Funded by the European Union and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Implemented by the Council of Europe

PRECOP-RF

Joint EU/CoE project on Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices

Technical Paper:

"Detention and liability of entrepreneurs for economic crimes and failure to execute contracts"

Prepared by

Mjriana Visentin, Council of Europe expert

ECCU-2312-PRECOP-TP1/2015

The PRECOP RF is funded through the Partnership for Modernization, a jointly launched initiative by the EU and Russian authorities. One of the priority areas of this initiative is the effective functioning of the judiciary and strengthening of the fight against corruption.

For further information please contact:

Economic Crime and Cooperation Unit (ECCU)
Action against Crime Department
Directorate General of Human Rights and Rule of Law-DG I, Council of Europe

Tel: +33-3-9021-4550
Fax: +33-3-9021-5650
e-mail: *mustafa.ferati@coe.int*
www.coe.int/corruption
www.coe.int/precop

Table of Content

1 Executive Summary

This technical paper has been developed within the framework of the Joint EU/CoE project on Protection of the Rights of Entrepreneurs in the Russian Federation against Corrupt Practices (PRECOP-RF).

The paper integrates three major bodies of analysis by providing an overview of the ECHR case law on pre-trial detention with particular regard to individuals charged with economic crimes, as well as good practices from Council of Europe member states. In addition it provides an overview of policies regarding the prosecution of economic crimes and the use of pre-trial detention. Finally the paper focuses on the regulation of boundaries between civil and criminal liability for willful failure to execute a contract.

For the purpose of the analysis during the drafting the paper the author refers to good practice examples and regulation from several countries with a major focus and emphasis on the regulation in: Italy, France, Germany, Spain and the United Kingdom.

Most Council of Europe member states follow similar provisions regarding pre-trial detention while standards of review may vary, as while certain countries require only reasonable suspicion that a crime has been committed, others require a strong suspicion that a crime has been committed. Some countries permit pre-trial detention only for crimes that are punishable with at least three or even five years of imprisonment while others do not permit pre-trial detention if a judge decides that the accused is unlikely to receive a custodial sentence if convicted or if the pre-trial detention duration is going to be longer than the eventual sentence handed. Pre-trial detention is also regulated as an *extrema ratio* when alternative measures are not appropriate.

The effective length of pre-trial detention may vary irrespective of the concrete existing legal provisions. The key factor in determining whether effective control over the length of pre-trial detention exists is regular and reasoned judicial review taking into consideration relevant circumstances (as opposed to judicial review following a formalistic court-made recitation of grounds).

With specific respect to economic crimes criminal policies have been affected by other factors and recourse to pre-trial detention for economic and financial crimes is extremely limited.

According to a recent report on prison population in Europe, which for the needs of the Council of Europe was prepared by the Institute of Criminology and Penal Law ("Institut de Criminologie et Droit Pénal") of the Lausanne University, the number of individuals detained for economic crimes in most European countries is on average a few hundreds[1]. For example Czech Republic 3284, Finland 114, Greece 54, Ireland 44, Lithuania 725, The Netherlands 218, Norway 141, Poland 113, Romania 76, Spain 1646, Sweden 272, Turkey 3710 and UK 1565. The most notable exception is Germany with 8500 individuals detained in connections with economic crimes[2].

[1] Council of Europe (2010), *Annual Penal Statistics*, PC-CP(2012), available at www.coe.int

[2] Most likely this "record number" is due to the absence of corporate criminal responsibility. Currently, among the countries analysed, criminal convictions for economic and financial crimes amount to 1% of the overall number of criminal convictions.

These numbers reflect a progressive trend towards decriminalization and the idea that regulation of economic crimes may find its appropriate place outside of the criminal law realm.

This process of decriminalisation began in the late 90s as unforeseeable and incoherent criminal investigations were negatively affecting corporate financial and economic development. Reliance on criminal law has been substituted by corporate governance mechanisms, corporate responsibility (which favour economic sanctions over deprivation of liberty) and the creation of regulatory bodies with oversight over financial activities of economic actors. Economically criminal behaviours can be efficiently addressed through civil provisions and sanctions such as nullity and compensation of damages. More recently reforms have been considered at the EU level to improve the system of court injunctions in order to prevent these types of crimes rather than to focus on their punishment.

Above all, decriminalisation of economic crimes has taken place by replacing criminal sanctions with administrative ones. In general an understanding has been reached that pecuniary sanctions are more appropriate to the nature of economic and financial crimes.

Even when criminal prosecution remains in place, pre-trial settlements have been favoured over deprivation of liberty as advantaging both authorities and economic actors due to the more efficient use of law enforcement resources, the convenient resolution of complex cases, as well as the reduced risk and increased certainty about the penalty applicable. At the same time safeguards have been introduced to avoid the risk that pre-trial settlements are abused through collusive agreements or selective prosecution.

The progressive withdrawal of criminal action from the area of business relationships is also reflected in the extremely rare use of criminal sanctions in contractual disputes. This development has been underscored by the elimination of imprisonment for failure to pay debts following the adoption of the 4th Protocol to the Council of Europe Convention for the protection of human rights and fundamental freedoms[3] in 1963.

In the Western legal thought, the intentional breach of contract is generally considered a civil offense except under very specific, fraud-related circumstances. Criminal sanctions are only considered in breach of contract actions when the accused entered into the contract knowing he would be unable or unwilling to perform his duties under that contract. Actions or circumstances taking place during the execution of the contract are only relevant for civil liability. Generally it can be stated that the failure to disclose one's intention to breach is not in and of itself criminal, while failure to disclose other circumstances relevant to the execution of a contract will only entail criminal responsibility when there is a specific obligation to communicate such circumstances. Criminal liability will not be found if the breaching party did not intend to breach at the time the contract was signed, but subsequently changes his mind. In such case, the non-breaching party will normally be awarded damages.

Above all it should be noted that is usually easier to win a civil suit since the requisite burden of proof is lower than for criminal cases, where the intention to deceive must be proven beyond reasonable doubt.

[3] Council of Europe, *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto as amended by Protocol No. 11, ETS No. 155, available at http://conventions.coe.int/

2 Introduction

Liberty and security for every person are fundamental rights guaranteed, inter alia, by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). These rights specifically include the right to liberty pending a criminal trial. The overview of the ECtHR case law and of regulation across European countries shows how effective protection against ungrounded deprivation of liberty may depend more on effective judicial review and other mechanisms that automatically ensure release in case of violation of procedural rules rather than on the existence of a specific legal provision. Effective judicial review has been in fact developed through a growing body of international case law and judicial decisions of supreme and constitutional courts protecting individuals through an increasing specification of existing standards.

Effective judicial review protects against bad faith and abuse on the part of prosecuting authorities ensures that authorisation of any deprivation of liberty is based on the assessment of evidence justifying whether there is a reasonable suspicion that a crime has been committed (instead of entirely deferring to prosecutorial discretion on the grounds that such an assessment would pre-judge the merits of the case) and is based on the existence of relevant and sufficient grounds assessed on the basis of the concrete circumstance of the case.

At the same time the issue of pre-trial detention in respect of economic crimes across European countries has remained of limited relevance as pre-trial detention is seldom applied against economic actors. This situation reflects European criminal policies that consider that deprivation of liberty may not be the appropriate measure to address economic crime when financial sanctions and other preventive measure may be more efficient. Similarly disputes between economic actors may be better solved through civil and administrative mechanisms unless other important public interests may come to the fore such as the need to protect weaker parties to contractual obligations as in the case of consumer protection. The involvement of law enforcement in the field of economic activities may have disproportionately negative effects on the business environment due to its unpredictability and stifling effect on features that are intrinsic to the dynamic of most business activities, which is the existence of unavoidable business risks. The use of criminal provisions should always remain a choice of *extrema ratio*.

3 The ECHR Case Law on Pre-Trial Detention For Economic Crimes

3.1 Introduction

The key principle of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) is the right to liberty and security for every person.

Liberty and security for every person are fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). These rights specifically include the right to liberty pending a criminal trial. While reasonable suspicion of an individual's malfeasance suffices to arrest him, it does not justify a continued deprivation of liberty over any period of time. Such deprivation can only be justified by one of the specific reasons laid out in the Convention's case law (namely

danger of absconding, danger of hindering the investigation, danger of committing further offences, or preservation of public order), which the authorities must sufficiently prove.

3.2 Lawfulness

Following is an excerpt of Article 5 (1), referred to above:

> *"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.***
>
> *a. the lawful detention of a person after conviction by a competent court;*
>
> *b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;*
>
> *c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
>
> *d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
>
> *e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
>
> *f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."*

The **law must be accessible, foreseeable, and certain**, as well as containing other guarantees against the possible arbitrariness. A deprivation of liberty will be found in violation of the Convention when it is effected either as a means of interfering with other rights and freedoms or through a law that is applied in an arbitrary manner or whose very character is regarded as deficient.

In *Mooren v Germany*, a case concerning detention for tax charges, the European Court of Human Rights (the Court) stated that detention is "arbitrary" where, despite complying with the letter of national law, there has been an **element of bad faith or deception on the part of the authorities** or where the domestic authorities **neglected to attempt to apply the relevant legislation correctly.** A detention will be arbitrary when in the light of the particular circumstances of the case it is not really needed or is used to achieve an illegal objective.

The Court has also found that a detention was unlawful when it had appeared that **the conduct giving rise to a deprivation of liberty did not fall within the scope of an offence already established by law**: in the case *Lukanov v Bulgaria,* the country's former prime minister had been deprived of his liberty in relation to the grant of certain public funds to developing countries. Although deprivation of liberty in connection with criminal offences is

potentially compatible with the Convention, there was a failure to establish in this case that the activity giving rise to the loss of liberty was actually unlawful, let alone a criminal offence. This impugned activity of the applicant could not, therefore, provide a basis in Bulgarian law for depriving him of his liberty. Furthermore, even if the criminal prohibition on seeking an advantage for oneself might have been potentially applicable to the making of these grants (which seemed unlikely), there was no fact or information, which pointed to the existence of a reasonable suspicion that the prime minister had actually sought such an advantage.

Article 5 (1) (c) of the Convention must be read in conjunction with Article 5 (3) of the Convention, which incorporates a number of essential guarantees in order to make **deprivation of liberty an exception to the rule of liberty and to ensure that judicial supervision is in place.**

In this respect the Court stressed that pre-trial detention should be an extreme ratio when **alternative measures** are available and sufficient. In the *Segeda v Russia* case, which concerned fraud charges against the managing director of a construction company, the court found a violation on account of the circumstance that in most of their decisions the domestic courts held that they saw no grounds to cancel the preventive measure or to apply a more lenient measure. However, they omitted to set out why such alternatives would not have ensured that the trial followed its proper course.

3.3 Reasonable suspicion

The objective of apprehending a suspected offender must be to bring him before the competent legal authority and there **must be a reasonable suspicion** he has committed an offence.

In the case of *Ilijkov v Bulgaria* the Court held that while Article 5 (4) does not require that judges address every argument in the applicant's submission when they examine the lawfulness of a detention, the right in Article 5 (4) will be deprived of its substance if the judge disregards or treats as irrelevant concrete facts invoked by the detainee which are capable of placing a doubt on the existence of the conditions essential for the "lawfulness" in the meaning of the Convention. In that case, the courts had refused to consider the applicant's arguments and the supporting evidence concerning the persistence of a reasonable suspicion against him, arguing that if they would comment on these issues they would pre-judge the merits of the criminal case and thus become partial.

Similarly the court found a violation in the *Segeda v Russia* case on account, among the others, of the national court's failure to effectively review the grounds for custody, in particular whether there was a reasonable suspicion that the applicant had committed an offence: the national courts had ordered the applicant's detention on the grounds that "at the present stage of the proceedings they could not make an assessment of the evidence in the criminal case, so it was impossible to apply a more lenient preventive measure in respect of the applicant not involving custody, such as [releasing him subject to] a written undertaking".

Reasonable suspicion was held to be established in *K.-F. v Germany***,** where tenants were arrested for rent fraud when, after their landlady had alleged to the police that they did not intend to perform their obligations, inquiries revealed that the address which they had given was merely a post office box and one of them had previously been under investigation for

fraud. In *Punzelt v the Czech Republic* the Court found a reasonable suspicion where reliance was placed on the inability of the vendor of two department stores to cash two cheques deposited as security in negotiations because they were dishonoured.

In *Lukanov v Bulgaria* the Court underlined that no fact or information had been provided which showed the applicant as having sought to obtain for himself or anyone else an advantage from his involvement in allocating public funds to other countries; a vague reference to certain "deals" was understandably regarded by the Commission as not having substantiated the existence of such an improper objective. However, the main problem in *Lukanov* was that most of the accusations brought against him did not amount to any criminal offence under Bulgarian law.

Conversely in the *Ovsjannikov v Estonia* case against an entrepreneur and chairman of a local city council and financial committee who had been detained on charges of corruption, the court noted that the criminal proceedings in respect of the applicant concerned several counts of different crimes related to corruption (such as prejudicing free competition, influence peddling, demanding bribes and money laundering) and the statement of suspicion presented to the applicant and summarised in the prosecutor's detention request and the courts' decisions included detailed descriptions of the facts on which the suspicion was based. The degree of detailing these descriptions was such as to allow a conclusion to be drawn that the prosecuting authorities had collected substantial evidence concerning the suspected offences. The Court was therefore satisfied that there existed a reasonable suspicion that the applicant had committed the offences in question.

Nevertheless the court held that the limited **access to the case file and the evidence relied on by the prosecutors to substantiate the detention request** due to the impossibility of examining some witness statements in detail (due to the witnesses fear that they would lose their job or be victims of abuse of power at the hand of the applicant) was in violation of article 5. The court noted that without knowing the specific accusations the applicant could not present counter-arguments and evidence to disprove the groundless allegations. The applicant's handicap was even greater as regards the evidence on the basis of which the prosecution argued and the national courts concluded that he might tamper with the evidence and exert pressure on the witnesses. The court acknowledged the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during such investigations, has to be kept secret in order to prevent suspects from tampering with evidence and impeding the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, **information, which is essential for the assessment of the lawfulness of a person's detention, should be made available in an appropriate manner to his or her lawyer.**

A deprivation should only occur when the suspicion that a person has committed an offence is well-founded and not arbitrary. **It should be based on facts or information that objectively links the suspect to a supposed crime.** The decision should **contain references to the facts and circumstances of the specific case**.

In the *Novruz Izmayilov v Azerbaijan*, concerning charges of fraud, embezzlement and forgery against a banker, the court held that the **fact that a suspicion is held in good faith is insufficient.** The words "reasonable suspicion" mean the existence of facts or information, which would satisfy an objective observer that the person concerned might have committed

the offence there must be evidence of actions directly implicating the person concerned, or documentary or forensic evidence to a similar effect. The mere assertion that there is reliable but confidential information is not sufficient.

In the case of *Gal v Switzerland* concerning fraud and abuse of power charges against the applicant, the national **courts justified the detention on the grounds that there was "information" confirming that the applicant,** together with an associate, had intended to eliminate evidence and incriminating documents, thereby impeding the on-going investigation; **this "information" was, however, not specified.** The European Court ruled that the repeated reference made to "another reason" for the applicant's continued detention bordered on speculation in the absence of ascertainable information concerning the actual situation. It held that the reliance by the courts on elements undisclosed to the suspect is hardly reconcilable with the principle of "equality of arms" generally required in the field of guarantees against arbitrary deprivation of liberty. The Court acknowledged "the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected during them is to be kept secret in order to prevent suspects from tampering with evidence and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Therefore, information which is essential for the assessment of the lawfulness of detention should be made available in an appropriate manner to the suspect's lawyer"

3.4 Admissible grounds for detention: Relevant and sufficient grounds

Deprivation of liberty is admissible on a limited number of grounds such as when it is reasonably considered necessary to prevent this person from committing a new offence, and/or to prevent this person from interfering with the investigation and/or to prevent this person from fleeing after committing an offence.

The right to liberty can only be outweighed by a genuine public interest. The **gravity of the charges alone cannot itself justify detention pending trial.** In the *Nevmerzhitsky v Ukraine* case, concerning allegations of unlawful currency transactions against a bank manager, the court held that the existence of a strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention.

The Convention case law has developed four basic acceptable reasons for continuing a person's pre-trial detention:

1) risk of absconding;
2) risk of interfering with the administration of justice;
3) risk that further offences will be committed; and
4) risk that if released the suspect will cause disturbance to the public order.

Other grounds under the convention are not admissible

In the case *Novruz Izmayilov v Azerbaijan*, the national courts authorised the extension of the applicant's detention period on the grounds that a number of investigative steps needed to be carried out, the applicant was to be charged with additional criminal offences, and the issue of the responsibility of other persons involved in the crimes had to be decided, and thus more time was needed to complete the investigation. The European Court noted at the outset that grounds such as the need to carry out further investigative measures or that the proceedings

have not yet been completed are not acceptable reasons for detaining a person pending trial under Article 5 § 3 The court also criticised the applicant's continued detention on the grounds that the applicant was to be charged with additional offences, when in fact the applicant was not charged with new criminal offences until almost four months after the extension order. Similarly in the *Segeda v Russia* case the Court considered that a mere reference to the need to carry out investigative measures is not as such a relevant consideration justifying the continued detention.

The extensions of pre-trial detention on the basis that the detainee needs further time to get acquainted with the case file are not a sufficient ground for extension either. In the case *Yuri Rudakov v Russia* concerning charges of loan fraud against a manager, the European Court reviewed the Russian practice of extending detention pending study of case file by a defendant, and arrived at the conclusion that the relevant provisions of Russian law were not foreseeable in their application and fell short of the "quality of law" standard required under the Convention, in so far as they did not contain any express rule regarding the possibility of repeated extensions of a defendant's detention pending study of the case file (see *Tsarenko v Russia*, no. 5235/09, §§ 59-63, 3 March 2011; *Suslov v Russia*, no. 2366/07, §§ 75-79, 29 May 2012; and *Pyatkov v Russia*, no. 61767/08, §§ 86-91, 13 November 2012).

3.4.1 Danger of absconding

The severity of the sentence faced is an important element to establish a danger of absconding. But it cannot be gauged solely on this and can especially not justify long periods of pre-trial detention. It must be assessed with reference to a number of other relevant factors. The factors which may confirm the existence of a danger of absconding can be found in: the difficulty to capture the individual, whether he fled before, whether he expressed distaste for detention, specific evidence of plans to flee. These factors must be weighed against any other factor which may point against the likelihood that the person will flee such as the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted. The mere absence of a fixed residence does not give rise to a danger of flight.

Examples of justified detention include the case *W v Switzerland*, 26 January 1993, where the applicant was a single man who had transferred his residence to Monte Carlo and had frequently visited Anguilla – where he was supposed to be the owner of a bank – England, Germany and the United States, appeared to have considerable funds at his disposal outside Switzerland and possessed several different passports; the case *Punzelt v the Czech Republic*, where the applicant had numerous business contacts abroad; the case *Barfuss v the Czech Republic*, where the applicant could have obtained German citizenship if he had fled to Germany, which would have made extradition back to the Czech Republic impossible.

However, the mere mention of the applicant's "international connections" when too vague and not supported by any evidence will lead to a finding of violation (*Khodorkovsky and Lebedev v Russia*).

The reference to the applicant's character must be accompanied by description of the applicant's character or an explanation as to why it made his detention necessary (see *Polonskiy v Russia*, no. 30033/05, §152, 19 March 2009).
The fact that other suspects had left had fled the country might probably have been relevant at the initial stage of the investigation, but "the fact that a person is charged with acting in

criminal conspiracy is not in itself sufficient to justify long periods of detention; his personal circumstances and behaviour must always be taken into account". Furthermore, the Court notes that "the behaviour of a co-accused cannot be a decisive factor for the assessment of the risk of the detainee's absconding. Such assessment should be based on personal circumstances of the detainee" (see *Khodorkovskiy and Lebedev v Russia* and *Mamedova v Russia*, no. 7064/05, § 76, 1 June 2006).

In the case of *Velichko v Russia***,** the court held that the fact that the applicant might have a dual nationality could be a relevant factor in assessing the flight risk he posed. However, the danger of an accused absconding does not result just because it is possible or easy for him to cross a border: there must be a whole set of circumstances, such as, in particular, a lack of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem to him or her to be a lesser evil than continued imprisonment. In the *Velichko* case the European Court also took into account that the domestic authorities did not explain why the confiscation of both the applicant's Russian and Belarusian passports would not have been sufficient to prevent him from absconding abroad.

3.4.2 Danger of hindering the proper conduct of the proceedings

An accused could use the opportunity of his release to interfere with the investigation and undermine the preparation of the case against him by putting pressure on witnesses and victims, tipping off other suspects, colluding with other suspects or by destroying evidence. The existence of the danger of the accused hindering the proper conduct of the proceedings must however be assessed with reference to relevant factors and not *in abstracto*. Courts must justify their decision by concrete factual circumstances.

The risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings. In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the alleged risks diminish with the passing of time as the inquiries are conducted, statements taken and verifications carried out. In the *Gal v Switzerland* case the court held that the risk of collusion must be regarded as significantly less relevant once the evidence has been gathered, the investigation terminated and a bill of indictment preferred

In the *Khodorkovskiy and Lebedev v Russia* case, the court noted that the extension of pre-trial detention could not be justified on the basis of the risk of tampering with evidence since when the trial started, all documentary evidence had been already seized by the prosecution, all prosecution witnesses and experts had been questioned and their recorded testimony had been submitted to the court. These developments significantly reduced the risk of tampering with evidence. Furthermore, at an early stage of the proceedings the main assets of Yukos were attached and sold at auction. Thus, the second applicant ceased to exercise de facto control over the company; his ability to influence the company's personnel was accordingly reduced. Despite those changes the domestic courts continued to repeat the reasons set out in their earlier detention orders.

In the *Segeda v Russia* case, the European Court held that in so far as the domestic courts relied on the applicant's senior managerial position in the construction company, it agreed that it was relevant for the purposes of assessing whether he might obstruct the proceedings by destroying evidence and putting pressure on witnesses. However, even assuming that that risk initially existed, after the evidence had been collected and the witnesses had been

interviewed, it could no longer justify the applicant's continued detention. The Court noted that the domestic courts did not refer to any other factors or evidence which could have substantiated the assertion that the applicant might abscond, reoffend or obstruct the proceedings, but simply accepted the investigators' allegations that the applicant was likely to do so. They gave no heed to important and relevant facts supporting the applicant's requests for release and reducing the risk that he would abscond, reoffend or interfere with the proceedings. Among those were his serious state of health, his argument that he had never changed his place of residence, that he had not attempted to escape, that he had strong family ties, no previous criminal record, and that there was nothing to suggest that he had ever tried to destroy evidence or to contact the victims or witnesses in the course of the criminal proceedings. In these circumstances, the Court cannot but conclude that the domestic courts failed to assess the applicant's personal situation and to give specific reasons, supported by evidence, for holding him in custody.

3.4.3 Danger that the accused commits further offences

The danger that the accused commits further offences must be a plausible one and that pre-trial detention is therefore appropriate, in the light of the circumstances of the case: for example explicit and specific consideration should be given by the courts to the previous commission of other offences in the past, the past history and the personality of the person concerned.

In the case *Riccardi v Romania,* the European Court observed that although the domestic courts repeatedly relied on the validity of the initial grounds justifying the applicant's detention – the fact that he was a danger to public order, the severity of the sentence if convicted and the danger of his absconding – they failed, with the passage of time, to give specific reasons why the discontinuance of the applicant's pre-trial detention would have had a negative impact on society or on the investigation. The fact that the domestic courts briefly referred to the seriousness of the offences, the circumstances in which the offences were committed and the severity of the potential sentence could not replace the failure to provide specific reasons for the applicant's continued detention, because the nature of the elements relied on raised more questions than answers with regard to the existence of an alleged danger to public order. The domestic courts failed to provide sufficient reasons, based on relevant facts, capable of showing that the release of the accused would actually disturb public order. The court reiterated that, in addition, detention would continue to be legitimate only if public order remains actually threatened.

Reference to a person's prior criminal record cannot suffice to justify refusal of release. In the case *Miladinov and others v Former Yugoslav Republic of Macedonia* concerning two entrepreneurs involved in crimes with respect to bankruptcy proceedings the European Court held that although the national courts had mentioned the applicant's previous convictions, the courts never went beyond these findings. The courts never compared the nature and the degree of seriousness of the previous convictions with the charges in the present case. Nor did they respond to one of the applicant's arguments that his previous conviction had concerned a traffic offence, which was not comparable either in nature or in degree of seriousness with the charges of money laundering, abuse of position, fraud and forgery. The same concerned the second applicant who had no previous conviction, but only was charged for certain crimes that the courts did not specify.

3.4.4 Preservation of public order

In relation to public order, the Court accepted that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. But one cannot solely rely on the gravity of the offences allegedly committed by the accused for extensive pre-trial detention. The (judicial) authorities have to provide any evidence or indicate any instance, which could show that a release could pose an *actual* danger. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence

3.5 Judicial review of pre-trial detention

As was concluded in *Lettelier v France*, a court "must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release".

All the grounds as mentioned before can be regarded as relevant and sufficient provided it is based on the facts of the criminal file and/or the personal circumstances of the accused. Arguments for and against release must not be "general and abstract" but contain references to the specific facts and the personal circumstances of the accused justifying his detention. It is not enough if it is claimed that, for example, there is a fear of flight or interference with witnesses; evidence of this possibility has to be brought forward and like all evidence the judge must examine its cogency. Moreover, the reasoning given by the judge must be real and not a ritual incantation of a formula, demonstrating that no consideration was given whether or not pre-trial detention is justified. For example, the decisions to keep an accused in pre-trial detention cannot be solely based on a stereotypical reasoning concerning the "nature of the offence", "the state of the evidence" or the "content of the file". Unreasoned decisions as well as automatic prolongations of the pre-trial detention are therefore not acceptable. In several cases the Court found the reasons to be formalistic in nature and not sufficient to justify detaining the accused. There had therefore been a violation of Article 5 (3) of the Convention.

In the case *Riccardi v Romania*, concerning an entrepreneur charged with forgery of accountancy documents and embezzlement, the domestic courts regularly and repeatedly extended the applicant's pre-trial detention by using abstract and brief reasoning in their judgments. The judgments were limited to mentioning certain grounds provided for by the code of criminal proceedings, but failed to explain how this criterion came into play in the applicant's case. Moreover, the court orders maintaining detention nearly always used identical, even stereotypical, wording and relied repeatedly on the same criteria, a practice which was not be considered to comply with the requirements of Article 5 § 3 of the Convention.

In the case *Valeriy Kovalenko v Russia* the court held that the detention orders also contained such grounds of keeping the applicant in custody as "information about the applicant's personality" and "the particular circumstances of the case". However, the courts never explained why these facts justify the applicant's prolonged remand in custody. Such grounds were not sufficient to justify the length of detention

The domestic courts should also address any of the specific arguments advanced by the applicant in his submissions challenging his continued detention when those arguments did not appear to be irrelevant or frivolous (*Novruz Izmayilov v Azerbaijan*).

In the *Matyush v Russia* case, the court noted that the domestic authorities' decisions were not based on an analysis of all the pertinent facts. They took no notice of the arguments in favour of the applicant's release pending trial. The European Court noted that the domestic authorities, using the same formula, simultaneously extended the detention of the applicant and her co-defendants. In the Court's view, this approach was incompatible, in itself, with the guarantees enshrined in Article 5 §3 of the Convention in so far as it permitted the continued detention of a group of persons without a case-by-case assessment of the grounds for detention or of compliance with the "reasonable-time" requirement in respect of each individual member of the group

Similarly in the *Contoloru v Romania* case, concerning a director of a bank charged with economic crimes, the courts prolonged the applicant's pre-trial detention using, besides the above-mentioned stereotypical justifications, reasons such as that other people had been arrested and other crimes had allegedly been discovered at the same bank branch since the beginning of the investigation. The European Court observed that the domestic courts of how these new facts related to the individuals on trial, and specifically to the applicant made no analysis.

The European court also criticised the uncritical acceptance of prosecutor's request for extension of a detention order which was underlined by the circumstance that the national court's decision was almost identical in wording to the prosecutor's request for the extension of the applicant's detention, and that the judge did not in any way address the grounds for the applicant's continued detention or his personal situation (*Novruz Izmayilov v Azerbaijan*).

3.6 Judicial review of extension of pre-trial detention

Article 5 (3) of the Convention requires that deprivation of liberty pending trial should never exceed a reasonable time. The Court held repeatedly that continued detention may be justified in a given case only if there are clear indications of a genuine public interest, which, notwithstanding the presumption of innocence, outweighs the right to liberty.

Continuation of detention should always be subject to judicial scrutiny. The competent legal authority should not only consider whether the detention was justified in the first place, but also whether the prolongation of detention is still appropriate. A pre-trial detention cannot be extended merely because there continues to be a reasonable suspicion that the person concerned committed a crime. This is because there is a specific right to be released pending trial. Reasons, which at first appear to justify a continued deprivation of liberty, will become less compelling the longer the detention lasts. To continue pre-trial detention, the authorities have to give "relevant" and "sufficient" reasons and show that they had displayed "special diligence" in the conduct of the proceedings. When there is still a reasonable suspicion but there are no sufficient reasons for the continuation of detention, the suspect should be released on bail subject to guarantees designed to ensure that he appears at trial.

Continuation of detention cannot be justified when a national court repeatedly uses an identical and stereotypical form of words, without further elaboration. Courts are required to give an independent critical decision and to justify this decision with a reasoning, which

reflects the arguments raised, by the defence and the prosecution. The use of stereotyped wording in a decision authorising the extension of detention may suggest that there was no genuine judicial review of the need for the detention (*Khodorskovskiy and Lebedev v Russia*)

The judges have a duty to review the continued detention of persons awaiting their trial with a view to ensure release when circumstances no longer justify continued deprivation of liberty. The question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features

3.7 Special diligence

Ultimately, the justification for the length of the pre-trial detention of an accused, while relevant, can become insufficient in the circumstances as the initial relevance will not withstand the test of time. It is up to the judge to verify whether the ground(s) remain valid during the pre-trial detention.

Deprivation of liberty pending trial should never exceed a reasonable time. Continued detention may be justified only if there are clear indications of a genuine public interest, which, notwithstanding the presumption of innocence, outweighs the right to liberty. The judge has to verify whether the authorities displayed "special diligence" in the conduct of the proceedings.

In determining what is reasonable the Court has never accepted the idea that there is a maximum length, which must never be exceeded. The fact that a law establishes a certain maximum length does not make it acceptable that detention is extended to such term if a shorter period is sufficient under the circumstances of the case.

The determination of the reasonable length is hence made not *in abstracto* but on the basis of concrete circumstances of each case. Any period, no matter how should will have to be justified. The Court found violations of Article 5 § 3 of the Convention in cases where applicants had been detained for short periods of time: a total of thirteen days in *Ţurcan v Moldova*[4]; forty-six days in *Musuc v Moldova*[5]; three months and four days in the case *Sarban*, and approximately four months and a half in the case *Becciev* and in *Castravet v Moldova*[6].

Depending on the circumstances the court found periods of one year to be excessive while periods of two years were reasonable. Periods beyond five years however have never been found reasonable.

The complexity and special characteristics of the case are factors the judge can consider. Many violations of the right to a reasonable length of pre-trial detention are the result of long periods of inactivity in the handling of the case prior to trial, of delays caused by experts, inadequate facilities of working practices, staffing difficulties. In this respect it will be relevant whether the case was complex, whether sufficient diligence has been shown by creation of a special unit to deal with the case, that additional resources have been invested, whether all possible efforts have been made to expedite the proceedings.

---

[4] ECtHR, *Ţurcan v Moldova*, no. 39835/05, 23 October 2007, available at http://hudoc.echr.coe.int/

[5] ECtHR, *Musuc v Moldova*, no. 42440/06, 6 November 2007, available at http://hudoc.echr.coe.int/

[6] ECtHR, *Castravet v Moldova*, no. 23393/05, 13 March 2007, available at http://hudoc.echr.coe.int/

For example offences involving fraud and other offences, which entail a large volume of documentation and many witnesses, may require more time than average. In the case *Marian Sobczinski v Poland*, involving organised crime, tax fraud and perjury charges, the court held that the need to obtain voluminous evidence and the need to secure the proper conduct of the proceedings, in particular the process of obtaining evidence from witnesses, including experts in finance and forensics constituted valid grounds for maintaining of the applicant's detention for the period of one year, two months and ten days.

The European Court noted that the investigation was of considerable complexity, regard being had to the number of witnesses, the extensive evidentiary proceedings and the implementation of special measures required in cases concerning organised crime. The Court did not discern any significant periods on inactivity in the investigation or the initial phase of the trial. Furthermore, as noted by the authorities, the proceedings were additionally complicated by the need to obtain evidence from the experts in finance, accounting and forensics. For these reasons, the Court considered that during the relevant period the domestic authorities handled the applicant's case with relative expedition.

In the *Ovsjannikov case v Estonia* the court considered that considerable complexity, regard being had to the number of suspects and the fact that the criminal acts had been committed over a period of several years, as well as the number of witnesses and the volume of the documentary and other evidence collected and analysed.

On the other hand in the case of *Matyush v Russia* for example, the court held that the fact that the applicant had been under investigation for large-scale franchise fraud was not sufficient to justify more than four years of pre-trial detention. Court held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand. This is particularly true in the Russian legal system, where the characterisation in law of the facts – and thus the sentence faced by the applicant – is determined by the prosecution without judicial review of whether the evidence obtained supports a reasonable suspicion that the applicant has committed the alleged offence.

The judge has a duty to reason his decision regarding to the continuation of pre-trial detention when the defense makes some remarks on a lack of „special diligence".

The duty to prove that there are still grounds for the prolongation of the detention is on the authorities and not on the suspect. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Convention, a provision that makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases (*Matyush v Russia*).

While an accused person in detention is entitled to have his case given priority and conducted with particular expedition, this must not stand in the way of the efforts of the authorities to clarify fully the facts in issue.

A suspect is not under obligation to cooperate but his conduct in not doing so may be considered by the court as a factor contributing to the slowness of the progress of the investigation and a factor to be considered to assess whether the overall length of the detention was excessively long. Any type of obstructive behaviour cannot, nevertheless, be used by the authorities as a justification for the length of a pre-trial detention that has already

become unreasonable. In the *Novruz Izmayilov v Azerbaijan* case the court noted that Court accepts that the existence of a reasonable suspicion that the applicant had committed serious criminal offences and the fact that he had failed to comply with some of the investigator's requests may have initially sufficed to warrant his detention. However, with the passage of time those grounds inevitably became less and less relevant and his continued detention had to be justified by other relevant reasons, taking into account his personal situation.

In the case *Contoloru v Romania* on one occasion the domestic court relied on the additional reasoning that the defendants had rendered the investigation more difficult by requesting expert reports, as well as on the fact that they had submitted documents in their defence for the first time before the court and not during the investigation phase. The Court noted that these are elements of the right of defence in a criminal trial and cannot be relied upon to justify an accused's pre-trial detention (see *Tiron v Romania*[7], and *Ţurcan v Moldova*[8]).

3.8 Conclusion

Pre-trial detention extending beyond the formalities of the arrest of the suspect can be justified only by one of four premises: the individual poses a risk of absconding, there is a risk that the suspect would interfere with the administration of justice, there is a risk that the suspect could commit further offences, or there is a risk that, if released, the suspect would disturb the public order. There are no other admissible grounds to detain an untried individual and doing so would violate the right to liberty pending criminal trial enshrined in Article 5(3) of the Convention. The right to liberty and security for every individual is a cornerstone of the European Convention for the Protection of Human Rights – any attempt by a State to encroach on these freedoms, including by depriving an untried individual of his liberty – must be examined with great care to ensure that genuine public interest outweighs the potential affront to personal liberty.

[7] ECtHR, *Tiron v Romania*, no. 17689/03, § 43, 7 April 2009, available at http://hudoc.echr.coe.int/

[8] ECtHR, *Ţurcan v Moldova*, no. 39835/05, § 51, 23 October 2007, available at http://hudoc.echr.coe.int/

4 Pre-Trial Detention and Criminal Policies for Economic and Financial Crimes in Europe

4.1 Decriminalisation of Economic and Financial Crimes

In most European countries, recourse to pre-trial detention for economic and financial crimes is extremely limited as there is a progressive trend towards decriminalisation of such crimes, which limits the possibility of using liberty deprivation as a sanction. The process of decriminalisation began in the late 90s as unforeseeable and incoherent criminal investigations were negatively affecting corporate financial and economic development.

Reliance on criminal law has been substituted by corporate governance mechanisms, corporate responsibility (which favour economic sanctions over deprivation of liberty) and the creation of regulatory bodies with oversight over financial activities of economic actors. In France for example, the creation of financial regulatory bodies in the early 2000s led to the abolition of half of all criminal provisions concerning corporate crimes. Currently criminal convictions for economic and financial crimes amount to 1% of the overall number of criminal convictions.

A number of financial crimes have also been regulated through the introduction of specific criminal provisions targeting specific illicit behaviours. The use of such provisions has helped overcome the often-vague character of criminal provisions on fraud, embezzlement, and breach of trust. It is noteworthy that the sanctions for violating these provisions tend to be either very limited (e.g., six months of incarceration) or purely pecuniary. For example in France, failure to call a shareholders' assembly or obtain approval for the annual report is punishable with six months' imprisonment and a €9,000 fine. The shortness of the potential prison term automatically disallows pre-trial detention. In a 2008 government report, it was suggested that the provision be further decriminalised and further injunctions be introduced to ensure that a shareholder's assembly is called. Not calling a required shareholders' assembly is punishable under administrative provisions in Germany, while in Spain and United Kingdom this offense is not punishable at all. Abuse of voting rights in a shareholders' assembly is administratively sanctioned in Germany, not sanctioned at all in the UK, but criminally sanctioned in Italy and Spain. Belgium, Spain and Italy also have specific provisions on the abuse or misuse of corporate assets (*abus de biens sociaux*) while, in Germany, this remains regulated through the criminal provisions on breach of trust.

More recently reforms have been considered to improve the system of court injunctions in order to prevent these types of crimes rather than to focus on their punishment. For example measures have been introduced to ensure that court orders imposing an injunction on a defendant are subject to appropriate penalties for non-compliance. In Slovenia for example failure to comply with an order may led the courts to replace the initial measure (such as a market recall) by another, more severe (such as a confiscation order). In several countries, such as the United Kingdom for example intentional failure to comply with a court order is considered a criminal offence. Moreover recurring fines for failure to comply with the order may accrue to the benefit of the rights-holders. In Belgium and Italy, for example recurring fines can be imposed by the courts in the order to accrue automatically to the rights-holder if the infringer fails to comply, while criminal fines can also be imposed by the State in cases of intentional non-compliance ("contempt of court").

In certain countries injunctions are issued not only to prevent an infringer from engaging in the same conduct (continuous infringement) but also to prevent the infringer from engaging in certain similar types of further infringements. In Italy the Industrial Property code specifies that an interlocutory injunction should be available whenever an infringement of intellectual property is ongoing or imminent, irrespective of the degree of urgency of the matter as there is a legal presumption that stopping an Intellectual Property infringement is a matter of urgency in itself. When an interim injunction is granted, it is considered as anticipation of what the outcome of the proceedings on the merits is expected to be. Therefore it becomes final if both parties refrain from filing proceedings on the merits.

Corporate criminal and administrative responsibility has been introduced throughout Europe as a more effective means of addressing corporate crimes both given to the pecuniary nature of sanctions and the use of other sanctions such as debarment. Corporate responsibility has also been deemed more apt to address a peculiar aspect of corporate crimes, which is the virtual impossibility of identifying specific culprits within a company and the inappropriateness of the use of organised crimes charges against a company's employees when a crime has been made possible by a series of structural inefficiencies and policies.

In general an understanding has been reached that pecuniary sanctions are more appropriate to the nature of economic and financial crimes.

4.2 Mechanisms for the De-penalisation of Financial and Economic Crimes

Economically criminal behaviours can be efficiently addressed through civil provisions and sanctions such as nullity and compensation of damages. Such changes are the natural consequence of the elimination of imprisonment for failure to pay debts following the adoption of the 4th Protocol to the Council of Europe Convention in 1963. Civil injunctions efficiently address financial nonfeasance. The simplification of criminal provisions in order to avoid overlapping in the regulation of economic crime has reduced the risks of overcharging. In United Kingdom overlapping prosecutions by the Inland Revenue and the Crown Prosecution Service for tax crimes is usually prevented though the Revenue's Hansard Policy. The Hansard Policy is the system whereby where serious fraud is suspected; the Revenue may in certain circumstances accept a money settlement instead of instituting legal proceedings in respect of fraud alleged to have been committed by a tax payer. Where taxpayers have collaborated with the Revenue, perhaps having made confessions or declarations against their interest, prosecutions are rare and are usually challenged on the grounds that they are unfair and contrary to the legitimate expectations of the taxpayer.

Risks of abuses and indiscriminate application of criminal sanctions have been also reduced through the creation of courts and prosecutors' offices specialised in financial and economic crimes and by improving investigative methods. Increased professionalism reduces the risk of arbitrary prosecutions while increases their efficiency.

Above all, decriminalisation of economic crimes has taken place by replacing criminal sanctions with administrative ones. For example, in Germany bookkeeping irregularities are addressed through administrative sanctions unless it can be proven beyond a reasonable doubt that the irregularities were the result of a fraudulent intent. In most cases the introduction of administrative sanctions has strongly limited the possibility of using criminal sanctions. In fact, influenced by ECHR case law, under certain conditions administrative sanctions are

considered to have a criminal nature under ECHR Article 6 to which the *non bis in idem* principle applies[9].

ECHR Article 6 has been held to apply to administrative proceedings in the field of customs law (*Salabiaku v France*, § 24), to penalties imposed by a court with jurisdiction in budgetary and financial matters (*Guisset v France*, § 59), to certain administrative authorities with powers in the spheres of economic, financial, and competition law (*Lilly France S.A. v France* (dec.); *Dubus S.A. v France*, §§ 35-38; A. *Menarini Diagnostics S.r.l. v Italy*, §§ 38-44), and to tax surcharge proceedings[10] (*Bendenoun v France*). In such cases, once an administrative sanction has been applied, it is not possible to apply criminal charges for the same facts. In the case of *Grande Stevens and Others v Italy* for example, the ECtHR held that Italy had been in violation of the *non bis in idem* principle because it filed both administrative and criminal charges in respect of allegations of market manipulation in Italy.[11]

4.3 Pre-trial Settlements as an Alternative to Deprivation of Liberty

Another mechanism that has considerably reduced the detention for economic and financial crimes is the pre-trial settlement. An examination of civil law and common law jurisdictions that are most active in combatting financial and economic crimes reveals that most of them are not using full trials and deprivation of liberty but rather some form of abbreviated criminal proceeding. In fact, there are only very few cases of economic crimes going to trial anywhere – shortened procedures are becoming the norm rather than the exception, especially in cases involving legal persons. Nevertheless on occasion concerns have been raised in respect of the abuse of pre-trial detention to exert pressure on suspects and solicit settlements. For this reason detailed rules and judicial practice have regularly targeted the prosecuting authorities' behaviour in order to prevent abuses at this stage.

Pre-trial settlements are advantageous both for authorities and economic actors. For the authorities these advantages include the efficient use of law enforcement resources and the convenient resolution of complex cases, while for entrepreneurs they include reduced or no penalties (under reward systems structured to impose lesser penalties for those who admit responsibility early), ability to pay (as defendants' liquidity is taken in consideration when

---

[9] ECHR Article 4 states that no one shall be tried or punished again in criminal proceedings under the jurisdiction of the same member state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.

[10] Article 6 has been held to apply to tax-surcharges proceedings, on the basis of the following elements: (1) that the law setting out the penalties covered all citizens in their capacity as taxpayers; (2) that the surcharge was not intended as pecuniary compensation for damage but essentially as a punishment to deter reoffending; (3) that it was imposed under a general rule with both a deterrent and a punitive purpose; and (4) that the surcharge was substantial (*Bendenoun v. France*).

[11] The administrative authority in charge of supervising the stock market imposed administrative sanctions on the applicants for "disseminating information ... capable of providing false or misleading information concerning financial instruments" and banned the individuals from administering, managing and controlling companies listed on the stock exchange for varying periods.

Separately, the applicants were criminally prosecuted for the same conduct and were convicted of a criminal offence decision that the criminal prosecution of the applicants, in addition to administrative enforcement action for the same conduct, was a breach of the *ne bis in idem* principle as articulated in Article 4 of Protocol No 7 (Article 4).

The court found a violation of Article 4 notwithstanding that only one of the proceedings in the case before them was recognised in Italy as "criminal" in nature.

determining the sanction), reduced risk and increased certainty about the penalty applicable (since it is possible to know the settlement's specifics from the outset).

Different jurisdictions conduct abbreviated procedures in different ways. Common law jurisdictions tend to prefer a negotiated process in which prosecution and defence reach a mutually acceptable agreement. This agreement is then usually presented to a judge for confirmation. The most widely used mechanism in such cases is the guilty plea in United Kingdom.

In civil law countries, although negotiations may take place, the process tends to take the form of a proposal made by the prosecutor to the defendant to admit liability, agree to pay a specific sum of money or meet certain conditions, and thus avoid a long, drawn-out procedure. A few examples of this type of settlement are the summary punishment order in Switzerland, the so called "*patteggiamento*" in Italy, the administrative and criminal settlement procedures in Germany, and the penalty notice used in Norway.

According to Section 352 of the Swiss Code of Criminal Procedure (SCCP), under certain conditions the prosecutor may conclude a case without bringing it to court if the prosecutor considers that the charges do not merit a penalty of greater than six months' imprisonment and a fine of CHF 5 million, regardless of any confiscation. Section 358 of SCCP provides for a negotiated resolution or so-called simplified procedure, in which the accused can negotiate the sentence in exchange for admitting to the facts underlying the offense in documentation approved by the court. Penalties under this provision can include up to five years imprisonment penalties and monetary penalties without limit.

In Norway, the prosecution may issue a penalty notice to a natural or legal person if the prosecutor determines that the case should be decided by the imposition of a fine and/or confiscation rather than a prison sentence (in the case of natural persons). The Norwegian penalty notice cites the allegedly violated legal provision, describes the violation, and sets forth the proposed monetary penalty. The defendant may accept and pay the penalty or proceed to trial.

In the case of "*patteggiamento*" in Italy, after the prosecution has decided upon a charge, the prosecution and defence can jointly ask the judge to impose a penalty on which both have agreed. The judge may accept or reject that penalty, but cannot modify the agreed-upon fine. If the offender compensates the "victim" and takes steps to eliminate the consequences of the offense, the offender may be able to reduce its fine. Further, the court hearing where the "*patteggiamento*" is pronounced is open to the public. However, it appears that only those persons who can justify an "interest" in receiving communication of the written disposition would have access to the decision. An additional advantage of the "*patteggiamento*" for the defendant is that the disposition will not appear in his/her criminal record.

A provision was recently introduced into the German Criminal Procedure Code that provides for negotiated sentencing agreements. The provision refers to natural persons in the regular criminal trial and to legal persons if their participation in the criminal procedure is ordered. The subject matter of the agreement may consist only of legal consequences, procedural measures, and the conduct of the participants during the trial, not the verdict of guilt (although a confession forms an integral part of the negotiated sentencing agreement). The prosecutor is held to the same evidentiary standard as in a full trial. The court announces the possible content of the negotiated agreement, which enters into effect if the defendant and the

prosecution agree. Strong judicial control over the procedure ensures that risks of abuse are reduced.

The United Kingdom has a long tradition of settlements through guilty pleas. Criminal settlements are negotiated between the prosecutors and the defendant. The plea agreement must be in writing and contain an admission of facts constituting the offenses. Then the plea must be entered in a hearing in open court before a judge. While the parties can confer in advance about what is an appropriate sentence and monetary punishment, they cannot agree on an exact sentence. At sentencing, the judge will listen to the arguments of the parties and then decide on a sentence. In civil settlements, by contrast, the prosecutor and the defendant can agree on a specific penalty, and the prosecutor needs only to request a judicial order in that amount.

In order to avoid abuses through the solicitation of incriminating statements against co-suspects through guilty pleas British courts have been empowered to strike down prosecutions where there was collusion between the suspect turned witness and investigators. Crucial for this determination is whether incriminating statements were made (or not) from the very outset, when the suspects were interviewed under caution and without any offer of reward by the investigators and only afterwards were offered immunity for becoming prosecution witnesses[12].

In the case of tax crimes clear prosecution policies are adopted in order to avoid risks of selective prosecution. The Inland Revenue has chosen to prosecute only a small proportion of those against whom there is sufficient material to prosecute for tax fraud. For the majority of taxpayers the priority is to reach settlements whereby the tax plus interest and penalties is paid over. The Inland Revenue has, since 1999, published its selective prosecution policy.

4.4 Arrest and Pre-trial Detention

Most European countries follow similar provisions regarding pre-trial detention. These include the adoption of pre-trial detention when there is a risk of ascendance, when the suspect may commit further offences, tamper with evidence or interfere with the investigation, interfere with victims or witnesses, to prevent the suspect from contacting his accomplices, and, in France, to put an end to an exceptional disruption of public order ("*ordre public*") due to the seriousness of the offence or the damage caused.

Standards of review may vary as while as certain countries require only reasonable suspicion that a crime has been committed, while others, notably Italy and Portugal, require a strong suspicion that a crime has been committed. Most countries permit pre-trial detention only for crimes that are punishable with at least three or even five years of imprisonment while some countries, such as the Netherlands, do not permit pre-trial detention if a judge decides that the accused is unlikely to receive a custodial sentence if convicted or if the pre-trial detention duration is going to be longer than the eventual sentence passed. Pre-trial detention is also regulated as an *extrema ratio* when alternative measures are not appropriate.

Alternative measures include permanent or semi-permanent house arrest, orders to remain in a specific area, orders to report at regular times to a specific authority, orders to disassociate from family or other co-habitants, orders not to enter specific places without court

[12] R v Bigley [EWCA Crim 3012, [2001] All ER (D) 253 Dec.

authorization, orders to avoid contact with specific persons, a ban from exercising public office or service or specific professional and business activities.

The effective length of pre-trial detention may vary irrespective of the concrete existing legal provisions. While certain countries, such as Spain and Ireland, do not have upper limits, others, such as Germany, fix a maximum length but allow unlimited extensions. The existence of legal provisions establishing a maximum length does not necessarily mean shorter pre-trial detention than in countries where such provisions do not exist. In fact, control over the length of pre-trial detention appears to depend more on effective judicial review than on formal standards fixed in codes of criminal proceedings. The key factor in determining whether effective control over the length of pre-trial detention exists is regular and reasoned judicial review taking into consideration relevant circumstances (as opposed to judicial review following a formalistic court-made recitation of grounds).

4.5 Compensation for Pre-trial Detention

Compensation is usually provided to persons held in pre-trial detention but subsequently acquitted. In the Netherlands, compensation may be awarded if pre-trial detention was unlawful or imposed without an adequate basis if the court deems such compensation reasonable. In Spain, compensation can also be awarded for damages caused by judicial error or irregularities in the administration of justice. With the exception of Denmark, where the amount of compensation is predetermined on a per diem basis, courts generally have discretion to determine the amount of such compensation. In France, compensation for pre-trial detention is also awarded when charges are dismissed, but not for an arrest even when a person has not been indicted nor for pre-trial detention authorized on the basis of the accused's voluntary self-incriminating statements.

Petitions for compensation are decided by the president of the competent appeals court and may, be appealed before the National Reparation Commission for detentions (NRCD) placed before the Court of Cassation. Compensation must cover the loss of wages during the period of imprisonment and after release, for the period necessary to search for employment (Cass. NRCD, 21 October 2005, 05-CRD005)[13], damage resulting from the payment of legal fees incurred to obtain the release, and moral damages[14].

In Italy the Supreme Court has ruled that compensation for unjust detention of an entrepreneur who has endured economic damages due to his inability to manage his company during pre-trial detention should not be limited to an arithmetic calculation of the days spent

[13] Similarly, if incarceration has led to the loss of housing which the applicant was a tenant, moving expenses and transportation incurred by him and which are directly related to the holding must be repaired. (Cass. NRCD, 14 December 2005, 05-CRD044). In addition, the applicant shipping cost incurred to allow his wife to visit him in prison are spending on remand and compensable. (Cass. NRCD, 14 December 2005, 05-CRD036).

[14] Moreover, his detention necessarily causing moral harm, it must be repaired.
In assessing the pecuniary damage, the repair detentions commission may take into account several factors that can increase the compensation:
- The consequent psychological impact of pretrial detention;
- Distance of the family or the separation of the applicant from his young children;
- The public authority role in causing a backlash from other prisoners (police officer, prison officer, mayor, etc ...);
- The very long duration of the trial or detention
- Conditions of detention related in particular to violence and threats and the climate of violence suffered in detention.

All losses are many and varied, it must be personal and individual analysis, case by case, depending on each situation.

in detention, but also include the economic and professional consequences, included non-pecuniary damage to the entrepreneur's reputation, consideration being given also to his social status.[15] Such losses must be included in the calculation (although compensation cannot go beyond a given maximum).

4.6 Country-Specific Regulation of Pre-trial Detention

4.6.1 Italy

In Italy, the duration of pre-trial detention varies depending on the type of offence and the stage of proceedings. According to the code of criminal proceedings, pre-trial detention can only be ordered when there is significant circumstantial evidence that a crime has been committed and actual risk that the defendant may commit further offences, abscond, tamper with evidence, or obstruct the investigation.

Pre-trial detention should be excluded when alternative measures may be appropriate although it is mandatory for certain crimes, such as mafia-related organized crime, drug trafficking and terrorism. Following the passing of law 117/2014, pre-trial detention cannot be ordered if the judge deems that penalty applicable to the case is less than three years imprisonment or will the sentence will be suspended (275 2 bis). There is also an automatic prohibition against pre-trial detention for crimes punishable with a maximum of 5 years imprisonment (280 CCP).

Although it is possible to ask for regular review of pre-trial detention, in general the law does not offer sufficient protection against systemic delays and excessively lengthy of pre-trial detention due to an overall lack of effectiveness of the judicial review of pre-trial measures and delays before decisions are made by the Tribunal of Freedom. New provisions obligating judges to properly reason pre-trial detention decisions rather than simply referring to the prosecution's arguments have recently been discussed.

A certain degree of protection is provided by a regime of nullities which affect arrest and pre-trial detention decisions in case of serious procedural violations. For example, criminal proceedings including pre-trial detention orders can be nullified upon the re-opening of a criminal case without prerequisite judicial authorization (Cass sez I 4.3.2010 no 16306) or where a request for pre-trial detention was not been issued by the competent prosecutor office (Cass Sez fer. 6.9.1990). The law expressly foresees also the nullity of a pre-trial detention when it is adopted in the absence of the suspect's lawyer or when the suspect is not duly notified, as well as when the lawyer is not duly notified or is not regularly notified of the hearing for the review of the pre-trial detention (179 and 485 of the Italian Criminal code). Such nullity makes the pre-trial detention null and void and cannot be remedied

Pre-trial detention for economic crimes

Due to the privileged status of economic crimes vis-à-vis ordinary crimes under the Italian legal system, such delays and inefficiencies infrequently affect entrepreneurs. The criminal policy regarding economic crimes is distinguished by a marked trend towards decriminalization through corporate administrative responsibility and short prison sentences.

[15] Decision 43978 of the 17 November 2009

Another feature of the Italian criminal legislation is the existence of short prescription periods (statutes of limitation) for many economic crimes (six years for fraud, for example) which substantially reduce the leeway of investigative authorities in prosecuting such crimes.

Leniency for entrepreneurs involved in corrupted deals has been introduced though judicial practice in the early 90s allowing the decriminalisation of bribing when entrepreneurs paid bribes in order to obtain access to services, contract, licences that they were anyway entitled to but were unable to obtain unless they paid bribes to public officials. In the Italian context characterised by widespread corruption ("*corruzione ambientale*") courts developed a flexible interpretation of the crime of extortion preferring charges against public officials (rather than charging entrepreneurs for bribing) when even in the absence of explicit acts of extortion, it was clear that an entrepreneur had had no other choice than paying a bribe.

In Italy, law of the 28th of April 2014, n 67 decriminalized crimes that were previously punishable only with pecuniary sanctions or with deprivation of liberty of up to five years. The decriminalisation however operates only when the crime is not particularly grave and the suspect is not a repeat offender. This law allows the suspension of proceedings by allowing the introduction of a probation period for a maximum period of two years and payment of damages. After two years the crime is expunged from the records.

In November 2014, the government passed additional measures decriminalizing certain tax crimes and incentivizing collaboration between tax payers and tax authorities to encourage voluntary payment of tax debts rather than punishment. Overall these reforms have been motivated by the need to reduce the number of individuals in pre-trial detention (23,000 out of a total prison population of 63,000) although the number of individuals detained for economic crimes remains nevertheless statistically irrelevant.

In January 2015, a decree was passed excluding pre-trial detention for economic crimes and establishing that pre-trial detention in general should be applied only when there is a clear and present danger of flight and when alternative measures such as house arrest, passport confiscation or the, obligation to reside in a certain place are not feasible. Such reforms effectively excluded the application of pre-trial detention for three-fourths of crimes in which the suspect was not a repeat offender. This law also strengthened the nullity regime for pre-trial detention and arrest: in case of a delay in transmitting the file to the tribunal for the review of pre-trial detention ("*Tribunale del Riesame*") or the deposit of an arrest order ("*Ordinanza di Custodia Cautelare*") not only do the responsible magistrates become subject to disciplinary sanctions (at least "*censura*"), but pre-trial detention becomes automatically null and void and cannot be requested again except under exceptional circumstances.

Further pre-trial detention can be excluded if the judge believes that the accused will most likely receive a suspended sentence, which usually applies when a person is sentenced to less than three years in prison. Considering that, in the overwhelming majority of cases, economic crimes are punished with less than three years imprisonment; pre-trial detention will be automatically excluded.

Such measures represent an attempt to streamline the implementation of pre-trial detention with existing ECHR standards

4.6.2 France

Article 144 of the French Code of Criminal Procedure demands the length of pre-trial detention be reasonable given the seriousness of the offence and the complexity of the investigation. Pre-trial detention cannot be ordered when the applicable punishment is less than three years imprisonment, or five years for crimes affecting property rights (such as theft, fraud, embezzlement, abuse of confidence, money laundering).

The length of pre-trial detention depends on the gravity of the offence and spans four months to four years: pre-trial detention may not exceed four months if the person under investigation has been charged with a crime punishable with less than 5 years imprisonment.

The accused cannot be remanded to custody for more than two years when the penalty is less than twenty years' imprisonment or criminal detention beyond three years in other cases. Deadlines are extended to three or four years when one of the facts constituting the offense was committed outside the national territory. Four years detention is also permitted when the accused is charged with serious crimes such as drug trafficking, terrorism, pimping, extortion, or for organized crime.

Any decision concerning the arrest and pre-trial detention is decided by the "Judge for Freedoms and Detention", a specialized body created in order to ensure effective protection of defence rights and the right to liberty. The accused must be present and represented by a lawyer at the first hearing relating to pre-trial detention as well as at each subsequent hearing for its extension. Requests for release can be submitted at any time by the suspect or his lawyer. The suspect may request the pre-trial detention hearing be held in public; such request can be denied only if there are considerable issues of confidentiality to protect. Any decision concerning pre-trial detention must be duly reasoned.

Another guarantee which has considerably strengthened defence rights from the very outset of the deprivation of liberty is the implementation of EU Directive 2012/13/UE, which grants legal representative of suspects the right to access the case file from the time of the suspect's arrest ("*garde à vue*")[16]. Evidence from the case file will normally include the victims' complaint, witness statements and other evidence such as conversation recordings and reports of searches collected by the investigative authorities before the arrest. Normally legal representative should be able to review the entire case file or, at a minimum, the evidence and information from the case file necessary to verify and challenge the lawfulness of an arrest.

Prior to this directive, a lawyer's access to the case file at the arrest stage was limited to the "*procès-verbal*"*:* the notification of the decision to arrest a person, medical certificates, and

[16] According to the directive Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person. The authorities must ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers; besides this access must be granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence; such access shall be granted in due time to allow the effective exercise of the rights of the defence and at the latest upon submission of the merits of the accusation to the judgment of a court. Where further material evidence comes into the possession of the competent authorities, access shall be granted to it in due time to allow for it to be considered.

the report of the questioning of the arrested person. Following the implementation of this directive courts have, on occasion, declared arrests of suspects null and void if their lawyer was not granted access to the case file ("*Tribunal correctionnel de Paris*", 30 December 2013).
Similar to Italy, a regime of nullities is foreseen by the Code of Criminal Proceedings and the "*Cour de Cassation*" has ruled that the violation of certain procedural safeguards violate the rights and interests of the affected person and will necessarily lead to the declaration that the detention is null and void (*Cass. Crim* 18 July 1995). The court has also stated that certain violations of procedural rules affecting public order may lead to the nullity of a detention order even in the absence of a complaint on the part of a suspect. Among such violations are orders for pre-trial detention issued in the absence of the suspect's legal representative, when the legal representative has been unable to assist the suspect during his questioning by the authorities or when the detention was requested by a police officer or a police officer without territorial competence. If a police officer has failed to pre-emptively inform the prosecutor office or the competent judge of the arrest, the arrest will be similarly declared null and void (Cass crim. 10 May 2001).

Individuals in pre-trial detention are held in a "*maison d'arrêt*", a prison specifically designed for individuals awaiting trial or condemned to less than one year in prison (article 714 of the code of criminal procedure) The average length of pre-trial detention is around 16.4 months, although according to other estimates[17] it is 11.3 months. According to data provided by the "*Commission de suivi de la détention provisoire*", as of January 2013 there have been 16,500 individuals in pre-trial detention in France. The reduction in the number of detainee as compared to 1995 (23000) was explained with the general decrease of criminal proceedings opened by the authorities. However, according to the Commission, the average length of pre-trial detention remains excessive and in violation of suspect's rights, especially throughout the trial stage.

Pre-trial detention and economic crimes

While current legislation and implementing practice do not appear to provide sufficient guarantees against excessive pre-trial detention, in respect of economic crimes this has been achieved through decriminalization of certain conduct. Convictions for economic and financial crimes amount to 1% only of the overall number of convictions in France.[18] According to statistics made available in 2002 by the Ministry of Justice, about 13.3% of suspects of economic and financial crimes were placed in pre-trial detention (9.4% in cases with only one charge filed and 17% of cases with multiple charges). Pre-trial detention was hardly ever used in cases of corporate crimes and tax fraud but more often in cases of corruption, customs crimes and abuse of corporate assets, for example in 60% of money laundering cases. The average length of pre-trial detention for economic and financial crimes was 3.7 months with 28% of pre-trial detentions not exceeding 10 days and only 5.1% exceeding one year.

Between 2002 and 2005 the number of criminal investigations into allegations of financial and economic crimes has steadily decreased from 355,342 to 310,229. The number of

[17] Pierre Tournier (2012), *Length of time spent in custody, holding period, custody time* [*Durée de temps passé sous écrou, durée de détention, durée de détention provisoire*], Arpenter le champs pénal, available at http://pierre-victortournier.blogspot.ru/

[18] Infostat Justice (Juin 2002), *The economic and financial crime sanctioned by Justice* [*La délinquance économique et financière sanctionnée par la Justice*], available at http://www.justice.gouv.fr/

criminal cases remitted by the police to prosecution or judicial authorities decreased by 12.7%. In 2006, the number of convictions pronounced by the courts for fraud was 3379, for violation of competition laws 2550, and for corporate crimes 2303. During 2015, the number of convictions for bankruptcy and abuse of trust/confidence and fraudulent management and accounting ("*banqueroute ou gestion et comptabilité frauduleuse*") as well as for abuse of corporate assets was 0.29% of all convictions passed by the French courts.

As in other countries, the decriminalization of economic and financial crimes has been justified with the need to protect enterprises from the unforeseeable and incoherent risks of criminal proceedings. For example such reduction took place in 1992 following the decriminalization of the emission of unfunded cheques. Corporate crimes have been replaced by corporate governance measures to the point that about half of all corporate crimes have been abolished. The imposition of prison terms has been similarly sharply reduced by the introduction of corporate criminal responsibility focused on pecuniary sanctions and on the overall responsibility of a company rather than of specific individuals.

In June 2000 a new law was passed strengthening the protection of the right to be presumed innocent and reducing the recourse to pre-trial detention (*loi n° 2000-516 du 15 juin 2000*) by limiting its use only to cases when a conviction would lead to imprisonment of more than three years. Given the average shortness of imprisonment terms for economic crimes, and as pre-trial detention cannot be ordered for crimes punishable with less than three years in prison, entrepreneurs charged with such crimes rarely spend time in pre-trial detention.

At the same time, while ordinary economic and financial crimes do not usually lead to deprivation of liberty, increased efforts have been undertaken in order to fight major forms of tax fraud and other economic and financial crimes. In December 2013, a law (No 2013-1117) was passed to strengthen prosecution of grand economic crimes. This law introduced aggravating circumstances such as the commission of tax fraud through an organized criminal group or legal entities registered abroad such as shell companies or trust funds. Sanctions for such crimes have been increased to 7 years imprisonment and fines of EUR 2 million.

An exception to the criminal policy excluding pre-trial detention for economic crimes was introduced in February 2014 through the implementation of the EU directive on market abuse for which the penalty has been raised from two years to four years imprisonment. Still it has been considered that given the higher tolerance of the French judicial system for crimes involving property, it remains unlikely that any decision for pre-trial detention will be adopted by courts save under exceptional circumstances. At the same time, the law has introduced leniency for individuals who admit their crimes to the administrative or judicial authorities and identify any accomplices. In this case no penalties will be meted if as a result if was possible to prevent further crimes, while in case the information provided helped the authorities to stop the criminal behaviour, the penalty is halved. Under the same law, a prosecutor for financial crimes was introduced as necessary for an effective and coherent prosecution of economic crimes. In order to avoid possible conflicts of competence with other authorities charged with prosecution of economic crimes, the law has established than any such conflict of jurisdiction is to be resolved by the Prosecutor General's office in Paris.

Another provision was introduced allowing individuals suspected of grave financial and economic crimes to be held for up to 96 hours from arrest without filing charges and, for up to 48 hours, without access to a lawyer. The constitutional court, however, declared this provision unconstitutional because it considered that such types of crimes do not represent a

threat to the security, life, or dignity of other persons or society unlike crimes such as terrorism and drug trafficking, for which such extended terms of arrest are admissible, and were hence considered disproportionate (*Decision No 2013-679 DC of 04 December 2013*).

4.6.3 Germany

Germany provides a fairly effective system of judicial review of pre-trial detention that has rarely been found in violation of ECHR article 5(3). The increasing use of alternatives to pre-trial detention and to fines has also played a role in the further reduction of the use of pre-trial detention in Germany. According to the German Code of Criminal Procedure, pre-trial detention should not last longer than six months unless the investigation is particularly difficult or of unusual extent, in which case pre-trial detention can be extended.

The objectives of pre-trial detention in Germany are to ensure a thorough investigation of crimes, to ensure criminal procedure according to the rule of law and, if applicable, to ensure the execution of the sentence. The main objective seems to be to ensure the presence of the defendant during trial, because trial *in absentia* is not possible in Germany. Therefore, the main ground for pre-trial detention is the risk of abscondence. According to paragraph 112 I StPO (Code of Criminal Proceedings) pre-trial detentions may not be ordered if it is not in proportion with the importance of the case and punishment that may be expected. Save for certain crimes as mentioned in paragraph 112a German CCP, it is not possible to detain a person on the ground he will commit a new crime upon release.

The proportionality principle is key in ensuring that pre-trial detention is not abused or allowed for an excessive period; this excludes an extension of pre-trial detention unless it is considered as strictly necessary.

A suspect or his lawyer can apply for a revocation of pre-trial detention or substitution with alternative measures at any time. However, once detention has been found to be justified, a further request for review can be submitted only after two months. The prosecutor must regularly confirm that continued pre-trial detention is justified and an extension will only be admitted if the investigation is particularly difficult.

Following the ECtHR's decisions in *Lietzow v Germany*, *Garcia Alva v Germany* (appl. no. 23541/94, judgement of February 13, 2001), and *Schöps v Germany* (appl. no. 25116/94, judgement of February 13. 2001), German legislation has been amended to ensure increased access to the case file even in sensitive cases as previous restrictions were found by the court to interfere with defence rights and the possibility of obtaining effective judicial review of pre-trial detention orders.

Several types of legal remedy can be used in Germany for judicial review of pre-trial detention. The detainee can apply to the investigating judge for judicial review of the warrant. If this appeal is not successful, the detainee can lodge an appeal to the district court. If this appeal is not successful, the decision can be appealed to the higher regional court. A defendant can argue his release to the investigating judge at any time before and during the trial. An appeal can be lodged once. There is also the possibility of a constitutional complaint to the Federal Constitutional Court as an extraordinary legal remedy. This is used relatively often in detention matters to contest prolonged periods of detention and restrictions during the enforcement of detention.

Judges are required, to substantiate their decision either by a strong suspicion and/or one or more of the mentioned grounds present by assessing the relevant facts and circumstances leading to the decision. There is a strong judicial review of the decisions on pre-trial detention, not only by the higher courts, but also by the Constitutional Court. The Constitutional court often rules on issues of criminal procedure and has had much influence on the development of pre-trial detention. Individuals in pre-trial detention must be kept separate from convicted individuals and should be subject only to restrictions that are strictly necessary to serve the purpose of detention.

Further guarantees are provided by court for defects in the detention orders. The consequences of a court's finding in the course of judicial review proceedings that a detention order is flawed will depend on the nature of the defect found. Certain formal defects, in particular a failure to set out in sufficient detail in the order the facts establishing the grounds for strong suspicion that an offence has been committed and for the arrest, will make the order defective in law ("*Rechtsfehlerhaft*"), but not void ("*unwirksam / nichtig*")[19].

Such defects may therefore be remedied by the appeal courts in the course of the judicial review proceedings by either quashing the defective order or replacing it with a fresh, duly reasoned order. A defective detention order thus remains a valid basis for detention until the defect is remedied. On the contrary, detention on the basis of a detention order which is void owing to a serious and obvious defect is unlawful.

The Federal Court of Justice gave the following reasons for the distinction between void and defective court decisions: "Only in rare, exceptional cases can a court decision be considered void in its entirety, with the consequence that it is legally irrelevant. This will occur if the extent and gravity of the defect are such that the decision blatantly contradicts the spirit of the Code of Criminal Procedure and key principles of our legal order. From the perspective of legal certainty, the assumption that a decision is null and void presupposes, in addition, that the serious defect is obvious"

Pre-trial detention and economic crimes

In Germany, specialised prosecutors' offices have been created for the prosecution of serious economic crimes for a more efficient investigation and prosecution. The use of pre-trial detention to hold suspects prior to trial is a key strategy employed by economic crimes' prosecutors. Prosecutors regularly attempt to hold white collar crime suspects in pre-trial detention to prevent destruction of evidence or witness tampering. However, since, according to the law, detention can only be authorised if there is strong evidence the suspect has committed the offence, that there are grounds to ask for the detention, and that it is not "disproportionate to the case's significance", courts tend to exert extreme vigilance over the well-foundedness of pre-trial detention requests and reject them on these grounds, even if detention would facilitate completion of the investigation. If an extension of detention is required past the initial six months, prosecutors must demonstrate that they are continuing to make progress on the investigation.

When detention is not proportionate to the likely punishment and severity of the offence, release will be ordered by a court. As such standard is quite difficult to meet, economic crimes prosecutors will seldom be able to obtain an extension of detention beyond six

[19] see, inter alia, Karlsruhe Court of Appeal, *no. 3 Ws 252/85, decision of 28 November 1985*, Neue Zeitschrift für Strafrecht (NStZ) 1986, pp. 134-35; and Berlin Court of Appeal, *no. 5 Ws 344/93, decision of 5 October 1993*, StV 1994, p. 318).

months.[20] Faced with these restrictions, prosecutors may pursue only those cases that warrant an investment of investigative resources.

German prosecutors have often exploited the vague wording of certain provisions of the criminal code to prosecute businesspeople. An example is the crime of breach of trust ("*Untreue*"), which was originally intended for the prosecution of small scale embezzlers and not corporate crimes: proving intention to breach trust is difficult as it requires proving the suspect was aware of his fiduciary duties, that he breached that duty, and that he knew that the breach would cause financial damage to the company. Because breach of trust is regulated as a misdemeanour under the criminal code, prosecutors investigating economic crimes are usually able to offer settlements to suspects, rather than engaging in complex investigations with uncertain outcomes. Most economic crimes prosecuted do not end in an indictment or a conviction but rather in settlements as a result of legislation which classifies many crimes as misdemeanours allowing the possibility for plea bargaining practices (which are admitted for misdemeanours). Settlements are also encouraged due to the difficulties of investigating complex crimes to which existing criminal law models (such as fraud, drafted more than a century ago) become more and more inadequate. Prosecutors are also able to offer probation to suspects of economic crimes when the defendant is facing a potential sentence of less than two years imprisonment. This option is preferred by the prosecuting authorities, as offering probation and a fine rather than resorting to imprisonment saves the state money.

4.6.4 Spain

In Spain, the maximum period for pre-trial detention is four years although such lengthy terms are only allowed for grave offences to which lengthy prison terms would be applicable. If the offence is punishable with a sentence of no more than two years, pre-trial detention is only permissible if the suspect has already a criminal record. The seriousness of the punishment is not per se sufficient to order pre-trial detention when the nature of the crime or the circumstances of the suspect indicate that it is not likely that the suspect will try to evade justice.

Spanish law also distinguishes the admissible length of pre-trial detention on the basis of the reasons justifying it. If it is ordered to prevent reoffending or evasion of justice, it cannot exceed one year (or two years in case of serious crimes), while if the goal is to prevent interference with the investigation and gathering of evidence, its term cannot be longer than 6 months.

In order to avoid abuse of the duration of pre-trial detention, the Spanish Constitutional Court ruled (STC 127/1984 of the 26th of December) that an individual who is charged with several connected crimes cannot be handed pre-trial detention calculated on the basis of each charge separately, as this would violate the principle of proportionality. The court held that in such case, the length of pre-trial detention would depend on the number of charges being pressed by the investigative authorities and should be no longer than the pre-trial detention permissible for the most serious charge.

Appeals against detention can be filed with the "*audiencia nacional*" as well as with the constitutional court if there are grounds to believe that the suspect's human rights are violated

[20] Shawn Marie Boyne (2014), *The German Prosecution Service: Guardians of the Law?* Springer.

("*recurso de amparo*"). However, on average, only 1.5 % of complaints to the constitutional court are declared admissible. Pre-trial detention can be reviewed at any time before trial and the examining judge is required to visit the local prison once a week, without providing the prison authorities prior warning.

Pre-trial detention and economic crimes

In Spain, as in other European countries, most economic crimes usually do not entail prison sentences as the majority of the criminal cases end up with a decision "*nolle prosequi*" or acquittal. The Spanish Supreme Court has, in certain instances, justified acquittal for major economic crimes case with the need to protect "absolute market freedom". In view of the jurisprudence of the Supreme Court, it is clear that even when the applicable penalty is imprisonment, there will be little recourse to pre-trial detention and even when prison sentences are imposed, pardons are frequently given or sentences suspended. In 2014, according the General Council of the Judiciary, Spanish courts had 1,661 open corruption related criminal cases including trespass, revealing secrets, bribery, influence peddling, embezzlement, money laundering, embezzlement, fraud, forgery, and crimes against historical heritage and the environment. Even for these proceedings the number of people currently in prison serving sentences is very small.[21]

Until 1995, corporate crimes were not regulated by the criminal code and even after their criminalisation these crimes are usually punished with less than two years imprisonment or with fines, which automatically eliminate the possibility of pre-trial detention. Further changes in the Penal Code adopted in December 2012 allowed individuals charged with tax evasion to avoid prison by paying the amount owed to the tax authorities plus a fine less than the amount owed, payable within two months of being charged. In exchange for this payment, any prison sentence would be limited to one year, possibly just three months, nothing is recorded in the criminal record. Since the applicable prison sentence only a few months or one year maximum, the execution of the sentence is automatically suspended and no prison term will apply. Making such payment avoids the application of the criminal provisions mandating one to five years in prison and a fine up to six times the amount defrauded for financial or social security fraud exceeding EUR 120,000. Besides this, in 2012, a tax amnesty was adopted which further reduced the number of criminal cases for tax evasion.

Finally, many criminal proceedings have been avoided though the introduction of corporate criminal responsibility in 2010. Since then, prison sentences have been awarded in only a handful of cases, but the standard has begun to change some corporate behaviours. Large multinational companies have developed surveillance and control programs to prevent crimes and assess the risk of engagement in fraud though compliance mechanisms. With this information, a risk map is designed by the management and policies, procedures and protocols established to prevent unethical or outright criminal behaviour. Crime prevention models in companies do not guarantee that there will not be unlawful conduct, but, when effective, dramatically decrease the chances that economic crimes happening. [22]

[21] 20 Minutos (2014), *Corruption in Spain: 1,700 cases, more than 500 suspects and only twenty in prison* [*Corrupción en España: 1.700 causas, más de 500 imputados y sólo una veintena en prisión*], available at www.20minutos.es/

[22] María Fernández / David Fernández (2014), *Firewall against abuse* [*Cortafuegos contra los abusos*], El Pais, available at http://economia.elpais.com/

4.6.5 United Kingdom

In England and Wales, a time limit of 182 days has been established to limit the maximum length of pre-trial detention, which can only be extended if the prosecution can justify the time they are taking to bring the case to trial. A 2009 report found that the average length of pre-trial detention was 13 weeks. In 2011, there were approximately 12,266 pre-trial detainees in English and Welsh prisons – 14% of the total prison population.

According to the law, no conditions should be imposed on release pending trial unless it appears to the court that it is necessary to do so prevent the failure of the defendant to surrender to custody, the commission of an offence while released, interference with witnesses, or obstruction of the course of justice. Pre-trial detainees should be out of contact with convicted prisoners as far as reasonably possible, unless the pre-trial detainee has consented to share accommodation and participate in activities with convicted prisoners. However, under no circumstances should an untried prisoner be required to share a cell with a convicted prisoner. While in pre-trial detention a defendant should have the right to communicate with a lawyer, the right to an interpreter and translation of documents, and the right to view codes of practice governing detainee rights.

Judicial protection is afforded against abuses of pre-trial detention in particular in cases when a suspect held in custody originally charged with one offence but subsequently another is substituted. The possibility for a fresh time limit to start once a new charge is introduced has led to risk of abuses by the prosecution since it allowed an extension of pre-trial detention without having to seek the permission of the court to grant an extension. By allowing such latitude to the prosecution to substitute or charge additional offences prosecutors not only detain a suspect for longer than intended but also to avoid the requirement of showing due diligence. In the case R (Wardle) v Crown Court at Leeds the House of Lords ruled that when the new charge is brought in bad faith or dishonestly for example to keep a suspect in custody for a longer period there may be an abuse of process and a new custody time limit should not begin[23].

Pre-trial detention and economic crimes

The crime and courts act 2013 has introduced Deferred Prosecution Agreements, another important form of settlement for economic and financial crimes involving companies. Under such agreement between a prosecutor and an organisation facing prosecution for an alleged economic or financial offence, the organisation agrees to comply with a range of terms and conditions and the prosecutor agrees to institute but then defer criminal proceedings for the alleged offence. The suspension of the proceedings is the means by which the prosecution is deferred. The threat of the prosecution proceeding in the event of breach hangs over the organisation to make compliance with the DPA more likely. No other authority may bring charges against the organisation for the same alleged offence whilst the prosecution is deferred. The law also specifies the "designated prosecutors" who may enter into a Deferred Prosecution Agreement: the Director of Public Prosecutions and the Director of the Serious Fraud Office.

[23] [2001] UKHL 12, [2002] 1 AC 754

5 Willful failure to execute a contract: Boundaries between civil and criminal liability

5.1 Introduction

In Western legal thought, the intentional breach of contract is generally considered a civil offense except under very specific, fraud-related circumstances. Criminal sanctions are only considered in breach of contract actions when the accused entered into the contract knowing he would be unable or unwilling to perform his duties under that contract. Actions or circumstances taking place during the execution of the contract are only relevant for civil liability.

Willful breach of contract does not normally lead to criminal responsibility unless it is shown that the breaching party, from the very outset of the contract, had no intention of ever fulfilling its obligations. Such actions are generally governed by fraud legislation and specific additional requirements vary from country to country. Generally it can be stated that the failure to disclose one's intention to breach is not in and of itself criminal, while failure to disclose other circumstances relevant to the execution of a contract will only entail criminal responsibility when there is a specific obligation to communicate such circumstances. Criminal liability will not be found if the breaching party did not intend to breach at the time the contract was signed, but subsequently changes his mind. In such case, the non-breaching party will normally be awarded damages.

Above all it should be noted that is usually easier to win a civil suit since the requisite burden of proof is lower than for criminal cases, where the intention to deceive must be proven beyond reasonable doubt.

5.2 France

In France, willful failure to execute a contract will normally impose civil liability. The civil code specifically distinguishes between contractual fraud ("*mensonge simple*"), which nullifies the contract, and liability for damages from the intentional failure to execute a contract. While the first is deceit taking place at the time the contract is signed[24], deceit at the execution stage (1150 civil code) takes place when, following an agreement, a party deliberately fails to execute the contract; the latter will give rise to a claim for compensation for damages. In order to prove intentional ("*fautif*") breach of contract, creditors need to prove the bad faith intent of the other party as well as the causal link between the intention (umisel/podlog)("*dol*") and the non-execution of the contract.

Civil code Article 1150 limits compensation to the creditor, holding the debtor "liable only for damages which were or could have been foreseen when the contract was signed when it is executed on account of his deceit." In accordance with Civil Code Article 1151, when "breach of the agreement [results] from the deceit of the debtor, the damages shall include the loss sustained by the creditor and the gain of which he was deprived that is an immediate and

[24] According to article 116 of the Civil Code: "*dol*"(podlog/umisel) is a cause of nullity of the agreement when the maneuvers performed by one of the parties is such that it is clear that without these maneuvers, the other party would not have contracted. It is not presumed and must be proved. The elements of the tort are: special intent, namely intent to deceive the interlocutor (intentional tort), a cause and effect relationship between the fraud and the conclusion of contract, tort taking the flawed nature of consent (result offense). Sanctions include nullity of the contract and possible damages

direct consequence of the breach of the agreement." In bilateral contracts, if a party fails to perform its obligation, the other may suspend the execution of his obligation and even request the cancellation or termination of the contract for default (Article 1184 of the Civil Code).

Under French law, criminal fraud is a crime of commission, not omission. The French Penal Code sanctions individuals who deceive another or a corporation only if the deception took place under specific circumstances: by using a false name or fictitious capacity, by abusing a genuine capacity, or by means of an unlawful manoeuvre, thereby leading that person or corporation to transfer funds or property, or to provide a service, to the detriment of that person or corporation, or a third party (French Penal Code,[25] Article 313-1). In order for the intentional failure to execute a contract to become criminally relevant, it must be established that the breach depended on or was a direct result of fraud at the time the contract was concluded (when the second party was induced to enter into an agreement by a deliberate misrepresentation of the first party). It must be shown that the second party had no intention to execute the contract from the very outset.

The Criminal division of the French Supreme Court held that "the mere issuance of unfunded checks, in the absence of external fact or physical act, staging, or intervention by third parties, does not constitute fraudulent practice." Judgment of 1 June 2005 (*No. 04-87757*). The Supreme Court refused to find fraud when an individual, taking out a large loan, failed to reveal that he is in a state of bankruptcy, reasoning that his reluctance could not be regarded as corrupt. Such behaviour would, on the other hand, meet the criteria for civil liability for fraudulent concealment ("*réticence dolosive*"). (*Cass. First civil section 23 May 1977*). Criminal intent must be proven beyond a reasonable doubt (*Cass. crim. 3 March 1949*); simply failing to return property out of the belief that continued possession was justified is similarly not criminal.

In certain cases, the willful failure to execute a contract may blur the boundaries between civil responsibility and criminal liability for abuse of trust. Abuse of trust (Penal Code Art 314-1) is embezzlement funds, securities or any property that was given and accepted upon condition it would be returned or put to a specific use. A delay in returning funds or property is, given the restrictive application of criminal law, not considered sufficient to generate criminal liability as the failure to return the property must be irreversible.Intentional failure to execute a contract will otherwise only lead to liability for civil damages under article 1150 of the civil code. Specific cases of non-execution of contractual obligations are foreseen in other laws, for example article 442-6 of the French Code of Commerce establishes civil liability for the "rupture" of an established commercial relationship without due warning.

Overall, the extremely limited, if not non-existent application of criminal sanction to the intentional failure to execute a contract is a reflection of the most recent criminal policy of the French government which, in 2007, opted to decriminalise financial and economic crimes.

[25]Fraudulent obtaining is the act of deceiving a natural or legal person by the use of a false name or a fictitious capacity, by the abuse of a genuine capacity, or by means of unlawful manoeuvres, thereby to lead such a person, to his prejudice or to the prejudice of a third party, to transfer funds, valuables or any property, to provide a service or to consent to an act incurring or discharging an obligation. Fraudulent obtaining is punished by five years' imprisonment and a fine of €375,000.

5.3 Italy

Breach of contract is criminal fraud when it results from pre-existing fraudulent intent, which was manifested through trickery, aimed as misleading the party to a contract (*Sez II Cass. 1 Oct 1983*). According to Italian jurisprudence, the fact that a contract is affected by deceit is not sufficient per se to attribute criminal responsibility to the deceiving party. To be found criminally responsible, the victim must be deceived through tricks or deceptions ("*artifizi o raggiri*"). Hence, breach of contract will lead to criminal liability only when (1) the non-breaching party has been induced to agree to a contract by trick or deception and (2) it can be proven that, at the time the contract was signed, the breaching party had no intention to execute the contract ("*animus inadimplendi*"). Criminal liability for fraud may also arise when the impossibility to execute a contract was already extant at the time the contract was concluded.

According to Italian law, general rules of conduct (according to which parties must negotiate in good faith) as well as specific statutory provisions impose a duty to inform contracting partners of certain information (*Cass. Sez II, 2/03/1996, Capra*). If, during contract negotiations, one party dishonestly fails to inform the other party of circumstances it has a duty to disclose, irrespective of whether the other party may be able to find them out by reasonable diligence, criminal liability can be inferred (*Cass. pen., sez. II, 30 October 2009, n. 41717*). For example, the Italian Supreme Court held that the sale of real estate for use as a residential dwelling when in an area exclusively filled to hotels amounted to fraud as the seller had omitted inform the Buyer thereof (*Cass. pen., sez. III, 15 gennaio 2007, n. 563*). Similarly, the preliminary sale of a building that had already been sold to third parties was also considered as fraudulent when the seller had failed to inform the purchaser of the existence of a previous sale, irrespective of the previous contract's validity (*Cass. pen., sez. I, 12 giugno 2006, n. 19996*).

Under Italian law, fraud can be found at the execution stage of a contract if, to avoid or postpone a claw-back action by creditors, the debtor uses invalid sureties giving a false representation as to his solvency (*Cass. pen., sez. II, 14 febbraio 2012, n. 5572*).

The Italian Supreme Court held that paying for goods with bad cheques is not per se fraudulent unless further behaviours, such as dishonest conduct capable of inducing the victim to reasonably rely on the honesty of the other party and his ability to pay his debts, have taken place. *Cass. pen., sez. II, 20 December 2011, n. 46890*). Conversely, a seller who has kept silent in bad faith about faults of the goods will only incur criminal liability if the faults were hidden through trickery (and not simply by omission). A sales contract that was formulated in vague terms leading to different interpretations of its terms and hence to a dispute between the parties as to its interpretation is not considered "trickery" at the expenses of the purchaser (who at the time he signed the contract did not ask whether a certain good was included in the sale) (*Cass. 7 July 1943*).

Italian courts did find the failure to pay for goods or services to be fraudulent where the buyer regularly paid initial purchases for a limited amount in order to convince the seller of his good faith, but then stopped paying when the purchase valued increased. Here, the courts considered that an intention to deceive the seller could be gauged by considering the clear discrepancy between the overall amount of the paid goods and the amount of the unpaid goods. (*Cass. 25 march 1983*)

Pursuant to Article 641 Anyone who, while concealing his own insolvency, incurs an obligation with the clear intention of not meeting it shall, on complaint of the victim, be considered criminally liable. Criminal concealment of insolvency as per Article 641 requires preforming a positive action that conceals the insolvency and leaves the injured party ignorant of such insolvency. The mere silence on one's real financial situation is not sufficient to generate criminal liability (*Corte app. pen.Napoli, sez. II, 28 February 2011, n. 951*). Using a credit card beyond one's solvency amounts to fraud (and not the less serious crime of fraudulent insolvency) when the author has not only hidden his inability to pay but has made use of artifices and deception to misrepresent his solvency with the specific goal of inducing others in error (*Cass. pen., sez. II, 2 maggio 2007, n. 16629*).

Individuals who fail to pay a debt without having intentionally hidden their own insolvency at the time a contract as concluded were found by the Italian Supreme Court to have committed breach of contract and not fraudulent insolvency (and thus to be civilly, rather than criminally, liable) (*Cass. pen. sez. II, 13 October 2009, n. 39890*). The Supreme Court also held that the mere failure to proceed to the sale of goods after having received and retained a deposit by the purchaser, does not automatically expose the seller to criminal liability unless a specific intention to evade execution of the contract has been proved. (*Cass. pen., sez. II, 16 aprile 2010, n. 14674*).

Unilateral modification during a contract's execution of terms previously agreed upon by the parties will only lead to criminal liability if it can be proved that the breaching party misled the other as to his intention to perform the contract under the terms agreed at the time the contract was concluded. (*Ca.. Sez. I, 25 June 2003*).

When the breach of contract is due to a vendor selling property belonging to third parties, criminal liability will only arise if the vendor pretended or falsely stated he was the owner while, from the very outset, having no intention to ensure that the property would be acquired by the other party. If the vendor simply remained silent on the circumstance that the property did not belong to him, he will be civilly liable for breach of contract.

When parties sign a non-competition agreement whereby the seller of an enterprise undertakes to abstain for a certain number of years to open a similar enterprise which, due to its activities, location or other circumstance, may attract clients away from the sold enterprise, the contract is regulated by the civil code (article 2557 on "*divieto di concorrenza*"). In case of breach, the seller will be considered civilly, but not criminally, liable.

The willful refusal to pay the remaining part of an agreed price is not considered fraudulent if the breaching party believes (rightly or wrongly) that he has the right to refuse to pay, for example if he considers that the other party has failed to meet its own obligations (*trib. Roma 4 December 1954*).

Fraudulent insolvency, the crime of failing to pay one's creditors, is specifically regulated by the Italian criminal code (Criminal Code Art. 641) and occurs when a party conceals its solvency and keeps its victim ignorant as to the real situation. This crime is not considered as grave as fraud and is punished accordingly. However, if the party has misrepresented his solvency and thereby induced the victim to believe that he could pay, he will be liable for fraud. A typical example is the person who goes to a restaurant dressed elegantly and displays a wallet full of false banknotes but fails to pay for his meal. If the person went dressed

normally but did not pay, he will be liable only for fraudulent insolvency, but not fraud. If he were dressed as a homeless person, his behaviour would not be considered criminal at all as it was clear that he would be unable to pay by his appearances so he did not mislead anybody. In both cases the misleading actions must have taken place at the time the contract was concluded.

An entrepreneur who obtained a loan by pretending he was in a good financial situation while in reality he was unable to repay the loan is criminally liable for fraud even if his intention was not to avoid repayment but he had simply hoped to be in an economic situation that would allow him to pay at the time payment became due. (*Cass 22 Oct. 1962*). An entrepreneur who maliciously omitted to declare that he had already received payments for the sale of real estate that he had promised to use to repay his bank loans was found criminally liable for fraud, as the court held that such behaviour was apt to mislead the bank (*Genova Court of Appeal, 10 March 2004*)

Recently, the Italian Supreme Court has specified the boundaries between civil and criminal responsibility in cases where after the payment of a price a good has not been delivered. The court stated that while normally such failure to execute a contract, even if willful, only leads to civil responsibility, when the seller has managed to convince the victim to sign the contract by prospecting the possibility of considerable benefits such as a an excessively low price, then he will be guilty of fraud (*Cass. sen. 5922 del 7.02.2013*).

5.4 Spain

Under Spanish law, civil liability for breach of contract will arise when one party misleads the other to induce it to enter into the contract, but some possibility, however remote, of the agreement's terms being realized remains. *STS 1117/1996, of 31 December*. Remedies under civil law in these cases include specific performance, compensation for damages, or termination of the contract. The underlying principle is that the civil law provides remedies to restore the rule of law when it is violated and the interests protected are purely individual. The use of criminal law remedies to address breach of contract is considered residual and a form of *extrema ratio*.

Breach of contract will lead to criminal liability only when it has been established, beyond any reasonable doubt, that from the very outset the offending party feigned solvency in order to contract with another party, without ever harbouring the intention to fulfil this obligation and thereby inflicting pecuniary damage on the other party. In these cases criminal provisions on fraud will be applicable.[26]

The Spanish Supreme Court has also clarified that fraud will not be found if the fraudulent intention not to abide by the contractual terms arises after the conclusion of the contract (*dolo*

[26] The elements that compose the crime of fraud , according to the guidelines of the doctrine and jurisprudence (on STS 465/2012 of 1 June) are: 1) The use of a prior deception by the perpetrator, sufficient to create an inadmissible risk to the legal right ; this adequacy , suitability or fitness of deception is to be established under a mixed objective - subjective standard based on the assessment of the level of insight of the average citizen as well as on the specific circumstances of the case; 2) The deception must trigger the error of the victim of the action; 3) there must also be a transfer , precisely because of the mistake, to the benefit of the author of the fraud or a third party; 4) The deceptive conduct must be executed willfully and for profit; 5) it must result in a damage to the victim, and the damage must be causally linked to the deceitful conduct of the perpetrator.

subsequens). Without doubt, intent must precede all the other elements of fraud (*STS 393/1996, of 8 May*). Fraud is found when there is deception at the origin of the contractual relations because there is a mismatch between the inner will of one party not to comply with the contract terms and its externalized and misleading representation to the other party of the will to comply. STS 14 June 2005. The offender feigns a serious intention to commit to the contract when, in fact, his real intention is to take advantage of the other party. It is also required that the "*engaño*" be sufficient to deceive and induce the mistake of the victim (*STS 61/2004, of 20 January*) damage. This occurs when, under the guise of regular contractual will, there is an intention to hide, conceal, or falsely represent that causes the other party to err, to transfer assets or to incur some loss that unjustly enriches the party who used deception for profit (see also the *SSTS 1045/1994 of 13 May and 987/1998, of 20 July*).

For example with decision *STS 2202/2002, of January 2*, the supreme court stated that "when a disproportionate value was attributed to a good, there could be no fraud when the disproportion was readily apparent to the recipients of the fraudulent conduct, and they could, even with the help of timely verification of state registers, find the true value of the property on the market.

Normally the risk of breaching a contract is inherent in commercial activities so, for example, failure to repay a credit will not lead to criminal charges unless the risk undertaken by the debtor was extremely high and did not correspond to any commercial logic as it can be inferred that the debtor had no intention to return the credit under the circumstances. In *STS 247/1996*, the court found fraud (and not simple breach of contract) when the offending party knew from the outset that the credits they offered for purchase to the victim could never be repaid. The court considered that, since the culprits had assured the existence of a credit that did not exist or did not exist to the extant they had promised, the matter was not one of assessment of financial risks but of misrepresentation of facts. At the time the credits were offered, the culprit knew they were not executable – the hope that the financial situation of his/her enterprise would improve was based on the taking place of events that were out of his control. When a party intends or clearly knows that execution will be impossible or highly problematic (i.e., that it will not want or be able to execute the contract), it will be criminally liable for fraud (*STS 1117/1996, of 31 December*). However, if, using reasonable diligence, the victim could have avoided the damage caused by the breach of contract, criminal liability will not arise. This is particularly true for entrepreneurs who are expected to undertake verification measures when contracting. The fact that a notary participated in the registration of a contract does not exclude fraudulent intent since the notary is not required to ascertain the real intentions of the parties but only the existence of formalities.

Fraud has been found when an enterprise solicited the prepayment of sums and even performed some works for a client knowing that it would be unable to execute the contract in full. The court imputed such knowledge because, at the time the prepayment was solicited, the company had already been involved in a procedure that would lead to its declaration of insolvency and the solicitation of pre-payment was an attempt to regain liquidity. It was clear from the circumstances that the company had no intention to complete the works. (*Audiencia nacional* 20 July 1998). A similar case was decided by the Court of Cassation (21/2010 of 26 January 2010), where the failure to execute a contract on the part of a company was found fraudulent as the company had already de facto ceased to exist at the time the contract was agreed – it had not filed its annual accounting reports and had laid off employees These circumstances were considered sufficient to find an intent to deceive. Usually however, in the

absence of other circumstances, it is necessary that no activity whatsoever was carried out in order to prove fraud (STS 12 may 1998).

Fraud can also be imputed by the use of typical fraudulent schemes such as the provision of promissory notes which are invalid or obtained from non-existant issuers in order to obtain a discount contract from a bank. STS 1092/2000 27 November). *Dolus bonus*, an exaggeration of product or service's virtue is not relevant for civil or criminal responsibility

5.5 Germany

In principle, breach of contractual obligations is not a criminal offense under German criminal law – creditors' claims are subject to civil procedure. The most relevant exceptions are the so-called fraudulent representation to obtain a contract ("*Eingehungsbetrug*") – deception at the time of signing – and fraudulent performance ("*Erfüllungsbetrug*") – deception.
Fraudulent representation occurs when a contracting party enters a contract with the intention of willfully breaching the contract or knows or should know that it cannot fulfill its obligations, with the intent of obtaining a pecuniary advantage by inflicting a property loss on the other parties[27]. The crucial element is that the party in breach must have had the intent to breach/not fulfil at the time the contract was formed. Defaulting on a debt is not sufficient.
Fraudulent performance can be divided into two categories: true and untrue performance fraud. True performance fraud exists when the defrauding party decides to breach the contract only after the contract has been agreed upon, in which case the defrauding party will be liable between the promised and actually delivered performance. Untrue performance occurs when a party makes untrue representations at the time of contracting, such as misrepresenting the

[27] The central provision for criminal integration in case of willful breach of contract in both special cases is § 263 StGB (Fraud):

„(1) Whosoever with the intent of obtaining for himself or a third person an unlawful material benefit damages the property of another by causing or maintaining an error by pretending false facts or by distorting or suppressing true facts shall be liable to imprisonment not exceeding five years or a fine.

(2) The attempt shall be punishable.

(3) In especially serious cases the penalty shall be imprisonment from six months to ten years. An especially serious case typically occurs if the offender

1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud;
2. causes a major financial loss of or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud;
3. places another person in financial hardship;
4. abuses his powers or his position as a public official; or
5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting fire to it or caused the sinking or beaching of a ship.

(4) Section 243(2), section 247 and section 248a shall apply mutatis mutandis.

(5) Whosoever on a commercial basis commits fraud as a member of a gang, whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269 shall be liable to imprisonment from one to ten years, in less serious cases to imprisonment from six months to five years.

(6) The court may make a supervision order (section 68(1)).

(7) Section 43a and 73d shall apply if the offender acts as a member of a gang whose purpose is the continued commission of offences under sections 263 to 264 or sections 267 to 269. Section 73d shall also apply if the offender acts on a commercial basis.

quality of the goods being sold. In such a case, fraud will only be found if the value of the goods or services is less than that for which they were sold.

At the execution stage of a contract there will be deferral fraud, and not simple breach of contract when the author withheld or delayed the ability of the creditor to claim his due by deceiving him and making promises about payments and personal guarantees. Such deferral fraud, however, is only punishable if the chances for the fulfillment of a claim decrease with the passage of time and thus the passing of time decreases the value of the credit.[28]

In the case of a loan agreement, fraud may take place if the repayment is placed under circumstances that make it less secure when the creditor can satisfy his credit with difficulty, especially without the participation of the debtor.[29]

A fraud may take place when the deception affects the security of the recovery of a loan. In such instances to calculate the prejudice it may be necessary to assess the hypothetical amount that would have been realized had the deception not taken place[30]. Fraud takes also place when a person deceives another into parting with his money to make an investment that he falsely represent as being sound when he actually anticipated the possibility of a total loss.[31]

[28] BGH, judgment dated 19 June 1951

[29] BGH, judgment dated 5 May 2009

[30] BGH, judgment dated 27 March 2003

[31] BGH, judgment dated 4 December 2002