety. They range from 7 to 18 years. In the majority of the countries, pre-trial detention can be applied to juveniles older than 15. Whether pre-trial detention can be applied, and for what period, can also be dependent on the gravity of the offence. In some countries, juveniles younger than 16 who are suspected of having committed less serious crimes cannot be taken into pre-trial detention or only for a limited period of time.

- In about half of the countries, pre-trial detention of juveniles is regulated by specific Juvenile Acts. In the remaining countries, the general provisions on pre-trial detention, as laid down in the general Code of Criminal Procedure, are also applicable to juvenile offenders.

- In the majority of the EU Member States, specific provisions exist for reducing the pre-trial detention period for juveniles. However, the maximum period that a juvenile can be held in remand according to the law varies from two weeks to two years. In some countries, the time limit for remand detention is set to half or two-thirds of the period applicable to adults. In other countries there is no difference between juveniles and adults. In Finland for example Chapter 1, section 26a of the Act on coercive measures is also applicable to minors, stating: "no one shall be detained where it would be reasonable having regard to the particulars of the case or the age or the personal circumstances of the suspect". In practice a minor is detained only detained in exceptional circumstances.

- In many, but not in all countries, the law guarantees legal assistance to juveniles during the pre-trial period/investigations.

- In many, but not in all countries, the law guarantees the immediate notification of parents/guardians etc. by the authorities if a juvenile is taken into pre-trial detention. However, practice shows that this obligation is not always respected.

- In most of the countries, pre-trial detention for juveniles is considered a last resort. As a consequence, in almost half of the countries, specific grounds for the application of pre-trial detention to juveniles have been developed. These grounds are stricter than the grounds that apply to adults and mostly refer to the risk of absconding if the juvenile has already escaped, prepared to escape or has no permanent home address.

- In the majority of the countries, priority is given to alternatives to pre-trial detention. These alternatives can consist of various types of bail, conditional suspension of pre-trial detention, application of protective and educational measures, placement in a special centre for juveniles, supervision by parents/guardians, supervision by the administration of an educational establishment, supervision by a special commission for the protection of juveniles, or probation supervision. Other alternatives that are applied are court instruction orders with respect to study and work, home restriction orders, curfew, house arrest, and commitment to the care of a public or authorised community. In some countries, it is also possible to apply a family law or a youth welfare law directive.

- In several, but not in all countries, juveniles are granted the right to involve parents, guardians or trusted adults in the first pre-trial proceedings.

- Not in all countries, the law requires that juveniles are separated from adults and that pre-trial (juvenile) detainees are kept separate from sentenced prisoners. Even in countries where such requirements exist, practice shows that the separation principles are not always respected, because of the problem of overcrowding in the penitentiary institutions or because the number of juvenile detainees is too low to maintain special juvenile units.

- In some countries, it is not unusual to keep juvenile pre-trial detainees in police stations for more than a few days.

- In several reports, the CPT criticised the living circumstances in pre-trial institutions, especially with respect to living space, the limited possibilities for out-of-cell activities, access to activity programmes, restriction of contacts with the outside world, and the non-compliance with the separation principle.

8.2 Women

Table 8.2

	Specific regulations for women in pre-trial detention	**Specific provisions for mothers with children**	**Specific provisions for suspected pregnant women**
Austria	-	-	-
Belgium	-	X (< 3 years)	-
Bulgaria	X	X	X
Cyprus	-	-	-
Czech Republic	X	-	-
Denmark	-	X	-
Estonia	-	-	-
Finland	-	-	-
France	-	-	-
Germany	-	-	-
Greece	-	-	-
Hungary	-	-	-
Ireland	-	X (<1 year)	-
Italy	X	X (<3 years)	X
Latvia	X	X (<1 year)	-
Lithuania	X	-	X
Luxembourg	-	-	-
Malta	-	-	-
Netherlands	-	X (<4 years)	-
Poland	-		X (draft law)
Portugal	-	X (<3 years)	X
Romania	-	-	-
Slovakia	X	-	X
Slovenia	-	-	-
Spain	-	X	X
Sweden	-	-	-
United Kingdom	-	-	-

Main observations with respect to women:

- According to the available information, in most of the countries, the law does not contain specific rules with respect to pre-trial detention of women, except that they have to be accommodated separate from men and that pre-trial detainees should be separated from convicted prisoners (double segregation principle).

- In some countries, the law allows mothers to keep their children up to a certain age with them during pre-trial detention. In Ireland and Latvia, this is allowed when the child is not older than 12 months; in Belgium, Italy and Portugal, the child may not be older than 3 years and in the Netherlands, children up to 4 years of age can stay in prison with their mothers.

- In Lithuania, women who are over three months pregnant may request to be kept separate from other women. Also in Lithuania, the law concerning pre-trial detention explicitly states that pregnant women and nursing mothers shall be provided with better accommodation and everyday life conditions. Furthermore, this law prescribes that some measures of restraint, in particular the use of firearms, cannot (or only in a restricted manner) be used against women, except in cases of self-defence or if detainees use firearms themselves. When the new Law on the Execution of Pre-trial detention will have come into force (2009), pregnant women will be the only detainees entitled to receive food packages under certain circumstances.

- Only in a small number of countries three countries, special provisions forbid or restrict the application of pre-trial detention to pregnant women or single mothers. This is, for example, the case in Italy, where the CCP prescribes that pre-trial detention cannot be imposed on pregnant women and single mothers of children under the age of 3, except if the grounds for detention are exceptionally serious. Also in Italy, single fathers of children under the age of 3 cannot be taken into pre-trial detention either, if the mother of the child is deceased or completely unable to take care of the child. In Slovakia the law prescribes that when a prison director finds out that a woman in custody is pregnant, he has to inform the public prosecutor.

- In Latvia, pregnant women, women in the post-natal period (up to one year), and women during the entire period of breast-feeding cannot be detained, unless they are held suspect or accused of having committed a serious crime, or have violated the provisions of another security measure.

- In Portugal, the use of pre-trial detention is restricted by the provision that pre-trial detention may be suspended, if necessary, if the detainee is pregnant or has recently given birth. The suspension ends when the circumstances that gave rise to it end. In the case of post-partum, the suspension terminates at the end of the third month following childbirth. During the period of suspension of pre-trial detention, the detainee is subject to house arrest and/or to any other measure appropriate in her condition, particularly hospital detention.

- With respect to the way pre-trial detention is executed in penitentiary institutions, one can conclude from the findings of the CPT and national/international human rights organisations that not in all countries women are allocated in institutions dedicated to accommodating female prisoners. Specific problems observed are: overcrowding in female institutions, the lack of sufficient medical care provisions, limited access to out-door activities, and the poor state of repair and cleanliness of some institutions.

- A specific problem mentioned in the German report is that women in pre-trial detention, because of the segregation principle, are often kept either quite isolated or – if accommodated in larger prisons designed only for female prisoners – further away from friends and family, with the risk of even more limited contact with the outside world.

8.3 Foreigners

As was shown in the statistical overview in Chapter 2, in the majority of the EU Member States, foreigners are strongly overrepresented within the total prison population as well as among pre-trial detainees. Exceptions are Bulgaria, Hungary, Poland, Romania, Latvia and Lithuania, where the share of foreigners in both the pre-trial and the total prison population does not exceed 5%. The share of foreign prisoners among the total prison population and among the total number of pre-trial detainees amounts to about 40% in Austria and Belgium, and to 50% in Cyprus, Greece and Malta. The highest share can be found in Luxembourg, where 75% of all pre-trial detainees and 88% of the total prison population consist of non-Luxembourgian offenders.

The high percentage of foreign prisoners among pre-trial detainees is explained in various reports by referring to the fact that many foreigners do not have a fixed address or even a residence permit. The absence of a fixed address or a residence permit is, by many investigating judges and courts, seen as a serious risk of absconding and/or recidivism. This means that foreigners without a fixed address will normally be excluded from alternatives to pre-trial detention and be placed into pre-trial detention on a routine basis, even for minor offences. As one of the few exceptions, the provision in the Estonian CCP can be mentioned, which allows for the substitution of detention by the payment of a sum of money (to secure the costs of the proceedings and a possible fine), if a person who does not reside in Estonia is suspected of an offence in the second decree punishable by a fine.

In all countries, except Luxembourg, the prerequisites for applying pre-trial detention do not differentiate between national citizens and foreign citizens. This is based on the principle that everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other convictions, material standing, birth, education, social status or any other personal circumstances. However, in Luxembourg, foreigners without a fixed address in Luxembourg may already be taken into preventive detention if serious indications of guilt exist and the offence is punishable by a custodial sentence. For Luxembourgian residents, this is only possible if the offence is punishable by a custodial sentence of at least two years, and there is a risk that the suspect will flee, meddle with the evidence or will commit new crimes.

With respect to the detention regimes to which pre-trial detainees are subject and the places where pre-trial detention is executed, from the various country reports, one can conclude that in the legal provisions, in principle, no differentiation is made based upon the nationality of detainees. This is in accordance with the principle that every person is entitled to the fundamental rights and freedoms of the individual, whatever his race, place of origin, political opinions, colour, creed or sex may be. This means that foreign (remand) prisoners are detained in the same penitentiary institutions as national citizens and, in principle, have access to the same living conditions and facilities as other prisoners. When foreigners are excluded from certain facilities or privileges, they usually have no residence permit or have been declared *personae non grata*. The normal procedure is that such detainees will be expelled immediately after their release. In many countries, this means that, during the detention period, they will be excluded from reintegration programmes, furloughs, weekend leave, and transfer to a more open institution, probation assistance, and alternatives such as semi-detention or electronic monitoring.

As far as the Code of Criminal Procedure, the Penitentiary Act, or a special Act for the Execution provides articles aimed at foreign detainees, these refer to specific rights that foreigners deprived of their liberty are entitled to. These rights, which are provided by law in all or almost all countries, include:

- the right to receive written information sheets explaining the detainee's rights and duties in his/her mother tongue or in another language he/she understands;
- the right to legal aid after apprehension;

- the right to contact the diplomatic mission of the detainee's country of origin and to receive visits by its representatives;
- the right to assistance by an interpreter.

However, from the various country reports, we have to conclude that the daily practice does not always reflect these basis rights.

8.4 Alleged terrorists

Only in less than one-third of the EU Member States, specific provisions have been introduced with respect to suspects of terrorist crimes. The provisions in the Codes of Criminal Procedure of Austria, the Czech Republic and Italy have only a limited scope, in contrast to the provisions in France, the Netherlands, Spain and the United Kingdom. In Austria, the terrorist provision refers to the grounds for pre-trial detention, stating that the prosecutor and the judge, when considering the risk of re-offending, must particularly take into account whether the risk derives from the membership of a criminal or terrorist organisation (Art. 173,3CCP). In the Czech Republic, the only reference to alleged terrorists in the CPC relates to the exclusion of suspects of terrorist crimes from bail.

The Italian CPP does not provide for special provisions regarding pre-trial detention of terrorists. Once taken into pre-trial detention, terrorists can, however, be subjected to the emergency measures provided for by the Prison Act, such as the following restrictions:

- limitation of out-of-cell activities to a total of four hours a day (two hours of outdoor exercise in small groups and two hours of indoor group activities, in a room inside the unit especially equipped for cultural, leisure and sports activities). During these activities, prisoners are only allowed to associate in groups of up to five persons;
- limitation of visits by family members and/or companions to one or two visits a month and only under closed conditions. In practice, it is, however, possible for prisoners to see their own children for ten minutes under open conditions, if the children are below the age of 12;
- restriction of access to telephone calls in such a way that access is granted once a month and for a maximum of ten minutes, provided no visits are received during that month. However, access to telephone calls is only allowed after an initial waiting period of six months. Furthermore, telephone conversations are subject to strict security conditions (e.g. the other party is obliged to call from a law enforcement establishment or prison, and conversations are systematically recorded, with the exception of conversations with the suspect's lawyer);
- application of strict regulations concerning transfers, supplementary food supplies, parcels etc.;
- the prohibition to use tape recorders and CD players. (as to the prohibition to use CD players, this is not explicitly included in the Prison Act);
- censoring of incoming and outgoing correspondence, with the exception of correspondence with members of Parliament and with European or national authorities having competence in the field of justice.

In France, the anti-terrorism Acts of 1986, 1996 and 2006 have a much larger impact on suspects of terrorist crimes, especially with respect to the first days of police investigation. The maximum term that a suspect can be held in police custody may, under certain conditions, be extended to four or six days, before the suspect is brought before a judge to be placed under judicial investigation or released without charge. Suspects may only see a lawyer for the first time after three days in custody (in some cases: four days) and for no longer than thirty minutes. The lawyer does not have access to the case file or information on the exact charges against his or her client, leaving little scope for the provision of legal advice.

Since 2004, the Dutch legislator has incorporated specific provisions for suspects of terrorist acts in the Penal Code and the Code of Procedure. In the year mentioned, certain crimes were included in the Criminal Code as terrorist crimes, if they had been committed with a "terrorist intention". The penalties for these terrorist crimes were increased significantly, and in 2006 special procedural provisions were also included in the CCP for cases of suspected terrorism. With regard to pre-trial detention, these new provisions also

entail that, if a terrorist crime is suspected, an order of remand in custody does not require "serious suspicion"; "reasonable suspicion" will suffice. The period of remand detention can also be extended by nine months at a time until the start of the trial, up to a maximum of two years.

Since 2006, suspects of terrorist crimes can be locked up in separate terrorist departments of two penitentiary prisons: in Vught (males) and Rotterdam (females). Placement takes place pursuant to Article 20a of the Regulation on classification, placement and transfer of detainees, in accordance with which a person charged with – or sentenced for– a terrorist offence, or spreading a message of extremism among fellow inmates, may be placed in a terrorist department by order of the selection office. At the time of the CPT visit to the Netherlands (2007), eight male prisoners were being held at Vught prison and two women at Rotterdam prison. During its visit, the CPT was highly critical of these terrorist departments, with their restricted high-security regimes. The major points of criticism concerned the automatic placement of terrorist suspects in these departments (without a previous risk assessment), the lack of regular review of such a placement, the material conditions at Vught prison, and the use of restraint in both departments.

Spain does not have a special anti-terrorism law. Penalisation and prosecution of terrorist offences are regulated in the Penal Code and the Code of Criminal Procedure. Last-mentioned Code in particular establishes the conditions for pre-trial detention of certain groups of serious offenders, such as terrorist suspects, and their rights during pre-trial detention. "Prisión provisional incommunicado" is the strictest type of pre-trial detention. It is mostly used for preventive detention of alleged terrorists and allows for suspects to be deprived of their liberty in the investigative stage, and to be deprived of certain rights that suspects held in ordinary pre-trial detention may not be deprived of, such as the right to receive visits and the right to communicate with the outside world. A suspect held in incommunicado detention does not have the right to appoint a lawyer of his own choice either, nor can he notify a relative or another person of his choice. Another important restriction is that an alleged terrorist is not entitled to private conversations with his lawyer upon completion of proceedings in which the lawyer took part. In order to ensure that the remaining rights of such detainees are respected, the CCP prescribes that the examining judge, together with a public prosecutor, shall visit the local prisons once a week – not on a fixed day and without prior warning. The aim of these visits is to establish what the conditions are in which prisoners are detained, and to take the necessary measures – within the competence of the investigating judge and the public prosecutor – to end any violations encountered.

In the UK, the Terrorism Acts of 2000 and 2006 have also extended the time limits for holding a suspect in police custody in case of terrorism investigations. In terrorism investigations, the police can detain arrested persons on their own authority for a maximum period of 48 hours. After this period, a warrant for further detention may be obtained from a judicial authority. The pre-charge detention of a terrorism suspect may be initially extended up to seven days, which may be prolonged by periods of seven days repeatedly for up to 28 days. However, a Counter-Terrorism Bill, introduced in Parliament on 24 January 2008, makes provisions for the maximum limit of 28 days to be extended to 42 days under specified circumstances. However, the plans to extend pre-charge detention to 42 days were recently rejected by the House of Lords, which means that the government has to shelve the measure.

In its 2008 report on the visit to the United Kingdom, the CPT states that "the existing – and a fortiori possible new – provisions regarding the permissible length of pre-charge detention in cases falling under the terrorism legislation are a matter of considerable concern". Furthermore, the CPT insists that neither the existing nor any new provisions in relation to the length terrorist suspects spend in pre-charge detention should result in criminal suspects being held in police custody for a prolonged period of time. The sooner a suspect is handed over to a custodial authority that functions separately from the police, the better. Despite the fact that the Code of Practice (Code H) on detention of persons under the Terrorism Act 2000 prescribes when detention beyond 14 days is authorised ("the detainee must be transferred from detention in a police station to detention in a designated

prison as soon as is practicable"), the CPT remarks that there are exceptions to the obligation to transfer a suspect to a prison (if the suspect requests to remain in the police station, and if transfer to prison would prevent the investigation from being conducted diligently and expeditiously). In the CPT's opinion, the exceptions are questionable. The CPT, therefore, recommends that the necessary steps be taken to ensure that:

- "all persons suspected of offences under the terrorism legislation in respect of whom detention beyond 14 days is authorised are transferred forthwith to a prison;
- appropriate arrangements are in place, enabling terrorist suspects transferred to prison whilst still in pre-charge detention to make effective use of their rights, including that of access to a lawyer".

Besides the Terrorism Acts 2000 and 2006, the Anti-Terrorism, Crime and Security Act 2001 was introduced to create powers to detain without trial persons suspected of international terrorism, in which a derogation from Art. 5 ECHR was entered. In 2004, the House of Lords decided, *inter alia*, that the derogation from Art. 5 was incompatible with the Convention. Following the ruling by Britain's highest court, the Prevention of Terrorism Act 2005 came into force on 11 March 2005. This Act replaced Part 4 (ss. 21-32) of the Anti-Terrorism, Crime and Security Act 2001, which made provisions for the indefinite detention of foreign terrorism suspects. The Prevention of Terrorism Act 2005 allows for control orders, restricting the freedom of persons suspected of terrorist activities. These control orders can include several conditions, "such as restrictions on movement and travel, restrictions on associations with named individuals and the use of tagging for purposes of monitoring curfews". Despite the fact that indefinite detention is banned from English law, the new Prevention of Terrorism Act still meets with sharp criticism.