# Luxembourg

## 1. Introduction

The legal system of Luxembourg is to a large extent similar to the French Code Napoleon, except for the commercial and criminal justice system, which are more similar to the Belgian system. This is mainly due to the fact that in Luxembourg, the criminal procedure – notwithstanding various reforms in the last decades- is still based on the Napoleonic Code d'Instruction Criminelle (1808). This Code is still in force in Belgium and this explains the strong resemblance of the Luxembourg criminal procedure with that of Belgium. The Penal Code of Luxembourg, which dates from 1879, is almost identical to the Belgian Penal Code of 1867 that in turn is based on its predecessor, the French Penal Code of 1810.

In spite of these common features, the criminal procedure in Luxembourg is not a complete copy of the Belgian one. Especially since the 1970's, important changes have been introduced such as the modification of the regime of detention awaiting trial with Article 94 CCP as applicable rule[1], the introduction by the Statute of 30 December 1981[2] of the compensation of persons unjustly detained on remand (détention préventive inopérante), and the reform by the Statute of 16 June 1989, that substantially modernised the provisions on pre-trial investigations.[3]

As in Belgium, the Luxembourg criminal proceedings are divided in two stages: the pre-trial stage and the trial stage. In the pre-trial phase, the following courts are competent: 1) the investigating judge (juge d'instruction, one single judge), the judicial council of the court in first instance (chambre du conseil, three judges), and the judicial council of the court of appeal (three judges). Their functions are more or less the same as those held by the Belgian courts that are competent at the pre-trial stage.[4] Coercive measures that can be applied in the pre-trial stage are a.o. the identity checks of suspects (vérifications d'identité), temporary detention (rétention), arrest (arrêt), restriction order (interdiction de communiquer), detention on remand or preventive detention (détention préventive).The main provisions on the pre-trial stage and the coercive measures that can be applied are laid down in articles 39-45 and 94-126 of the Code of Criminal Procedure. In 1855 a special law came into force concerning the preventive detention of foreigners. This law, which was modified in 1986, is in practice not applied.

In this report, the pre-trial stage will be discussed thoroughly. The aim is to give an analysis of the minimum standards in pre-trial detention and the grounds for regular review in Luxembourg. After dealing with 'Empirical Background Information' in the 2nd paragraph, the 'Legal basis: Scope and notion of pre-trial detention' will be discussed in paragraph 3. The 4th and 5th paragraphs concern the 'Grounds for detention and other prerequisites' and 'Grounds for review of pre-trial detention, respectively. The 'Length of pre-trial detention' will be treated in paragraph 6, after which 'Other relevant aspects' in relation to pre-trial detention follow. Paragraph 8 will focus on the system of pre-trial detention regarding 'Vulnerable groups'. A summary of all the paragraphs mentioned above will be given in paragraph 9.

## 2. Empirical background information

Various sources deliver statistics on the numbers of the prison population, pre-trial detention/remand imprisonment, etc in Luxembourg. In this paragraph, attention will be paid on data from international sources: the Council of Europe's SPACE I, International Centre for Prison

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[1] Mémorial, A, 1973, p. 1104.
[2] Mémorial, A, 1981, p. 755.
[3] Mémorial, A. 1989, p. 774.
[4] See: A. and D. Spielmann, Chapter 9, Luxembourg, in : Chr. van den Wyngaert, Crominal Procedure in systems in the European community, london, Brussels, Dublin, Edinburg, 1993, p. 262.

Studies of King's College London and data from the Ministry of justice and the Statistical Office of Luxembourg. After showing the data, the statistics will be explained and compared.

**Data from the Council of Europe Annual Penal Statistics, SPACE I, Survey 2006.[5]**
Remarks: The numbers relate to the 1st of September 2006 (stock), they include the whole prison population and not only those who are held in penal institutions and no measures (legislative or other) influencing directly the trends in the number of prisoners that have been taken in the course of the last 12 months.

**Table 1, Luxembourg and its prisoners in general**

| | |
|---|---|
| Population 2006, annual estimates (thousands) | 461.4 |
| Total number of prisoners (including pre-trial detainees) | 755[6] |
| Prison population rate per 100.000 inhabitants | 163.6 |
| Total capacity of penal institutions / prisons | 781 |
| Prison density per 100 places | 96.7 |

**Table 2, Special groups of prisoners[7]**

| | |
|---|---|
| Number of female prisoners (including pre-trial detainees) | 38 |
| % of female detainees (including pre-trial detainees) | 5 |
| Number of foreign prisoners (including pre-trial detainees) | 563 |
| % of foreign prisoners (including pre-trial detainees) | 75.2 |
| Of which: Number of foreign pre-trial detainees | 290 |
| % of foreign prisoners who are pre-trial detainees | 51.1 |

**Table 3, Legal status of prison population I**

| | |
|---|---|
| Untried prisoners (no court decision yet reached) | 215 |
| Convicted prisoners, but not yet sentenced | ... |
| Sentenced prisoners who have appealed or who are within the statutory time limit for doing so | 100 |
| Sentenced prisoners (final sentence) | 404 |
| Other cases | 36 |
| Total | 755 |

**Table 4, Legal status of prison population II:**

| | |
|---|---|
| Percentage of prisoners not serving a final sentence | 46.5 |
| Rate of prisoners not serving a final sentence per 100,000 inhabitants | 76.1 |
| Percentage of untried prisoners (no court decision yet reached) | 28.5 |

[5] 23 January 2008, PC-CP (2007)9 rev3, by M.F. Aebi, N. Delgrande: University of Lausanne, Switzerland.
[6] According to table1.2 of Space 1 this number includes also an unknown number of immigration detainees (asylumseekers or illegal aliens) but no persons held in institutions for juvenile offenders, persons held in institutions for drug-addicted offenders or persons serving their sentence under Electronic Monitoring. Also are excluded detainees from CPG (penitentiary centre of Givenich –semi-detention).
[7] SPACE provides no numbers on juveniles.

| | |
|---|---|
| Rate of untried prisoners (no court decision yet reached) per 100,000 inhabitants | 46.6 |

**Table 5 Evolution of prison populations between 2000 and 2006[8]**

| Year | Total number of Prison population rate prisoners (including pre-trial detainee of each year s) on 1st September | Per 100,000 inhabitants on 1st September of each year |
|---|---|---|
| 2000 | 394 | 90.4 |
| 2001 | 357 | 80.9 |
| 2002 | 380 | 86.6 |
| 2003 | 498 | 111.1 |
| 2004 | 548 | 121.3 |
| 2005 | 693 | 152.3 |
| 2006 | 755 | 163.6 |

- The change between 2000-2006 = evolution (in percentage) of prison population rates between 2000 and 2006: -3
- The change between 2005-2006 = evolution (in percentage) of prison population rates between 2005 and 2006: + 3.6

**Data from the International Centre for Prison Studies, King's College London**

**Table 6 Prison Brief 2007**

| | |
|---|---|
| Prison population total (including pre-trial detainees / remand prisoners)[9] | **745** at 1.9.2007 (Ministry of Justice) |
| Prison population rate (per 100,000 of national population) | **155** based on an estimated national population of 481.300 at beginning of September 2007 (from Eurostat figures) |
| Pre-trial detainees / remand prisoners (percentage of prison population) | **42.0%** (01.09.2007) |
| Female prisoners (percentage of prison population) | **3.5%** (1.9.2007) |
| Juveniles/minors/young prisoners (percentage of prison population) | **1.1%** (15.7.2007- under 18) |
| Foreign prisoners (percentage of prison population) | **73.3%** (1.9.2007) |
| Official capacity of prison system | **696** (15.7.2007- 597 at CPL, 99 at semi-open CPG) |
| Occupancy level (based on official capacity) | **106.92%** (15.7.2007) |

[8] Council of Europe Annual Statistics -Space 1-2006, p. 28

[9] Prison Brief for Luxembourg, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=133

**Table 7 World Pre-trial/Remand Imprisonment List[10]**

| | |
|---|---|
| Total number in pre-trial/remand imprisonment | 309 |
| Date | 15 July 2007 |
| Percentage of total prison population | 41.5 |
| Estimated national population (at date shown) | 466.300 |
| Pre-trial/remand population rate (per 100,000 of national population) | 66 |

**Table 8 World Female Imprisonment List[11]**

| | |
|---|---|
| Female prison population (number of women and girls in penal institutions, including pre-trial detainees/remand prisoners) | 29 |
| Date | 16 February 2005 |
| Female prisoners –percentage of the total prison population | 4.4 |

**Data from the Statistical Office of Luxembourg**

**Table 9 Penitentiary institutions in Luxembourg[12]**

| Year | Prison population at the end of the year | Of which women | Of which women in % | Of which sentenced | Of which sentenced in % | Of which not sentenced | Of which not sentenced in % |
|---|---|---|---|---|---|---|---|
| 2000 | 400 | 25 | 6.25 | 187 | 47.7 | 213 | 52.3 |
| 2001 | 341 | 14 | 4.1 | 169 | 49.5 | 172 | 51.5 |
| 2002 | 391 | 26 | 6.5 | 160 | 40.9 | 231 | 59.1 |
| 2003 | 455 | 20 | 4.4 | 188 | 41.3 | 267 | 58.7 |
| 2004 | 577 | 26 | 4.5 | 214 | 37 | 363 | 63 |
| 2005 | 735 | 32 | 4.4 | 308 | 41.9 | 427 | 58.1 |
| 2006 | 738 | 36 | 4.9 | *367* | 49.7 | 371 | 50.3 |

**Data from the annual Activities Report of the Ministry of Justice[13]**

**Table 10 Prison populations in Luxembourgian prisons according to their legal status and sex (1 September 2007)[14]**

| Total number of detainees | Of which sentenced (men) | Of which sentenced women | Of which preventive detainees | Of which men | Of which women |
|---|---|---|---|---|---|
| 745 (100%) | 418 (56.1%) | 10 (1.3%) | 281 (37.7%) | 265 (35.5%) | 16 (2.1%) |

[10] Roy Walmsley, January 2008, http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=World%20Pre-trial&search=search&type=0&month=0&year=0&lang=0&author 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).

[11] Roy Walmsley, August 2006, http://www.kcl.ac.uk/depsta/law/research/icps/downloads.php?searchtitle=world+female+imprisonment+list&type=0&month=0&year=0&lang=0&author=&search=Search

[12] Portail des Statistiques du Grand-Duché de Luxembourg, http;//www.statisques.public.lu/stat

[13] Le Gouvernement du Grand-Duché de Luxembourg, Ministère de la Justice, Rapport d'activité 2007, Luxembourg 2008.

[14] Le Gouvernement du Grand-Duché de Luxembourg, Ministère de la Justice, Rapport d'activité 2007, Luxembourg 2008, p. 286

**Table 11 Prison population in Luxembourgian prisons according to their legal status and nationality[15]**

| Total number of detainees | Of which sentenced foreigners | Of which sentenced European foreigners | Of which sentenced non-European foreigners | Of which preventive detained foreigners | Of which preventive detained European foreigners | Of which preventive detained non-European foreigners |
|---|---|---|---|---|---|---|
| 745 (100%) | 291 (39%) | 179 (24%) | 112 (15%) | 223 (30%) | 113 (15.1% | 110 (14.8%) |

**Comparison**

From the several sources, in which the numbers sometimes differ slightly, tables 6, 10 and 11 gives us the most recent numbers (dated 1 September 2007) of the total prison population in Luxembourg, which adds up to 745. This means that the prison population rate per 100,000 inhabitants lies on 155 persons. This prison rate is higher than the average total prison population in the rest of Europe. An occupancy level of about 107 % from the total capacity of 696 of the prison system indicates that the total capacity is not sufficient for the accommodation of prisoners. The 2007 Country report on Human Rights Practices, published by the United States Department of State emphasized that especially the overcrowding in the Schrassig prison is still a problem.[16] If one compares the numbers of prisoners, including pre-trial detainees, one has to conclude that they have increased since 2000 from 394-400 to 745-755 in 2006, an increase of about 75% .

The different sources mention the share of pre-trial detainees of the total prison population to be 59-63% during the period of 2002-2004. During the period 2006-2007 this number decreased again to a percentage that, dependent on the consulted source, varies from 37.7% up to about 50%. The decrease from 2006 onwards may have been caused by the amendment that took place in 2006, in which the possibilities for alternatives for preventive detention were broadened.

Comparison of the different sources is hampered because not always the same figures are used. For instance, some statistics include the administrative detention of foreigners awaiting their removal from Luxembourg and other types of detention, even though this does not belong to criminal law stricto sensu. Also the dates to which the information is related vary, which hampers a comparison. That does not alter the fact that the available sources are consistent in broad outlines as regards to, among other things, the large share that foreigners have on the total prison population and the percentage of foreigners who are placed in preventive detention. Tables 2, 10, and 11 show that between 69-75% of the total prison population consist of foreign prisoners.

On the total prison population, the total share of foreigners who are placed under preventive detention lies between 30 and 38,4 %.. Among the preventive detainees, the share of foreigners amounted, according to SPACE 1, to 92% on 1 September 2006. According to the latest report of the Ministry of Justice, this share amounted one year later to about 80% (table 10 and 11). These numbers show that foreign prisoners are substantially overrepresented among the preventive detention population in comparison to their share on the total prison population. The share of foreigners coming from Europe and coming from outside Europe is practically the same. In 61% these foreigners were in preventive detention due to suspicion of a drug related crime; in 17% it concerned the suspicion of a property crime and in 5% a violent crime[17].

According to Stefan Braum, this increase of foreign prisoners is due to etiological conditions which are quite different when compared to domestic offenders and are caused by the paradigms of the labelling process; in general, foreigners are more often accused, more often sentenced and

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*15* Le Gouvernement du Grand-Duché de Luxembourg, Ministère de la Justice, Rapport d'activité 2007, Luxembourg 2008, p. 292-293

16 UNHCR Refworld, www.unhcr.org/refworld/docid/47d92c43c.htlm

17 Le Gouvernement du Grand-Duché de Luxembourg, Ministère de la Justice, Rapport d'activité 2007, Luxembourg 2008, p. 292-293

less often released. In particular the number of foreign prisoners being kept in pre-trial detention has significantly increased during the last years. This underlines and proves the mechanisms of the labelling process. The lack of social and communicative capacities facilitates the imputation of deviance to foreigners. [18]

The share of female prisoners on the total prison population, on the other hand, is low with 4.4 – 4.9%. According to the available sources, a juvenile under 18 years is only rarely preventively detained. On 1 September 2007, only 3 – convicted – juveniles were detained in Luxembourg and at that date, there were no juveniles in pre-trial detention.

## 3. Legal basis: Scope and notion of 'pre-trial detention'

In relation to the scope and notion of 'pre-trial detention', several aspects will pass in review in this paragraph, such as: the definition of pre-trial detention, the primary objective of pre-trial detention, beginning and end of pre-trial detention according to the law, the competent authorities for arrest / further detention and the procedural rights of the accused at time of arrest /during detention.

Basic regulation regarding the judicial system is to be found in the Constitution of 17 October 1868, as amended in 1919, 1948, 1956, 1972, 1996 and 1998. Article 87 provides for the organization of a Superior Court of justice (Cour Supérieur de Justice). The Superior Court of Justice is composed of the Court of Cassation, a Court of Appeal, and a department of public prosecution. The Court of Cassation compromises a bench of five judges, responsible for hearing cases that seek to overturn or set aside decisions given by the various benches of the Court of Appeal. The Court of appeal consists of nine benches of three judges each, having civil, commercial and criminal cases. With respect to the lower courts, a distinction is made between courts that are competent at the pre-trial stage, and trial courts. The courts that are competent in the pre-trial stage do not render final judgments but have various competences in the pre-trial stage. The trial courts are those which decide on the merits during the trial stage of the proceedings. Courts that are competent at the pre-trial stage are the investigating judge (juge d'instruction, one single judge), the judicial council of the court of first instance (chamber du conseil, consisting of three judges) and the judicial council of the court of appeal (consisting also of three judges). The trial courts can be divided into: 1) the police court (tribunal du juge de paix, sitting as a juge de police, a single judge)), 2) the correctional chambers of the district courts (tribunal d'arrondissement) (consisting of three judges, 3) the criminal chambers of the tribunal d'arrondissement (three judges). This distinction corresponds to the three categories of offences in the Penal Code: Crimes, serious offenses and petty offenses. Crimes are punished with criminal sanctions, including life imprisonment and prison sentences that can vary from 5 to 30 years (art. 7-8 PC). Serious offenses can be punished with prison sentences differing from 8 days up to 5 years (art. 14-15 PC). Petty (administrative) offenses can be punished with a fine (art. 25 PC). The police court deals with the petty offences (contraventions), the correctional chamber deals with the more serious offences (délits) and the most serious crimes are dealt with by the chamber criminelle. The correctional chamber acts also as court of appeal for judgments of the police judge. The correctional chamber of the Court of Appeal can hear appeals against judgments of the correctional chamber of the district courts. Judgments of the criminal chamber of the district court can be appealed against before the criminal chamber of the Court of Appeal that in that case is composed of 5 judges.

Criminal investigations are conducted by the "judicial police". To this "judicial police" belong persons invested with the capacity of judicial police officer (officier de police judiciaire), judicial police agent (agent de police judiciaire) or judicial civil servant (functionnaires et agents charges de certaines fonctions de police judiciaire) (art. 9 CCP). All these persons act under the direction of the head of the Public Prosecution Service, the "Procureur d'Etat".

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[18] S. Braum, Luxembourg, in: A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dünkel, Foreigners in European Prisons, Nijmegen 2007, p. 590.

The procedure of arrest and detention on remand are described by A. Spielmann and D. Spielmann as follows[19]: According to art. 45 CCP, "judicial" police officers and agents (officiers et agents de police judiciaire) are entitled to stop, at any moment persons suspected of:

- having committed an offence or having attempted to do so;
- preparing the commission of an offence (crime or délit);
- being able to give useful information to the authorities relating to an investigation concerning an offence (crime or délit);
- being subject to an investigation ordered by judicial or administrative authorities.

A person thus stopped must be identified immediately. The person in question must be informed of his right to inform his family or any person of his choice and to notify the public prosecutor. To this end, a telephone must be put at his disposal.

The identification check may only last for the time that is strictly necessary, and may in no case exceed 4 hours. The Procureur d'Etat can, at any moment, stop the temporary detention (retention) carried out for the purpose of an identity check. Fingerprints and photographs may only be made if it is absolutely necessary to identify the person in question (art. 45(5)), and must be authorized by the Procureur d'Etat or the investigating judge. If the person concerned is not subjected to any judicial investigation or enforcement measure, the records (process verbaux) and any other document relating to the identification must be destroyed within 6 months.

Other forms of coercive measures that can be applied in the pre-trial stage are 1) arrest, 2) restriction order and 3) detention on remand.

Article 12 of the Constitution guarantees everyone's individual freedom. One of the guarantees is that "Except in flagrante delicto, no one may be arrested without the reasoned order of the judge served at the time of arrest or within twenty four hours at the latest". In accordance with article 12 of the Convention, art. 39(1) CCP states that suspects i.e. persons against whom there are serious suspicions may be arrested by the police if they are caught in flagrante delicto. The period of arrest can not last more than 24 hours (art. 39(1) CCP). By the end of this period, the persons concerned must be brought before a court or be released.

The main rights of the arrestees during arrest are laid down in article 39 CCP. This article stipulates a.o. that unless the needs of the enquiry require otherwise, detained persons shall immediately be informed in a language they understand, except in cases where this is materially impossible and, when this fact is duly needed, of their right to inform a person of their choice. The persons concerned shall sign a document stating that they have been duly informed; a telephone shall be made available for this purpose. Arrestees are also entitled to be assisted by a counsellor during their interrogation by the police, who must previously inform them of this right (art. 39)(7) CCP. Legal aid is given at government expense for indigents. After the visit of the CPT to Luxembourg in 1997, the right of access to a doctor has also been inserted in article 39-6.

The investigating judge may, immediately after having interrogated the accused, issue a restriction order (interdiction de communiquer) for a period which may not exceed 10 days. This period may be prolonged once. The restriction order does not relate to the communication with the defence counsellor. Any person having a legal interest in stopping the communication ban may request the judicial council to revoke it.

The most far-reaching coercive measure in the pre-trial stage is the detention on remand. Detention on remand may only be ordered by a judge, by virtue of a warrant called "mandat de dépôt". According to article 94 of the Code of Criminal Procedure, this warrant can only be delivered with respect to Luxembourgian residents if there are serious indications that the suspect has committed the offense and that this offence concerns an offence that can be punished with a prison sentence of at least two years. Also the Article 94 prescribes that this detention on remand can only be imposed by the investigation judge on specific grounds. These grounds will be dealt with in the following paragraph.

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[19] A. Spielmann and D. Spielmann, Luxembourg in: Chr. Van den Wyngaert, Criminal Procedure systems in The European community, London etc 1993, p. 370.

## 4. Grounds for detention

According to article 94 CCP, detention on remand may only be ordered if one of the following conditions are met:

1. there is a risk that the suspect will abscond. This risk is presumed if the offense committed is a "crime", i.e. an offense that can be punished with a prison sentence of at least five years;
2. there is a danger that the suspect will meddle with the evidence;
3. there is reason to believe that the suspect will make misuse of his freedom to commit new offenses.

Article 94 makes an exception with respect to the preventive detention of foreigners. Even when there is no risk that the foreigner will abscond or there is no danger that the evidence will be obscured, this foreigner can be put under preventive detention if he has committed an offense that can be punished with a custodial sentence, irrespective of the length of it. Before the investigation judge can issue a warrant, he is obliged to interrogate the accused. Since 1987, article 94 CCP prescribes that this warrant must be dully motivated.

As long as the case is not brought before the court, the investigation judge can terminate the detention on remand ex officio, after having consulted the Public Prosecutor or at request of the Public Prosecutor. In doing so, he can combine that with the obligation that the accused will be put under contrôle judiciaire (controlled freedom) and with the condition that the accused will appear at all proceedings where his presence is required and will submit himself to the execution of the judgment (Art. 94-2) CCP.

Until the amendment of Article 94-3 in 2006, this article prescribed that if the accused had not been committed for trial within a month after the warrant had been delivered, he would be released, unless the judicial council should decide unanimously that he should be further detained. This decision had to be renewed each month as long as the accused had not been committed for trial by the judicial council. In 2006, the period of one month has been replaced by a period of two months, counting from the date of the first interrogation by the investigating judge. The request to lift the detention on remand can be made by the Procureur d'Etat or the Procureur Général d'Etat, if the conditions 1, 2 and 3 as mentioned above are not longer actual. The procedure is similar to the procedure of conditional release of the detention on remand, as laid down in article 113 and following of the Code of Criminal Procedure.

Until the Act of 7 July 1989, trial courts could also order the immediate arrest of a convicted person, whose judgment had not yet become final. In order to avoid that the convicted person from the day of judgment until the day that the judgment could be enforces should remain free, the trial court orders that he should be taken in immediate arrest. According to A. and D. Spielmann, this immediate arrest was in reality a form of detention on remand, "as the authority on which it was based was not the judgment, but a temporary authority, which allowed detention on remand pending the final judgment".[20] These authors mention as one of the main reasons why this immediate arrest has been abolished in 1987 that "it was considered to be unjust for condemned persons to have undergone their custodial sentences before having had the occasion to lodge an appeal or to apply for a pardon, and without having had the opportunity of contacting the magistrate, responsible for the execution of sentences".[21]

## 5. The grounds for review of pre-trial detention

With regard to the issue of legal remedies, the Luxembourgian system makes a distinction between ordinary and extraordinary remedies for the decisions of an authority responsible for criminal proceedings. Ordinary remedies are: opposition against in absentia judgments and appeal against judgments, rendered in first instance. Extraordinary remedies include cassation and retrial.

These remedies do not refer to detention on remand. The order to detain an accused on remand is not seen as an "ordonnance présentant un caractère juridictionnel" and is for that

[20] A. and D. Spielmann, Luxembourg, o.c., p.272.
[21] See: Documents parlementaires, session 1988-1989, nr. 3121,4, p. 2-3.

reason susceptible to appeal (Court of Cassation 13 November 1987, 27.202). However, as mentioned before, the detention on remand is subjected to a periodical review each two months which can result in a request by the Procureur d'Etat or the Procureur Général d'Etat to make an end to the detention on remand.

Also the accused himself can request that he will be released. On this request the judicial council (chamber du conseil) orders that the accused will be released, but in this case, the release will always be conditional. Since 1877, this conditional release is always connected with the condition that the accused will appear at all proceedings where his presence is required and that he will submit himself to the execution of the judgment (art. 113). According to Article 114 CCP the conditional release may be subject to bail (see further paragraph 7).The request for conditional release can be done at each stage of the criminal procedure and must be addressed to the chamber of the competent court. Which court is competent is dependent of the stage of the criminal procedure and is regulated in detail in Article 116 CCP

## 6. Length of pre-trial detention

The Code of Criminal Procedure does not fix the maximum duration of the pre-trial detention. In practice this means that the preventive detention can continue until judgement has become irrevocable. However, preventive detention will be terminated as soon as it equals the imposed punishment, regardless whether the judgement is final or if an appeal procedure is pending (art.153 Regulation on the administration and the internal regime of penitentiary institutions).
Table 3 of paragraph 2 shows that, out of the 315 pre-trial detainees almost 1/3 had already been sentenced in first instance but appealed afterwards or was still in the statutory time limit for doing so. The only legal boundary to the length of preventive detention is the boundary that is set by art. 5 § 3 ECHR. However, in the case Pêcheur vs. Luxembourg, the ECHR did not consider a pre-trial detention of four years, two months and 19 days a violation of art. 5 § 3. With that, the Court took into consideration the various accounts made by the suspect during the preliminary inquiry, the seriousness and the complexity of the offence, and the risk that the suspect, who did not have the Luxembourg nationality and who did not have a permanent place of residence, would flee in order to withdraw from trial. Based on the risk of escape, appeals for a conditional release were refused by the Luxembourg courts, which got approved by the European Court[22]. There are no statistics available on the average duration of pre-trial detention in Luxembourg, or on the average and maximum duration of the criminal proceedings. Neither is any jurisprudence published from which further conclusions can be derived regarding the duration of the pre-trial detention and the duration of the criminal proceedings.

## 7. Other relevant aspects

Several elements in relation to pre-trial detention have already been discussed in the previous paragraphs. Some relevant questions that remain, such as whether the time spend in pre-trial detention will be taken into account, if there is a mechanism for compensation if the accused is not sentenced, whether there are alternatives to pre-trial detention and the practice regarding the execution of pre-trial detention will be treated in this paragraph.

Article 33 PC stipulates that the period of detention undergone in Luxembourg or abroad before the sentence has become definitive, must be deducted from this sentence, as far as it concerns a custodial sentence. The Law does not contain any provision with respect to the deduction of pre-trial detention from other non-custodial sentences.

Concerning the issue of compensation for detained persons who are eventually not sentenced, articles 159, 191, 212 and 213 offers the possibility to ask for compensation for the damage caused by, for example, the time spent in pre-trial detention.

[22] ECHR, 11 December 2007, nr. 16308/02.

In the pre-trial phase, the following alternatives to pre-trial detention are available: 1) Controlled freedom (contrôle judiciaire), 2) conditional release (liberté provisoire, 3) bail (cautionnement) and 4) victim-offender mediation.

The regulation on controlled freedom has been changed considerably in 2006. It is laid down in the articles 106-112 CCP. The measure can be applied in the interest of the investigation or as a security measure. This means that a suspect can be subjected to certain conditions by the investigating judge, as long as the offence of which he is suspected of, may be punished with a prison sentence of two years or more. When a suspect does not have a place of residence in Luxembourg, the measure can be issued when the offence can be punished with a lower prison sentence. The application of the measure of controlled freedom leaves the possibility to take the suspect into pre-trial detention afterwards unimpeded, if "this is needed by new and serious circumstances" (art. 106 CCP).

The measure of controlled freedom entails that the investigating judge can oblige the suspect to undergo one or more of the conditions mentioned in article 107 CCP. These conditions entail among other things:

- not to proceed outside an area, as indicated by the judge;
- not to leave one's domicile or by the judge appointed residence, without permission;
- to refrain oneself from certain places or to stay at one place, specially appointed by the judge;
- to present oneself on a regular basis to the authorities, appointed by the investigating judge;
- to cooperate to the process of identification;
- to answer to convocations of the appointed authorities;
- to refrain oneself from driving vehicles and, if necessary, handing in ones driving licence;
- to refrain oneself from contact with certain persons;
- to submit to certain control measures, such as the control on drugs, if necessary in a clinic;
- payment of bail;
- to refrain oneself from carrying weapons;
- to comply with financial obligations towards one's family.

"Electronic monitoring or electronic tagging" cannot be imposed as a measure. In July 2006, an experiment started with electronic monitoring as an alternative to imprisonment for those who have been convicted to a prison sentence with a maximum of one year or for those who should still serve a prison sentence with a maximum of one year. There is a possibility that, after the experiment has been completed, the measure will be extended to preventive detention.

By imposing controlled freedom, the investigating judge also determines which authority is responsible for the implementation, such as the police, a judicial service, or an administrative service, in particular the Probation Service (Service social d' assistance). These services supervise the performance of the conditions imposed and are obliged to inform and advice the investigating judge on the matter. As long as the case has not been brought to Court, the investigating judge can change or withdraw the conditions (art. 109 CCP). If the conditions are not complied with, they can withdraw the measure of controlled freedom and place the suspect yet in pre-trial detention.

If a case has already been before a court, the measure of controlled freedom can, on request of the Public Prosecutor, be applied under the same conditions by the Court of Justice that is processing the case (art. 110 CCP). As far as available, data shows that controlled freedom does not seem to be applied frequently. In the Activities Report 2007 of the Ministry of Justice, six cases of controlled freedom are mentioned, carried out in 2006/2007 under supervision of the Probation Service.[23] Among them were four males and two females, but no foreigners.

The second alternative for pre-trial detention is the conditional release from pre-trial detention (art. 113-119 CCP). In 2006, this regulation was changed considerably as well. This alternative is meant for accused persons who are already in pre-trial detention. They can request the judicial council of the court that is treating their case, to be conditionally released. If the request is accepted, this will always be under the condition that the accused will appear at all proceedings where his presence is required and that he will submit himself to the execution of the judgement.

[23] Le Gouvernement du Grand-Duché de Luxembourg, Ministère de la Justice, Rapport d'activité 2007, p. 210.

The request can only be denied if the grounds of article 94, which were the foundation of pre-trial detention, are still actual (art. 116-5 CCP). The conditional release can be combined with bail (cautionnement, see below) and with the measure of controlled freedom. If the Public Prosecutor does not agree with the ruling to grant a conditional release, he can lodge an appeal within one day. This appeal must be handled within ten days. The pre-trial detainee will remain in pre-trial detention during the appeal period. Exceeding the term of ten days means that the pre-trial detention must be terminated (art. 116-7 CCP). The pre-trial detainee has the right to let his view be known to the court in writing (art. 117 CCP). If the conditions are not met, the conditional release can be revoked and the pre-trial detention can be resumed. The Annual Report of the Ministry of Justice shows that the judicial council of the Court of Appeal in 2006/2007 handled 41 requests for conditional release. The judicial council of the District Court of Luxembourg handled in the same period 699 requests for conditional release and decided in 795 cases to the extension of the preventive detention. Out of 122 requests for conditional release, the judicial council of the District Court of Diekreich turned down 85 requests. [24]

The third alternative is bail (cautionnement). This is laid down in art. 120 -125 CCP. Bail is not an individual alternative, but is always connected to the measure of controlled freedom or to a conditional release. Bail entails that the suspect, who has been released under controlled freedom or conditional release, promises that he will appear at all proceedings where his presence is required and that he will submit himself to the execution of the judgement. In addition, he has to make a deposit as a guarantee for 1) the compensation and restitution to the victim, 2) the obligation of alimony, 3) the legal costs of the civil party or the government and 4) fines. The height of the deposit will be determined by the investigating judge when deciding about the controlled freedom or by the judicial council when ordering the conditional release. The sum is payable in installments (art. 121 CCP). If the person concerned does not hold his end of the commitment that he will appear at all proceedings where his presence is required and that he will submit himself to the execution of the judgment, part of the deposit will fall to the State. If the criminal case is dismissed or if the accused is acquitted, this sum can be refunded, although this is not a legal obligation. In this case, the other part of the deposit will always be paid back. In the case of a conviction, the sum that can be repaid will first be reduced with the payments that are indebted to restitution to the victim, the legal costs and any fines (art. 124 CCP). There is no conclusive information available about the kind of cases and the number of cases to which bail is applied.

The fourth alternative is the victim-offender mediation. Since the amendment of article 24-5 CCP in 2003, this article provides that "the prosecutor may, prior to his decision on further action, decide on mediation if it seems to him that such a measure would ensure reparation of the damage caused to the victim, or to put to an end the trouble resulting from the offence, or to contribute to the rehabilitation of the offender. However, the recourse to the mediation is excluded in the presence of infringements with regard to the people with whom the author cohabits. The mediator is bound by professional secrecy".

In how far the possibility of mediation is really used as an alternative to pre-trial detention is not clear. According to the information given by P. Schroeder[25], there are in theory no restrictions concerning the type of offenses that are suitable for mediation. "In practice, cases referred to mediation concern mainly assault and battery, injury and threat, neighbourhood and family disputes. Whatever the outcome of the mediation may be, it will be reported to the prosecutor, whose decision whether to prosecute or to dismiss the case remains". This possibility to dismiss a case is not laid down in the law, but is based on the expediency principle that goes back to a decision of the French Court de Cassation of 1826. Since then, the Public Prosecutor is not obliged to prosecute whenever an offense has been reported to him. He has the discretionary power to waive the case.

Only one penitentiary Institution exists where preventive detention can be implemented. This is the "Centre pénitentiaire de Luxembourg à Schrassig". The other penitentiary Institution, the "Centre pénitentiaire de Givenich" is meant only for the execution of imposed punishments.

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[24] Le Gouvernement du Grand-Duché de Luxembourg, Ministère de la Justice, Rapport d'activité 2007, p. 72-74, 105 and 117.

[25] P.Schroeder, restorative justice in Luxembourg (up to date until February 2008), www.euforumrj.org/readingroom/Countries/Luxembourg/Luxembourg.pdf

Various reports of international organizations have expressed their concern regarding the unacceptable conditions of detention at the Schrassig Luxembourg Prison Centre. De criticism concerned a.o. the problem of overcrowding, the detention facilities for women and minors, the lack of appeal procedures against the risk of arbitrary punishments, inadequate training of prison warders, allegations of arbitrary and racist behaviour, inadequate access to medical care, failure to provide copies of the prison regulations, the use of solitary confinement, particularly as a preventive measure during pre-trial detention, and the placement of minors in adult prisons.[26]

With respect to the detention in police establishments, following its 2003 visit, the CPT reported that they did hear a limited number of allegations of deliberate physical ill-treatment by the police. Kicks, punches and beating with batons were most commonly mentioned, mainly in the course of apprehension. With respect to the material conditions of detention the CPT concluded that they were good or even very good in all police establishments visited. However, the CPT delegation met many persons held in police custody who claimed that the right to inform a relative or third party had not always been granted to them from the outset of their deprivation of liberty. Also the specific provisions applied to juveniles (notably the police officer's duty to inform the parents/legal representative) were not always respected. Critical remarks were also made with respect to access to a lawyer. According to the opinion of the CPT, the right of access to a lawyer must include the right to talk to him in private, without witness, and not only to have a lawyer present during any interrogation conducted by the police. Another shortcoming in the CPT's view is that in many cases, court-appointed lawyers have no contact with the detained person before his or her appearance in court.

The in 1999 established institution of the "General Police Inspectorate" is entrusted with the task "to see that the execution of the duty is carried out lawfully..(it has also) the right of general ongoing inspection, exercised, if necessary, at its own initiative".[27]

With respect to the Schrassig Prison, the CPT delegation did not receive recent allegations of physical ill-treatment of a prisoner by prison staff. On the other hand, a number of allegations were received of racist and/or xenophobic insults by guards and the information gathered by the CPT suggests that the relations between staff and prisoners were generally tense.

Concerning the material conditions in the new build remand section of Schrassig Prison, the CPT delegation considered them during its 2003 visit of very high quality. The cells measured about 12 m² for a maximum of two persons, had a WC which was partitioned off and were generally well-equipped. Access to natural light, artificial lighting, ventilation and heating were adequate.

The Luxembourgian prison rules are laid down in the Regulation on the administration and the internal regime of penitentiary institutions (Règlement grand-ducal du 24 mars 1989 concernant l' administration et le regime interne des établissements pénitentiaires)[28] . In practice there are two regimes for remand prisoners. Regime A, a cellular or restrictive regime is applied to those remanded in custody or to appear in court and those arrested with a view to extradition. As soon as the needs of the investigation or prosecution permit, remand prisoners can be transferred to regime B, a communal or "open door" regime, which is similar to that of sentenced prisoners. This change of regime needs the agreement of the competent investigating judge. Remand prisoners subject to regime B may work in the workshops and attend education and training courses and other socio-educational activities. However, as was observed by the CPT delegation in 2003,"the activities offered to them were very limited and approximately one hundred of them

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[26]See for example:1) ACAT's Luxembourg and FIACAT's concerns regarding torture and ill-treatment in Luxembourg, July 2008 http://lib.ohchr.org/HRBodies/UPR/Documents/Session3/LU; 2) ACAT Luxembourg and Info Prison, Observations relating to the submission of Luxembourg's 5th periodic report to the Committee against Torture, http://www.ohchr.org/english/bodies/cat/docs/**ACAT**_2007; 3) Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to the Government of the Grand-Duchy of Luxembourg, April 2004, CPT/Inf (2004) 12; 4) Conclusions and recommendations of the Committee against Torture, Luxembourg, CAT/C/CR/28/2/12 June 2002; 5) Report of Mr Álvaro Gil-Robles, Commissioner for Human Rights, on his visit to the Grand-Duchy of *Luxembourg, 2-3 February 2004 (CommDH(2004)11), § 13-14. 2 i.*

[27] Article 74 of the Law of 31 May 1999 on the Police and General Police Inspectorate".

[28] Mémorial A, 17, 1989, p.195.

were on a waiting list to take part in a workshop activity". [29] Another observation was that remand prisoners under regime A were systematically prohibited to have access to a telephone. According to the CPT's opinion, this should only be permitted under an appropriate supervision.

To conclude this paragraph, it is to be stated that the prison Rules, laid down in the above mentioned "Règlement" from 24 March 1989 guarantees the remand prisoners the basic rights as formulated in the revised European Prison Rules, with respect to e.g. education and recreation, outdoor exercise, contact with the outside world, medical and pastoral care.

## 8. Vulnerable groups (special regulations; practice)

In Luxembourg, relatively few women and juveniles are placed in preventive detention. Apart from a single provision in the Regulation on the administration and the internal regime of penitentiary institutions from 1989, no separate provision exist in relation to the (preventive) detention of women and minors in Luxembourg. Besides, no separate penitentiary institutions exist for these two categories. The preventive detention of women and minors is implemented in the penitentiary institution of Schrassig, be it that, according to the prison rules, they must remain separated from the male and adult detainees. Several reports of international and national authorities mention the concern about the fact that minors, ordered to be placed in disciplinary centers, are put in adult prisons, and that a law, reorganizing the State Socio-Educational Centres that was passed on 16 June 2004 and that provided a Legal basis for the building of the Dreiborn security unit which was scheduled for mid-2005, had not been implemented, even though the Government of Luxembourg had later promised that the building would start in June 2008. According to the information provided by Acat and Fiacat Luxembourg, in July 2008, building had not yet started.[30]

Minors can be deprived of their liberty from the age of 10 and are placed in the Minors' Section of Schrassig prison that has a capacity of 27 places. At the time of the last CPT visit in February 2003, this unit was accommodating five minors (aged from 15-17). On average, the minors spend from one to eight months in the Section, under conditions that, according to the observations of the CPT delegation, were good. All the minors had the same detention regime, whatever their legal status (on remand, convicted, foreign nationals awaiting removal). The CPT criticised the limited possibilities for out-of cell activities on Tuesdays and Thursdays and during the weekend.

A special problem with respect to the women's section concerns the accommodation of young mothers with children. This can be illustrated by the case mentioned in 2006 by the Ombudscommittee on the Rights of the Child (ORK)'s report: "two young mothers were imprisoned on remand at the beginning of October 2006 with their children aged two-and-a half and sixteen months respectively at the prison in Schrassig. The two women shared the same cell with their two children who spent 5 days a week locked up all day, with an hour's permission to go out into the prison yard. The prison is overcrowded and has neither the infrastructure nor the material or personal resources to cater for young children with their imprisoned mothers. Very young children have no choice but to run around in the corridor, surrounded by keys and the locking and unlocking of doors".[31]

As little as for women and minors, the Luxembourgian legislation contains special provisions for preventive detained foreign prisoners. Until the law reform of 2006, there existed a special law on the detention of foreigners awaiting trial.[32] This law from 1855 was abrogated by the Law on the modification of different articles of the Code of Criminal Procedure from March 2006. This made an end to the differences in the treatment between residents and non-residents who were suspected to have committed an offense. Since 2006, in general sense, this distinction between

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29. Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to the Government of the Grand-Duchy of Luxembourg, April 2004, CPT/Inf (2004) 12 , p.22.
30 ACAT's Luxembourg and FIACAT's concerns regarding torture and ill-treatment in Luxembourg, July 2008, o.c., p. 1-2.
31 Ombuds-Comité fir d'Rechter vum Kand (ORK), 2006 Report (http://www.ork.lu/PDFs/rapport2006.pdf), Section 12 'Réflexions sur l'accueil d'enfants avec leur mère incarcérée', pp. 62-63.
32 Mémorial 1855, p.31.

residents and non-residents has basically been withdrawn. The main distinction that still exists is that, according to article 94 CCP, a foreigner without a residence in Luxembourg can already be put under preventive detention if serious indications of guilt exist and the offense can be punished with a custodial sentence. For Luxembourgian residents, this is only possible if the offense can be punished with a custodial sentence of at least two years and there exists the risk that the suspect will flee or will meddle with the evidence.

No differences exist in theory with respect to the detention regime. According to article 331 of the regulation on the administration and the internal Regime of penitentiary institutions, foreign prisoners are to be subject to the same rules as national prisoners. Consequently, they have, for instance, the same right to work, the same right to medical and social service as well as the same right to education and access to the prison library. As far as this Regulation contains special provisions for foreign detainees, they concern, for example, the right to be assisted by an interpreter and the right to communicate in their own language during meetings and correspondence. However, as is worked out more in detail by Stefan Braum in his description of the position of foreigners in Luxembourg in prisons, the daily practice is not always reflecting these basic rights.[33]

## 9. Summary

In comparison with most other EU Member States, pre-trial detention is, in proportion, often applied in Luxembourg. At a rough estimate, 38-50% of the prison population consists of pre-trial detainees. The major part of the population of pre-trial detainees consists of foreigners (80-92%). The number of foreigners coming from Europe and coming from outside Europe is practically the same.

Preceding preventive detention, a suspect can be placed in police custody for a maximum of 24 hours. De following preventive detention can be applied if there are serious indications that the suspect has committed an offense which can be punished with a prison sentence of at least two years. As far as it concerns foreign suspects it is sufficient that the suspicion concerns an offense that can be punished with a custodial sentence. The detention on remand can only be ordered if there is a risk of absconding, or a danger that the evidence will be meddled with or there is a reason to believe that the suspect will make misuse of his freedom to commit new crimes. For foreign suspects, the first two grounds are not needed to put them under preventive detention.

The ordinary and extraordinary remedies do not refer to preventive detention. Preventive detention is subjected to a periodical review each two months, but has no other time limit than the limit prescribed by article 5)3) ECHR. As a consequence, preventive detention can last very long. The time spend in preventive detention has to be deducted from the imposed custodial sentence. Since 2006, the Code of Criminal Procedure provides for a few alternatives to preventive detention: controlled freedom, conditional release, bail, and mediation. In practice they seem not to be applied very often. Pre-trial detainees who are eventually not sentenced can be compensated for the time spent that they were deprived of their liberty.

There is only one penitentiary institution where preventive detention can be executed: the penitentiary institution of Schrassig. There is no special penitentiary institution for women, minors or foreigners. With some small differences, the legal position of all foreigners, women and children in preventive detention is equal. The detention circumstances in Schrassig are very frequently criticised, especially with respect to the problem of overcrowding, arbitrary and racist behaviour by staff, the placement of minors in this adult prison and facilities for women with children. The applicable prison rules are in line with the revised European Prison Rules from the Council of Europe.

[33] S. Braum, Luxembourg, in: A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dünkel, Foreigners in European Prisons, Nijmegen 2007, pp. 575-595.

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