APPLICATION OF PRE-TRIAL DETENTION AND HOUSE ARREST IN UKRAINE

Based on the analysis of practice for the period 2018-2020

RESEARCH REPORT

COUNCIL OF EUROPE

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LIST OF ABBREVIATIONS

Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
CoE	the Council of Europe
ECtHR	the European Court of Human Rights
CoE CM	the Committee of Ministers of the Council of Europe
CCP	the 2012 Code of Criminal Procedure of Ukraine
CC	the Criminal Code of Ukraine
SC	the Supreme Court;
USRCD	the Unified State Register of Court Decisions
Civil Code	the Civil Code of Ukraine
HCJ	High Council of Justice of Ukraine
NSJ	Nation School of Judges of Ukraine
BCDP	Body in Charge of the Disciplinary Proceedings of the public prosecution service of Ukraine
BQDC	Bar Qualification and Disciplinary Commission of Ukraine

INTRODUCTION

A) Objectives of this Research

1. In its judgments against Ukraine the European Court of Human Rights (ECtHR) found numerous violations of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Some of these violations were caused by structural deficiencies originating from shortcomings in domestic legislation or inappropriate practice of its application. To address the above problems, the ECtHR obliged the State to reform its legislation and practice to bring it into line with its findings. Among the measures taken by Ukraine was the adoption of the Code of Criminal Procedure of Ukraine (CCP)[1]. It has removed some of the legislative shortcomings identified by the ECtHR.
2. Next step was to ensure that the provisions of CCP were effectively applied in practice by all the domestic authorities involved. To assess this aspect of the problem, the Committee of Ministers of the Council of Europe (the CoE CM), that is endowed with the task of supervising the execution of the ECtHR judgments by member States, in its decisions called on the Ukrainian authorities to provide information as to how the CCP is implemented in practice in the context of the problems identified by the ECtHR and invited them to submit an overview of domestic detention practices.[2]
3. It is for assisting the domestic authorities in the above task that this Research was undertaken. Its purpose is to give a comprehensive overview of the practice of application of pre-trial detention and 24-hour house arrest in Ukraine. The research was conducted before 24 February 2022 when the Russian Federation's unprovoked and unjustified military aggression against Ukraine commenced. Its release was put on hold till November 2022.

B) Methodology

4. The Research was carried out on the basis of the specially designed Methodology, which was agreed with the national authorities and which is an integral part of this Research (see Annex 1). The Methodology includes full description of the process of research, lists the information and documents that were analysed and the way they were obtained. With respect to the analysis of the court decisions, the checklists foreseen under the methodology were slightly revised based on the review of the pilot batch of court decisions (see Chapter 4 of the Research).

C) Scope of the Research

5. The Research was to examine the state of play, to analyse progress and to formulate recommendations vis-à-vis the problems identified by the ECtHR and the CoE CM in the cases against Ukraine with respect to violations of the Article 5 of the Convention. The list of such issues is set out in the CoE CM notes[3] and includes the following matters:
    1) the general practices of unregistered detention by the police and administrative arrest for the purposes of criminal investigation without safeguarding the detainee's procedural rights, in particular the right to a defence;
    2) detention without judicial decision (e.g. during the period between the end of the investigation

1 See also "Opinion on the Criminal Procedure Code of Ukraine" prepared in 2012 – https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802e707e

2 CM/Del/Dec(2019)1348/H46-33

3 CM/Notes/1348/H46-33 – https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168094756b

and the beginning of the trial);

3) failure to state the relevant grounds when authorising detention on remand or to set a time-limit for such detention (Article 5 § 1);

4) failure to bring the arrested person promptly before a judge;

5) failure to advance relevant and sufficient grounds for extending detention on remand or to consider any alternative preventive measure (Article 5 § 3);

6) lack of a clear procedure in the legislation which would allow speedy review of the lawfulness of detention on remand (Article 5 § 4); and

7) lack of a remedy capable of providing compensation for the above breaches (Article 5 § 5).

6. Initial version of the Methodology limited the scope of the Research to issues under nos. 2 – 7 above. The practice of unrecorded detention (issue no. 1) could not be examined within the framework of this Research due to difficulty of identifying such breaches.

7. The issues indicated under nos. 2 and 7 above are rather caused by the deficiencies of legislative regulation and are addressed only in parts of the Research dedicated to analysis of the relevant domestic legislation.

8. Also, as the practical implementation of the second stage of the Research was about to commence that would inter alia entail review of case files, its scope had to be further narrowed. Thus, the successful analysis of the issues nos. 4 and 6 above depended to a large extent on unrestricted access to full detention case files chosen by the team of experts based on the sampling rules stipulated in the Methodology. The domestic authorities assisting the team of experts in performing the Research informed that full access to detention case files could not be ensured. Instead, they proposed the Research to be carried out based on data available in the publicly accessible Unified State Register of Court Decisions (USRCD). Since the USRCD includes only court decisions the issues nos. 4 and 6 had to be excluded from the scope of the Research.

9. Therefore, the Research concentrated on issues nos. 3 and 5. On more advanced stages of the Research, the domestic authorities provided the team of experts with access to 165 detention case files from 3 courts of their own choosing. The analysis of these case files helped the experts to perform more thorough and deep analysis of the pre-trial detention practices. It allowed, among other things, to analyse not only the reasoning adduced by the courts in their decision but also the performance of prosecutors and defence and their role in existing practices of applying pre-trial detention.

10. Apart from that in the course of the Research the team of experts identified a number of issues which have not been specifically highlighted by the ECtHR in its judgments against Ukraine but which nonetheless were related and contributed to the existence of problems the ECtHR identified.

D) Stages of the Research

11. The Research includes four main stages. The first stage was the desk research. Its purpose was first of all to give an overview of key ECtHR judgments against Ukraine finding violation of Article 5 of the Convention and relevant CoE CM decisions and procedures. Secondly, it had to give the analysis of relevant domestic legal framework concerning detention in the context of above international instruments. The results of the above stage of the Research are laid down in Chapters 1 and 2.

12. The second part of the Research was a survey conducted among three categories of professionals involved in the process of applying detention: prosecutors, attorneys and judges. It was carried out on the basis of the list of specific questions which are an integral part of the Methodology. These questions were distributed among the participants. Their answers were collected and analysed by the team of experts. The results of the Survey are set out in the Chapter 3 below.

13. The third stage of the Research concerned the analysis of court decisions and case files concerning detention. It is the most complex part of the Research. The detailed description of the process of this stage of the Research and analysis of its results are laid down in Chapter 4.1. below.

14. The forth stage of the Research concerned the analysis of statistics provided by domestic authorities. Part of the statistics which comprised general information about application of preventive measures by the courts was already available. The other part was for the purposes of this Research prepared by local courts on the basis of comprehensive analysis of criminal case files (see Chapter 5 for more details).

15. The fifth and final stage of the Research was the discussion of preliminary version of the report in focus groups. Overall there were five focus groups: scholars, human rights activists, attorneys, prosecutors and judges. The purpose of this stage was to test the results of the research, gain some insight into the origin of problems identified as the result of the Research and to analyze which measures will better remedy the above problems.

E) Sociological sampling of the court decisions and case files concerning detention analysed in the framework of the research.

1. Sampling for the Initial pilot analysis.

16. A stratified single-stage random sample was developed for the study. Initially, the sample was divided into 4 equal parts, which represent the regional structure of Ukraine: Kyiv (Centre/North), Lviv (West), Odesa (South), Kharkiv (East). It was assumed that 200 cases would be selected for each city.

17. Further, for each city, proportional stratification was carried out by year (2017, 2018, 2019) and by court. Accordingly, each year is represented in the sample in proportion to the number of cases for that year, and within the year each court is represented in proportion to the number of cases from that court. As a result, it was determined how many cases were to be selected in each "cell" of the city X year X court.

18. At the last stage, for each city X year X court, the required number of cases was randomly selected from the available cases (with a random number generator). The selection was carried out completely randomly without any arbitrary actions, which guarantees the correctness of the selection process and obtaining truly representative results.

19. A total of 816 cases were selected, about 200 in each of these 4 cities.

2. Sampling for the main part of Research

20. A stratified single-stage random sample was developed for the study.

21. The sample was stratified by region (24 regions of Ukraine), year (mostly 2018, 2019, 2020 see para. 244 below for more detailed statistics), categories of detention / house arrest, as well as by categories of satisfied / extended. In total, such criteria give a total of 288 stratas. It was estimated that a total of 1,002 cases would be selected for the sample.

22. Further, for each "cell" (combination of all the above criteria) in proportion to the number of cases, it was determined how many cases should be selected for the sample (in some cases there were few cases, so in such "cells" no case was selected). Accordingly, all regions of Ukraine, all years, categories of detention / house arrest, as well as categories of satisfied / extended are proportionally represented in the sample.

23. At the last stage, the required number of cases was randomly selected for each "cell" from the available cases (with a random number generator). The selection was carried out completely randomly

without any arbitrary actions, which guarantees the correctness of the selection process and obtaining truly representative results.

24. A total of 1,002 cases were selected.

25. Apart from the aforementioned cases the authorities provided the research team access to 165 case files concerning pre-trial detention from three first instance courts in Kyiv, Lviv and Kharkiv. The Supreme Court (SC) also provided general statistics concerning application of preventive measures in 2019 – 2020 which is annexed to this Research. Also, the SC provided detailed statistics concerning length of pre-trial detention in 5288 sets of criminal proceedings covering 2020. These materials are also analysed in relevant Chapters of the Research.

3. The research team.

26. The initial version of the Methodology was prepared by Nazar Kulchytskyy4 and peer reviewed by Oleksandra Yanoska[5] by way of adapting the methodology that had been used for the similar research in the Republic of Moldova to specific features of the Ukrainian legal system.

27. The research team comprised of a lead national consultant and 11 field consultants engaged for different tasks throughout the research. The lead consultant was Markiyan Bem whereas the team of field consultants comprised of Olha Denkovych, Nataliya Glynska, Oleksandr Khoroshavin, Daria Klepka, Yaroslav Korniienko, Roman Maksymovych, Alla Mukhshymenko, Oleksii Plotnikov, Viktoria Saienko, Tatiana Shepilenko, and Zlata Shvets. The lead consultant conducted the desk research. The materials related to the third stage of the research were collected and/or analysed by the designated field consultants each of whom was assigned a specific area of research to be covered. The lead consultant, in coordination with the CoE secretariat, also provided initial training and continued guidance to the field consultants in course of the research. The lead consultant was similarly responsible for the consolidation of the findings of all stages of the research and proposing recommendations in a report. Finally, Eric Svanidze[6] carried out a peer review of the preliminary draft of the the Research report.

4 A practicing lawyer in Ukraine with extensive experience and a criminal justice expert.

5 Judge of the Ukrainian Supreme Court.

6 International consultant of the Council of Europe and the research team lead for the aforementioned research conducted in the Republic of Moldova.

1

Legal regulation of issues related to deprivation of liberty of a suspect / accused person before sentencing

1.1. Introduction

28. This section is aimed at analysing the subject of the present research from the standpoint of the Convention.

29. First of all, it reviews the judgments of the ECtHR in respect of Ukraine, which found a violation of Article 5 of the Convention due to unjustified decisions of the national courts on detention on remand and 24-hour house arrest, and a number of other related problems.

30. In this regard, it should first be noted that the Convention and the case-law of the ECtHR enjoy unconditional and ever-increasing authority in the national legal system.

31. Thus, according to Article 9 of the Constitution of Ukraine, the Convention, like any other existing international treaties that are in force, ratified by the Verkhovna Rada of Ukraine, is part of the national legislation of Ukraine. In order to strengthen its role and significance, the law of Ukraine "On the execution of judgments and the application of the case-law of the European Court of Human Rights" was adopted in 2006. This Law establishes the obligation and procedure for executing the ECtHR judgments in cases in respect of Ukraine. The Law also contains a provision that specifically emphasises that courts shall apply the Convention and the case-law of the Court as a source of law when considering cases. The "case-law of the Court" hereby refers to the entire array of judgments of the ECtHR and formerly the European Commission on Human Rights.

32. According to part 5 of Article 9 of the CCP, the criminal procedural legislation of Ukraine shall be applied in the light of the case-law of the ECtHR. Also, as will be shown below, the provisions of the CCP in so far as they relate to the issues analysed in this study are largely the result of the almost step-by-step implementation of the current case-law of the ECtHR.

33. At the practical application level, the assessment of knowledge of the Convention and the case-law of the ECtHR is an integral element of qualification examination both in the judiciary system and in the prosecution and the bar systems. It seems that even in practice, parties to the criminal proceedings try to use the case-law of the ECtHR in their work with varying success.

34. Finally, this section will also analyse the practice of the CoE CM. In its decisions, the CoE CM analyses the state of execution of the ECtHR judgments by Ukraine and the need to take certain measures to address the problems identified therein.

1.2. ECtHR case-law in respect of Ukraine.

35. The issues addressed by this study, namely, the unjustified decisions on remand in custody and 24-hour house arrest, improper and/or excessively lengthy consideration of the defense applications to change the mentioned preventive measures to other non-custodial measures, are usually analysed by the ECtHR under Article 5 §§ 3 and 4 of the Convention. At the same time, there are a number of other issues that relate to the above and partially fall within the scope of this study. In particular this refers to the cases when the national court in its decision on detention or 24-hour house arrest does not indicate any grounds other than reasonable suspicion. Such issues are normally covered by Article 5 § 1 of the Convention.[7]

36. As of today, the ECtHR has adopted 428 judgments in cases against Ukraine in which it considered complaints under Article 5 of the Convention.[8] In about 127 judgments the Court found a violation of

7 Kleutin, para. 105; Ignatov, para. 36

8 https://www.ECtHR.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf

Article 5 § 3 of the Convention. The absolute majority of judgments where the ECtHR found a violation of Article 5 § 3 of the Convention concerned the subject at hand, namely the national courts' unjustified decisions on detention on remand and 24-hour house arrest. Only a small part of these judgments relate to other aspects of Article 5 § 3 of the Convention. These include, for example, violations related to the excessive time taken to bring a detainee before a judge to decide on the imposition of a preventive measure.[9]

37. Judgments of the ECtHR directly related to the subject of the present research will be further analysed.

38. In general, the right of a person guaranteed by Article 5 § 3 of the Convention to trial "within a reasonable time or to release" provides for the ECtHR to establish, on the one hand, whether there were "relevant" and "sufficient" grounds for detention, and on the other hand, "whether the national authorities displayed "special diligence" in the conduct of the proceedings".[10] In this regard, the ECtHR analyses the "complexity and special characteristics of the investigation".[11] At the same time, the ECtHR usually does not go to a detailed analysis of the thoroughness of the investigation. But, in any event, in cases in respect of Ukraine, the ECtHR found violations due to the lack of "relevant" and "sufficient" grounds for depriving the person of liberty. Such a position seems quite logical since it makes no sense to analyse the effectiveness of a pre-trial investigation if the decisions on detention or 24-hour house arrest themselves are unjustified.

39. Thus, Article 5 § 3 of the Convention requires "that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. The arguments for and against release must not be taken *in abstracto* but must be supported by factual evidence".[12]

40. Often, in the judgments in respect of Ukraine, the ECtHR draws attention to the fact that the courts refer to the reasonable suspicion that a person has committed an offense as one (and often one of the few or even the only) of the arguments for depriving a person of liberty. In this regard, it should be emphasised that according to the established case-law of the ECtHR, the persistence of reasonable suspicion is a condition *sine qua non* for imposing a preventive measure involving deprivation of liberty against a person, but after a while, it becomes insufficient. Normally, the requirement to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say, "promptly" after the arrest.[13] Therefore, having regard to other requirements of the national law, reasonable suspicion as a ground for deprivation of liberty may suffice only at the initial stage of detention.

41. In this regard, according to the case-law of the ECtHR, "the danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial".[14]

42. It is worth noting here that if the ECtHR finds that the person was deprived of liberty in the absence of reasonable suspicion, it usually finds a violation of Article 5 § 1 of the Convention.[15] Such a violation,

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9 Gal, para. 28; Belousov, para. 95; Kvashko, para. 71; Nechiporuk and Yonkalo, para. 215; Oleksiy Mykhaylovych Zakharkin, para. 91; Salov, para. 59; Nevmerzhitsky, para. 127. At the same time, in two of these judgments (Nechiporuk and Yonkalo and Nevmerzhitsky), the ECtHR also found violations of Article 5 § 3 of the Convention due to unjustified detention decisions. Here and elsewhere in the present study, abbreviated case names will be usually used.

10 Korban, para. 154

11 Nevmerzhitsky, para. 132

12 Taran, para. 69.

13 Buzadji v. the Republic of Moldova, application No. 23755/07, para. 102

14 Taran, para. 69.

15 However, there may be exceptions. Thus, in some cases, the ECtHR found a violation of Article 5 § 3 of the Convention due to the fact that the domestic court did not specify any grounds for extended detention at all. Such a decision was

in so far as such an assessment of the Convention violations can be made at all, is particularly arbitrary as it resulted from non-compliance with the most basic safeguards provided for in Article 5 of the Convention. However, in terms of Article 5 § 3 of the Convention, the ECtHR assesses whether the decisions to deprive a person of liberty were justified, in particular, whether the decision included specific grounds for deprivation of liberty and whether these grounds were confirmed by any specific facts and evidence. Translating into the language of national legislation, this is in reference to the national court or investigating judge substantiating the existence of risks that give sufficient grounds to believe that a person can commit actions provided for in Article 177(1) of the CCP.

43. The abovementioned problem has existed in Ukraine in one form or another since its ratification of the Convention. Thus, in 2005, in the *Nevmerzhitsky* case, which was the first judgment under Article 5 in respect of Ukraine, the ECtHR found a violation of Article 5 § 3 of the Convention due to the lack of proper justification for decisions ordering the applicant's detention. The domestic courts' decisions ordering detention on remand were based on such grounds as "the risk of obstructing, intimidating witnesses and tampering with evidence." At the same time, the detention decisions did not indicate any factual circumstances that would confirm the existence of these risks. Moreover, some of the grounds that were sufficient for initial detention became irrelevant over time. Thus, the risk of obstructing the investigation was much less relevant at the stage when the applicant began familiarising himself with the materials. In addition, the national court did not analyse the possibility of applying alternative preventive measures, in particular in the form of bail.

44. In the 2008 judgment delivered in the *Svershov* case, the ECtHR first discovered another issue. In this case, the applicant's lawyer applied to the court to lift the detention on remand imposed against the applicant. In his request, he put forward several rather weighty and quite relevant arguments: the applicant was a minor, had no previous convictions; had positive aspects to his character; permanently resided in the city of Kerch; did not – and could not – try to abscond due to the lack of resources or relatives in other parts of the country, etc. The national court did not pay attention to these arguments. In the Court's opinion, the domestic courts, by ignoring those arguments altogether, despite the fact that they were specific, pertinent, and important, fell short of their obligation under Article 5 § 4 of the Convention.[16]

45. In 2009, in the case *Sergey Volosyuk*, the ECtHR had to consider the applicant's complaint that at the trial stage of his case, the court examined the defence request for release pending trial for too long. Having analysed the circumstances of the case, the ECtHR noted that the defence's requests were usually considered in the course of the hearings held in the applicant's case. However, in view of the fact that such hearings were sometimes scheduled at very long intervals, the speed of consideration of these requests was incompatible with the requirements of Article 5 § 4 of the Convention, which provides that the lawfulness of the detention shall be decided speedily by a court.[17]

46. Furthermore, the ECtHR delivered a significant number of judgments that found a violation of Article 5 § 1 of the Convention due to the lack of any indications in court decisions as to the grounds for ordering detention on remand or extended detention.[18]

47. Subsequently, similar violations were repeatedly found by the ECtHR in its judgments.[19] At a certain stage, it became obvious that these problems are not the result of isolated "failures" in the work of the judiciary but are systemic in nature. In this regard, in another judgment in the case *Kharchenko*, the ECtHR once again found the above-mentioned violations of Article 5 §§ 3 and 4 of the Conven-

made in the case of Shalimov v. Ukraine (para. 51).

16 Svershov, para. 71.

17 Sergey Volosyuk, paras. 56 – 58.

18 See, for example, the ECtHR judgments in the cases of Solovey and Zozulya (para. 76) and Yeloyev (para. 54).

19 Feldman, Buryaga, Vitruk, Yeloyev, Solovey and Zozulya, Shalimov, Moskalenko and others.

tion and decided to apply Article 46 of the Convention and provide the Government of Ukraine with a clear signal of the need to undertake general measures to address these problems and prevent their recurrence.

48. To this end, the ECtHR first of all, clearly outlined the nature of the problems addressed in its judgment. Thus, in the *Kharchenko case*, the ECtHR noted that "the Court often finds a violation of Article 5 § 3 of the Convention on the ground that even for lengthy periods of detention the domestic courts **often refer to the same set of grounds, if any, throughout the period of the applicant's detention,** although Article 5 § 3 requires that after a certain lapse of time the persistence of a reasonable suspicion does not in itself justify deprivation of liberty and the judicial authorities should give other grounds for continued detention, which should be expressly mentioned by the domestic courts".[20] As to the right to review of the lawfulness of the detention guaranteed by Article 5 § 4, the ECtHR notes that "in this and other similar cases previously decided it faced an issue of the **domestic courts' failure to provide an adequate response to the applicants' arguments as to the necessity of their release**". Moreover, "**speediness of review of the lawfulness of the detention seems to be compromised by the fact that such a review is linked to other procedural steps** in the criminal case against the applicant during the investigation and trial, while such procedural steps might not necessarily coincide with the need to decide on the applicant's further detention promptly and with reasonable intervals".[21]

49. Therefore, having clearly outlined the scope of these problems and having found their structural nature, the Court stresses that "specific **reforms in Ukraine's legislation and administrative practice** should be urgently implemented in order to bring such legislation and practice into line with the Court's conclusions in the present judgment to ensure their compliance with the requirements of Article 5".[22]

50. Partly in response to the aforementioned judgment, Ukraine adopted the CCP on 13 April 2012, which replaced the 1960 Criminal Procedure Code of Ukraine. With regard to the issues discussed above, the CCP contained clear provisions that regulated in detail the deprivation of liberty at the stage of pre-trial investigation and trial. These provisions, as will be demonstrated below, reflected all the key requirements set out in the ECtHR's case-law under Article 5 of the Convention. A significant number of problems involving deprivation of liberty that were previously identified by the ECtHR, especially those caused by deficiencies in the legislation, were eliminated.[23]

51. Within about 3 years after the judgment in the case *Kharchenko*, the ECtHR delivered a significant number of judgments on violation of Article 5 of the Convention, but all of them related to the period preceding the adoption of the CCP in 2012.

52. However, in 2014 the ECtHR delivered its judgment in the case *Chanyev*, which found a violation of Article 5 of the Convention in the circumstances related to the provisions of the new CCP. In the abovementioned case, the applicant's case was transferred to the trial court for consideration on the merits the day before the end of his detention on remand. Nevertheless, the trial court did not rule on the applicant's continued detention for about one and a half months, and the applicant remained in detention, even though Article 203 of the CCP clearly provided that any decision on preventive measures should cease to have effect immediately after the expiry of its term of validity. All his requests for release were rejected by the investigating judge stating that the trial court had two months from the date of referring the case to the court to decide on the applicant's continued detention under Article

20 Kharchenko, para. 99.

21 Ibid, para.100.

22 Ibid, para.101.

23 See CM/Del/Dec(2017)1294/H46-35: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168074a339

331 § 3 of the CCP. Having regard to these facts, the ECtHR concluded that the existing legislative framework allows the continued detention of the accused without a judicial decision for a period of up to two months and found a violation of Article 5 of the Convention.[24] The ECtHR also applied Article 46 of the Convention in this case. The ECtHR noted that the abovementioned problem was considered to stem from a legislative lacunae and stressed the need to bring its provisions in line with Article 5 of the Convention.[25]

53. It is worth noting that despite the above-mentioned requirement of the ECtHR, as well as concerns expressed by the CoE CM,[26] no changes have been made to the national legislation, in particular Article 331 of the CCP, until now. However, it appears that since the judgment in the case of *Chanyev*, the ECtHR has never found a violation of Article 5 of the Convention in the circumstances considered in the above case. The probable reason for this could be a number of measures taken by the national authorities to remedy this problem in practice.[27] In any case, although the aforementioned problem remains unresolved it is not analysed in the framework of this study and is referred to solely to provide a complete picture of the problems in complying with Article 5 of the Convention relating to the application of the CCP.

54. In 2016, the ECtHR delivered a judgment in *Ignatov* case, in which it found a violation of Article 5 §§ 1, 3, and 4 of the Convention similar to those in *Kharchenko* case under the new CCP.

55. Thus, in *Ignatov*, the applicant's pre-trial detention lasted for nearly a year and eight months. The ECtHR found a violation of Article 5 § 1 of the Convention due to the fact that the national court did not indicate any grounds for the applicant's detention in one of its decisions.[28] Also, having analysed the court decisions ordering detention on remand and extended detention, the ECtHR notes that all of them were couched in general terms and contained repetitive phrases. In particular, the national courts referred to the seriousness of the charges against the applicant, the risk of absconding, and influence on the course of pre-trial investigation as the grounds for imposing the above preventive measure. Apart from quoting these grounds, the court did not provide any other justification. Moreover, with the passage of time, the applicant's continued detention required more justification, but the courts did not provide any further reasoning. Furthermore, at no stage did the domestic authorities consider any other preventive measures as an alternative to detention.[29] In view of the above, the Court has found a violation of Article 5 § 3 of the Convention.

56. In addition, the ECtHR found a violation of Article 5 § 4 of the Convention due to the fact that the applicant's two requests to alter the detention on remand imposed against him were considered by the court in violation of the requirement for a 'speedy review' provided for by the aforementioned provision of the Convention.[30]

57. Having analysed these violations, the ECtHR noted that they were repetitive, which was also stressed in the *Kharchenko* judgment. Having regard to the circumstances of the case of *Ignatov*, the Court noted that it was not convinced that the new legislation was sufficient. In view of the above, the Court stressed the need to bring the reform of legislation and/or practice forward in order to ensure that the above procedures for imposing detention on remand comply with the requirements of Article 5 of the Convention.

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24 *Chanyev*, paras. 29 – 31.

25 Ibid, paras. 34 – 35.

26 See CM/Del/Dec(2016)1265/H46-3

27 These are practical recommendations prepared by the High Specialised Court of Ukraine for Civil and Criminal Cases for courts considering the application of preventive measures, which were mentioned in the Decision of the Committee of Ministers CM/Del/Dec(2017)1280/H46-36.

28 *Ignatov,* para. 36.

29 *Ibid,* para.41.

30 *Ibid,* para.46.

58. In 2019, the ECtHR delivered a judgment in the case of *Korban*, which revealed another issue of imposing preventive measures in Ukraine. In this case, the ECtHR found a violation of Article 5 § 3 of the Convention due to applying detention on remand and 24-hour house arrest to the applicant. The Court, guided by its findings in the case *Buzadji v. the Republic of Moldova* (application no. 23755/07, paras. 112 - 114), noted that in terms of the right to liberty guaranteed by Article 5 of the Convention, both detention on remand and 24-hour house arrest are essentially identical preventive measures. Therefore, the same criteria should apply in assessing the reasonableness of the entire period of deprivation of liberty, irrespective of the place where the applicant was detained – in a pre-trial detention facility or at home under house arrest.[31]

59. In the above case, the judge did not adduce any grounds for releasing the applicant from detention in custody under 24-hour house arrest. The judge *de facto* considered the absence of grounds for the applicant's continued detention as a justification for placing him under 24-hour house arrest.[32] In the ECtHR's view, although house arrest implied fewer restrictions and a lesser degree of suffering and inconvenience for the applicant than ordinary detention in prison, it still amounted to a deprivation of his liberty in the meaning of Article 5 of the Convention. Therefore, the domestic authorities were under an obligation to provide due grounds for the indicated preventive measure. No justification was provided and the ECtHR found a violation of Article 5 of the Convention.[33]

60. It should be noted that in the judgment in the *Kharchenko* case, the ECtHR found violations due to lack of adequate response by the domestic courts to the applicants' arguments for their release from custody. In the judgment in the *Ignatov* case, the ECtHR did not consider this issue. Thus, at first glance, the above problem seems to have been eliminated with the adoption of the CCP in 2012 or, at least, to have lost its comprehensive nature. However, the analysis of the ECtHR Committee's judgments rendered in recent years[34] shows that this problem persists even after the adoption of the CCP in 2012.

61. In sum, it should be noted that in cases in respect of Ukraine, the ECtHR found the following violations of Article 5 of the Convention, which are the subject of the present research:

    1) Lack of reference in the domestic court decisions to any legitimate grounds to impose a preventive measure involving the deprivation of liberty (Article 5 § 1 of the Convention);

    2) Unjustified decisions ordering detention on remand and extended detention, in particular, lack of "relevant and sufficient" arguments in favour of detention, lack of any additional arguments in favour of extended detention and analysis of considering alternative preventive measures (Article 5 § 3 of the Convention);

    3) Excessively lengthy consideration of the defence applications for other non-custodial measures (Article 5 § 4 of the Convention);

62. All these problems are systemic in nature. Therefore, their resolution, from the ECtHR perspective, requires the enforcement of measures of general nature.

63. However, there are a number of other problematic issues that, although not identified by the ECtHR as systemic in nature, are closely related to the problems at issue and therefore are given special attention in the study. This refers to among other things, unjustified court decisions ordering 24-hour house arrest (Article 5 § 3 of the Convention).

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31 *Korban*, para. 157.

32 Ibid, paras. 165 – 167.

33 Ibid, paras. 177 – 179.

34 Zhukov and Others, Verkhoglyad and Others, Bondarenko and Others, Ivanov and Others etc.

1.3. Decisions of the CoE CM

64. As mentioned above, the subject of the present research includes problems associated with compliance with the safeguards provided for in Article 5 of the Convention, in connection with the practical application by national authorities of the CCP. In this regard, the decisions of the CoE CM are undoubtedly one of the most important sources of information. This body supervises the proper execution of the ECtHR judgments in accordance with Article 46 of the Convention. In its decisions, the CoE CM not only assesses the execution of the ECtHR judgments but also provides practical recommendations on measures that states need to undertake in order to fully execute these judgments.

65. The supervision procedure is determined by the Rules of the CoE CM for the supervision of the execution of judgments and of the terms of friendly settlements adopted on 10 May 2006 at the 964th meeting of the CoE.[35] A more detailed understanding of the CoE CM supervision mechanism is set out in the so-called "New Working Methods"[36] of the CoE CM, which is a consolidated document that brings together the key rules for supervision of the execution of the ECtHR judgments developed by the CoE member states during the conference in Interlaken[37] on 19 February 2010 and several subsequent meetings of the CoE CM.

66. According to this instrument, the supervision of the execution of the ECtHR judgments is carried out in a continuous manner until the supervision of their execution is closed. Depending on the specific characteristics of the case, supervision can be carried out under two interdependent procedures: the standard procedure and the enhanced procedure. The enhanced procedure is applied in case of the supervision of the execution of:

    1) judgments requiring urgent individual measures;

    2) pilot judgments;

    3) judgments disclosing major structural and/or complex problems;

    4) interstate cases.

67. Only cases for enhanced supervision can be examined on the merits in the context of Human Rights meetings of the CoE CM.

68. In the case of Ukraine, all the judgments analysed in the previous section were grouped together for the purposes of effective supervision. Initially, it was the *Kharchenko* group of cases.[38] However, following the adoption of the CCP, some of the problematic issues that resulted in the violations of Article 5 of the Convention found by the ECtHR, in particular, those discussed in the *Kharchenko* judgment were resolved.[39] Consequently, the CoE CM decided to close the supervision of the execution of the ECtHR judgments in 36 cases involving the application of the 1960 Criminal Procedure

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35 See Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168064dd2a5

36 See Supervision of the execution of the judgments and decisions of the ECtHR. Consolidated document - New working methods. Twin-track supervision system: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168049426d#_ftn1

37 See Interlaken Declaration: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c7c21

38 See, for example, the decision adopted at the 1264th meeting of the CoE CM on 7 March 2013: https://hudoc.exec.coe.int/eng#{"fulltext":["kharchenko"],"EXECDocumentTypeCollection":["CMDEC"],"EXECLanguage":["ENG"],"EXECIdentifier":["CM/Del/Dec(2013)1164/33"]}

39 See CM/Del/Dec(2017)1294/H46-35: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168074a339;

Code of Ukraine.[40] However, at the same time, a judgment in the *Ignatov* case was delivered in 2016, where the ECtHR noted that a number of problems were not finally eliminated with the adoption of the CCP. For these reasons, the CoE CM indicated in the same resolution that it would continue to supervise the outstanding questions related to the application of the detention on remand under the new CCP in the context of the remaining cases of this group and in particular the case *Ignatov*. Since then, all questions that are the subject of the present research are considered by the CoE CM within the *Ignatov* group of cases. For the reasons discussed above, in particular the systemic nature of the problems in question, the CoE CM supervises the execution of the judgments from the *Ignatov* group under the enhanced procedure.

69. It should be noted that in view of the Decisions of the CoE CM[41] and the documents on which they were based, in particular those prepared by the Department for the Execution of Judgments of the European Court of Human Rights (DEJ), the problems identified by the ECtHR in the case *Ignatov* are considered to be caused by the improper practice of applying the CCP rather than by deficiencies in the legislation. Thus, in the Decision dated 21 September 2017, adopted at the 1294th meeting, the CoE CM urged the authorities to continue taking all necessary measures (and including raising awareness and capacity-building) "*to ensure that the provisions in the new Code relating to detention on remand are effectively implemented by all relevant actors in the judicial system, including the prosecution*".[42]

70. In this respect, the notes on the agenda indicate that despite the new legislation, further steps are required to ensure its effective implementation in practice. In particular, it includes the need to strengthen the reasoning in motions for detention lodged by prosecutors and judicial decisions to detain; establish clearly the factual basis for decisions to detain; consider alternative measures of restraint, and to provide speedy judicial review of lawfulness and justification of detention, etc.[43]

71. In its subsequent decisions in the *Ignatov* group of cases, the CoE CM confirmed these findings.

72. The Notes on the Agenda to the 1318th meeting (5-7 June 2018) indicated that "the Committee has already noted that the CCP appears capable of remedying most of the deficiencies identified by the ECtHR under Article 5 §§ 1, 3 and 4 in this group of cases if applied correctly"[44]. However, the ECtHR continued to find a violation of these provisions of the Convention in its judgments. Therefore, there was a need to ensure that the provisions of the CCP were effectively applied in practice by all the institutions involved. In this regard, in the Decision adopted at the 1318th meeting (5-7 June 2018), the CoE CM urged the national authorities to provide information on the implementation of the CCP in practice in the context of the above problems.[45]

73. Following the results of the 1348th meeting on 4-6 June 2019, the CoE CM invited the national authorities to submit a comprehensive overview of domestic detention practices, including prosecutorial and judicial practice.[46] It is for this purpose that the present study was commissioned.

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40 See CM/ResDH(2017)296: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168074cbd2 and CM/Notes/1294/H46-35: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680739ec8

41 CM/Del/Dec(2017)1294/H46-35: https://hudoc.exec.coe.int/eng#{"fulltext":["kharchenko"],"EXECDocumentTypeCollection":["CMDEC"],"EXECLanguage":["ENG"],"EXECIdentifier":["CM/Del/Dec(2017)1294/H46-35E"]} and CM/Notes/1294/H46-35: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680739ec8

42 CM/Del/Dec(2017)1294/H46-35

43 CM/Notes/1294/H46-35

44 CM/Notes/1318/H46-27

45 CM/Del/Dec(2019)1348/H46-33

46 CM/Del/Dec(2019)1348/H46-33

1.4. National legislation of Ukraine.

74. In Ukraine, the fundamental questions related to deprivation of liberty are determined by the Constitution, in particular Article 29. In so far as it relates to the subject of this research, Article 29 of the Constitution provides that every person has the right to freedom and personal inviolability; no one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law; in the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours; the detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the holding in custody; everyone detained has the right to challenge his or her detention in court at any time.

75. Other issues related to the application of detention on remand or 24-hour house arrest against a person in criminal proceedings are regulated by the CCP. As noted above, the provisions of the CCP in this regard do not raise significant reservations by the ECtHR or the CoE CM in the context of their compliance with the requirements of the Convention. A minor exception is a problem identified in the judgment in the case *Chanyev*, in which the ECtHR indicated the need to amend the CCP. Such amendments have not been made yet, but this problem has no longer been mentioned in the ECtHR judgments. Given that more than 6 years have passed since the judgment was delivered, additional measures undertaken by the Government appear to have had a significant impact on the elimination of the above problem. In general, it should be noted that most of the CCP provisions on the deprivation of liberty echo the requirements of the ECtHR case-law in the smallest detail.

76. The CC of Ukraine also plays a related role in regulating the deprivation of liberty in the stage of pre-trial investigation and trial. In particular, it concerns the CC provisions on the classification of criminal offenses (minor, grave, and particularly grave), assessment of the gravity of a punishment that may be imposed on a person, etc.

77. Another important authority are the decisions of the Constitutional Court of Ukraine in which it examined the constitutionality of certain provisions of the CCP related to detention.

78. In particular, in its decision of 25 June 2019 No. 7-p/2019 the Constitutional Court found the provision of Article 176 § 5 of the CCP restricting the possibility of applying preventive measures in the form of personal undertaking, personal guarantee, house arrest and bail to persons suspected/charged of crimes under Articles 109 – 114-1, 258 – 258-5, 260, 261 of the CC to be unconstitutional.

79. According to the decision of 23 November 2017 No. 1-p/2017 the Constitutional Court declared the third sentence of Article 315 § 3 of the CCP unconstitutional. Pursuant to the above provision preventive measures applied during the pre-trial investigation stage are automatically extended if during the preliminary hearing in the court the parties to criminal proceedings fail to lodge any motions concerning the change or extension of preventive measure etc.

80. Also, by its decision of 13 June 2019 No. 4-p/2019 the Constitutional Court found unconstitutional the provision of Article 392 § 2 of the CC which did not provide for the possibility of lodging appeal against the court's decision extending detention in custody at the stage of trial.

81. All the aforementioned decisions relied in their reasoning on the case law of the ECtHR.

1.4.1. Issues related to the respect of rights guaranteed by Article 5 §§ 1 and 3 of the Convention

1.4.1.1. Limitations and grounds for applying detention on remand and 24-hour house arrest established by law.

82. The CCP limits the range of cases for applying detention on remand. Thus, according to Article 183 § 2 of the CCP, as a general rule, the above measure of restraint can be applied to a person without prior convictions who is suspected of or charged with an offense punishable by imprisonment of more than 5 years. Article 183 § 2 allows to apply this measure of restraint to a person who is suspected of or charged with an offense punishable by a less serious penalty exceptionally under a number of other substantial circumstances: a prior record of convictions; where the prosecutor had proven that the person failed to fulfil the obligations imposed upon him when an earlier measure of restraint or failed to deposit bail; where the prosecutor has proven that the person was fleeing pre-trial investigation or trial, obstructed criminal proceedings or has been notified of suspicion in the commission of another offense; a person wanted by competent authorities of a foreign state for the commission of a criminal offense in connection with which the issue of extradition to such foreign state may be decided. However, even under the above circumstances, detention may only be applied to a person suspected or charged with an offense for which the law provides for a punishment of certain severity. With a few exceptions, it refers to imprisonment.

83. In addition, when the investigating judge or the court orders detention on remand Article 183 § 3 of the CCP establishes the obligation to determine an amount of bail sufficient for ensuring that the suspect or the accused should comply with the duties provided for by criminal procedure legislation. Exceptions to this obligation are insignificant and relate to cases when a person is suspected of violent offenses, offenses causing the death of an individual, participation in a criminal organisation, commission of especially serious drug-related criminal offence; or if the person violated the terms of bail within the same set of proceedings. Even in the listed above cases the investigative judge or the court, although not being obliged, may still determine the amount of bail if he/she/it finds it necessary. The only absolute exception to the obligation/right to determine the amount of bail was introduced on 27 April 2021 (Law of Ukraine No. 1094-IX): the bail is not applied when detention on remand is ordered in respect of a suspect who is on international wanted list and/or is located (entered) on the temporary occupied territory of Ukraine or the territory of a state recognized by the Parliament as an aggressor-state.

84. Article 183 § 1 stipulates a basic requirement of the ECtHR case-law, according to which keeping in custody is an exceptional measure of restraint enforced exclusively if the public prosecutor proves that none of the less strict measures of restraint can prevent risks specified in Article 177 of the CCP. Article 176 of the CCP provides for possibility of applying four preventive measures alternative to custody: personal undertaking, personal warranty, bail, and house arrest.

85. Also, Article 181 of the CCP establishes that house arrest consists in prohibition to the suspect/accused to leave his home on the 24- hour basis or during a certain period of day.

86. Similar to keeping in custody, the CCP sets limitations on the application of this preventive measure. Thus, house arrest may only be applied to a person who is suspected or accused of committing a crime punishable by imprisonment. The enforcement of the preventive measure in the form of a house arrest is controlled by the National Police of Ukraine.

87. Besides, according to Article 194 § 5 when ordering 24-hour house arrest or any non-custodial preventive measure the investigative judge or the court may impose additional obligations on a suspected

/ accused individual: to refrain from visiting certain locations or communicating with certain individuals, wear electronic means of control, not to leave the place of residence without permission of the judge, prosecutor or investigator etc.

88. According to Article 177 of the CCP, grounds for enforcement of a measure of restraint shall be the existence of reasonable suspicion of having committed a criminal offense, as well as the existence of risks that provide sufficient grounds to an investigating judge, court to believe that the suspect/accused or the convicted person can commit at least one of the following actions:

    1) hide from pre-trial investigation agency and/or the court;

    2) destroy, conceal or spoil any objects or documents that have essential importance for establishing circumstances of a criminal offense;

    3) exert unlawful influence on the victim, witness, another suspect, accused, expert or specialist in the same proceedings;

    4) obstruct criminal proceedings in another way;

    5) commit similar or the same criminal offense or continue the criminal offense of which he is suspected/charged with.

89. According to Article 176 § 2 of the CCP, an investigating judge/court shall deny enforcement of a measure of restraint unless an investigator/public prosecutor proves that circumstances established in the course of considering the motion on enforcement of measures of restraint are sufficient for the belief that none of the less strict measures of restraint can prevent the risk or risks proved in the course of consideration.

90. Thus, the key requirements for the application of detention on remand or 24-hour house arrest provided for in the CCP seem to fully comply with the case-law of the ECtHR:

    1) the existence of a reasonable suspicion as a condition *sine qua non*;

    2) the existence of a risk of committing at least one of the actions defined in Article 177 of the CCP, the list of which is identical to the one provided for in the ECtHR case-law. Moreover, the list defined in Article 177 of the CCP is generally narrower than the one provided for by the ECtHR, which additionally includes the risk of "disturbance to public order" as a ground for deprivation of liberty;[47]

    3) considering alternative preventive measures.

1.4.1.2. The procedure for applying remand in custody and 24-hour house arrest at the stage of the pre-trial investigation.

91. Decision ordering remand in custody and 24-hour house arrest as well as their extension is rendered by an investigating judge (at the stage of pre-trial investigation) or a court (during the trial of the person charged) based on the motion filed by a prosecutor.

92. The term of validity of a ruling on remand in custody or continued pre-trial detention may not exceed sixty days. The overall duration of remand in custody of the suspect/accused in the course of a pre-trial investigation shall not exceed six months in criminal proceedings in respect of minor crimes and twelve months in criminal proceedings in respect of grave or especially grave crimes (Art. 197 of the CCP).

47 See, for example, judgment in the case *Letellier v. France*, para. 51

93. The term of validity of the order issued by an investigating judge concerning the period of keeping a person under a house arrest may not exceed two months. If necessary, such period may be extended upon request of a public prosecutor within the framework of the pre-trial investigation subject to the procedure laid down in Article 199 of the CCP (see below). The aggregate duration of house arrest during the pre-trial investigation may not exceed six months (Art. 181 of the CCP). Upon termination of this period, the ruling concerning application of the measure of restraint in the form of house arrest shall be valid no longer, and the measure of restraint shall be deemed revoked.

94. Investigator's/public prosecutor's motion to enforce a measure of restraint shall, inter alia, contain a description of circumstances which give grounds for suspecting in or charging the individual concerned with a criminal offense, and reference to relevant supporting evidence; reference to one or several risks specified in Article 177 of the CCP; description of circumstances which gave ground to the investigator/public prosecutor to conclude that a risk or several risks as stated in his motion is real, supported with relevant materials; substantiation of impossibility to prevent the risk or risks referred to in the motion through the application of less strict measures of restraint (Art. 184 of the CCP).

95. According to Article 188 § 1 of the CCP, along with a motion to enforce a measure of restraint, a public prosecutor or an investigator with public prosecutor's approval, shall have the right to file a motion on authorisation for apprehension with a view to compel appearance for participation in the consideration of a motion on enforcement of a measure of restraint in the form of custody. Motion to enforce a measure of restraint is considered with participation of public prosecutor, suspect/accused, and his defence counsel.

96. When considering the motion to enforce a measure of restraint, an investigating judge/a court is required to find out whether evidence produced by parties to criminal proceedings does prove circumstances which point to:

    1) 1) the existence of reasonable suspicion that the suspect/accused has committed the criminal offense;

    2) 2) the existence of sufficient grounds for belief in the existence of at least one of the risks as referred to in Article 177 of the CCP and as stated by the investigator/public prosecutor;

    3) 3) insufficiency of enforcing less strict measures of restraint for preventing the risk or risks specified in the motion.

97. If the public prosecutor failed to prove the insufficiency of applying less strict measure of restraint, the investigating judge/the court may enforce a less strict measure of restraint than the one indicated in the motion.

98. The investigating judge/the court should include in the ruling on the measure of restraint information about: 1) the criminal offense of which the person is suspected/accused; 2) circumstances which show the existence of risks referred to in Article 177 of the CCP; 3) circumstances which show that less severe measures of restraint are insufficient for preventing the risks specified in Article 177 of the CCP; 4) reference to evidence which supports such circumstances (Article 196 § 1 of the CCP). Moreover, in the ruling the judge is required to set the date of expiration if the imposed measure of restraint is remand in custody or house arrest.

99. In addition, as required by the ECtHR case-law, the CCP imposes additional requirements on the motion of the prosecutor and the ruling of the investigating judge/court on extended custody. Thus, in the motion to extend the period of detention, in addition to the requirements mentioned above, the public prosecutor should indicate: 1) the circumstances which show that the stated risk has not decreased or that new risks have emerged, which justify continued remand in custody; 2) the circumstances which obstruct the completion of the pre-trial investigation before the expiry of the previous ruling on the remand in custody. Investigating judge is obliged to deny the extension of

the custody period unless the public prosecutor/investigator proves that the circumstances justify continued detention (Art. 199 of the CCP).

100. The CCP also establishes a general guarantee that upon the expiry of the period of the ruling on the custodial measure of restraint, the suspect/accused should be released immediately, unless by this time there is any other court decision which has taken legal effect and which directly prescribes keeping this suspect/accused in custody (Article 202 § 5 of the CCP).

101. A similar requirement is established for 24-hour house arrest. Thus, according to Article 203 of the CCP, which concerns all types of measures of restraint, a ruling to enforce a measure of restraint terminates after the expiry of the period of validity of the given ruling, after delivering the judgment of acquittal, or after the closing of the criminal proceeding as prescribed by the CCP.

1.4.1.3. Challenge of rulings of the investigating judge to enforce/extend custody and 24-hour house arrest at the stage of pre-trial investigation

102. According to Article 309 § 1 of the CCP, during the pre-trial investigation, investigating judge's rulings may be challenged in appeals procedure related to:

- imposing remand in custody as a measure of restraint or denial in such measure;
- extending duration of remand in custody or refusal to extend;
- imposing the measure of restraint in the form of house arrest or denial in such measure;
- extending the duration of house arrest or refusal to extend;

103. Thus, all rulings of the investigating judges on remand in custody as well as 24-hour house arrest can be appealed.

1.4.1.4. The procedure for remand in custody and 24-hour house arrest at the stage of trial

104. After the indictment is submitted to the court, all issues related to remand in custody and 24-hour house arrest are decided by the court which considers the merits of the case. Article 315 of the CCP regulates the enforcement of a measure of restraint during a preparatory court session, and Article 331 of the CCP – during the trial. The grounds to enforce, change or extend the measures of restraint, the applicable procedure, and order for considering the relevant motions of the prosecution and defence are regulated by the same provisions also applicable as at the stage of pre-trial investigation.

105. Before 2 December 2020, court rulings on measures of restraint issued during trial were not subject to appeal. On 2 December 2020, the Parliament adopted a Law No. 1027-IX which introduced the procedure of lodging appeal against court ruling ordering (continued) detention on remand at the stage of trial. The fact that the appeal procedure was introduced only in relation to rulings concerning detention on remand, further corroborates that there is probably incorrect understanding of the nature of the 24-hour house arrest.

106. In addition, according to Article 331 § 3 of the CCP, irrespective of whether the motion (i.e. the motion of the prosecution for continued detention) is lodged, the court shall be obliged to examine the reasonableness of the accused's continued detention within two months from the date of receipt of the indictment by the court or from the date of the court ruling ordering the accused's detention as a preventive measure. Therefore, the court is entitled to examine the issue of detention on its own initiative if the prosecution fails to lodge its motion to this effect. Depending on how the above

provision is applied in practice it might under certain circumstances undermine the impartiality of the court or even implicitly shift the burden of proof from the prosecution to defense. This issue is analyzed in more detail in Chapter 4 below.

1.4.1.5. Conclusions.

107. To summarise the foregoing, it should be noted that the above provisions of the CCP with respect to remand in custody of a suspect or accused are fully consistent (if not repeat verbatim) with the requirements of the ECtHR case-law. Therefore, as the CoE CM established it, the remedy of the problems stated by the ECtHR in the case *Ignatov* lies in the practice of applying the CCP by all authorities involved.

108. However, the analysis of the above-mentioned provisions in the light of the ECtHR's findings in the case *Korban* leaves a number of open questions. Thus, the CoE CM considers the problems identified in this judgment more in line with the problem of illegal detention, that is, in terms of Article 5 § 1 of the Convention.[48] It is obvious that the violations of Article 5 § 3 of the Convention found in the judgment at issue are analysed by the CoE CM as being similar to the violations of this provision of the Convention found in the case *Ignatov*. However, the legislation analysis shows that it does not fully comply with the requirements of the Convention in terms of 24-hour house arrest.

109. Thus, as noted above, for the purposes of Article 5 of the Convention, detention on remand and 24-hour house arrest are equal measures. Of course, 24-hour house arrest can, to some extent, be considered an alternative to detention, but only in the context of the detention conditions rather than the degree of restriction of liberty.

110. The CCP is built on different approaches.

111. On the one hand, it is clear from Article 195 §§ 2[49] and 6[50] of the CCP that the CCP distinguishes between house arrest and non-custodial measures of restraint. However, it seems that this distinction is more due to the difference in the procedure for using electronic control means as referred to in Article 195 of the CCP and is irrelevant in the context of choosing a measure of restraint. It also seems that such a distinction is not entirely correct, since even in terms of the ECtHR case-law, only 24-hour house arrest can be equated to deprivation of liberty, while "partial" house arrest (for example, in the most common form - from 22:00 to 06:00) can only be considered as a restriction on freedom of movement.

112. On the other hand, according to Article 176 § 3 of the CCP, **any** type of house arrest is considered as a "less strict measure" in comparison with remand in custody, and therefore as an alternative to the latter. It is this understanding of the nature of house arrest that has the greatest impact on how it is applied by the courts in practice. It follows from this provision that a measure of restraint in the form

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48 https://hudoc.exec.coe.int/eng#{"fulltext":["korban"],"EXECLanguage":["ENG"],"EXECIdentifier":["004-46503"]}

49 According to this provision, "electronic control means may be applied:

1) by the investigator based on investigating judge's, court's ruling to choose in respect of the suspect, accused a measure of restraint not involving keeping in custody, which imposes on the suspect, accused the appropriate duty;

2) by officers of an internal affairs body, based on investigating judge's, court's ruling to choose in respect of the suspect, accused the measure of restraint in the form of house arrest."

50 "Refusal to wear electronic control means, deliberate removal, damaging or other interference in its operation with the purpose of eluding control, as well as attempts to act in this way shall be deemed non-fulfilment of duties imposed by court on the suspect, accused when choosing a measure of restraint not involving keeping in custody, or in the form of house arrest"

of 24-hour house arrest can be applied if there is a risk of improper procedural behaviour which is significantly lower than the level of risk that must be proved to apply remand in custody. Therefore, the threshold of justification of decisions ordering 24-hour house arrest may be lower than that of decisions ordering detention. This approach contradicts the ECtHR case-law according to which the standard of justification of such decisions should be identical.

113. Also, based on Article 199 § 3 of the CCP, the requirement that the custody period can be extended only if the public prosecutor proves that the previously stated risk has not decreased or new risks have emerged, which justify remand in custody, does not apply to the procedure for extending the period of 24-hour house arrest. Thus, when issuing another ruling to extend the period of 24-hour house arrest, the investigating judge or court is not obliged to give any new arguments. This directly contradicts the ECtHR case-law, according to which with the passage of time, continued detention requires more justification.[51]

114. Thus, the above provisions of the law create prerequisites under which decisions ordering 24-hour house arrest will be *a priori* less justified than decisions ordering detention. This state of affairs is not consistent with the ECtHR requirements.

115. However, it is possible that this problem can also be addressed by changing the practice of applying legislation on the enforcement of preventive measures in the form of 24-hour house arrest. It is in this vein that the ECtHR's findings in this regard are set out in its judgment in the case *Korban.* It is obvious that the CoE CM has followed this path.

116. The way the above issue is tackled in practice by the courts is analyzed in Chapter 4 below.

1.4.2. Issues related to the respect of rights guaranteed by Article 5 § 4 of the Convention

117. It was already noted above that the ECtHR identified two types of violations of Article 5 § 4 of the Convention. These refer to excessively lengthy (in violation of the "speediness" requirement) and improper consideration of the defence application to change detention or 24-hour house arrest to another non-custodial measure.

118. At the national level, all issues related to the consideration of such applications of the defence are regulated by Articles 201 and 331 of the CCP. Article 201 of the CCP concerns the period of pre-trial investigation, and Article 331 of the CCP applies at the trial stage.

119. According to Article 201 § 4 of the CCP, investigating judge/court is required to consider such motion of the suspect/accused within three days after its submission, in accordance with rules laid down for consideration of the motion to enforce a measure of restraint.

120. Under Article 331 § 2 of the CCP, the court decides on the measure of restraint in accordance with the procedure established by Article 18 of the CCP.

121. Upon results of consideration of such motions, the investigating judge, court may, inter alia, by its ruling, change the measure of restraint in the form of detention or 24-hour house arrest to another non-custodial measure.

122. Thus, the procedure for considering a motion to change the measure of restraint is determined by Article 195 of the CCP, which was discussed above. The procedure determined by the above provision of the CCP is fully consistent with the requirements of the ECtHR case-law. Therefore, it is obvious that, as in the case with violations of Article 5 § 3 of the Convention, the reason for improper

51 Ignatov, para. 41

consideration of the defence motions to change the preventive measure lies in the improper application of the CCP in practice.

123. At the same time, the aforementioned provisions of the CCP clearly define the deadline for consideration of such motions – 3 days. The given deadline is quite reasonable and fully complies with the requirements of the ECtHR case-law.

124. As a result, it can be stated that the legislation regarding the establishment of requirements for the procedure of consideration of the defence motion to change the measure of restraint and the terms of consideration of such a motion does not contain any obvious deficiencies in terms of Article 5 of the Convention.

2

Right to apply for compensation in respect of a deprivation of liberty effected in contravention of Article 5 §§ 1-4 of the Convention.

2.1. The ECtHR case-law

125. As a general rule, Article 5 § 5 of the Convention guarantees that everyone may apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3, and 4. The right to compensation set forth in paragraph 5, therefore, presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Court. The effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty.[52]

126. The first violation of this provision of the Convention by Ukraine was found by the ECtHR in 2009 in the judgment in the case *Svetlorusov*.[53] The most recent violation of this provision of the Convention by Ukraine was found by the ECtHR Chamber in 2019 in the judgment in the case *Korban*.[54]

127. The algorithm for consideration of complaints under Article 5 § 5 of the Convention is almost equal in all judgments of the ECtHR in respect of Ukraine. In each of these judgments, with a few exceptions,[55] the ECtHR found at least one violation of Article 5 §§ 1, 2, 3 or 4 of the Convention. It then proceeded to analyse whether the applicant was able to obtain compensation for deprivation of liberty contrary to Article 5 of the Convention at the domestic level. In this regard, the ECtHR pointed out that:

- in most cases, the circumstances that become the basis for the ECtHR's finding of a violation of Article 5 of the Convention did not constitute a violation of the national law[56] (which was logical since in such a case, either the case would not have been referred to the Court or the Court would have dismissed it due to the applicant's failure to exhaust domestic remedies). Therefore, before applying to the ECtHR, the applicant did not have available legislative mechanisms for obtaining compensation for violations that would be further identified by the ECtHR;
- the legislation also did not provide the applicant with a protected right to compensation for damages in connection with the finding by the ECtHR of a violation of Article 5 of the Convention. Therefore, even after the ECtHR found one or more violations of Article 5 §§ 1-4 of the Convention, the applicant could not expect to receive compensation for such violations.

128. Having regard to the above circumstances, the ECtHR repeatedly stated the lack at the national level of mechanisms for obtaining such compensation provided for by law. In all judgments related to Ukraine's compliance with Article 5 § 5 of the Convention, the ECtHR found a violation of this provision. It should be noted that the legislation regulating the procedure for obtaining compensation for illegal deprivation of liberty has not changed much in recent decades. Therefore, the aforementioned state of legislative framework provides a comprehensive understanding of the circumstances that were analysed in the judgments of the ECtHR in this regard.

2.2. Decisions of the CoE CM

129. The problem identified by the ECtHR in the aforementioned cases has been under consideration by the CoE CM since 2015. Given the structural nature of the problem, it is considered by the CoE CM under the enhanced supervision procedure. Like all the problems analysed above, it was initially

52 *Korban*, para. 194.

53 *Svetlorusov*, paras. 66 – 70.

54 *Korban*, paras. 195 – 202

55 See, for example, the judgment in the case *Shulgin*, where the ECtHR considered only a complaint of a violation of Article 5 § 5 of the Convention.

56 See, for example, judgments in the cases *Nechiporuk and Yonkalo*, paras. 229-232 or *Korban*, para. 199.

considered in the *Kharchenko* group of cases before the closure of the proceedings and thereafter – in the *Ignatov* group of cases.

130. According to the CoE CM, the reasons for the given violation are related to the deficiencies in the legislation. Therefore, the solution to this problem lies in the introduction of amendments to national legislation, namely, in the creation at the national level of an effective mechanism for obtaining compensation for unlawful deprivation of liberty. These are the requirements set by the CoE CM in its latest decisions.

131. This question was first considered by the CoE CM during the 1265th meeting in September 2016. The CoE CM then urged the Government to provide an action plan to address the problem of the lack of effective remedies at the national level against complaints of unlawful deprivation of liberty[57].

132. After that, the CoE CM returned to the issue at hand during the 1348th meeting on June 4-6, 2019[58].

133. Between these meetings, the Government notified the CoE CM of the measures taken to address this problem. On the one hand, the Government noted that a draft law No. 9044 was tabled with the Verkhovna Rada of Ukraine proposing an amendment to the Law of Ukraine "On the Procedure for Compensation of Damage Inflicted Upon Citizens by Unlawful Actions of Bodies for Operation and Search Activities, Pre-Trial Investigation, Prosecution and Courts" (Compensation Act).

134. At the same time, the Government notified the CoE CM that the courts had started applying the existing at that time civil legislation (e.g., Article 1176 of the Civil Code) to award compensation for unlawful deprivation of liberty following the adoption of a ruling setting a first precedent by the SC. As evidence of the emergence of the new practice, the Government of Ukraine provided two examples of decisions of this nature.[59]

135. In its decision following the 1348th meeting, the CoE CM encouraged the national authorities to accelerate the adoption of draft law No. 9044. It also welcomed the emerging practice of awarding compensation for unlawful deprivation of liberty under the existing legislation. The CoE CM also invited the authorities to provide detailed statistics and examples of relevant judicial decisions in case draft law No. 9044 is not adopted in time for the next examination by the CoE CM of this group of cases.[60]

136. In this regard, it should be noted that according to the information on the official web portal of the Verkhovna Rada of Ukraine, the draft law at issue was withdrawn from Parliament on 29 August 2019,[61] that is, two and a half months after the adoption of the abovementioned decision of the CoE CM. Therefore, it seems that the emergence and development of a new practice of applying the current legislation by courts, which was mentioned in the decision of the CoE CM, remains the only real mechanism for addressing this problem.

137. It is to be noted that during the research, i.e. more than 1 and a half year after relevant information was provided by the Government to the CoE CM, the expert team did not manage to identify any relevant case law regarding compensation for damage caused by unlawful detention.

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57 CM/Del/Dec(2016)1265/H46-33 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168064620

58 CM/Del/Dec(2019)1348/H46-33 https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168094c715

59 https://hudoc.exec.coe.int/eng#{"fulltext":["CM/ResDH(2017)296"],"EXECDocumentTypeCollection":["CEC"],"EXECLanguage":["ENG"],"EXECIdentifier":["004-46503"]}

60 CM/Del/Dec(2019)1348/H46-33

61 The Draft Law was withdrawn because the new parliament was elected, which leads to automatic withdrawal of all draft laws that had not passed the 1st reading at the previous convocation of the Parliament.

2.3. National legislation

138. In view of the findings set out in the judgments of the ECtHR and the decisions of the CoE CM (see above), it is obvious that the current national legal framework for compensation for damage caused by deprivation of liberty, contrary to the requirements of Article 5 of the Convention, does not meet the requirements of the ECtHR case-law. At the same time, for a better understanding of the problem at hand, in particular the above findings of the ECtHR and the CoE CM, it is necessary to provide a general description of the relevant legislation and focus on its key provisions.

139. The Civil Code in Articles 1166 §§ 1-2 and 1167 establishes general grounds for liability for pecuniary and non-pecuniary damage. The general principles of compensation for damage caused by illegal actions or omissions of the preliminary investigation body carrying out operational-search activities, pre-trial investigation, prosecutor's office or court are established by Article 1176 of the Civil Code.

140. Article 1176 § 1 of the Civil Code establishes a general rule according to which "damage inflicted to a physical person as a result of its (...) illegal use of preventive measure (…) shall be indemnified by the state in full-scope irrespective of the guilt of the officials or employees of the body carrying out operational-search activities, pre-trial investigation, prosecutor's office or court".

141. At the same time, Article 1176 §§ 2 and 7 of the Civil Code establish that the right to indemnify for the damage arises in cases provided for by law, and the procedure for its indemnification shall be established by the law.

142. The law setting out the procedure for indemnification referred to in the above provision is the Compensation Act.[62]

143. Article 1 of the Compensation Act defines the types of damage that are subject to compensation on the basis of the law. Thus, the damage inflicted to a physical person as a result of, inter alia, unlawful detention and custody are subject to indemnification. Such damage shall be indemnified in full-scope irrespective of the guilt of the officials or employees of the body carrying out operational-search activities, pre-trial investigation, prosecutor's office or court.

144. In addition, the Compensation Act, in particular Article 3, establishes the types of damages subject to indemnification based on its provisions. Among those that may be caused by unlawful deprivation of liberty are earnings and other monetary income that a person has lost as a result of illegal actions; amounts paid by a person in connection with the provision of legal assistance; and moral damage.

145. The key provision of the Compensation Act, which actually caused the finding by the ECtHR of a violation of Article 5 § 5 of the Convention, is Article 2 of the Act. This provision establishes a list of cases in which the right to compensation for damage arises. Thus, according to Article 2 of the Compensation Act, the right to compensation for damages in the amounts and manner arises in the following cases:

    1) rendering a judgment of acquittal;

    2) establishment in the guilty verdict of the court or other court decision (except for a court ruling ordering new trial) of the fact of (...) illegal detention and custody (...) and other procedural actions that restrict or violate the rights and freedoms of citizens, unlawful conduct of operational search activities;

    3) closure of criminal proceedings because no crime was committed, absence of elements of crime

62 I.e. the Law of Ukraine "On the Procedure for Compensation of Damage Inflicted Upon Citizens by Unlawful Actions of Bodies for Operation and Search Activities, Pre-Trial Investigation, Prosecution, and Courts".

in the act, or failure to establish sufficient evidence to prove the person's guilt in court and exhaustion of opportunities to obtain them.

146. Therefore, it turns out that a person against whom a preventive measure in the form of detention or 24-hour house arrest was enforced can expect compensation for the specified damage only if he or she is acquitted, criminal proceedings against him or she is closed, or the court decision declared unlawful the application of these preventive measures.

147. As of today, at the national level, there are no mechanisms for declaring unlawful/unjustified/excessively lengthy detention or 24-hour house arrest. The Compensation Act also does not provide for obtaining compensation by a person if a violation of his or her rights guaranteed under Article 5 of the Convention was found by the ECtHR.

148. The above circumstances became the basis for the ECtHR finding a violation of Article 5 § 5 of the Convention and further requirement of the the CoE CM to establish an effective remedy with respect to complaints about violation of Article 5 of the Convention.

149. Also, it is necessary to pay attention to several other circumstances that were not separately analysed by the ECtHR, but to a certain extent may question the effectiveness of the Compensation Act. Thus, in case of acquittal, a person becomes automatically entitled to compensation for damages caused by detention. However, the Law does not provide for the opportunity to take into account and analyse the circumstances referred to in the judgments of the ECtHR under Article 5 of the Convention: whether the detention was justified, whether the court indicated the grounds for detention, whether the court provided "sufficient and relevant" arguments and whether the alternative measures of restraint were analysed. Instead, the Act is guided by other criteria when determining the amount of compensation. In short, this issue can be formulated as follows: the law grants an automatic right to compensation for damage caused by detention in case of acquittal, but according to the ECtHR, acquittal does not automatically mean that the detention was contrary to the requirements of Article 5 § 3 of the Convention.

150. Another significant circumstance is that the Compensation Act provides for compensation only for damage caused by "*unlawful detention*" (Article 1). The Act makes no reference to unlawful apprehension or 24-hour house arrest that also speaks against the effectiveness of the Compensation Act.

3

Survey conducted among attorneys, prosecutors and judges

3.1. General reservations.

151. The objective of this survey was to understand the respondents' vision of the issues, which are the subject of this research. When combined with other elements of this research, the analysis of the survey results should lay the groundwork for better solutions to these issues.

152. To this end, several blocks with questions were prepared. The first group of questions should help determine the representativeness of the survey results, as well as the quality and reliability of the answers received.

153. The second set of questions concerns the opinion of the surveyed regarding the (non)existence at the national level of a systemic issue related to unjustified court decisions on deprivation of liberty; the difficulties and problems they face in the proceedings on choosing preventive measures in the form of remand in custody and 24-hour house arrest; the level of compliance with the law in the remand proceedings. This block should also shed the light on how, according to respondents, the system of compensation for unlawful deprivation of liberty should work.

154. Finally, the third block of questions concerns some of the most problematic aspects of the procedure for applying or extending preventive measures in the form of remand in custody and 24-hour house arrest. These include questions related to key aspects of this research, such as distinguishing between reasonable suspicion and other grounds for imposing preventive measures, understanding the concept of the risk of improper procedural behaviour as a ground to impose preventive measures and the relationship between detention on remand and 24-hour house arrest.

3.2. Analysis of the survey results

3.2.1. Questions 1-3 concerning the profession and background of respondents.

155. **Question 1** was to determine the respondent's profession. A total of 1,397 respondents were interviewed during the survey, including 126 judges, 914 prosecutors, and 345 attorneys. However, the sample was mindful of the geographical factor: respondents from each of these professional groups include representatives from all regions of the country. This sample is sufficiently representative in the context of the survey objectives.

156. **Question 2** concerns the length of service in the specified profession, and therefore the respondent's experience. Although this is generally not the rule, in this case, the longer the respondent's experience, the greater the "reliability" of the responses received. Lengthy service in the relevant field, in view of the objectives of this survey, certainly makes it possible to better shape a vision of the nature of the problems that are the subject of this research. Therefore, the respondents were asked to choose one of the following options: 0 – 2 years; 3 – 5 years; 6 – 10 years; more than 10 years.

157. The results show that more than half of the respondents (55.8 %) have been working in the respective capacity for more than 10 years; about a third (29.9 %) – from 6 to 10 years, and only a very small number have work experience of 3 – 5 years and 0 – 2 years (8.7% and 5.6%, respectively).

158. At the same time, if the number of respondents among attorneys with different lengths of work experience was distributed less evenly (0 – 2 years – 5.2%; 3 – 5 years – 20.6%; 6 – 10 years – 25.5% and more than 10 years – 48.7%), among prosecutors and judges, the respondents with longer work experience obviously dominate. This is particularly evident in case of judges, among whom 70.6% have been working for more than 10 years. 15.9% - judges with work experience from 5 to 10 years, 2.4% - with work experience from 3 to 5 years, and 11.1% - with work experience up to 2 years. The structure of respondents among prosecutors is similar: 56.5% have been working for more than 10 years, 33.5 % - 6-10 years, and only a small number (only 10.1 %) from 1 to 5 years.

159. Question 3 concerns work experience specifically related to the subject of this research. The respondents are asked to indicate how often their professional activities are related to the process of imposing preventive measures. There are four answers to choose from: "never", "rarely", "often", and "regularly". The answer to this question should demonstrate how well the respondents are familiar with the problems analysed in this research.

160. The answers to the third question indicate that most of respondents often or regularly work with issues of imposition of preventive measures. This percentage is the highest among attorneys, among whom only 6.1% indicated that they rarely work with these issues. There is no one who has never encountered this issue in their work. Among judges and prosecutors, the number of those who do not work with issues related to the imposition of preventive measures is insignificant and amounts to 1.6% and 8.6%, and those who deal with this issue rarely – 15.9% and 23.9%, respectively.

161. In general, the respondents' answers to this and previous questions support the representativeness of the survey and the reliability of the results obtained.

3.2.2. Questions 4-11 concerning compliance of application of preventive measures involving deprivation of liberty with domestic legislation.

162. Question 4 ("problems related to application of detention") is intended to determine the respondents' understanding of the reasons for the existence of problems related to the application of preventive measures involving the deprivation of liberty. Among other things, this question should determine the attitude of groups to their own responsibility for the existence of relevant problems. The following are suggested as response options: "unclear law," "lack of unity in judicial practice," "indictment bias," "low level of justification of motions," "low level of justification of rulings," and "other option."

163. The first option is neutral, and in fact, its choice will indicate that the responsibility for the existence of the problem lies with the third party. The second option obviously refers to the inappropriate and contradictory practical application of legislation. Choosing this option will be a *de facto* admission of collective (refers to all three groups of participants), including personal responsibility for the existence of the problem. The "indictment bias," as an option, will indicate the assignment of responsibility for problems related to the application of preventive measures to prosecutors and court. Options 4 and 5 obviously attribute the responsibility for existing problems to prosecutors and judges, respectively. The respondents also had the opportunity to give their own reasons, but given the small number of such responses, they will not be analysed below.

164. In conclusion, it should be noted that in the above question, each respondent had the opportunity to choose multiple answers. The results are summarised in Table 1.

Table 1.

Identify one or several problems related to application of detention	Total	Judges	Prosecutors	Attorneys
Unclear law	31,6	21,4	40,6	11,3
Lack of unity in judicial practice	42,3	19,8	53,9	19,7
Indictment bias	23,3	15,9	5,8	73,3
Low level of justification of motions	37,7	83,3	17,5	74,2
Low level of justification of rulings	19,2	4,0	9,6	50,4
Other option	3,8	4,0	4,6	1,4

165. The absolute majority of attorneys assign the responsibility for deficiencies in the application of preventive measures involving deprivation of liberty to the prosecution and courts. At the same time, most of them took advantage of the opportunity to choose multiple options in this respect. While 73.3% see the source of the problem in the indictment bias of the proceedings on the application of preventive measures, a significant part, namely, 74.2% and 50.4%, chose as options the unjustified motions and rulings, respectively. Having regard to these figures, only a small number of respondents chose the deficiencies of the practical application of legislation and unclear law – 19.7% and 11.6%, respectively.

166. Judges, assign the responsibility for problems in the application of "isolation" measures to prosecutors, namely, the unjustified motions prepared by the prosecution. This opinion is shared by a record 83.3% of the respondents among judges who answered this question. This is **quite interesting, especially considering that according to the statistics provided by the SC, a significant part of the prosecution's motions to impose preventive measures are granted by the courts**. Thus, according to these statistics, in 2020 46.2 % of motions on keeping in custody were granted by the courts and in 2019 – 45.5% (see the statistics in Chapter 5 below). However, these statistics obviously do not take into account the number of motions in which the court denied detention and applied 24-hour house arrest. It can be assumed that there were many such cases. It turns out that judges are dissatisfied with the justification of the prosecution's motions and still grant them, thus generating decisions the justification of which may not meet the requirements of the ECtHR case-law. Logic suggests that when granting such motions, the judges set a certain standard of justified motions that the prosecutors will further adhere to, thereby fuelling the existing deficiencies in law enforcement. However, only 4% of respondents among judges believe that the responsibility for the situation lies with them. The remaining responses received a "moderate" number of votes: "unclear law" - 21.4%; "lack of unity in judicial practice" - 19.8 %; and "indictment bias" - 15.9% of respondents.

167. As to prosecutors, the majority of them (53.9 %) chose the "lack of unified judicial practice", thus choosing the model of collective responsibility of all (including prosecutors) involved parties to the proceedings on imposing preventive measures. Such response seems to be the closest to the cur-

rent understanding of the problem by the CoE institutions involved. At the same time, 40.6% of respondents among prosecutors believe that the source of the problem is "unclear law."

168. During the focus group discussions the expert team tried to find out which provisions of the legislation do not seem clear enough for the actors involved. The absolute majority of participants among judges, attorneys, human rights activists and scholars noted that they did not see any major problems relating to domestic legislation. When the same question was raised in the focus group of prosecutors some of them noted that at the stage of trial the prosecution did not have (contrary to the stage of pre-trial investigation) a right to collect evidence necessary to establish whether the risks continued to exist. Indeed, under domestic legislation at the stage of trial the prosecutors cannot collect evidence. But it appears that they still can request the court to obtain necessary information. Besides, the prosecutors have full access to information and documents produced in the course of trial. It is the improper behavior during the trial (for example, failure to attend a court hearing etc.) that frequently becomes the reason for imposing additional restrictions on the accused individual. Therefore, this aspect of the Survey should be at the very minimum further researched before taking any specific (legislative) measures.

169. 17.5% of respondents among prosecutors indicated that they consider the unjustified prosecution's motions to be a source of problems with the application of preventive measures. Only 9.6% of surveyed prosecutors assign responsibility to judges. Thus, the respondents-prosecutors have demonstrated a very critical view on the situation in the application of preventive measures, which may signal the willingness to work and improve in this direction.

170. Question 5 is intended to provide insight how the parties to the proceedings on choosing preventive measures involving deprivation of liberty assess their compliance with national legislation. To do this, the respondents are asked to score the compliance of such proceedings with national legislation on a ten-point scale, where 10 points mean full compliance and 1 – almost complete non-compliance with national legislation. The results are summarised in Table 2 below.

Table 2.

How would you assess compliance of ordering preventive measures involving deprivation of liberty with national legislation (0-10)?	Total	Judges	Prosecutors	Attorneys
1 – Negative	4,8	1,6	2,5	12,2
2	2,4	0,0	1,1	6,1
3	7,8	5,6	3,7	19,4
4	5,9	5,6	3,9	11,0
5	25,7	21,4	24,3	31,0
6	11,9	8,7	12,9	10,4
7	17,8	19,0	22,4	4,9
8	13,2	20,6	16,0	3,5
9	4,7	11,9	5,4	0,6
10 – Positive	5,8	5,6	7,8	0,9

171. If we analyse the overall responses of all respondents, the majority assessed the compliance with the law during the imposition of preventive measures involving deprivation of liberty in the range from 5 to 8 (25.7 %, 11.9 %, 17.8 %, and 13.2%, respectively). In general, such a situation demonstrates a "guardedly optimistic" assessment. The assessment provided by judges and prosecutors is approximately in the same range. Attorneys are more critical of the compliance of the application of preventive measures involving deprivation of liberty. Their estimates mostly range from 1 (12.2%) to 5 (31.0%). A very small number of respondents from the group of prosecutors and judges rated the compliance from 1 to 4 (12.8 % - judges and 11.2 % - prosecutors).

172. The judges' response is clear: they are more interested in the results. However, both attorneys and prosecutors, being equal parties to the proceedings on choosing a preventive measure, are less interested in high results. However, the breakdown of estimates of the application of preventive measures involving deprivation of liberty demonstrated by them may, to some extent, be evidence of the elements of indictment bias in this system. Thus, given the adversarial principle and equality of the parties, the prosecution and the defence should normally give roughly the same estimates. Low estimates would rather demonstrate poor work of the courts and high estimates – on the contrary. If the results of the survey of these parties to the proceedings differ so significantly (prosecutors mostly believe that the procedure for applying preventive measures complies with the law, while attorneys – do not), this may clearly indicate that violations of the law are one-sided.

173. The results of the Survey are consistent with and confirms the results of this research, which demonstrates the widespread practice of unjustified use of preventive measures involving deprivation of liberty.

174. The following **question 6** should determine at what stage the legal requirements for deprivation of liberty are most often violated. In accordance with the provisions of the criminal procedure legislation, three stages were conditionally distinguished for this purpose: application of a preventive measure (both at the stage of pre-trial investigation and trial stage), the extension of the preventive measure at the stage of pre-trial investigation and extension of this preventive measure at the trial stage. It is also possible that there are no frequent violations at any of these stages. It should be noted that the CCP imposes, probably indirectly, somewhat greater responsibility for extending the period of detention at the stage of pre-trial investigation on the court and at the stage of pre-trial investigation - on the prosecution.[63] Moreover, the legislation on the extension of preventive measures at the trial stage was found not fully compliant with the provisions of Article 5 of the Convention.[64]

Table 3.

At what stage the legal requirements for deprivation of liberty are most often violated?	Total	Judges	Prosecutors	Attorneys
Application of a preventive measure	35,9	31	33,7	44,1
Extension of the preventive measure at the stage of pre-trial investigation	18,9	39,7	17,2	16,2
Extension of this preventive measure at the trial stage	35,9	17,5	37,3	38,3
None of the options	9,3	11,9	11,8	1,4

63 For example, according to Article 331 of the CPC of Ukraine, the court may, on its own initiative, consider the issue of expedience to extend the period of keeping the accused in custody. At the stage of pre-trial investigation, the resolution of this issue falls entirely within the scope of the prosecutor's office.

64 See *Chanyev*, paras. 29 – 35.

175. The majority of respondents most critically assessed the stages of application of a preventive measure and its extension at the trial stage – 35.9% for each category of the answer.

176. When looking at how the responses were divided among groups, one can follow certain trends. Thus, the majority of judges are inclined to believe that violations most often occur during the application of a preventive measure and its extension at the stage of pre-trial investigation (31.0% and 39.7%, respectively). Prosecutors have a different opinion: the majority of them chose the stages of application of a preventive measure and its extension at the trial stage (33.7% and 37.3%, respectively). At the same time, a notable number of respondents from these groups are inclined to believe that no violations occur at any of these stages: 11.9% among judges and 11.8% among prosecutors.

177. As to attorneys, only a small number believe that the legal requirements are not violated at any stage – 1.4 %. Most of the respondents were divided between the first three options: 44.1 % - at the stage of application of a preventive measure, 16.2 % - extension at the stage of pre-trial investigation, and 38.3% - extension at the trial stage. Such distribution of results supports the existence of a systemic problem covering all stages of the consideration of issues involving deprivation of liberty before sentencing.

178. Q**uestion 7** is aimed at obtaining information on the respondents' opinion on the frequency of violations of the law, depending on the nature of decisions on deprivation of liberty to be taken by the court. The response options reflect the types of decisions on the deprivation of liberty provided for by the criminal procedure legislation: decisions on remand in custody (initial remand or its extension); decisions on 24-hour house arrest (initial imposition of the measure or its extension); decisions on release from custody under 24-hour house arrest and none of the listed options (see Table 4).

Table 4.

The frequency of violations of the law, depending on the nature of decisions on deprivation of liberty to be taken by the court	Total	Judges	Prosecutors	Attorneys
Decisions on keeping in custody (for the first time or extension)	56	63,5	40,8	94,2
Decisions on 24-hour house arrest (for the first time or extension)	7,4	8,7	8,5	3,5
Decisions on release from custody under 24-hour house arrest	30,9	12,7	44,5	2
None of the listed options	5,6	15,1	6,1	0,3

179. The majority of respondents indicated that most violations of the law occur during the decisions on remand in custody – 56.0 %. A similar trend can be observed in certain groups: 40.8% among prosecutors, 63.5% among judges, and 94.2% among attorneys.

180. Quite a significant percentage chose the option of the decision to release from custody under house arrest – a total 30.9 %. This overall percentage is explained by the significant number of such responses among prosecutors – 44.5 %. At the same time, both judges and attorneys gave a rather small number of votes in favour of this option: from a noticeable 12.7% among judges to a meagre 2.0% among attorneys.

181. The trend is generally obvious: the majority of respondents believe that, most often, violations of the law occur during the imposition/extension of remand in custody. At first glance, this may indicate that the process of choosing a preventive measure in the form of remand in custody is indeed accompanied by a larger number of violations.

182. However, assuming that both detention and 24-hour house arrest are different forms of deprivation of liberty, and therefore the decisions on their application should be equal in terms of the strength of arguments, it seems that the answers should have been distributed more evenly between the first three options.

183. Analysis of further questions (see, for example, question 16) indicates that survey participants consider 24-hour house arrest as a less restrictive preventive measure compared to detention, seen as its alternative. Thus, the specified breakdown of responses may indicate that the majority of participants, for the same reasons, are less picky about the justification of decisions to apply a preventive measure in the form of 24-hour house arrest and therefore do not see significant violations when this measure is applied. It is obvious that the participants (especially on the part of the defense lawyers) consider house arrest as significant mitigation of the preventive measure. However, the fact remains that decisions to apply 24-hour house arrest must be justified on a par with decisions on keeping in custody.

184. The next **question 8** is intended to assess other aspects of compliance of decisions on deprivation of liberty with the national legislation, namely, the correlation between the level of their justification. Ideally, the level of justification of decisions ordering remand in custody and 24-hour house arrest should not be different. Based on the logic of the previous question, the respondents, at least among judges, should have indicated that the level of justification of rulings on keeping in custody is higher.

185. In practice, the overwhelming majority of respondents from all three groups (66.1% totally, 71.4% among judges, 62.0% among prosecutors, and 75.4% among attorneys) agreed that the level of justification of decisions to apply the abovementioned measures is almost the same. Only about a third of respondents (28.2 %) indicated that decisions on remand in custody are more substantiated.

186. Such a breakdown of replies generally argues for proper understanding by the survey participants of the nature of these preventive measures. On the other hand, given the existence of a systemic problem related to the inadequate reasoning of the courts' decisions to apply preventive measures involving deprivation of liberty, such a breakdown of responses may indicate that the level of reasoning in both groups of decisions is equally insufficient. This latter explanation is also confirmed by the results of this study.

187. The **question 9** should shed light on whether the survey participants believe that in Ukraine, there is a problem of excessive abuse of preventive measures in the form of deprivation of liberty. The wording of the question implicitly indicates that if there is a problem with excessive abuse of a preventive measure in the form of remand in custody, then there is probably also a problem with unjustified decisions on the application of this preventive measure. Of course, none of the participants may have accurate information in this regard, but in this case, their perception and subjective assessment are important. Thus, subjective recognition of the problem indicates its rejection and involuntarily induces a person to act in such a way as not to aggravate it. If the participants do not see a problem, this obviously indicates satisfaction with the existing situation and lack of initiative and desire to change something.

188. The majority of judges (69.8 %) believe that the problem exists, but it happens only in some isolated cases and also that it is not serious. The same view is shared by a significant number of prosecutors – 53.7 %. At the same time, 15.9% of respondents among judges and 36.8% of respondents among prosecutors believe that such a problem does not exist. Only 14.3% and 9.5% of respondents among judges and prosecutors, respectively, believe that such a problem exists in Ukraine and it is serious.

189. The results among attorneys are diametrically opposed. If 24.3% of respondents among attorneys believe that a problem exists, but mostly in some isolated cases and it is not serious, 73.6% are convinced that the problem definitely exists and it is serious in nature. Only a small 2.0% of respondents believe that the problem does not exist at all.

Table 5.

Is there a problem of excessive abuse of preventive measures in the form of deprivation of liberty in Ukraine	Total	Judges	Prosecutors	Attorneys
Yes, this is a problem and it's quite serious.	25,8	14,3	9,5	73,6
No, this is not a problem at all.	26,1	15,9	36,8	2
Yes, the problem exists, but it happens only in some isolated cases and it is not serious	48	69,8	53,7	24,3

190. The results indicate that the key actors who must ensure that deprivation of liberty before sentencing is justified in each case, namely, the prosecution and the court, for the most part, believe that if the problem exists, it is unsystematic and sporadic. This observation contrasts with the findings of the present research and indicates that it is necessary to work towards further dissemination of information on the research issues among judges and prosecutors. Also, if we assess the position of judges and prosecutors in combination with the position of attorneys, this may be regarded as indirect evidence of the existence of a system configured in favour of the prosecution. There is obviously no other explanation for why there is such a difference in the perceptions of the problem among respondents-prosecutors and respondents-attorneys.

191. **Question 10** is general and is intended to determine the position of the interviewed participants as to where the greatest difficulties in the application of a preventive measure in the form of keeping in custody arise. Two response options are offered: imperfect regulatory framework and inconsistency in the practice of its application, in particular, legal traditions and habits that are contrary to the current legislation.

192. If the respondents choose the first option it will be indicative of the fact, they do not see problems in their own work, and all the "shortcomings" lie in the legislative activity, which they become hostages of. For the same reasons, their choosing the second option will indicate a critical attitude to their own work and recognition of collective responsibility for the current situation. Such answers, therefore, will be reliable in terms of quality and representativeness. At the same time, it is worth noting that, as a general rule, judges and prosecutors still play a key role in the proceedings for the application of a preventive measure. Despite the consolidation of the principle of equality in the criminal procedure legislation, it is the prosecutor who in practice "sets the tone" and the judge who delivers the final decision. The prosecutor independently decides when to file a motion, has more time to collect the necessary information and documents, independently determines for which preventive measure such evidence may be sufficient, etc. Therefore, it is obvious that the application of legislation refers more to the work of prosecutors and judges.

193. The analysis of the answers to this question fully fits into the overall picture of the survey. Thus, the overall assessment of the responses shows that participants in equal parts see the source of the problem both in improper law enforcement and in legislative deficiencies (42.5% vs. 57.5 %). However, the results among certain groups of respondents differ significantly. Thus, 43.7% of the judges surveyed believe that the problem lies in the sphere of practical application. On the one hand, this

is evidence that judges believe that part of the responsibility for problems in the sphere lies with them. On the other hand, a significant number of judges in response to the fourth question of this survey indicated that the biggest problem in the procedure for choosing a preventive measure involving deprivation of liberty is poor-quality motions of the prosecution. Therefore, it seems that the response to this question by the respondents among judges should be understood in the same vein as well. As to prosecutors, 71.3% of respondents from this group indicated the imperfection of legislation as the greatest difficulty associated with choosing preventive measures. Thus, the majority of respondents in this group do not see any problems either in their own work or in the work of other parties to the proceedings. Such a position largely contradicts the position of the CoE CM in this regard and the actual results of this research. In general, it seems that respondents among prosecutors and judges do not see any problems or deficiencies in their work.

194. As for the respondents among attorneys, 79.4% of them believe that the problem lies in the improper practice of application of legislation. This position is generally consistent with both the position of the CoE CM and the research results and, in view of the above considerations, carries weight.

195. Question 11 is similar to question 10 but concerns 24-hour house arrest. The distribution of responses among participants is almost similar as the results concerning question 10.1. Therefore, all the above considerations apply equally to the responses to this question.

3.2.3. Questions 12-13 concerning substantiation of courts' decisions.

196. Question 12 should help establish what, according to respondents, the main difficulties in justifying detention exist at the national level. This question comes close to the main subject of this research – reasoning of decisions to apply preventive measures involving deprivation of liberty (in this case, remand in custody). Several response options are offered, which, if summed up, are as follows: 1) the prosecutor's office files unsubstantiated or insufficiently substantiated motions; 2) the defence does not raise this issue at a sufficient level; 3) insufficiency of evidence to confirm the existence of grounds for detention; 4) lack of sufficient reasoning in the court ruling indicating the existence of grounds for detention, and 5) lack of clear case-law of the national courts. If responses 1, 2, and responses 4 and 5 are related to deficiencies in the work of the prosecution, the defence, or the court, respectively, the response 3 is more multi-faceted and complex. Insufficient evidence of the existence of grounds for choosing a preventive measure can be considered by judges as a deficiency in the work of the prosecution, and by attorneys – as a deficiency in the work of the prosecution, which, if the motion is granted, extends to the work of the court as well.

197. **In general, as in all previous questions, the problem is the same, and it is obvious – unjustified court decisions. The solution to this problem largely depends on the courts. However, the respondents' vision of this problem will make it possible to choose the way to solve it more effectively. In general, the responses among the participants were distributed as follows (in descending order) (see also Table 6):**

- **insufficient evidence to support the existence of grounds for detention (44.5%);**
- **lack of clear case-law (36.5%);**
- **unjustified prosecutor's motions (26.5%);**
- **lack of justification for the existence of grounds for detention in the court's ruling (22,9%);**
- **the defence does not properly raise the issue of insufficiency or lack of grounds for detention (9,9%);**
- **other (3,8%);**

Table 6.

What are the main difficulties in justifying detention that exist at the national level?	Total	Judges	Prosecutors	Attorneys
The prosecutor's office files unjustified or insufficiently justified motions	26,5	66,7	8,3	59,4
The defence does not raise this issue at a sufficient level	9,9	23,8	10,6	2,6
Insufficient evidence to confirm the existence of grounds for detention	44,5	58,7	32,9	69
Lack of justification for the existence of grounds for detention in the court ruling.	22,9	8,7	15,2	48,4
Lack of clear case-law in this respect.	36,5	16,7	48	13,9
Other	3,8	0,8	4,9	1,7

198. **Thus, as it really is, the main difficulties are caused by complex problems. Lack of sufficient evidence to support the need to place a person in custody, according to the research results, is a problem that, along with the lack of arguments in the court rulings, is one of the root causes of the systemic problem that was identified by the ECtHR.**

199. **The majority of surveyed judges indicate among the greatest difficulties the inadequate justification of the prosecutor's motions (66.7 %) and insufficient evidence (apparently, as noted above, in the motions of the prosecution) for choosing a preventive measure (58.7%), while only a small 8.7% see problems with the reasoning of court decisions. Such a result is quite contradictory since it is difficult to understand how it is possible to draft a well-reasoned decision to apply a preventive measure in the form of detention if the prosecutor's motion is unsubstantiated. Therefore, such a breakdown of responses indicate that the respondents were more likely to choose problems related to the work of other institutions involved.**

200. **The majority of surveyed attorneys chose the lack of evidence in the materials (69.0%), unjustified motions of the prosecution (59.4%), and lack of justification in court rulings (48.4%) as the main difficulties. These results are consistent with the results of the present research. At the same time, only 4.7% of attorneys indicated the existence of shortcomings in the work of the defence. Despite the low percentage, it is worth noting that the respondents from the group of prosecutors do not consider shortcomings in the work of the defence a significant problem (only 10.6 %) either. The position of judges somewhat varies and is more critical in this respect (23.8 %).**

201. **As for the respondents-prosecutors, they see the main difficulties in the lack of clear case-law (48.0 %) and insufficient evidence (32.9 %). Given that the key role in collecting evidence lies with the prosecution, this may indicate an actual recognition of shortcomings in their own work. However, given the wording of the question and the specified response option ("What difficulties arise with justifying detention?" and "Insufficient evidence to support the existence of grounds for detention"), it turns out that there is a practice when the respondents see that there is insufficient evidence, but still submit the motion to apply detention. This practice is inconsistent with the ECtHR standards.**

202. **Question 13 is similar to the previous one but concerns 24-hour house arrest. The approach of the ECtHR and the CoE CM is based on the fact that in terms of Article 5 of the Conven-**

tion, both detention and 24-hour house arrest are identical preventive measures in that they both constitute deprivation of liberty. Therefore, the breakdown of responses among respondents should be more or less the same. However, the results differ markedly, by an average of 5-20 % (see Table 7).

Table 7.

What are the main difficulties in justifying detention that exist at the national level?	Total	Judges	Prosecutors	Attorneys
The prosecutor's office files unjustified or insufficiently justified motions	22,4	62,7	7,2	48,4
The defense does not raise this issue at a sufficient level	9,7	18,3	10,6	4,1
Insufficient evidence to confirm the existence of grounds for detention	33,7	53,2	25,8	47
Lack of justification for the existence of grounds for detention in the court ruling.	21,4	11,1	17,3	35,9
Lack of clear case-law in this respect.	43,6	19,8	52,7	28,7
Other	3,4	1,6	4,3	1,7

203. **The difference in distribution of answers is usually downward, except for one criterion – the lack of clear case-law. In terms of practical application, according to the respondents, there are far more difficulties. Thus, as compared with detention, there are generally fewer difficulties associated with the application of a preventive measure in the form of house arrest. This is unlikely due to the fact that the prosecutor's motions and court rulings on 24-hour house arrest are better justified, and the materials contain more convincing evidence compared to similar parameters in proceedings on detention. But this may rather indicate a less demanding attitude of the respondents to the application of a preventive measure in the form of house arrest. This, therefore, supports the hypothesis that, at the national level, 24-hour house arrest is considered as a less strict preventive measure and an alternative to detention. As for the greater difficulties due to the lack of clear, practical application, this, given the situation with choosing other criteria, indicates the lack of common approaches to the application of the 24-hour house arrest. In any case, all these factors indicate the need for educational activities among these groups of survey participants.**

3.2.4. Questions 14-15 with practical tasks concerning reasoning of court`s decisions

204. The next **question 14** is formulated as a task of the following content: "The suspect is a high-ranking official in one of the law enforcement agencies, who was removed from office during the pre-trial investigation. The suspect has a significant fortune and often travels abroad. He is suspected of committing a particularly serious non-violent crime in an organised group, for which he faces up to 12 years in prison. The suspect refuses to admit his guilt or cooperate with the investigation. Are these circumstances sufficient to apply a preventive measure in the form of detention or 24-hour house arrest?». This is a general question aimed at testing the respondents' understanding of what constitutes a proper justification for the existence of risks warranting detention. All the circumstances mentioned in the question are a typical set of arguments that are often used by courts as justi-

fication for the existence of a risk of improper procedural behaviour of a person, which, however, are not such according to the ECtHR. According to the ECtHR, all of them are rather neutral and can neither confirm nor refute the existence of such risks.

205. It should be noted that although these are all evaluation categories, the most acceptable answer in terms of these arguments is "These circumstances alone do not confirm or deny the existence of risks provided for in Article 177 of the CPC of Ukraine".

206. This answer was chosen by a total of 28.3% of respondents, including 26.2% among judges, 24.5% among prosecutors, and 39.7% among attorneys. Therefore, it seems that despite a slightly better understanding of the problem by individual groups of respondents, the overall result fits into the outline of this research and indicates a lack of understanding by participants of the survey of the concept of "justified" decision on detention / 24-hour house arrest. **As with responses to many of the previous questions, this breakdown of responses indicates the need to raise awareness about the relevant ECtHR case-law among judges, prosecutors, and attorneys**.

207. It should be noted that among the possible responses to this question, about 14.5% chose a response that was based on a misunderstanding of the relationship between detention and 24-hour house arrest. This is about the last, fifth, answer: "*Sufficient to apply a preventive measure in the form of 24-hour house arrest. To apply a preventive measure in the form of detention, it is necessary to give more serious arguments, since such a preventive measure provides for the deprivation of liberty of a person*". This problem is dealt with in questions 16-17 below.

208. Question 15 is actually a detail of the previous one: if the previous one concerned the general assessment of the risk of improper procedural behaviour of a suspect / accused person, question 19 focuses on the example of the (non)existence of a risk of a particular type of improper procedural behaviour: the risk of absconding. The question is, "Which of the indicated facts confirm(s) the existence of a **high** risk of a person's absconding during the pre-trial investigation and/or the trial?". The word "high" is intended to emphasise that it should be a really strong argument for a person's absconding. In general, the question is intended to provide an opportunity to assess the respondents' perception of what "risk" is. There are 4 possible response options:

- A person has two passports for traveling abroad and often travels outside the country;
- A person has real estate abroad and a significant fortune;
- A person is suspected of committing a particularly serious crime;
- None.

209. **Therefore, the responses are again based on facts that are usually neutral and are usually critically evaluated by the ECtHR as arguments for deprivation of liberty. The possession of passports for traveling abroad is a feature that characterises the majority of the population of Ukraine. To eliminate this problem, it is enough to take away a person's passports for traveling outside of Ukraine. However, it is impractical to regard it as an argument for the existence of a high risk of a person's absconding. The possibility of traveling outside the country and the risk of absconding from pre-trial investigation authorities should not be confused. Therefore, possession of a passport is more of a neutral fact rather than a confirmation that a person will abscond from the authorities. However, this option was chosen by a total of 44.1% of respondents (48.4% among the judges, 48.7 % - prosecutors and 31.0 % - attorneys).**

210. **The same applies to the other answers. The fact that a person is suspected of committing a particularly serious crime can indeed push someone to escape, but by this logic, it turns out that everybody suspected of committing a particularly serious crime is potentially prone to absconding, which is not true. Again, this option was chosen by 38.2% of respondents (41.3% among the judges, 41.0 % - prosecutors and 28.4 % - attorneys).**

211. **The fact that a person has real estate abroad and significant wealth is evidence of very minimal risk of evasion, which is again eliminated by the seizure of passports. Therefore, even taking into account some vagueness in the wording of the question, the option "none" seems to be the most accurate.**

212. **Only 21.4% of respondents among the judges and 17.6 % - among the prosecutors choose that correct option. Much better is the situation with attorneys 44.9 % of whom chose the correct response.**

3.2.5. Questions 16 – 17 concerning the nature of 24-hour house arrest.

213. The above analysis of indirect questions revealed possible indications that the respondents had no good understanding of the nature of 24-hour house arrest, in particular of the fact that this preventive measure should also be regarded as a deprivation of liberty and that its application should be accompanied by the same safeguards as the application of detention (see Questions 13-14 above). **Question 16** "puts the question point-blank" as to whether the participants see any difference between these measures, or rather: "what is the regime and relation between keeping in custody and 24-hour house arrest?». According to the first response, 24-hour house arrest is a less strict preventive measure since it involves less interference with a person's right to liberty and should therefore be regarded as an alternative to detention. This wording is closer to the "letter of the law" but is completely contrary to the ECtHR case-law. The second option: "in terms of interference with a person's right to liberty, these measures are equivalent, and their application requires equally serious justification." This thesis is formulated in the spirit of the ECtHR case-law based on its findings in the judgment *Buzadji v. The Republic of Moldova*. At the same time, it, by and large, is not contrary to the criminal procedure legislation, although it fits less into its concept. While not denying that 24-hour house arrest is an alternative to detention, as stated in the CCP of Ukraine, the thesis argues that solely in terms of the right to liberty, 24-hour house arrest and detention are essentially the same.

214. The respondents' answers demonstrate a commitment to an erroneous understanding, from the ECtHR standpoint, of the relationship between these measures (see Table 8 below).

Table 8.

What is the regime and relation between remand in custody and 24-hour house arrest?	Total	Judges	Prosecutors	Attorneys
24-hour house arrest is a less strict preventive measure since it involves less interference with a person's right to liberty and should therefore be regarded as an alternative to detention	72,7	59,5	77,4	64,9
In terms of interference with a person's right to liberty, these measures are equivalent, and their application requires equally serious justification	27,3	40,5	22,6	35,1

215. On average, 72.7% of respondents chose the first option, while only 27.3% chose the second one. The trend by groups is similar: judges have the best breakdown – 59.5% to 40.5 %, prosecutors – 77.4% to 22.6%, and attorneys – 64.9% to 35.1 %. As a result, about two-thirds of the survey participants believe that 24-hour house arrest is a less strict preventive measure compared to detention and, as an alternative to the latter, its application requires a lower level of justification than detention.

216. This conclusion is generally consistent with the analysis of the national legislation, which, as noted above, contributes to such an understanding of the relationship between these measures. This conclusion is also confirmed by the results of this research which also show a significantly lower level of justification of decisions on the application of preventive measures in the form of 24-hour house arrest. This is especially evident in the rulings of the investigating judges and the court on the release of a person from custody under house arrest.

217. The following questions are formulated in the form of contextual tasks. Their purpose is to analyse the respondents' perception of the problems that are the subject of this research using simulation of real-world situations.

218. **Question 17** provides for the following task: The prosecutor files a motion to extend the term of a preventive measure in the form of keeping in custody, the defence asks to deny the specified motion and release the suspect under 24-hour house arrest, the court agrees with the position of the defence. Then the participants are asked to choose one of the options for the decision that the court should render. These options differ in argumentation.

219. **In general, given that, according to the ECtHR, both 24-hour house arrest and detention are deprivation of liberty, the national court, if it deems it necessary to grant the defence motion, should regard this situation as a *de facto* extension of the person's detention on remand and give appropriate arguments.**

220. **According to the first option, given that the person himself applied for 24-hour house arrest, it is sufficient for the court to indicate that there are no grounds for granting the prosecutor's motion. This typical wrong option is based on the erroneous opinion that a person can voluntarily waive his or her right to liberty under these circumstances. The ECtHR has repeatedly noted that the guarantees of Article 5 of the Convention are too important to allow a court to deprive a person of his or her liberty without justification, even with his or her consent[65].**

221. **According to the second option, given that the person himself applied for 24-hour house arrest, it is sufficient for the court to indicate that there are no grounds for granting the prosecutor's motion and give arguments in this regard. This scheme is also incorrect. As this research shows, it is usually used by domestic courts: they justify the lack of grounds for granting the prosecutor's motion for detention but provide no arguments for 24-hour house arrest. It looks like "there are no grounds for deprivation of liberty, but we believe we should still deprive of liberty."**

222. According to the third **option** the court should justify the need to apply for 24-hour house arrest. However, in view of the fact that this is an alternative preventive measure in respect of detention, which involves a significantly lower degree of interference with a person's right to liberty, the justification requirements for such a decision are lower in this regard. This is also an incorrect option, which is based on the fact that 24-hour house arrest involves a lower level of interference with a person's right to liberty.

223. And finally, the fourth correct option: the court should justify the need to apply 24-hour house arrest. Given that both detention and 24-hour house arrest are different forms of deprivation of liberty, the justification requirements for a decision, in the context of the need to deprive a person of liberty, are the same.

224. Contrary to the logic of responses to the previous questions, the majority of participants answered correctly, i.e. opted for the fourth answer: totally – 63.2%, judges – 75.4%, prosecutors – 62.8%, and attorneys - 60.6 %. While this breakdown of responses is as encouraging as the results of responses

65 *Buzadji v. the Republic of Moldova*, §§ 107 – 108.

to the previous questions, the analysis of legislation and the research results show a completely different picture. Overall, 36.8% of participants still chose the wrong answer.

3.2.6. Questions 18-19 concerning the right to compensation.

225. **The following question 18 is intended to determine the participants' opinion on whether a person who was unlawfully detained (under 24-hour house arrest) should have the right to claim monetary compensation. Response options are the following: "No, until a person is finally acquitted," "Yes, despite decisions on the merits of his/her criminal charges," "Yes, only if the criminal charges are not serious," "No, if the person is released immediately after his/her detention is declared unlawful." The first answer is actually an embodiment of the real situation, which is inappropriate in terms of the ECtHR. The ECtHR standard is that deprivation of liberty can be contrary to the Convention regardless of whether a person is acquitted or convicted. The second answer reflects the position of the ECtHR as such. The third answer is intended to offer a middle ground between the requirements of the ECtHR and the current situation. It does not meet the requirements of the ECtHR case-law, since regardless of the seriousness of the charges, deprivation of liberty remains a deprivation of liberty. The fourth answer is also a middle ground which assumes that the very fact of recognising a violation and releasing a person is sufficient compensation. The results are set out in Table 9 below.**

Table 9.

Does the person who was unlawfully detained (under 24-hour house arrest) should have the right to claim monetary compensation	Total	Judges	Prosecutors	Attorneys
No, until a person is finally acquitted.	48,4	46,8	53,7	26,7
Yes, despite decisions on the merits of his/her criminal charges.	37,5	39,7	33,3	59,3
Yes, only if the criminal charges are not serious.	5,4	5,6	5,7	8,1
No, if the person is released immediately after his/her detention is declared unlawful.	8,7	7,9	7,3	5,8

226. **48.4% of all respondents chose the option that corresponds to the current state of legislation and practice in Ukraine. Only 37.5% chose the second option. Among the survey participants most involved in "compensation proceedings," the results do not differ much among judges (46.8% to 39.7 %) and a little better among attorneys (31.9% to 56.2 %).**

227. **The survey results among judges indicate that the survey participants are more likely to follow the requirements of the current legislation than interpret it in the light of a person's right to receive compensation for unlawful deprivation of liberty, guaranteed by Article 5 § 5 of the Convention. If the state of legislation was at the proper level, such an approach would not raise concerns. However, the ECtHR actually stated that the existing legislation does not provide for effective mechanisms for compensation for damage caused by unlawful deprivation of liberty. The Government pointed out that, in order to address this deficiency, they had developed draft law no. 9044, but, as noted above, the draft law was withdrawn. At the**

same time, the Government also emphasised in its report to CoE CM[66] that at that time, a new case-law was emerging at the national level, which made it possible to obtain compensation for unlawful deprivation of liberty without amending the legislation. This research shows that even today, let alone 2019 when the Government report was submitted, it is still too early to talk about the formation of such practice. In the light of such conclusions, the survey results clearly demonstrate that a radical change in case-law should not be expected in the near future since, as noted above, the majority of the surveyed consider the existing system to be correct. In any case, if the Government still follows the path of forming case-law rather than amending legislation, it is necessary to carry out at least an intense awareness raising campaign in this direction.

228. **Question 19, again, refers to the right of a person to receive compensation for unlawful deprivation of liberty. The question is whether a person should be entitled to monetary compensation for unlawful application of a preventive measure in the form of 24-hour house arrest or detention on remand if his or her initial charge of a serious crime for which he or she was arrested was finally reclassified by the court as a minor offense.**

229. **This question is essentially a concretisation of previous one including reservation concerning reclassification of charges. In contrast to question 18, this situation offers an additional circumstance that should encourage those who believe that only an acquittal, as provided for by the current legislation, should be a condition for providing compensation for the application of a preventive measure during the pre-trial investigation.**

230. **The additional circumstance prompted the respondents to accept a position based on the ECtHR case-law: "Yes, since any "unlawful" detention constitutes a violation of a person's right to liberty and security, and therefore compensation will be one of the elements of restoring his or her violated rights." This option was generally chosen by 45.7% of respondents (from 39.6% among prosecutors, 42.1% among judges, to 63.8% among attorneys). Nevertheless, the remaining respondents (54.3 %) chose other options, which to some extent make the right to compensation for unlawful deprivation of liberty dependent on the full or partial acquittal of a person. As already mentioned, this does not meet the requirements of the ECtHR since unlawful deprivation of liberty is unlawful regardless of the results of criminal proceedings against the suspect / accused person.**

66 https://hudoc.exec.coe.int/eng#{"fulltext":["CM/ResDH(2017)296"],"EXECDocumentTypeCollection":["CEC"],"EXECLanguage":["ENG"],"EXECIdentifier":["004-46503"]}

Conclusions based on the results of the survey analysis.

231. **The Survey results indicate the following:**

- **Survey participants among judges and prosecutors tend to believe that the problem of excessive use of a preventive measure in the form of detention is insignificant and not systemic. In contrast, most attorneys believe that this problem is serious;**
- **All respondents indicated that there were certain problems with the application of preventive measures in the form of deprivation of liberty. However, most of them believe that the cause of such problems is various deficiencies in the work of other parties to the criminal proceedings. Quite a significant number of respondents indicated the existence of shortcomings in the current legislation as a problem;**
- **It seems that the majority of the surveyed among judges and prosecutors set the threshold of proof for the existence of risks for applying a preventive measure in the form of deprivation of liberty significantly lower than attorneys. At the same time, they tend to use stereotypical arguments, which are not always in line with the ECtHR standards;**
- **Most participants of the survey have an understanding of the nature of 24-hour house arrest, which does not fully meet the requirements of Article 5 of the Convention. In their opinion, 24-hour house arrest is a full-fledged, more lenient alternative to detention, and its application requires a lower level of justification;**
- **The survey results indicate that there are possible signs of "indictment bias" in the proceedings in respect of preventive measures related to deprivation of liberty (see questions 5 and 9). Thus, judges and prosecutors highly assess the level of compliance with the law during the proceedings to deprive a suspect / accused person of liberty. However, their responses in this part almost coincide. Instead, most attorneys assess the compliance of this process with the national legislation much more critically;**
- **Most participants believe that a full (or at least partial) acquittal is a prerequisite for obtaining compensation for unlawful deprivation of liberty.**

4

Analysis of the performance of judges, prosecutors and attorneys in detention proceedings.

4.1. General observations

232. Within the framework of this research the team of experts examined decisions and case files concerning application of two types of preventive measures: remand in custody and 24-hour house arrest. The purpose of the research was to assess the performance of parties to the detention proceedings and the reasoning of domestic courts' decisions. The analysis of the above matters was made on the basis of the specifically designed Checklists that are an integral part of the Methodology. These Checklists were used as a basis for the work of the local experts.

4.1.1. As regards the initial pilot analysis.

233. Initially it was decided to conduct the preliminary analysis of 816 decisions delivered by the district courts in four cities: Kyiv, Lviv, Odesa and Kharkiv ("the initial pilot research"). These decisions (see paras. 16 – 19 above) were analysed by the team of designated local field experts on the basis of Checklist No.1. The results of the initial pilot research revealed certain problematic issues which were not initially in the focus of the Research. The **first** issue concerns the way courts apply 24-hour house arrest, the **second** concerns the way they set the amount of bail and the **third** – manifest lack of reasoning in court decisions delivered at the stage following the pre-trial investigation.

234. First, the issue of 24-hour house arrest was once analysed by the ECtHR in a case against Ukraine, namely, in the case of *Korban v. Ukraine*. In its judgement the ECtHR held that the domestic court "*de facto* equated the absence of any grounds for the applicant's pre-trial detention to the justification for placing him under house arrest".[67] Similar problem was identified in all of the examined decisions by which the courts either 1) refused to allow the prosecutor's request to order remand in custody and applied 24-hour house arrest instead or 2) released the suspect from custody under 24-hour house arrest. The number of such decisions was not sufficient to generalize the conclusions and to attribute them to the whole mass of the domestic case law. Further analysis and most of all bigger amount of data was required to either corroborate or refute the existence of the above problem.

235. Second, until 13 January 2022, (i.e. the beginning of the fifth and final stage of the Research (see Introduction part) the way domestic courts had determined the amount of bail had never been separately analysed by the ECtHR in any of its judgments in cases against Ukraine. Nevertheless, the issue of bail, when its amount is set in the court's decisions ordering detention on remand, has for a long time been the subject of the Court's well-established case law under Article 5 of the Convention.[68] For example, in case of *Piotr Osuch v. Poland* the Court found no evidence that before deciding on the sum of bail "*the domestic court made any effort to determine what would be an appropriate amount of bail in the circumstances*"[69] which in its turn became one of key arguments in favour of finding a violation of Article 5 § 3 of the Convention. During the initial pilot research, it was noted that in numerous decisions when setting the amount of bail the courts frequently provided either no reasoning at all or a very superficial reasoning. It was decided that more attention should be paid to this issue in the main research. Recently the above conclusion has been

67 *Korban v. Ukraine*, § 166.

68 *Mangouras v. Spain*, application no. 12050/04, §§ 78 – 81; *Piotr Osuch v. Poland*, application no. 30028/06, §§ 39,40 and 47; and *Bojilov c. Bulgarie*, application no. 45114/98 , §§ 59 – 65.

69 *Piotr Osuch v. Poland*, § 47.

confirmed by the ECtHR's judgment in case of *Istomina v. Ukraine*[70]. In this judgment the ECtHR found violation of Article 5 § 3 of the Convention due to the fact that the domestic courts failed to comply with their obligation to provide relevant and sufficient justification for their decisions setting bail.

236. Third, the initial pilot research showed that there was quite noticeable difference between the reasoning of court decisions delivered at the stage of pre-trial investigation and decisions delivered during the preparatory hearing and trial. In particular, decisions delivered after termination of pre-trial investigation were tangibly less substantiated. From some of the above decisions it transpired that the examination of the issue of continued detention was initiated by the court. In such cases the prosecutor who was present during the hearing did not request the court to extend the term of detention but rather opted for continued detention without apparently adducing any specific arguments.

237. Also, as the result of the initial pilot research it was revealed that the sampling of the court decisions analysed included quite a substantial number of decisions which did not fit the parameters set by the Methodology. In particular, there were some decisions by which the court applied non-custodial measures or even refused the prosecutors' requests and released the suspects.

238. Eventually, it should be noted that the initial pilot research showed that only the texts of court decisions did not suffice to analyse properly the performance of parties (defense and prosecution). Some of the courts reflected the position of parties in the text of their decisions so succinctly that it was practically impossible to analyse it. For the proper analysis of the performance of parties it was necessary to examine the investigative judges' and courts' case files. However, as it is mentioned in the Introduction part, the research team did not have access full access to case files and could obtain access to a very limited number of case files from only three district courts.

239. Therefore, it was decided 1) to include the aforementioned additional matters into the analysis and 2) to carry out the analysis of the reasoning of courts' decisions separately from the performance of parties. For this purpose, the Checklist No. 1 was amended to include additional questions concerning bail, house arrest and different stages of proceedings whilst the questions concerning performance of the parties were excluded. The amended Checklist (the Checklist No. 2) was used only for analysis of court decisions (see paras. 20 – 24). In such a way it was possible to analyse much bigger number of court decisions.

240. The original Checklist No. 1 was still used for the analysis of case files to which the expert team was provided access (see para. 25 above). After the above corrections were introduced, the research was resumed and conducted with a different sample of court decisions.

4.1.2. As regards the main part of the Research.

241. On the basis of the Checklist No. 2, local field experts analysed the decisions obtained from the USRCD (see paras. 20 – 24). The second round of research covered overall **1002 decisions** delivered by district courts (investigative judges) from most regions of Ukraine (all regions were covered except the City of Sevastopol and Autonomous Republic of Crimea). The detailed mapping of the examined decisions is provided in the Table 1 below.

70 *Istomina v. Ukraine*, application no. 23312/15, §§ 30 – 32.

Table 1.

Region	Number of decisions	Percentage of decisions
Autonomous Republic of Crimea	0	0
Sevastopol	0	0
Kyiv	139	14
Kyiv Region	54	5
Vinnytsia Region	40	4
Vilyn Region	19	2
Dnipropetrovsk Region	115	11
Donetsk Region	50	5
Zhytomyr Region	22	2
Zakarpattia Region	24	2
Zaporizhzhia Region	52	5
Ivano-Frankivsk Region	22	2
Kirovogradska Region	24	2
Lugansk Region	17	2
Lviv Region	30	3
Mykolaiv Region	26	3
Odesa Region	87	9
Poltava Region	31	3
Rivne Region	22	2
Sumy Region	20	2
Ternopil Region	12	1
Kharkiv Region	80	8
Kherson Region	26	3
Khmelnytsk Region	33	3
Cherkasy Region	22	2
Chernivtsi Region	16	2
Chernigiv Region	19	2

The analysed court decisions were divided by the research team into several categories:

- Decisions ordering the measure of remand in custody or 24-hour house arrest;
- Decisions ordering continued remand in custody (or 24-hour house arrest) during the pre-trial investigation stage;
- Decisions ordering continued remand in custody (or 24-hour house arrest) during the preparation hearing;

- Decisions ordering continued remand in custody (or 24-hour house arrest) during the trial stage;
- Decisions by which the court refused to allow the prosecutor's request to order remand in custody and applied 24-hour house arrest instead;
- Decisions by which the court released the individual from custody under 24-hour house arrest.

242. The distribution of the court decisions among the above categories is demonstrated in the Table 2.

Table 2.

Type of decisions	Number of decisions	Percentage of decisions
Decisions ordering the measure of remand in custody or 24-hour house arrest (initial)	710	71
Decisions ordering continued remand in custody (or 24-hour house arrest) during the pre-trial investigation stage	59	6
Decisions ordering continued remand in custody (or 24-hour house arrest) during the preparation hearing	51	5
Decisions ordering continued remand in custody (or 24-hour house arrest) during the trial stage	115	11
Decisions by which the court released the individual from custody under 24-hour house arrest.	9	1
Decisions by which the court refused to allow the prosecutor's request to order remand in custody and applied 24-hour house arrest instead	58	6

243. The decisions covered by the research were randomly selected within the general parameters defined in accordance with the sociological (representativeness) requirements in line with the distribution delineated on the basis of the statistical data on the relevant judicial decisions rendered during the research period and suggested in the Methodology.

Most of the examined decisions were delivered by the courts in 2018 – 2020:

- 2017 – 1 decision;
- 2018 – 346 decisions;
- 2019 – 338 decisions;
- 2020 – 315 decisions;
- 2021 – 2 decisions.

4.1.3. As regards the analysis of full detention case files.

244. On the basis of the Check-list No. 1 local field experts analysed the case files related to application of detention in custody or 24-hour house arrest. The research covered overall **165 case files** of investigative judges in three cities: Kyiv (53 case files making 32% of the total amount), Lviv (59 case files – 36%) and Kharkiv (53 case files – 32%). Most of the case files concerned either initial application of remand in custody (or 24-hour house arrest) (109 case files making 66% of the total amount) or continued remand in custody (or 24-hour house arrest) during the pre-trial investigation stage (43 case files making 26% of the total amount). Remaining case files concerned other types of decisions referred to in Table 2 above.

245. Most of the examined decisions were delivered by the courts in 2018 – 2020:

- 2017 – 1 decision;
- 2018 – 51 decisions;
- 2019 – 44 decisions;
- 2020 – 68 decisions;
- 2021 – 1 decision.

246. The approach to selection of cases was similar to the one adopted for selection of decisions from the USRCD.

4.1.4. Conclusions.

247. To sum up, the performance by the parties to the proceedings and judges will be analysed based on the following statistics:

- judges – based on the analysis of 1002 decisions;
- defence and prosecutors – based on the analysis of 165 case files.

4.2. Prosecution

248. First question of the Checklist No. 1 that addressed the performance of the prosecution was Question 9. It seeks to establish whether in its requests the prosecution referred to any of the grounds for detention on remand (risks) provided for by Article 177 § 1 of the CCP of Ukraine. And if so, what specific grounds the prosecution referred to. The question was formulated in the following way: "*What grounds for ordering (continued) detention on remand provided for by law does the prosecution refer to?*" The proposed answers to that question included, among other things, the list of grounds for detention provided for in Article 177 § 1 of the CCP of Ukraine. If the prosecution did not refer to any of the above grounds, the option "*None of the listed above*" was available. The results of analysis of the case files are summarized in Table 3.

Table 3.

What grounds for ordering (continued) detention on remand provided for by law does the prosecution refer to?	Number of decisions	Percentage of decisions
Risk of absconding (Article 177 § 1 (1) of the CCP)	158	96
Risk of tampering with evidence (Article 177 § 1 (2) of the CCP)	40	24
Risk of influencing the participants of the criminal proceedings (Article 177 § 1 (3) of the CCP)	146	88
Risk of other illegitimate interference in the administration of justice (Article 177 § 1 (4) of the CCP)	71	43
Risk of reoffending or continuing the criminal offence of which a person is suspected (Article 177 § 1 (5) of the CCP)	130	79
None of the listed above	1	1

249. The results show that in all of the analysed cases (except for one) the prosecution relied on at least one of the grounds for detention on remand provided for by domestic law.

250. Next Question No. 10 concerned the reasoning adduced by the prosecution to prove the existence of risks envisaged by Article 177 § 1 of the CCP of Ukraine. The purpose of the above question was to establish whether there were any deficiencies in the reasoning of the prosecution. The question was set out in the form of an assertion followed by a list of unacceptable grounds for detention on remand and techniques used for drafting requests. The list was formed on the basis of typical shortcomings identified by the ECtHR in judgments against Ukraine. The results are summarized in the Table 4 below.

Table 4.

The prosecutor mainly adduced unacceptable grounds/reasons for detention	Number of decisions	Percentage of decisions
Gravity of the crime / severity of the punishment	153	93
Special status of the accused / suspect	30	18
Criminal record	52	32
Frequent trips abroad	0	0
Availability of substantial assets	8	5
Irrelevant references to the case law of the ECtHR	37	22
Stereotyped wording	118	72
Prevailing quotations from the domestic law	7	4
Deterrent effect of the preventive measure	2	1
Unwillingness [of the accused/suspect] to cooperate with the prosecution	4	2
The risks did not diminish	18	11
24-hour house arrest is perceived as an alternative measure which has nothing to do with detention	0	0
Other practices	0	0
None of the listed	1	1

251. As it can be seen from the wording of the above questions, in particular from using the word "*mainly*", the experts had to choose one of the unacceptable grounds for detention only if it played a substantial role in the prosecutor's request. Otherwise, if none of unacceptable grounds played such role in the reasoning adduced by the prosecution, the experts could choose the option "*None of the listed*".

252. It appears that only in one of the analysed cases the prosecution did not base its reasoning on unacceptable grounds. In all other cases it mainly relied on unacceptable grounds for detention, namely: Gravity of the crime / severity of the punishment (93% of cases); stereotyped wording (72% of cases); criminal record (32% of cases), irrelevant references to the case law of the ECtHR (22% of cases) and special status of the accused / suspect (18% of cases).

253. To sum up, it appears that while referring to the risks provided for by domestic law, the prosecution did not adduce any specific reasons to prove that the above risks indeed existed to the extent necessary to place the accused in custody or under 24-hour house arrest.

254. Question 15 addressed the issue of alternative measures. The question was set out as follows: "***Did the prosecution adduce evidence / specific arguments proving the insufficiency of alternatives?***" The responses are summarized in Table 5.

Table 5.

Did the prosecution adduce evidence / specific arguments proving the insufficiency of alternatives?	Number of decisions	Percentage of decisions
No	113	68
Yes	52	32

255. It appears that only in 32% of cases the prosecution did adduce arguments in favour of insufficiency of alternative measures. Such statistics contradicts to some extent to the previous question. Thus, if the prosecution managed to adduce specific arguments in favour of insufficiency of alternative measures, it automatically implies that there are at least some arguments proving the existence of risks referred to in Article 177 § 1 of the CCP of Ukraine since both matters are closely connected.

256. Nevertheless, even assuming there was some evidence/arguments in favour of detention of a suspect/accused person in 32 % of cases, in the remaining 68% of cases there was nothing at all.

257. Normally if the prosecutor's request is not supported by relevant and sufficient evidence, the court should dismiss it and either not apply any of the preventive measures or at least apply a preventive measure which is not connected with deprivation of liberty. In spite of this it appears that in all 165 cases analysed by the research team, the judges ordered to place the suspects/accused persons in custody. Such situation raises serious concern as to the quality of the above decisions.

258. The measures that need to be taken to remedy the above problems depend on their origin. Thus, the problem may be caused by the lack of necessary knowledge. On the other hand, the insufficient level of performance may also be caused by unwillingness to act properly. According to the statistics provided by the SC, in 2020 46.2 % of prosecution's request for imposing pre-trial detention were granted by the courts and in 2019 – 45.5% (see Chapter 5 for the statistics provided by the SC analysed below). There is no data to this effect but most probably part of remaining requests for pre-trial detention (43.8 % in 2020 and 46.5 % in 2019) were partly allowed by the courts, i.e. the court refused to apply pre-trial detention but still applied some alternative measure instead. Also, as this Research shows, the majority of requests for imposing detention allowed by the courts are ill-founded (as well as the court decisions). With such statistics, the prosecutors might be simply not interested in putting much effort into preparation of requests.

259. The focus group discussions showed that most of the participants (including the prosecutors) perceive the problem as the complex one, caused by omissions of all actors involved. The courts do not set the standard of reasoning by allowing ill-founded prosecutors' requests for detention. The prosecutors in their turn frequently do not have sufficient motivation to prepare well-founded requests since even with the existing patterns of motivation the courts usually allow (or at least partly allow) their requests. The situation is aggravated by sometimes passive position of defense which further contributes to malfunctioning of the detention system.

260. Also, some of the participants acknowledged the existence of a wide-spread approach to the issue of detention among the prosecutors. At the stage of pre-trial investigation the prosecutors are for the most part concentrated on collection of evidence necessary for bringing charges whilst the collection of information necessary for choosing the correct preventive measure is largely perceived as being of secondary importance. The prosecutors tend to resort to easily available information for proving the existence of risks, i.e. information which does not require time and efforts to be found and proved. Typical example of such information are the severity of potential punishment and gravity of charges.

261. The participants noted that one of possible ways to remedy the abovementioned shortcomings is to prepare special "guidelines" setting out standards of reasoning in the prosecutors' requests and courts' decisions. Such guidelines should be specific and based on examples of good and bad practices from the case law of domestic courts and ECtHR. It was underlined that the above guidelines should be approved or recommended by the Prosecutor's General Office. Overall, most of the participants opted for adoption of common guidelines for all actors involved: prosecutors, attorneys and judges.

262. To sum up, the observations expressed during the focus groups should be further verified. Therefore, the needs assessment aimed at identifying the reasons for improper performance of the prosecution should be carried out.

263. Nevertheless, it appears that the prosecutors are in need of a serious capacity building measures which would provide them with relevant knowledge and skills as to how the grounds for detention provided in domestic law, in particular Article 177 § 1 of the CCP, should be applied in practice in the light of the ECtHR standards.

264. In addition, it appears to be a good idea to prepare practical guidelines for the prosecutors, judges and attorneys which would address the needs identified in this Report.

265. It should also be noted in this regard that failure to perform official duties or improper performance by the prosecutors are among the grounds for disciplinary liability provided for by the Law of Ukraine "On Prosecutor's Office". Insufficient reasoning (lack thereof) and improper quality of prosecutor's request might under certain circumstances fall into the above categories of disciplinary breaches.

266. Therefore, the existence of the above shortcomings should also be brought to attention of the Body in Charge of Disciplinary Proceedings of the public prosecution service (BCDP). This can be done by way of conducting a series of trainings into the ECtHR case law under Article 5 of the Convention and the role of prosecutors in this regard for staff of the disciplinary body.

4.3. Defence

267. Only two questions in the Checklist No. 1, namely Questions Nos. 11 and 16, were introduced to assess the performance of defence in cases concerning detention on remand or 24-hour house arrest. Questions No. 11 followed Question No. 10 concerning the use of unacceptable grounds for detention by the prosecution and was set out as follows: "***The defence adduced evidence/specific arguments to the contrary***". The above assertion was followed by a list of three possible answers: "Y*es, in written form*", "*Yes, in oral form*" and "*No*". The experts were guided that they could choose "Yes"-answer only if the defence put forward arguments undermining the position of the prosecution. The distribution of answers is summarized in Table 6 below.

Table 6.

The defence adduced evidence / specific arguments to the contrary	Number of decisions	Percentage of decisions
Yes, in written form	19	12
Yes, in oral form	106	64
No	40	24

268. In 76% of cases the defence put forward evidence/specific arguments to refute the position of the prosecution. In 24% of cases it either did not put forward any arguments or referred to some insignificant arguments. Apparently, such situation attests to a poor quality of representation in almost quarter of cases which is quite a significant rate. This is even more striking taking into account low quality of the prosecution requests which normally should have provided the defence with strong arguments in favour of their position.

269. Further, it should be noted that only in 12% of cases the defence managed to submit its observations to the court in written form. The fact that the defence prepares its position in writing might be indicative of a more diligent and careful approach to carrying out its duties. Therefore, such statistics also raises some concern as regards the quality of representation.

270. Question No. 16 concerned the way defence responded to prosecutors' arguments in favour of insufficiency of alternative. This question was formulated as follows: "***Did the defence adduced evidence/specific arguments to the contrary?***" (see Table 7)

Table 7.

Did the defence adduced evidence / specific arguments to the contrary?	Number of decisions	Percentage of decisions
No	83	50
Yes	82	50

271. The numbers show that in this regard the performance of defence is hardly any better. In 50% of cases the defence failed to adduce any serious arguments to rebut the claims of the prosecution.

272. The materials analysed by experts did not contain data necessary to elaborate on the reasons of poor performance of attorneys. This may be due to insufficient time to prepare position, for example if there exists a problem with a last-minute notification of an attorney about the hearing. But it may as well be caused by insufficient efforts or qualification of attorneys.

273. It is notable in this regard that during the focus group discussions the participants adduced for the most part similar explanations. Some of them referred to less efficient performance of legal aid lawyers, especially in small towns/districts.

274. In any case the above issue should be further separately researched. It also seems reasonable to analyse and compare the performance of free legal aid attorneys and other attorneys in cases concerning pre-trial detention. Such researches might be conducted on the basis of the Ukrainian National Bar Association (Національна Асоціація Адвокатів України) which acts on the basis of The

Law of Ukraine "On the Bar and Practice of Law" and has all acting attorneys in Ukraine as its members, and Coordination Centre of Legal Aid Provision. Other self-regulating professional institutions may also be involved, for example, Ukrainian Bar Association (Асоціація правників України).

275. If it turns out that the problem is mainly due to insufficient time for preparation two options seem possible. According to Article 184 § 2 of the CCP, copies of request for imposing preventive measure as well as supporting documents attached thereto should be served on the suspect/accused person in no later than **three hours** before the hearing. If the problem is caused by systematic breaches of the above requirement by the prosecutor's this issue should be separately raised within the framework of measures recommended for improving the performance of the prosecutors. **If the time provided by the CCP is insufficient it might be necessary to examine the option of amending domestic legislation, in particular, by way of possibly increasing the above period of time.**

276. In any case it is recommended to carry out an awareness raising campaign among the attorneys to further emphasize the role of defence in maintaining high level of human rights standards in Ukraine. Such measures may be taken within the framework of the above self-regulating professional institutions. It might also be useful to modify the questions for bar exams so that they better addressed the ECtHR standards under Article 5 of the Convention and problems analysed in this research in particular.

277. Also, it would be a good option to have in place specific guidelines setting out the ECtHR standards, examples of good practice in reasoning of court decisions ordering detention on remand and other preventive measures referred to in this Research as well as the clarifications concerning the role of the attorney in detention proceedings.

278. Further it should be noted that pursuant to the The Law of Ukraine "On the Bar and Practice of Law" attorney's failure to perform his professional duties properly is among the grounds for disciplinary liability. Therefore, **it is also recommended to bring the problems analyzed in this Report to the attention of Bar Qualification and Disciplinary Commission of Ukraine (the BQDC).** Before taking any measures provided by domestic law, **the BQDC might contemplate the possibility of carrying out overall evaluation of performance of attorneys based on the results of this Research and information it has in its possession. It might also prepare the guidelines for attorneys clarifying its position as regards the matters set out in this Report or/and organise discussions thereof among attorneys. Any such measures may be taken in conjunction with self-regulating bodies and in the framework of measures referred to above**.

4.4. Judiciary

4.4.1. Introduction.

279. The reasoning adduced by the courts in their decisions is a key factor in assessing whether the detention complies with the ECtHR standards. According to the Court's case law "*it is essentially on the basis of the reasons given in the domestic courts' decisions and of the facts mentioned by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention*".[71]

280. According to the case law of the ECtHR and the relevant provisions of the domestic law analysed in Chapter 1 of this research, the domestic courts are required 1) to refer in their decisions to one

71 See, for example, *Petukhov v. Ukraine*, application no. 43374/02, § 118 with further references.

or several grounds for detention; 2) to provide sufficient reasoning as to the ground/s for detention adduced in their decisions; and 3) to substantiate the insufficiency of alternative measures. The Checklist No. 2 was conceived along the same lines. The questions should guide the research team to assess the compliance with the above requirements. As it is specified above, the Checklist No. 2 was supplemented with specific questions addressing the issues of 24-hour house-arrest and bail.

4.4.2. Correlation between the gravity of the crime and application of pre-trial detention

281. One of the first steps of the performed analysis was to establish what is the correlation between the gravity of the crime and application of pre-trial detention. For this purpose, the research team had to indicate in the relevant field of the Checklist No. 2 the gravity of the crime of which the person was suspected in/accused of when placed in custody.

282. According to the general rule, the pre-trial detention is an exceptional preventive measure and should be applied respectively. Ordering detention of individuals accused of committing minor crimes or crimes of medium gravity might be indicative of an overall accusatory approach of the judicial system and unnecessary use of detention.

283. The data obtained is summarised in Table 8.

Table 8.

Gravity of crimes (classification before 01/07/2020)	Number of decisions	Percentage of decisions
Minor crime	10	1
Crime of medium gravity	174	17
Grave crime	610	61
Particularly grave crime	208	21

284. The results reflect the general positive tendency according to which the preventive measures relating to deprivation of liberty should be applied only in exceptional circumstances, one of important aspects of the above tendency being that such severe preventive measures should not normally be ordered in cases of individuals accused of minor crimes.

4.4.3. cGrounds for detention referred to by the courts.

285. The first specific question (Question No. 12) concerning the substance of the research seeks to establish whether in their decisions the judges referred to at least one of the acceptable grounds for detention. Question No. 12 was laid down as follows: "*Did the Court/Judge(s) refer in their decisions to at least one of the grounds, provided for by Article 177 § 1 of the Code of Criminal Procedure, for applying preventive measure?*". Normally, the answer should be "yes". It is a direct requirement of the domestic law that the decision ordering (continued) detention should refer to at least one of the grounds for

detention stipulated by the above provision of the Code of Criminal Procedure.

286. Nevertheless, the results of the research turned out to be less optimistic. In 14% of the analysed decisions the judges did not refer to any of the grounds set out in Article 177 § 1 of the Code of Criminal Procedure (see Table 9).

Table 9.

Did the Court/Judge(s) refer in their decisions to at least one of the grounds, provided for by Art. 177 § 1 of the CCP?	Number of decisions	Percentage of decisions
No	136	14
Yes	866	86

287. This is even more astonishing if analysed in light of answers to a similar question concerning the performance of the prosecution (see Table 3 above) which show that the prosecutors always referred to at least one of the risks provided for by Article 177 § 1 of the CCP.

288. As a rule, if the ECtHR finds that the decision sanctioning deprivation of liberty does not refer to any acceptable grounds for detention, it stops its analysis at this juncture and finds the violation of Article 5 of the Convention. Failure to state at least one of permissible grounds for detention in its decision is also a manifest breach of domestic legislation. It should be noted in this regard that according to the Law of Ukraine "On the Judiciary and the Status of Judges" some of the aforementioned shortcomings are among the grounds for disciplinary liability of judges

289. The next question seeks to find out what specific ground/s provided for in Article 177 § 1 of the CCP the court/judge referred to when ordering/extending detention (see Table 10).

Table 10.

The Court/judge mostly referred to the following grounds, while ordering/extending detention:	Number of decisions	Percentage of decisions
Risk of absconding (Article 177 § 1 (1) of the CCP)	781	78
Risk of tampering with evidence (Article 177 § 1 (2) of the CCP)	99	10
Risk of influencing the participants of the criminal proceedings (Article 177 § 1 (3) of the CCP)	480	48
Risk of other illegitimate interference in the administration of justice (Article 177 § 1 (4) of the CCP)	202	20
Risk of reoffending or continuing the criminal offence of which a person is suspected (Article 177 § 1 (5) of the CCP)	627	63

290. The results show that the judges most frequently rely on the risk of absconding when ordering detention. The results of Survey show that there is insufficient level of understanding among the respondents of factual circumstances that may prove the existence of the above risk at the level necessary for imposing detention on remand or 24-hour house arrest (see analysis of responses to Question 15 of the Survey). **Therefore, it seems important to raise this specific aspect when planning and carrying out capacity building measures for judges.**

291. Next Question No. 14 concerned unacceptable grounds/reasoning for pre-trial detention and other practices relating to failure to provide sufficient reasons for detention. The task was formulated in the following terms: "*The court (judge) mainly substantiated the decision by unacceptable grounds/reasoning*". Further the Checklist No. 2 proposed the list of possible unacceptable grounds for detention. It was formed on the basis of unacceptable grounds referred to in the ECtHR judgements. The Checklist set the following list of unacceptable grounds for pre-trial detention:

- Gravity of the crime/severity of the punishment;
- Special status of the accused/suspect;
- Criminal record;
- Frequent trips abroad/financial situation of the suspect \ accused;
- The accused/suspect has substantial assets;
- Irrelevant references to the case law of the ECtHR;
- Stereotyped wording;
- Prevailing quotations from the domestic law;
- Silence in response to arguments adduced by the parties;
- Deterrent effect of the preventive measure;
- Unwillingness [of the accused/suspect] to cooperate with the prosecution;
- The risks did not decrease;
- 24-hour house arrest is perceived as an alternative measure which has nothing to do with detention;
- The examination of the issue of extension of the period of detention (24-hour house arrest) is initiated by a court (judge);
- The decision concerning detention (24-hour house arrest) concerns several suspects or accused;
- Shifting the burden of proof;
- None of the listed features;
- Others;
- The court failed to analyse the risks;
- Complexity of the case, including the need to conduct additional investigative actions;
- Unclear or irrelevant reasoning / absence thereof;
- Reliance on the prosecutor's office;
- The court failed to examine the existence of reasonable suspicion;
- Technical mistakes;
- Irrelevant reference to personal features;
- Media sensitive case;

292. Each of the above shortcomings was accompanied by relevant clarifications to guide the research team. The experts could choose one or several options. The word "*mainly*" should have guided the research team to choose one of unaccepted grounds only if it played substantial role in the court's reasoning. Besides, the experts could indicate any other characteristics of the analysed decisions which in their opinion could also be qualified as unacceptable grounds/reasoning for pre-trial de-

tention in the field "Others". The analysis of decisions in light of the above criteria gave the results summarized in Table 11.

Table 11.

Unacceptable grounds/reasoning for pre-trial detention	Number of decisions	Percentage of decisions
Gravity of the crime/severity of the punishment	583	58
Special status of the accused / suspect	16	2
Criminal record	331	33
Frequent trips abroad/financial situation of the suspect/accused	6	1
The accused/suspect has substantial assets	1	0
Irrelevant references to the case law of the ECtHR	94	9
Stereotyped wording	362	36
Prevailing quotations from the domestic law	243	24
Silence in response to arguments adduced by the parties	249	25
Deterrent effect of the preventive measure	23	2
Unwillingness [of the accused/suspect] to cooperate with the prosecution	8	1
The risks did not diminish	117	12
24-hour house arrest is perceived as an alternative measure which has nothing to do with detention	67	7
The examination of the issue of extension of the period of detention (24-hour house arrest) is initiated by a court (judge)	22	2
The decision concerning detention (24-hour house arrest) concerns several suspects or accused	24	2
Shifting the burden of proof	26	3
None of the listed features	82	8
Others	16	2
The court failed to analyse the risks	13	1
Complexity of the case, including the need to conduct additional investigative actions	2	0
Unclear or irrelevant reasoning / absence thereof	26	3
The court failed to examine the existence of reasonable suspicion	4	0
Technical mistakes	4	0
Irrelevant reference to personal features	9	1
Media sensitive case	2	0

4.4.4. Gravity of the crime/severity of the punishment and other most widespread unacceptable grounds for detention.

293. The above results give a good understanding of typical deficiencies in the reasoning of court decisions. In particular, 58% of decisions relied mainly on the gravity of the crime imputed to the suspect/accused or severity of potential punishment. The Court repeatedly criticized overreliance of the domestic courts on such arguments when applying/extending preventive measure. Such approach frequently renders the domestic court's reasoning unacceptable from the point of view of the ECtHR.[72]

294. It is important to note that reference to existence of reasonable suspicion in the text of the judgment is a condition *sine qua non* according to the ECtHR case law and CCP (see, for example, Articles 177 § 2 and 194 § 1 (1). The fact that the individual is suspected of commission of a grave crime might to some extent prove the existence of certain risks. But reliance on the above fact as a main argument in favour of applying detention (or especially continued detention) is unacceptable.

295. Along with irrelevant references to the case law of the ECtHR (9% of decisions), stereotyped wording (36% of decisions) and prevailing quotations from the domestic law (24% of decisions), overreliance of the courts on gravity of the crime imputed to the suspect/accused or severity of potential punishment remain the most widespread deficiencies in the courts' reasoning.

296. Similar deficiencies were identified in the prosecutors' requests for ordering (continued) detention. Therefore, it is no surprise that they are experienced by the judiciary as well.

297. The overreliance of the prosecution and courts on gravity of the crime and severity of potential punishment as grounds for pre-trial detention is further supported by the results of Survey (see answers to Question 14-15 above). Thus, **41.3% of respondents among the judges and 41.0 % of respondents among the prosecutors identified the gravity of the crime as a fact that confirms the existence of high risk of absconding.**

298. **As it is mentioned above it seems important to raise this specific aspect when planning and carrying out capacity building measures for judges and prosecutors.**

299. Separate attention should be paid to the courts' failure to address in their decisions the arguments of the defence – a problem occurring in about 25% of analysed decisions. Indeed, in some cases if the arguments adduced by the defence are obviously irrelevant the court may simply reject them without adducing any additional explanations. But normally the court should address the parties' arguments in the text of the decision. Only in this way it can be verified whether the party was heard and there was indeed no necessity to analyse separately its arguments.

4.4.5. Specific features of decisions ordering (continued) detention or 24-hour house arrest delivered during preparatory hearing or at the stage of trial.

300. In 12% of the decisions the courts' reasoning was limited to a finding that the risks established in previous decisions concerning the suspect/accused did not diminish (or as the courts sometimes noted "continued to exist"). Such grounds are frequently used by the courts in the decisions ordering continued detention.

72 See, for example, *Taran*, § 69; *Kharchenko* § 80; *Ignatov*, § 41.

301. The disaggregated data suggest that the majority of the above decisions were delivered during the preparatory hearing or at the stage of trial (i.e. after the pre-trial investigation is terminated and the case is referred to the trial court for examination on the merits). In such decisions the courts frequently used stereotyped wording and extremely superficial reasoning. In many of the decisions the courts' reasoning was limited to one standard sentence. The following examples vividly demonstrate the above problem:

- "*When applying such preventive measure, the court takes into account the necessity of avoiding risks provided for by Article 177 of the CCP of Ukraine, gravity of imputed crime, and the fact that the reasons on the basis of which the court chose the preventive measure in the form of detention on remand did not disappear*";
- "*Risks that were taken into account when choosing preventive measure for PERSON_1 have not disappeared and continue to exist, due to which there is no grounds for altering or quashing preventive measure*".

302. Such approach of domestic courts to ordering continued detention is the complete opposite of what is required by the ECtHR. Thus, according to the Court's established case-law "*with the passage of time the applicant's continued detention required more justification*".[73] Even if initially there were some good grounds for keeping an individual in custody after a certain lapse of time the court should "*give other grounds for continued detention*".[74]

303. The trial courts' failure to adduce any reasons for a continued detention of the accused, might be indicative of even more perfunctory approach to the issue of detention at more advanced stages of criminal proceedings. Such conclusion is further supported by the statistics based on overall assessment of the reasoning of courts' decisions showing much worse performance during preparatory hearing and at the trial stage (see the statistics below).

304. Moreover, it is also supported by the results of Survey carried out among the judges, attorneys and prosecutors. Thus, 35,9% of respondents indicated that the procedure of applying and extending detention at the stage of trial is much more problematic compared to the stage of pre-trial investigation.

305. During focus group discussions some of the participants noted that the existence of the above problem could be explained by the fact that before 2 December 2020, when the Parliament adopted a Law No. 1027-IX (see Chapter 1.4.1.4), there had been no possibility of lodging appeal against court decisions ordering (continued) detention on remand at the stage of trial. Due to this the judges had adopted less diligent approach to the quality of reasoning in their decisions concerning detention on remand at the stage of trial. Such observation seems to be quite reasonable and hopefully the legislative amendments will remedy the above situation.

306. Nevertheless, this problem is to be also addressed by way of capacity building among the judiciary.

4.4.6. The issue of 24-hour house arrest.

307. Separate attention should be paid to the problem when 24-hour house arrest is perceived as a measure which is alternative to deprivation of liberty. It was identified mostly in domestic courts' decisions in which the courts:

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73 See, for example, *Taran*, § 71; *Kharchenko* § 80

74 See, for example, *Yeloyev*, § 60.

- either refused to allow the prosecutor's request to order remand in custody and applied 24-hour house arrest instead (58 out of 1002); or
- released the suspect /accused from remand in custody under 24-hour house arrest (only 9 out of 1002);

308. Overall, the above categories account for about 7% of the analysed decisions which appears to be quite significant. After picking the above decisions and subjecting them to a closer scrutiny it turned out that **almost all of them had the above shortcoming**.

309. In these decisions the courts dismissed all the reasons (or almost all of the reasons) invoked by the prosecutor in favour of (continued) remand in custody, found that there were in fact no grounds for applying/extending remand in custody and decided to apply 24-hour house arrest instead. Some of the decisions were mostly based on arguments proving that there were no risks provided by Article 177 § 1 of the CCP of Ukraine, overall positive characteristics of the accused and other arguments clearly favourable for the accused. From some of the decisions it was obvious that such problem was to a large extent caused by the fact that **courts regarded the 24-hour house arrest as a preventive measure different from (alternative to) deprivation of liberty**. For example, the following passages demonstrate the courts' approaches to 24-hour house arrest and its correlation with remand in custody:

- "*Having assessed the gravity of the punishment, threatening PERSON_1 for the criminal offence imputed to him, specific circumstances of commission of the criminal offence, namely the fact that he [PERSON_1] did not abandon the site of the traffic accident, provided first medical treatment, called ambulance and police, underwent medical examination and relevant tests as well as information characterizing the suspect, in particular, the fact that he has a permanent place of residence, lives together with his incapacitated mother, he is disabled since childhood and suffers from serious and heavy type of 1st type diabetes, he arrived in response to the investigator's summons and took part in the investigative experiment, – the court decides that ensuring proper procedural behaviour of the suspect PERSON_1 is possible under 24-hour house arrest*";
- "*Thus, during the hearing it was established that PERSON_4 is registered at the address INFORMATION_4, but in fact he resides at the address (…). At the above address [he] resides with his wife and two little children, i.e. he has strong social ties and permanent place of residence. Due to the aforementioned facts the investigative judge arrives at the conclusion that the risks indicated in the investigator's request, to which the prosecutor also referred during the court hearing, are in no way proved in the court hearing, unsubstantiated and of general nature, due to which the request cannot be allowed, instead of this the preventive measure in the form of the 24-hour house arrest should be applied to PERSON_4*";
- "*Besides, the investigator or the prosecutor have not adduced any evidence, which would give grounds to think that if a preventive measure which is not connected with deprivation of liberty is chosen the suspect may take actions provided for by paragraph 1 of this Article [Article 177]. At the same time the court found that PERSON_1 does not have criminal record. Moreover the personality of the suspect, who is married, has a permanent place of residence, where he lives with his family and supports his child, is not suspected of any other criminal offences, gives reasons to think that being at liberty will not obstruct his proper procedural behaviour and compliance with procedural obligations provided by law, therefore, the investigative judge regards as necessary to dismiss the investigator's request and pursuant to Article 181 of the CCP of Ukraine to choose for the suspect the preventive measure in the form of a house arrest at his place of residence*" etc.

310. To sum up, in most of the analysed decisions the courts found that there were no grounds for remand in custody and ordered the 24-hour house arrest which is in fact a "*detention under house arrest*". The courts perceived the 24-hour house arrest as a preventive measure which is alternative to detention and which could be applied based on a lower standard of proof.

311. This is further proved by the overall assessment of the reasoning of the above decisions by the research team. The disaggregated data suggest that out of 67 decisions by which the courts applied 24-hour house arrest instead of remand in custody (it includes both categories of decisions mentioned above), the reasoning on the grounds for detention in 52 decisions was assessed by the expert team as "Very poor", "Poor" or "Average". As it is explained in detail below only the reasoning fully compliant with the ECtHR standards could be evaluated as "Good" or "Excellent" (see more details in section 4.4.11 below). Therefore, 77,6% (52 out of 67) of the above decisions fall short of the ECtHR standards. The details are summarized in the Table 12 below.

Table 12.

How you would qualify judicial reasoning on the grounds for detention in the decision?	Number of decisions by which the courts applied 24-hour house arrest instead of remand in custody
Very poor	4
Poor	12
Average	36
Good	12
Excellent	3

312. It would also be interesting to analyse the same statistics for each of the analysed years (2018 to 2020) to see what are the trends. As the result of analysis of disaggregated data, it was established that 31 out of 67 decisions were delivered in 2018, 17 out of 67 - in 2019 and 19 out of 67 – in 2020.

313. Thus, in 2018 80.6 % (25 out of 31) fall short of the Convention standards, in 2019 – 70.6% (12 out of 17) and in 2020 – 79% (15 out of 19). As the result if taken roughly the tendency remains stably negative (see Table 13).

Table 13.

Judicial reasoning on the grounds for detention in the decision? / Year	2018 (31 dec.)	2019 (17 dec.)	2020 (19 dec.)
Very poor	2	1	1
Poor	3	4	5
Average	20	7	9
Good	5	4	3
Excellent	1	1	1

314. The approach when the courts perceive the 24-hour house arrest as a preventive measure which is alternative to detention is contrary to the ECtHR's position according to which the remand in custody as well as the 24-hour house arrest are different forms of deprivation of liberty (detention) and the same criteria should be applied, irrespective of the place where the person is detained – in cus-

tody or under house arrest.[75] The above shortcomings reveal that another pattern of violation previously found by the Court in case of *Korban v. Ukraine* probably continues to exist in judicial practice.

315. The existence of such problem is further corroborated by the results of Survey carried out within the framework of this Research (see analysis of Questions 16 – 17 of the Survey). The respondents' answers demonstrate a commitment to an erroneous, from the ECtHR standpoint, understanding of the relationship between detention on remand and 24-hour house arrest. The judges believe 24-hour house arrest to be an alternative to deprivation of liberty. It appears that most of the judges are convinced that by using 24-hour house arrest instead of detention, they are de facto finding in the suspect's/accused's favour.

316. Also, the existence of the above problem was almost unanimously confirmed by the participants of all focus groups. All of them concurred in the opinion that the above problem is for the most part the result of legislative shortcoming. Some of the participants expressed the view that it may be remedied by taking educational measures among the actors involved.

317. As it is demonstrated by the analysis of domestic legislation, the problem might indeed be rooted in the wording of domestic law which 1) doesn't distinguish between 24-hour house arrest and other types of house arrest, for example, night time house arrest and 2) clearly qualifies all types of house arrest as a preventive measure which is a less severe alternative to detention on remand.

318. Nevertheless, this problem might be, at least to some extent, addressed by changing the practice of applying 24-hour house arrest by the courts. The results of the Survey and focus group discussions demonstrate that there is a widespread misunderstanding among the judges, prosecutors and attorneys as to the nature of 24-hour house arrest and remand in custody.

319. Therefore, the judges (as well as the prosecutors and attorneys) need further capacity building with regard to the substance and specific practicalities of the application of the 24-hour house arrest, relevant legal provisions and nuances of the ECtHR case law in this regard.

320. Also, it is recommended to consider the possibility of amending domestic legislation in part concerning the status of the 24-hour house arrest.

4.4.7. Initiation by the trial court of examination of the issue of continued detention under Article 331 of the CCP.

321. Another troubling, although less widespread, tendency which, it appears, has not yet been analysed by the ECtHR in cases against Ukraine, is that in about 2% of decisions (22 decisions) the examination of the issue of extension of pre-trial detention was initiated by the court. Such situation occurs at the stage of trial. Therefore, if we deduce the decisions by which the courts choose the preventive measure for the first time (710 out of 1002 decisions) and decisions by which the court extended the period of detention at the stage of pre-trial investigation (57 out of 1002 decisions) the above percentage will become much more significant 22 out of 235 decisions which makes about 9%.

322. In the above cases the prosecutor who was present during the hearing did not request the trial court to extend the term of detention (24-hour house arrest). Instead of this it was the court that proposed the parties to express their position as regards the necessity of extending the detention thus seizing the initiative from the prosecutor. The prosecution in its turn simply opted for continued detention either without adducing any arguments or apparently putting forward several stereotyped phrases on the spot.

75 *Buzadji v. the Republic of Moldova*, §§ 111 – 114.

323. In the above decisions the prosecutor's position was summarized by the court in the following way:

- "*The prosecutor considered it necessary to extend the preventive measure in the form of detention on remand to the accused*";
- "*During the court hearing the prosecutor considered necessary to extend the period of detention on remand, noting that the risks provided for by Article 177 of the CCP of Ukraine continued to exist*"; etc.

324. Also, in the operative part of such decisions the court usually indicated that it "*rules to extend the detention on remand of PERSON_1*", whilst normally the court first rules to "*allow the prosecutor's request for extension of preventive measure*" and then "*to extend the detention on remand*". This proves that the prosecutor did not lodge any written request.

325. The disaggregated data show that in some of these decisions the courts did not ask the parties to express their opinion at all and decided on their own to order continued detention. The reasoning adduced by the courts was as in previous examples limited to a short statement that the previously identified risks continued to exist.

326. Although the number of such decisions is quite insignificant the participants of focus groups confirmed that the abovementioned approach is quite frequently applied by the judges when ordering continued detention at the stage of trial.

327. Such tendency appears to be troubling since by acting this way the court undertakes, at least to some extent, the function of the prosecution.

328. Even more troubling is the fact that the origin of such situation lies with the domestic legislation. Thus, according to Article 331 of the CCP "*during the trial the court, at the request of the prosecution or the defence, may issue a ruling altering, revoking or imposing a preventive measure against the accused. (…)* ***Regardless of whether such requests have been made, the court shall be obliged to examine the reasonableness of the accused's continued detention*** *within two months from the date of receipt of the indictment by the court (...) or from the date of the court ruling ordering the accused's detention as a preventive measure*". Somewhat different aspect of the above provision of domestic law has already been analysed by the ECtHR in its *Chanyev* judgement[76].

329. To sum up, it would probably be necessary to review the aforementioned provision of domestic law with the view to bringing the domestic courts' practice in line with the ECtHR standards according to which it is the prosecution that should initiate the examination of the issue of continued detention.

4.4.8. Other unacceptable grounds for pre-trial detention.

330. Apart from the aforementioned problems, the task performed by the research team revealed certain other shortcomings previously referred to by the ECtHR. Although less widespread they are sometimes even more troubling.

331. In 3% of analysed decisions (26 decisions) the courts *de facto* shifted the burden of proof from prosecution to defence. Usually in such decisions the courts based their reasoning primarily on the fact that the defence failed to adduce any evidence proving that the risk/s diminished or disappeared. Although the percentage of such decisions is not very high, the above problem is still serious since it unveils the existence of incorrect understanding of fundamentals underlying

76 *Chanyev*, §§ 22 – 31. For more details see the Chapter 1 above.

the right to liberty. According to well-established case law of the Court, "*it is incumbent on the domestic authorities to establish the existence of specific facts relevant to the grounds for continued detention. 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 which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases*".[77]

332. Also, some of the courts based their decision (only 8 decisions identified) at least partly on the suspects' unwillingness to cooperate with the prosecution thus encroaching upon their right not to incriminate themselves.

333. Again, 2% of the courts' decisions (24 decisions) applying/extending pre-trial detention (24-hour house arrest) concern two or more persons. In those decisions the courts did not distinguish between the suspects and set out the same reasoning for both/all of them. From the courts' decisions it was not at all clear whether it was a similarity of situations of each of the individuals warranting a similar approach and reasoning or the courts simply "equalized" the individuals by way of disregarding particular circumstances of their personal situations. In any case, the ECtHR noted that such situation leaves each of the individuals "*in a state of uncertainty as to the grounds for his detention*" which in its turn renders it "*incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1*"[78].

334. In any case the above issues should be addressed by way of capacity building among the judiciary aimed at increasing their awareness regarding the ECtHR standards.

4.4.9. Examination of possibility of imposing alternative preventive measures.

335. Another important aspect separately analysed by the research team was whether the court properly considered the possibility of applying alternative measures. Such obligation is provided for by both Convention[79] and domestic legislation[80] and it is called, among other things, to strengthen the exceptional character of pre-trial detention. Thus, after verifying that there are "relevant and sufficient" grounds for pre-trail detention of individual[81] but before ordering his/her detention, the court should assure itself that the alternative preventive measures won't suffice to ensure his/her proper procedural behaviour. What is even more important is that the court's reasoning to this effect should be reflected in its decision ordering (continued) detention (24-hour house arrest). Thus, Art. 196 § 1 (3) of the CCP requires that in its decision ordering detention the court should 1) indicate factual circumstance proving that the alternative, i.e. less severe, preventive measures are insufficient and 2) refer to relevant evidence supporting such position. Similar requirements are set by the ECtHR.

336. Due to this the experts had to find the answer to the following question: "**Did the judge (court) refer in his/her decision to the insufficiency of alternatives?**" (Question 17). The results of this part of research are summarized in Table 14.

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77 *Rokhlina v. Russia* (application no. 54071/00, § 67) and *Ilijkov v. Bulgaria* (application no. 33977/96, §§ 84-85).

78 *Ignatov*, § 36.

79 *Ignatov,* п. 36

80 Articles 176 § 2 and 194 § 1 (3) of the Code of Criminal Procedure of Ukraine.

81 *Korban*, п. 154.

Table 14.

Did the judge (court) refer in his/her decision to the insufficiency of alternatives?	Number of decisions	Percentage of decisions
No	343	34
Yes	659	66

337. The results appear to be disappointing. More than 8 years after the adoption of the CCP[82] setting out clear requirements to this effect (see above), in 34% of the analysed domestic court decisions the courts (investigative judges) do not refer at all to the issue of alternative measures. According to the well-established case law of the ECtHR, failure to address the above issue might be a serious argument to tip the wages in favour of finding a violation of the Convention.

338. The results appear to be even more disappointing taking into account the fact that, apart from simply referring to the alternative measures, the court is obliged to put forward relevant arguments and adduce supporting evidence to prove that alternative measures are indeed insufficient in the circumstances. It was the purpose of the following two questions to establish whether in those 66% of decisions where the judges referred to insufficiency of alternatives, they adduced any arguments in favour of such decision and whether those arguments were as it is required by the ECtHR "relevant and sufficient".

339. Question 17.1 that concerned only 66% of decisions where the courts (investigating judges) referred to insufficiency of alternatives and was the following: "***If so, did the judge (court) adduce any arguments in favour of such decision?***". The results are summarized in Table 15.

Table 15.

If so, did the judge (court) adduce any arguments in favour of such decision?	Number of decisions	Percentage of decisions
No	384	58
Yes	275	42

340. Question 17.2 had to be answered only in relation to those decisions which obtained "Yes" answer to the previous question. The question was the following: "***In your opinion, were the arguments adduced by the courts sufficient?***". The results are summarized in Table 16.

Table 16.

In your opinion, were the arguments adduced by the courts sufficient?	Number of decisions	Percentage of decisions
No	144	52
Yes	131	48

82 As it could be seen from Table 2 the scope of the research mostly encompasses the period between 2018 and 2020. So, to be more specific the period ranges from 6 to 8 years.

341. The above analysis shows that the courts even referring to the alternative measures sometimes (if not usually) do it rather perfunctorily without seriously going into the matter and analysing whether the alternatives are indeed insufficient. As the result only 131 out of 1002 court decisions, i.e. about 13% of the total number of decisions reviewed, fully comply with the ECtHR and domestic law requirements in terms of the necessity to analyse whether the alternative preventive measures suffice to ensure suspect's proper procedural behaviour.

342. It is also necessary to examine the tendencies in the way the courts analysed the possibility of applying alternative measures during the years that fall within the scope of this Research. For this purpose, only decisions analysed in Table 16 are taken, i.e. 275 decisions. The results are summarized in Table 17 below.

Table 17.

Sufficiency of arguments adduced by the courts / Year	2018 (89)	2019 (87)	2020 (99)
No	50	53	41
Yes	39 (43.8 %)	34 (39.1 %)	58 (58.6 %)

343. It appears that the quality of courts' decisions in terms of examination of the possibility of applying alternative measures substantially increased in 2020. This reveals optimistic tendency which should be further upheld by **additional capacity building among the judiciary.**

344. It should be one more time emphasized that failure to analyse the sufficiency of alternative measures which is the case in 34 % of analysed decisions (see Table 14 above) is a serious violation of domestic law and Article 5 of the Convention which demonstrated the negation of basic safeguards against unlawful detention.

4.4.10. Calculation of the amount of bail in courts' decisions.

345. Another issue that had to be analysed by the research team concerned the way the courts applied bail. According to Article 182 § 4 of the CCP of Ukraine, the amount of bail is determined by the investigative judge (the court) taking into account the circumstances of a criminal offence, financial and family status of the suspect, accused, and other data concerning his personality and risks provided for by Article 177 of the CCP of Ukraine. The amount of bail should sufficiently guarantee that the suspect, accused complies with his obligations and cannot be knowingly disproportionate for him.

346. Similar rules are provided by the case law of the ECtHR.[83] The Court held that the guarantee provided for by Article 5 § 3 of the Convention is designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing. The amount of bail must therefore be assessed principally by reference to [the accused], his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond. The

83 See *Mangouras v. Spain*, application no. 12050/04, §§ 78 – 81; *Piotr Osuch v. Poland*, §§ 39,40 and 47; and *Bojilov c. Bulgarie*, §§ 59 - 65.

authorities must take as much care in fixing appropriate bail as in deciding whether or not the suspect's/accused's continued detention is indispensable. Furthermore, the amount set for bail must be duly justified in the decision fixing bail and must take into account the accused's means.

347. The Checklist No. 2 included 3 questions specially designed to assess how the courts applied bail in the analysed decisions. The first of the questions (Question No. 18 in the Checklist) had to determine the amount of decisions in which the courts set a bail. The question was the following: "***Did the court, when deciding on application of preventive measure in the form of detention on remand, set the amount of bail?***". As a result, it was established that the courts examined the possibility of releasing the suspect/accused on bail and fixed its amount in 328 out of 1002 decisions which account for 33% of the analysed decisions.

348. Next question (Question No. 18.1 in the Checklist No. 1) concerned only those 328 decisions and was to establish whether the courts adduced any reasoning regarding the amount of bail at all. Normally the court should explain why the amount of bail it fixed, on the one hand, was sufficient to ensure proper procedural behaviour of a suspect/accused and, on the other hand, was not excessive and disproportionate in view of his financial circumstances, thus making any prospect of provisional release unrealistic. The question was formulated in the following way: "***If the court fixed the amount of bail, did it adduce any reasoning for applying bail in that specific amount?***". It turned out that in 187 out of 328 court decisions (i.e. 57% of the analysed decisions) the courts did not put forward any arguments to substantiate the amount of bail it fixed. Only in 141 out of 328 courts' decisions (43% respectively) did the courts give some reasons for their decisions concerning the bail.

349. Also, it should be noted that with the passage of time the tendency remains negative: whilst in 2018 the courts adduced at least some reasoning for the amount of bail in 49% of decisions analysed, in 2019 the amount fell to in 43.2% and in 2020 further decreased to only 37.7% (see Table 18 below).

Table 18.

Did the court adduce any reasoning for applying bail in the specific amount? / Year	2018 (102)	2019 (118)	2020 (106)
No	52	67	66
Yes	50 (49 %)	51 (43.2 %)	40 (37.7 %)

350. The third question required the team to perform even more complex analysis and to assess whether the reasoning regarding the amount of bail in the aforementioned 141 decisions complied with the ECtHR standards. The question was formulated as follows: "***In Your opinion, was the reasoning sufficient?***". The results are summarized in Table 19.

Table 19.

In Your opinion, was the reasoning sufficient?	Number of decisions	Percentage of decisions
No	79	56
Yes	62	44

351. According to the estimates of the research team only 62 out of 141 courts' decisions (44%) are in full compliance with the ECtHR requirements as regards the quality of reasoning concerning the amount of bail. If taken in proportion to the overall amount of decisions where the courts fixed the amount of bail the above 62 decisions will account only for about 19%.

352. It is also necessary to examine the tendencies in the way the courts analyse the possibility of applying bail during the years that fall within the scope of this Research. For this purpose, only decisions analysed in Table 18 are taken, i.e. 141 decisions. The results are summarized in Table 19 below.

Table 20.

In Your opinion, was the reasoning sufficient?/ Year	2018 (50)	2019 (51)	2020 (40)
No	31	26	22
Yes	19 (38 %)	25 (49 %)	18 (40 %)

353. It appears that the courts' approach to calculation the amount of bail remains more or less the same and only slight positive tendency can be noticed.

354. The participants of focus groups generally concurred with the Research in part concerning the application of bail.

355. The results of the above research reveal serious deficiencies in the courts' approach to the issue of bail. Since the domestic law appears to be fully compliant with the ECtHR requirements, the origin of the above deficiencies lies with the way the law is applied by the courts. Therefore, **it is necessary to take measures with the view to raising awareness among the judges with respect to the aforementioned Convention standards**.

4.4.11. Overall assessment of judicial reasoning on the grounds for detention in the analysed court decisions.

356. Eventually, the most elaborate evaluation of the compliance of analysed domestic courts' decisions with the ECtHR standards in terms of their reasoning had to be carried out on the basis of Question no. 19: "***How you would qualify judicial reasoning on the grounds for detention in the decision?***". It was supported with a five-grade rating system comprising the following qualifications: "Very poor"; "Poor"; "Average"; "Good"; "Excellent". It should be noted that during discussions with the research team it was agreed that only the reasoning fully compliant with the ECtHR standards could be evaluated as "Good" or "Excellent".

357. The criteria for referring the decisions to the aforementioned qualifications were stated in both Checklists and online tools created on this basis could be easily consulted by the experts each time they analysed the court decision. The criteria were the following:

- "*Very poor*" – No clear legal terminology applicable to the case; quotes of legal authorities manifestly irrelevant for the case; copy-paste phenomena; many errors and even grammatical inconsistencies; a reader is unable to understand the text and to follow the reasoning; very formal attitude and authoritative language giving an impression of an arbitrary decision; no clear coherence and clarity of arguments etc.;
- "*Poor*" – Incoherent argumentation; mainly consisting of quotations of the relevant legal provi-

sions, without attempting to apply them in casu; a judge was unable to adapt his reasoning to the context of the legal reasoning and arguments of the parties; no explanations of meaning and application of legal authorities; quotes of legal authorities do not bring any added value to the judicial reasoning and it could be easily ignored as if it does not exist;

- "*Average*" – Provided reasons reveal an average and general knowledge about the employed terminology and legal standards; however, the judge confuses legal standards and human rights issues (e.g. he/she links the reasoning on reasonable suspicion with grounds for continued detention (e.g. risk of flight, obstruction etc.), or employs other irrelevant standards (e.g. such as presumption of innocence confusing it with presumption of liberty, etc.);
- "*Good*" - Reasons show good knowledge of the case-law and legal provisions; judge mainly elaborates on his own assessment and applies this reasoning in casu, but he remains silent on the parties' arguments, imposing his authoritative opinion;
- "*Excellent*" - Judge elaborates on each parties' arguments (prosecution and defence) and adds his own argumentation applied in casu.

358. The results of the answers to the above question are generalized in Table 21.

Table 21.

How you would qualify judicial reasoning on the grounds for detention in the decision?	Number of decisions	Percentage of decisions
Very poor	43	4
Poor	309	31
Average	385	38
Good	220	22
Excellent	45	5

359. The analysis of chronological trends shows that the overall quality of decisions is slowly improving as the number of decisions with reasoning qualified as "Very poor", "Poor" and "Average" is slowly decreasing. In 2018 the proportion of decisions falling short of the ECtHR standards was 78.9 %, in 2019 – 75.4 %, 2020 – 65.4 % (see raw data in Table 21).

Table 21.

How you would qualify judicial reasoning on the grounds for detention in the decision? / Year	2018 (346)	2019 (338)	2020 (315)
Very poor	17	18	7
Poor	107	118	84
Average	149	119	115
Good	63	70	87
Excellent	10	13	22

360. In spite of moderately optimistic tendency, overall it appears that only 27% of analysed decisions comply with requirements of the ECtHR, whilst the remaining 73% of decisions do not. Such results in principle conform with the previous elements of the analysis and demonstrate that serious measures should be taken in order to bring the work of domestic judiciary in line with the standards developed by the ECtHR.

361. Next Table 22 shows the distribution of decisions between the capital and regions.

Table 22.

How you would qualify judicial reasoning on the grounds for detention in the decision? / Location of courts	Capital (139)	Regions (863)
Very poor	5	38
Poor	34	275
Average	53	332
Good	41	179
Excellent	6	39

362. It appears that in capital the proportion of insufficiently motivated decisions amounts to 66.2 % whilst in regions – to 74.7 %. Therefore, it appears that more effort should be made for strengthening the capacity of courts in regions.

363. It would also be helpful to perform the analysis of the quality of decisions based on disaggregated data concerning separate groups of decisions analysed above and to compare the results. In such a way it would be possible to verify some of the conclusions stated above. In particular, it was established that decisions ordering continued detention at the stage of trial as well as decisions refusing the request to place in custody and ordering 24-hour house arrest instead, appear to be less substantiated than the average. Therefore, it would be reasonable to compare the above-mentioned categories of decisions with court decisions ordering detention for the first time and decisions ordering continued detention at the stage of pre-trial investigation. Based on the previous conclusions of the research it also seems reasonable to assume that the first decision ordering detention (24-hour house arrest) should be better substantiated then decisions that follow. The results of analysis of disaggregated data are summarized in Tables 23 – 26 below.

Table 23 (decisions ordering 24-hour house arrest instead of detention).

How you would qualify judicial reasoning on the grounds for detention in the decision?	Number of decisions	Percentage of decisions
Very poor	2	3,5
Poor	11	19
Average	32	55
Good	11	19
Excellent	2	3,5

Table 24 (decisions ordering continued detention at the stage of trial).

How you would qualify judicial reasoning on the grounds for detention in the decision?	Number of decisions	Percentage of decisions
Very poor	6	5
Poor	57	50
Average	37	32
Good	14	12
Excellent	1	1

Table 25 (decisions ordering detention for the first time).

How you would qualify judicial reasoning on the grounds for detention in the decision?	Number of decisions	Percentage of decisions
Very poor	31	4
Poor	216	30
Average	256	36
Good	168	24
Excellent	39	6

Table 26 (decisions ordering continued detention at the stage of pre-trial investigation).

How you would qualify judicial reasoning on the grounds for detention in the decision?	Number of decisions	Percentage of decisions
Very poor	1	2
Poor	10	17
Average	28	47
Good	19	32
Excellent	1	2

364. The data shows that among decisions ordering detention for the first time 70% fall short of the requirements set by the ECtHR (Table 19 above); among the decisions ordering continued detention at the stage of pre-trial detention – 66% (Table 26 above); among decisions refusing the request to place the suspect /accused in custody and ordering 24-hour house arrest instead – 77,5% (Table 20 above) and finally among the decisions ordering continued detention at the stage of trial – 87% (Table 21 above).

365. The above statistics further supports the conclusions of research according to which the decisions ordering 24-hour house arrest instead of detention as well as decisions ordering continued detention at the stage of trial **appear to be less reasoned than average. It further confirms**

initial assumption that there are problems with understanding of the substance of the 24-hour house arrest among the judiciary and apparently less diligent approach to the issue of continued detention at more advanced stages of criminal proceedings.

4.4.12. Conclusions.

366. The results of the Research prove that a problem relating to insufficient reasoning of courts' decisions ordering (continued) detention in custody or 24-hour house arrest continues to exist. This problem is of a structural nature and is caused for the most part by inadequate practice of domestic courts. At the same time some aspects of the above problem appear to be caused by legislative shortcomings (see Chapters 4.4.6. and 4.4.7.).

367. As it is mentioned above to address the aforementioned problems it is necessary to take serious capacity building measures. For this purpose, it is recommended to bring the results of this Research to attention of **the National School of Judges (NSJ) that is responsible for training of judges and candidates for the position of a judge. The analysis of the problems identified in the Report should be implemented in all relevant training courses concerning the right to liberty for judges and candidates for the position of a judge that are organized by the NSJ.**

368. As it is the case with other actors involved in detention proceedings developing specific guidelines would also be an important step towards strengthening the existing safeguards against the breaches identified by the ECtHR and this Report.

369. Some of the matters analyzed above reveal serious and repeated breaches of the ECtHR standards and domestic legislation. Therefore, it appears reasonable to bring the above matters to attention of **the High Council of Justice of Ukraine (HCJ)**. For this purpose, it might be an option to carry out series of discussions of the results of this report with the HCJ staff.

370. The HCJ may contemplate the possibility of engaging in discussions with judges regarding the above problem.

371. The NSJ in conjunction with the High Council of Justice of Ukraine (HCJ) as well as any other interested institutions are welcomed to carry out further researches aimed at establishing the origin of the above problems and finding the best solutions thereto.

372. Eventually it should be emphasized that most of the participants of focus group discussions noted that there is serious a problem with understaffing in Ukrainian courts and that it might be one of the reasons causing the problems identified in this Report. Therefore, **taking appropriate measures for the purpose of ensuring sufficient stuffing of the courts might be one of possible solutions to the above problems**.

373. Any other organizational measures strengthening the capacity of the judiciary to deal with the matters identified in this Research, for example introducing the system of electronic exchange of documents between actors in criminal justice[84], are welcomed.

84 See for example https://legalhub.online/zakonodavstvo/ofis-genprokurora-spilno-z-nabu-sap-ta-vaks-zaprovady-at-systemu-elektronnogo-sudochynstva

4.5. General conclusions to Chapter 4.

374. To sum up, the analysis of performance of the actors involved in detention proceedings revealed serious deficiencies. As it is demonstrated above the defense sometimes takes absolutely passive position in detention proceedings and in some cases fails to adduce even the most evident arguments against ordering detention on remand (see Chapter 5.3.). The prosecution in the majority of its requests fails to adduce sufficient reasons in favor of applying detention, mainly referring to gravity of crime imputed to the suspect and/or severity of potential punishment (see Chapter 4.2.). The majority of courts' decisions ordering (continued) detention and 24-hour house fall short of the ECtHR standards under Article 5 of the Convention. Some decisions lack important elements provided by the domestic law and ECtHR case law which renders them unlawful. But most decisions are simply ill-founded: the courts often fail to adduce relevant and sufficient reasoning in favor of applying the aforementioned preventive measures. To remedy the above problems the authorities are recommended to take a set of problem- and institution-oriented capacity building measures referred to in paras. 264 – 267, 275 – 279 and 367 – 374 above and in some cases to introduce amendments to domestic legislation (see paras. 308 – 330).

5

Examination and analysis of the selected case-files and statistics concerning application of preventive measures provided by domestic authorities

375. The next stage of research concerned the analysis of the criminal case-files. The purpose of this part of work was to examine the detention of individuals in the wider context of criminal proceedings. It had to establish whether there is any correlation between the length of the detention and type of criminal proceedings, gravity of punishment and personality of the convict, to reveal any possible patterns and examine their significance and effect on the system of pre-trial detention in Ukraine.

376. The criteria based on which the case-files had to be analysed and information that had to be collected were set out in the Methodology. The analysis of case-files was facilitated by the SC which assigned this task to the local courts. The designated officials of local courts examined the case-files and collected the raw data which subsequently was transferred to the expert team. Afterwards it was processed and structured for further analysis the results of which are laid down in this Report.

377. The raw data collected by local courts encompassed standard information concerning 5288 case-files from all regions of Ukraine except for Autonomous Republic of Crimea and the City of Sevastopol and non-government controlled areas. The distribution of case-files among the regions is showed in Table 1.

Table 1.

Name of the Region	Number of decisions	Percentage of decisions
AR of Crimea	0	0
Zhakarpattia Region	62	1
Zaporizhzhia Region	403	8
Ivano-Frankivsk Region	87	2
Kirovograd Region	228	4
Lugansk Region	179	3
Lviv Region	186	4
Mykolaiv Region	127	2
Odesa Region	58	1
Poltava Region	375	7
Rivne Region	118	2
The City of Sevastopil	0	0
Sumy Region	49	1
Ternopil Region	57	1
Kharkiv Region	850	16
Kherson Region	179	3
Khmelnytsk Region	168	3
Cherkasy Region	94	2

Name of the Region	Number of decisions	Percentage of decisions
Chernivtsi Region	78	1
Chernigiv Region	196	4
The city of Kyiv	16	0
Kyiv Region	0	0
Vinnytsia Region	193	4
Volyn Region	107	2
Dnipropetrovsk Region	1002	19
Donetsk Region	302	6
Zhytomyr Region	174	3

378. Besides, the SC additionally provided three tables containing statistical data concerning examination of requests for applying preventive measures by the courts in 2019 and 2020.

379. First part of the Examination of Files concerned the correlation between the length of proceedings and severity of the crime of which the individual was suspected/accused. If the individual was suspected/accused of commission of several crimes it was the severity of the gravest crime that was taken into account. Table 2 shows the distribution of case-files depending on the severity of charges.

Table 2.

Severity of charges	Number of cases	Percentage of cases
Minor crime	89	2
Crime of medium gravity	1364	26
Grave crime	3184	60
Particularly grave crime	651	12

380. The above Table shows overall positive tendency according to which detention is ordered mostly in cases where individuals are suspected/accused of commission of either grave or particularly grave crimes: 60% and 12% respectively. Only in 2% of analysed cases the individuals charged with minor crimes were placed in custody.

381. Nevertheless, more important is the time that the individual spent in custody. To assess this aspect more elaborate analysis was performed: the raw data was structured depending on the period the individual spent in custody. For this purpose, the following periods were used: 0-6 months, 7-12 months, 13-24 months, 25-36 months, 37-48 months and periods exceeding 48 months. The results are summarized in Table 3 below.

Table 3.

Period of time spent in detention	Number of cases	Percentage of cases
0-6 months	2248	43
7-12 months	1192	23
13-24 months	1027	19
25-36 months	460	9
37-48 months	210	4
48+ months	151	3

382. According to a general rule, continued detention requires more justification. Normally the investigative judge (the court) examines the issue of continued detention each 60 days. Therefore, the extension of detention for lengthy periods of time (even periods exceeding 60 days) would require that the court either adduce each time additional reasoning or explain why the reasons on which the detention is already based continue to exist. Certainly, there are exceptional circumstances necessitating lengthy periods of detention of the suspect: commission of grave crimes in conjunction with confirmed absconding;[85] prosecution of influential criminals accused of taking part in an organized criminal act;[86] etc. But with the passage of time even such exceptional circumstances cannot be accepted as sufficient justification for holding the applicant in detention.[87]

383. The above statistics shows that in 3040 out of 5288 cases, i.e. in about 58% of cases, the individuals were held in custody for more than 6 months which is quite a substantial period. In 1848 out of 5288 cases, i.e. in about 35 % of cases, the individuals were held in custody for more than a year. As it is stated above there should be exceptionally serious reasons to keep the suspect/accused person in custody for such lengthy periods of time. Such statistics raise serious concerns as to reasonableness of such lengthy periods of detention.

384. Further statistics takes into account both seriousness of charges and overall period of detention (see Table 4).

Table 4.

Severity of charges	0 – 6 months		7 – 12 months		13 – 24 months		25 – 36 months		37 – 48 months		48+ months	
Minor crime	55	2	15	1	14	1	4	1	0	0	1	1
Crime of medium gravity	711	32	317	27	242	24	78	17	12	6	4	3
Grave crime	1363	61	745	63	614	60	293	64	129	61	40	26

85 *Titarenko v. Ukraine* (application no. 31720/02, § 74) – the applicant was kept in custody for more than 3 years on more or less the same grounds and the Court found no violation;

86 *Arutyunyan v. Russia*, application no. 48977/09, §§ 103 – 110 – the applicant was kept in custody for more than 15 months and the Court found no violation.

87 *Celejewski v. Poland*, application no. 17584/04, §§ 35 – 40 – the applicant was kept in custody for 3 years, 9 months and 15 days on more or less the same grounds. The Court found violation.

Severity of charges	0 – 6 months		7 – 12 months		13 – 24 months		25 – 36 months		37 – 48 months		48+ months	
Particularly grave crime	119	5	115	10	157	15	85	18	69	33	106	70

385. The above data show that, for example, in 29 out of 89 cases in which the prosecution concerned minor crimes suspects/accused individuals were kept in custody for periods ranging from 7 to 24 months. According to domestic law in effect at the material time, individuals convicted of commission of minor criminal offences were liable to a maximum punishment of 2 years of imprisonment. It is, therefore, difficult to imagine the circumstances which would necessitate keeping individual in custody for a period almost equal to a maximum potential punishment.

386. As regards the cases concerning crimes of medium gravity, in 653 out of 1364 cases (48 %) the suspects/accused were held in custody for more than 6 months. For grave crimes and particularly grave crimes such periods of detention become the norm: in the majority of cases the suspects/accused individuals were held in custody for more than 6 months. In cases concerning particularly grave crimes most of the suspects/accused were kept in custody for periods exceeding 12 months.

387. Overall, the above statistics appears to be logical: the more severe are charges brought against the individual, the longer the period of detention can s/he in principle face. Nevertheless, the severity of charges is only a basic requirement for applying pre-trial detention. Therefore, in view of the problems related to reasoning of court decisions referred to above, such statistics raises certain concerns and demonstrates that in principle **there is some space for further reducing the number of cases where continued detention is ordered as well as the period for which it is ordered**. These concerns are further strengthened by analysis of additional statistics provided by the SC below.

388. Further analysis seeks to establish the correlation between the length of detention, conviction and gravity of punishment imposed (Table 5). This should be the key part of Examination of case-files.

Table 5.

Type of punishment	Number of cases	Percentage of cases
Non-custodial sentence	74	1
Custodial sentence with release on probation	185	3
Up to 2 years of imprisonment	297	6
From 2 to 5 years of imprisonment	2659	50
From 5 to 10 years of imprisonment	1696	32
More than 10 years of imprisonment	295	6
The punishment was not imposed	82	2

389. Especially important in this context is the correlation between the overall number of cases and cases in which either non-custodial sentence was imposed or no sentence at all. Although indirectly it might be indicative of excessive use of pre-trial detention and reveal potential for further reducing the use of detention as a preventive measure.

390. At the same time, it seems that the number of cases where the non-custodial sentence was imposed is insignificant – about 1% of cases. The same applies to cases where the convict was released on probation and where the punishment was not imposed at all: 3% and 2% respectively.

391. More importantly in the above three categories of cases most of the individuals spent minimum periods of time in detention: 0 – 6 months (see Table 6).

Table 6.

Severity of charges	0 – 6 months		7 – 12 months		13 – 24 months		25 – 36 months		37 – 48 months		48+ months	
Non-custodial sentence	63	3	8	1	2	0	1	0	0	0	0	0
Custodial sentence with release on probation	155	7	25	2	4	0	1	0	0	0	0	0
Up to 2 years of imprisonment	208	9	53	4	32	3	4	1	0	0	0	0
From 2 to 5 years of imprisonment	1268	56	680	57	518	50	163	35	21	10	9	6
From 5 to 10 years of imprisonment	484	22	376	32	379	37	243	53	147	70	67	44
More than 10 years of imprisonment	36	2	34	3	76	7	39	8	39	19	71	47
The punishment was not imposed	34	2	16	1	16	2	9	2	3	1	4	3

392. Therefore, it appears that n**o adverse conclusions can be drawn from the aforementioned statistics. To the contrary it appears to be logical: the more severe the potential punishments – the longer the period spent in detention**.

393. The above findings are to a large extent corroborated by the additional statistical information provided by the SC. Below is the extract from one of the tables provided by the SC containing data concerning the number of requests for applying preventive measures considered by the courts in 2019 – 2020 (see Table 7).

Table 7.

No.	Data analysed	2019	2020	Dynamics, %
Preventive measures. Total amount.				
1	Requests returned without examination	1 716	1 741	1,5
2	Requests examined (excluding returned requests)	49 721	43 786	-11,9
3	Including requests that were allowed	28 895	26 605	-7,9
	Percentage, %	58,1 %	60,8 %	
Detention on remand (requested for the first time)				

No.	Data analysed	2019	2020	Dynamics, %
1	Requests returned without examination	1 502	1 533	2,1
2	Requests examined (excluding returned requests)	34 699	30 734	-11,4
3	Including requests that were allowed	15 774	14 185	-10,1
	Percentage, %	45,5 %	46,2 %	
Personal undertaking				
1	Requests returned without examination	106	64	-39,6
2	Requests examined (excluding returned requests)	5 886	4 563	-22,5
3	Including requests that were allowed	5 370	4 213	-21,5
	Percentage, %	91,2 %	92,3 %	
House arrest				
1	Requests returned without examination	91	125	37,4
2	Requests examined (excluding returned requests)	8 671	7 953	-8,3
3	Including requests that were allowed	7 486	6 886	-8,0
	Percentage, %	86,3 %	86,6 %	
Personal guarantee				
1	Requests returned without examination	2	0	-100,0
2	Requests examined (excluding returned requests)	48	43	-10,4
3	Including requests that were allowed	29	21	-27,6
	Percentage, %	60,4 %	48,8 %	
Bail				
1	Requests returned without examination	15	19	26,7
2	Requests examined (excluding returned requests)	408	486	19,1
3	Including requests that were allowed	229	295	28,8
	Percentage, %	56,1 %	60,7 %	

394. According to the data summarised in Table 7 in 2019 and 2020 the courts examined 49 721 and 43 786 requests for ordering preventive measures respectively. Overall, **it reflects positive tendency of 11.9 % decrease in the number of requests**. Among these requests 34 699 and 30 734 concerned detention on remand which makes 69.8 % and 70.2 % respectively.

395. For the sake of precision, it should also be mentioned that the number of requests for applying

measures related to deprivation of liberty is even higher than stated above. The above statistics (see Table 7) demonstrates that during the same period of time the courts examined 8 671 (2019) and 7 953 (2020) requests for applying house arrest. The available data does not distinguish between 24-hour house arrest and partial house arrest. Therefore, it is probable that substantial part of these requests concerned 24-hour house arrest, i.e. deprivation of liberty.

396. **The above data suggests that the number of requests for applying detention is excessive and disproportionate in comparison to the number of requests concerning other preventive measures**.

397. It should be noted that according to the CCP the court can allow such request and order detention or, if the reasoning is insufficient, refuse to order detention and apply any other less severe alternative measure. Therefore, it seems that the prosecution adopted a pattern according to which it is better to ask for a maximum and let the court tackle the problem. Such approach is contrary to the ECtHR standards. If analysed in light of stated above conclusions as to insufficient quality of prosecutors' requests, it suggests that the **prosecution might have abused its right to request the court to order detention, i.e. asked for detention in situations where there were no serious grounds for such request.**

398. The above conclusion is to some extent supported by the fact that more than a half of the requests were not allowed by the courts. Moreover, in 2020, 5 502 **requests concerning detention on remand (examined on the merits) were fully rejected by the courts (see Table 8). It implies that in 5502 cases the prosecution, whilst asking for the most severe preventive measure, failed to adduce evidence sufficient for applying even the mildest alternative.**

Table 8.

No.	Request		Кількість клопотань про застосування запобіжного заходу, які судді розглянули в 2020 році				
			Total	Among them:			
				Returned without examination	Allowed	Rejected	Different preventive measure
A	B		3	4	5	6	7
1	Requests for applying preventive measures (total, sum of rows 2-6)		45 520	1 741	25 600	6 337	3 103
2	including	Personal undertaking	4 627	64	4 213	237	20
3		Personal assurance	43		21	10	3
4		Detention	32 267	1 533	14 185	5 502	2 630
5		House arrest	8 078	125	6 886	483	400
6		Bail	505	19	295	105	50

399. The above conclusions are further supported by the results of focus group discussions. Most of the participants (especially among the prosecutors) acknowledged that the prosecutors tend to request

the court to order detention on remand in the majority of the cases. The reasons for this are simple:

- the courts usually allow (at least partly) the prosecutors' requests for ordering detention;
- there is a very poor level of supervision over implementation of non-custodial preventive measures. In particular when the court orders house arrest (in any form) it usually imposes additional obligation: the suspect is obliged to wear "electronic bracelet" tracking his/her movements (the so called "electronic control measure"). In practice, however, there is insufficient number of "bracelets" and in **most cases** the house arrest is implemented without additional electronic control measures. Therefore, there is no practical possibility to supervise its implementation;
- there is a stable practice of asking the court to order detention on remand when the suspect has been arrested. When the suspect is arrested and the prosecutor requests for a non-custodial preventive measure it might raise question as to the necessity of arrest. It might also have some negative consequences for such prosecutor. For the very minimum he/she will have to provide additional explanations to his superiors as to why only a non-custodial measure was requested;
- when the individual is charged of a grave or especially grave crime the prosecutors, usually to avoid any risk, request for custodial preventive measure. If, for example the individual accused of a grave crime remains at large and commits another crime such situation may have negative repercussions on the prosecutor who requested a non-custodial measure.

400. The above reservations expressed by the participants of focus groups seem to be absolutely sensible and coincide with the conclusions stated above.

401. As regards the courts Table 7 shows that they allowed 15 774 out of 34 699 (45,5 %) requests in 2019 and 14 185 out of 30 734 (46,2 %) – in 2020. In view of the findings made in previous Chapter as to the quality of reasoning of prosecutors' requests and courts' decisions it appears that the proportion of allowed requests is quite substantial. In numerical terms **in 2019 and 2020 the number of all requests for applying detention on remand allowed by the courts was bigger than the number of all requests for applying other alternative measures examined by the courts**.

402. Again, the above statistics does not include situations when the court rejects the request for applying detention on remand and orders 24-hour house arrest instead. Therefore, in practice the proportion of preventive measures related to deprivation of liberty is even bigger than stated above.

403. The above statistics also does not take account of requests for continued detention on remand which are dealt with separately. Relevant data in respect of such requests is summarized in Table 9.

Table 9

Continued detention on remand				
	Type of measure	**2019**	**2020**	**Dynamics, %**
1	Requests returned without examination	68	85	25,0
2	Requests examined (excluding returned requests)	6 902	6 691	-3,1
3	Including requests that were allowed	6 428	6 198	-3,6
	Percentage, %	93,1 %	92,6 %	

404. The number of requests for continued detention is much smaller that the number of requests for initial detention. It means that **in absolute majority of cases the suspects / accused individuals are kept in custody for periods not exceeding 2 months. It might suggest that there is a positive tendency in terms of length of pre-trial detention**.

405. Nevertheless, all the aforementioned facts show that the use of detention on remand by domestic authorities is excessive. There is necessity as well as further space for reducing the number of cases where pre-trial detention (24-hour house arrest) is applied. Instead, the prosecution and courts should more often contemplate the possibility of applying alternative non-custodial preventive measures.

406. To sum up, it appears that all problems identified in the Research are interrelated. Low standard of reasoning for applying pre-trial detention causes large influx of ill-founded requests to this effect. The prosecution frequently does not even contemplate the possibility of applying less severe preventive measures. Such influx exerts pressure on judiciary and implicitly contributes to maintaining the level of reasoning at relatively low level if not further lowering it. The situation is further aggravated by comparatively unsatisfactory performance of the defense. Therefore, all actors whose performance is analysed in the Research contribute to the existence of the above problem.

407. These circumstances confirm the findings of the ECtHR and prove that the problem of insufficient reasoning of courts' decisions continues to exist and apparently is of structural nature. It is closely connected to the other issue identified in this chapter, namely, the excessive use of custodial preventive measures.

408. The above analysis supports previous findings as to the necessity of taking further capacity development measures, including additional training and preparing specific problem- and institution-oriented guidelines for all the actors involved in detention proceedings.

409. Also, the above findings show **the need of taking additional organizational measures to ensure proper functioning of the system of non-custodial measures, in particular, house arrest (para. 396 above)**.

410. Eventually it should be mentioned that **there is visible lack of statistical information as to functioning of the system of preventive measures**. Most of the information analyzed in this Chapter was collected manually by the staff of numerous courts specially for this Research. The existing statistics, although being very helpful, lacks important aspects (sex and age of the suspect, severity and type of a criminal offence, overall time spent in custody, number of requests concerning change of preventive measure lodged by the suspects etc.). This issue should be addressed by **ensuring that necessary statistical data is collected on a regular basis and detailed statistics is easily available**.

OVERALL CONCLUSIONS AND RECOMMENDATIONS.

411. The Research shows that there is a problem with excessive use of pre-trial detention in Ukraine. Statistics for the years 2019 – 2020 shows that it is the most widespread preventive measure in Ukraine. It is requested two times more often than all other preventive measures taken together and it is also applied more often than all other preventive measures (see Chapter 5).

412. The majority of prosecution requests for applying detention on remand (24-hour house arrest) lack sufficient reasoning. The prosecutors rely heavily on gravity of crime imputed to the suspect / accused individual and frequently do not analyse the possibility of applying alternative measures (see Chapter 4.2.).

413. It appears that the prosecutors frequently ask the courts to order detention (as the most severe preventive measure) in cases where there are no grounds for applying even less severe alternative preventive measures (see Chapter 5.).

414. In about half of analysed cases the performance of defence in detention proceedings was unsatisfactory. In those cases, the defence failed to adduce any weighty arguments against applying detention (see Chapter 4.3.).

415. Most of the courts' decisions analysed within the framework of this Research are insufficiently reasoned (see Chapter 4.4.). In some of the decisions the courts do not refer to any grounds for detention provided by domestic legislation (Article 177 § 1 of the CCP) at all (see Chapter 4.4.3.). The majority of decisions rely mainly on unacceptable ground for detention. In most of the analysed decisions the courts did not analyse properly the possibility of applying alternative preventive measures (see Chapter 4.4.9.). When setting the amount of bail the courts usually either do not adduce any reasoning or it is insufficient (see Chapter 4.4.10.). Contrary to the ECtHR standards the decisions ordering continued detention at the stage of trial are much less substantiated than other categories of analysed decisions (see Chapter 4.4.).

416. There is obvious misunderstanding among the actors involved in detention proceedings of the nature of 24-hour house arrest. It is usually perceived as an alternative to detention, i.e. the preventive measure which doesn't involve deprivation of liberty (see Chapter 4.4.6).

417. All the aforementioned problems are interrelated and of structural nature. To resolve these problems, it is recommended to take series of awareness raising, capacity building, organizational, legislative and, if necessary and possible, disciplinary measures. These measures can be summarised as follows (see for more details paras. 262-266, 273-278, 366-373 and 408-410 above).

418. First of all, the results of this research should be brought to the attention of all subjects involved in detention proceedings: attorneys, prosecutors and judges. The same applies to authorities and self-governing bodies responsible for training and monitoring the activities of the above actors: the HCJ, the NSJ, the BQDC, the BCDP, the Ukrainian National Bar Association and the Ukrainian Bar Association, etc.

419. Capacity building measures should include institution- and problem-oriented training measures for attorneys, prosecutors and judges. To make the results more sustainable, it might be necessary to contemplate the possibility of including the issues examined in this Research in programs of trainings organised on regular basis for the above actors by the HCJ, the NSJ, the Ukrainian National Bar Association and the Ukrainian Bar Association etc.

420. Apart from the aforementioned training measures it is recommended to organise wider professional discussions/seminars/workshops with the engagement of all actors and institutions involved together to promote common understanding of the necessity of tackling problems mentioned in this

research.

421. Also, it appears that certain organizational and administrative measures **might** be taken to tackle the problems identified in the Research: ensuring sufficient stuffing of domestic courts, introducing effective supervision over implementation of house arrest and other non-custodial measures, introducing electronic exchange of documents in criminal justice system, collecting detailed statistical information etc.

422. It would also be helpful to bring the results of this Research to attention of disciplinary authorities. For this purpose, it might be necessary to carry out several sets of trainings concerning the issues analysed in this Report for the staff of disciplinary bodies, i.e. the HCJ, the NSJ, the BQDC and the BCDP. The disciplinary authorities may contemplate the possibility of engaging in discussions with all actors involved regarding the problems identified in this Research and, if need be, prepare specific guidelines clarifying their approach to the above problems.

423. Finally, it is recommended to examine the possibility of amending domestic legislation for the purpose of removing the deficiencies identified in this Report.

Annex1.

Methodology for conducting research on application of pre-trial detention and house arrest in Ukraine

LIST OF ABBREVIATIONS

FLA	Free legal aid
SC	Supreme Court
Research	Research on application of pre-trial detention and house arrest in Ukraine
SJAU	State Judicial Administration of Ukraine
Convention	European Convention on Human Rights
ECHR	European Court of Human Rights
COE CM	Committee of Ministers of the Council of Europe
CPC	Criminal Procedural Code of Ukraine
Methodology	Methodology for conducting the research on application of pre-trial detention and house arrest in Ukraine
MoJ	Ministry of Justice of Ukraine
UNBA	Ukrainian National Bar Association
NGOs	Non-governmental organisations
OPG	Office of the Prosecutor General
CoE	Council of Europe

I. GENERAL PART

1.1. Overall Objective

The research on application of pre-trial detention in Ukraine (hereinafter the "Research") is conducted in order to generally assess conformity of application of **pre-trial detention and house arrest** with the right to liberty and security under Article 5 of the European Convention on Human Rights (the Convention) and case law of the European Court of Human Rights (the ECHR). The Research has been prepared to establish the actual impact of the national regulatory framework and related processes upon the practice of the prosecution authorities and the judiciary as well as efficiency of defence at the stage of **pre-trial detention and house arrest**.

In its judgements on Ukraine, the ECHR has stated many times that the applicants' rights under Article 5 have been violated. In the end, in its judgment in the case of *Kharchenko v. Ukraine*, the ECHR reiterated that a number of the violations of Article 5 of the Convention, which had already been considered in the previous cases against Ukraine, were of systemic character. By applying Article 46 of the Convention, the Court drew attention of the Government of Ukraine to the need to reform Ukrainian legislation and administrative practice in order to bring them in line with the requirements of Article 5 of the Convention. In particular, in order to eliminate the violations, the new Criminal Procedural Code (CPC) was adopted in Ukraine in 2012. Nevertheless, it was established by the ECHR in a number of the judgements delivered after the new CPC had been adopted, namely the ones in the judgements on *Ignatov v. Ukraine, Korban v. Ukraine*, that most persistent issues specified without limitation in the judgement on *Kharchenko v. Ukraine* still had not been resolved. They include unjustified decisions on pre-trial detention (continuation of the pre-trial detention), promptness of consideration of motions and complaints submitted in this regard, lack of efficient remedies to ensure that the person gets compensation for the violated rights etc.

These issues persist despite the actions taken by Ukraine in pursuance of the requirements of the ECHR[1]. In its turn, this situation results in further court judgements or applications filed to the ECHR in connection with violation of the right to liberty and security by Ukraine.

This Research is conducted within the Council of Europe Project "Human Rights Compliant Criminal Justice System in Ukraine" (hereinafter the "Project"). The Research is based on Decision of the Committee of Ministers of the Council of Europe CM/Del/Dec(2019)1348/H46-33[2]. In this Decision, the CoE CM urges the public authorities to submit:

- a comprehensive overview of domestic detention practices, including prosecutorial and judicial practice, based on the outstanding issues identified in the *Ignatov* judgment;

- detailed statistics and examples of relevant judicial decisions on compensation for the damages as a result of unlawful deprivation of liberty.

As the ECHR applies the same approaches to assessment of pre-trial detention and house arrest, these issues are also associated with the house arrest. Moreover, the conclusions reached by the ECHR in the *Korban v. Ukraine* demonstrate that the practice of application of house arrest in Ukraine contains the same pressing problems as pre-trial detention. Therefore, it is expedient to expand the scope of this Research to include the practice of application of house arrest.

The results of the Research will be processed within the integral report that will contain observations, opinions and recommendations. The ultimate purpose of the Research is to support the public authorities

1 See the data base on enforcement of the judgements of the *ECHR*: https://hudoc.exec.coe.int/eng#{"fulltext":["ignatov"],"EXECDocumentTypeCollection":["CEC"],"EXECLanguage":["ENG"],"EXECIdentifier":["004-46503"]} *(with additional links).* Also see Section 2.3 of the Methodology below.

2 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168094c715

of Ukraine in their attempts to fully bring the national practice and legislative framework in line with the international standards in this industry by determining and eliminating the root causes of the violations associated with application of pre-trial detention and house arrest.

1.2. Tasks of the Research

The methods selected or adjusted to conduct this research are aimed at:

1. providing integral, objective and consolidated information as well as analysis as regards application of the measure of restraint in the form of pre-trial detention and house arrest;
2. increasing awareness of representatives of the public authorities, lawyers and the public in general of the function to be performed by pre-trial detention and house arrest in the criminal justice system in order to bring it in line with the human rights defence rules;
3. helping the national authorities establish the needs to regulate and apply the approach associated with pre-trial detention and house arrest in the context of conformity to the standards of the Convention;
4. providing the national authorities with the methodology and tools for further application of pre-trial detention and house arrest in the context of Article 5 of the Convention.

1.3. Guidelines

The Research, its methodology and tools have been developed in accordance with the following principles:

1. objectivity and impartiality;
2. confidentiality;
3. non-interference with justice in individual cases, accuracy and specificity;
4. no conflict of interest[3].

In terms of subject matter approaches, the Research is based on the Pre-Trial Detention Assessment Tool developed by the Council of Europe[4].

As for the framework of the Research, the experts being consultants of the Council of Europe and participating in the Research undertake to furnish accurate and reliable information, maintain confidentiality of data and have no conflict of interests when they perform relevant tasks.

1.4. Research Team

The members of the research team and description of tasks of each of them will be determined later by the Project team together with the key stakeholders of the Research (see Section 1.6).

3 These principles are consistent with the internationally recognised principles, namely the ones that can be found in the Training Manual for Human Rights Monitoring, Chapter 2: See the Basic Principles of Human Rights Monitoring https://www.ohchr.org/Documents/Publications/Chapter02-MHRM.pdf 18

4 Available at: https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06

1.5. Scope of Application and Elements

This Research covers the period from **1 January 2013** through **31 December 2019** .

The proposed Research (starting with development of the methodology and its elements/tools up to presentation of the preliminary draft report) is planned for **July to December 2020**[5].

In order to ensure multi-dimension and respective data spectrum, this Research uses a set of methods (elements) to collect, analyse and consolidate:

- analysis of the legal framework and internal institutional regulations;
- analysis of statistical data formed by the national stakeholders as well as quantitative data collected during the Research;
- expert examination and analysis of specific court decisions on application of pre-trial detention and house arrest as well as applicable case files;
- expert examination and analysis of the selected court decisions, applicable materials of the court sessions for the actions with the claims for paying compensations for unlawful application of pre-trial detention and house arrest;
- survey (by means of the questionnaires) on the matters associated with judges, prosecutors and attorneys;
- panel discussions with lawyers, scientists, representatives of the NGOs; consultations with representatives of public authorities and civil society;
- consolidation of the data and results by means of the above-mentioned elements, analysis and preparation of the integral report on the Research.

1.6. Research Stakeholders

The Council of Europe Project "Human Rights Compliant Criminal Justice System in Ukraine" applies to: 1) general matters of coordination and supervision over the process of this Research; 2) engagement of respective national authorities into the Research; 3) provision of international and local expert assistance and performance of works in accordance with this methodology; 4) respect for the terms and plan of the Research; 5) cooperation with the national stakeholders and consultants during the implementation and facilitation of the Research, including by supporting joint intermediary expert meetings; 6) cooperation with the public authorities on organising the survey of judges, prosecutors, attorneys as well as collection of statistical data and information from the national authorities for applicable analysis; 7) modification / revision / approval / translation and dissemination of the final report among the representatives of the public authorities.

The **Ministry of Justice** (MoJ) is expected to: 1) provide statistical data on the persons held in detention in the penitentiary facilities of Ukraine; 2) provide statistical data on the judgements of the ECHR regarding Ukraine where violation of Article 5 of the Convention was established in connection with a) application of the measures of restraint in the form of pre-trial detention and house arrest, and b) inability to receive a compensation for such violations at the national level; 3) information on the actions taken in pursuance of the judgements of the ECHR where the issues covered by this Research were established; 4) provide statistical data and free legal aid (namely the interest of the criminal proceedings where it was granted); 5) ensure participation of representatives of the Ministry in applicable expert discussions/panel discussions

5 These are indicative dates of the proposed Research at the time the Methodology was developed. The Research was completed in February 2022 (please see the Introduction part).

during this Research; 6) assist the Council of Europe and the research team in accessing the case files and other records necessary for the Research.

The **Supreme Court** (SC) is expected to: 1) ensure access to all the applicable judicial guidelines, case law opinions, reports, statistical data etc., which will be used during the desk review/research; 2) assist in distribution of the questionnaires and engagement of respective judges into this Research; 3) grant access to the case files necessary to conduct this Research; 4) consider statements from the research team in case the level of cooperation by the court staff and representatives of the judiciary is reduced; 5) participate in the applicable expert discussions/panel discussions during the Research.

The **State Judicial Administration of Ukraine** (SJAU) is expected to provide technical assistance, when necessary, to collect the above-mentioned statistical information and to get access to the necessary case files.

The **Office of the Prosecutor General** (OPG) is expected to: 1) inform all the respective prosecution authorities of this Research; 2) grant access to the institutional bylaws and regulations, guidelines, reports, statistical data etc. in connection with this Research; 3) assist in distribution of the questionnaires and engagement of respective prosecutors into this Research; 4) participate in the applicable expert discussions/panel discussions during the Research.

*(The **Ministry of Internal Affairs** (MIA) is expected to: 1) grant access to the institutional bylaws and regulations, guidelines, reports, statistical data (including without limitation statistical data on the persons for whom the measure of restraint was selected as house arrest) etc. in connection with this Research; 2) participate in the applicable expert discussions/panel discussions during the Research.)* **The need to engage the MIA is to be approved in consultation with the SC and the MoJ.**

The **Ukrainian National Bar Association (UNBA)** is expected to: 1) inform the attorneys of this Research; 2) grant access to the internal rules, guidelines, reports, statistical data etc. in connection with this Research; 3) assist in distribution of the questionnaires and engagement of respective attorneys into this Research; 4) participate in the applicable expert discussions/panel discussions during the Research.

The **NGOs in the field of justice or human rights NGOs** that take active part in consideration of respective matters are expected to: 1) provide reports and other materials associated with this Research; 2) participate in the applicable expert discussions/panel discussions during the Research.

II. SPECIAL PART

2.1. Analysis of the Legal and Internal Institutional Regulatory Frameworks

The analysis will focus on the standards of the Convention as to the quality (clarity, predictability and possible accessibility), overall expediency of the legal methods, and consistency of:

a) primary legislation, namely the criminal procedural, criminal (substantive) and other applicable law, including the available general and individual (civil/administrative) defences against unlawful deprivation of liberty and other violations that influence application of the measures of restraint in the form of pre-trial detention and house arrest and their connection with other measures of restraint; current state of affairs and dynamics during the period covered by this Research; their impact upon frequency of application of pre-trial detention and house arrest and respect of the right to liberty and security as well as efficiency of remedies against such violations;

b) applicable subordinate legislation, internal institutional regulatory framework, recommendations, reports, opinions on the national case law of the Constitutional Court, Supreme Court etc.

The analysis provides for consideration of the law of practice of the ECHR under Article 5 of the Convention as regards Ukraine and the documents of the CoE CM in the context of enforcement of respective judgements[6].

The analysis is to be completed **in October 2020** with account of the data obtained from the other elements of this Research. The results of the analysis will constitute an integral part of the final report on the Research[7].

2.2. Analysis of the Statistical Data Provided by the Stakeholders of the Research

The analysis will be focused on the data received and collected during the field research and/or provided by the national authorities. Such data include:

a) court decisions and other procedural documents (namely motions and complaints filed by the attorneys, suspects/the accused and prosecutors), persons being placed into pre-trial detention as well as general statistics and statistics broken down by the crime level;

b) statistical data on the amounts of compensations for the losses awarded by the Ukrainian courts for unlawful pre-trial detention;

c) statistical data on violations of Article 5 of the Convention established by the ECHR (including based on amicable settlement and unilateral declarations), and amounts of the compensations awarded to the applicants for the same period.

The initial analysis must be conducted by **mid July 2020** and fully completed in the context of update and correlation thereof with account of the data obtained from the other elements of the Research by **the beginning of October 2020.** The results need to be consolidated as an integral part of the final report[8].

2.3. Expert Examination and Analysis of Specific Court Decisions on Application of Pre-Trial Detention and House Arrest as well as Applicable Case files

The expert examination covers the case files as regards application (continuation) of the measures of restraint in the form of pre-trial detention and house arrest as well as case files following consideration of the motions to replace the measures of restraint with more lenient ones. It will also provide for analysis of general data on criminal proceedings.

The first part of the expert examination provides for drawing up **check list No. 1**[9] in order to consider the principal models of the violations established in the judgements of the ECHR against Ukraine, i.e. unsubstantiated decisions on application of the measure of restraint in the form of pre-trial detention (house arrest) and continuation thereof; inadequate and excessively long consideration of motions and complaints of the defence as regards replacement of the measure of restraint in the form of pre-trial detention (house arrest) with another one that is not associated with custodial restraint etc. The methodology and check list No. 1 have been developed for expert examination of the specific case files as regards

6 See Section 1.1. of the General Part of the Methodology above.

7 See Section 2.6 below.

8 See Section 2.1.2.7.

9 See Annex 2.

application of the measure of restraint in the form of pre-trial detention (house arrest) that were considered by the investigative judges, judges of the first-instance courts and courts of appeal. In particular, the following case files will be analysed:

1. court decisions on application, review, continuation, cancellation of the measures of restraint in the form of pre-trial detention and house arrest;
2. decisions of the court of appeal based on the appeal from the decisions specified in item 1 above;
3. prosecutor's motions to apply or extend the measures of restraint and attachments thereto;
4. objections of the defence to the prosecutor's motions and attachments thereto;
5. motions of the defence to replace the measures of restraint and attachments thereto;
6. statements of appeal (and objections thereto) on the court decisions specified in item 1 above.

The second part of the expert examination is drawing up **check list No. 2**[10] in order to determine the substantive law and general context associated with the procedure for application of the measure of restraint in the form of pre-trial detention in the specific situation of the particular suspect/accused. It is associated with legal qualification of crimes, overall duration of the pre-trial detention (house arrest), quantity and types of the respective procedural decisions and other key parameters of the criminal proceedings as to the persons held in custody or subject to the measure of restraint in the form of house arrest.

The expert examination is conducted by completing the applicable check lists in accordance with the guidelines. The check lists constitute an integral part of the Methodology of this Research.

Therefore, the expert examination will provide structured data and analytical guidelines on standard violations, namely as to justification of the decisions on pre-trial detention, with reference to the models that are already specified in the ECHR judgements regarding Ukraine. Moreover, it assesses the actual or potential violations of the right to liberty and security on the check lists. The data associated with the accused (general characteristic of the criminal proceedings) are necessary to determine the state of affairs (regularities) in terms of applicability of pre-trial detention in the context of the nature of crime, final punishment, duration of custodial restraint and other factors demonstrating general trends and practices and, therefore, to generate proposals on necessary adjustments to the policy. Therefore, the general data on criminal proceedings necessary for the second part of the expert examination will include the following:

1. Date of instituting the proceedings (entering data into the Unified Register of Pre-Trial Investigations).
2. Date of notifying the person of suspicion.
3. Qualification of the crime.
4. Data on termination of the proceedings: verdict of guilty, agreement on admission of guilt, decision to terminate the proceedings etc.
5. Data on the punishment prescribed.
6. Data on the overall duration of pre-trial detention (house arrest) during the proceedings.
7. Data on all the court rulings on application and continuation of the pre-trial detention (house arrest).
8. Data on appeals of both parties from the court decisions on application and continuation of the pre-trial detention (house arrest).
9. Data on motions to replace the measure of restraint and results thereof.

The cases covered by the **first part** (check list No. 1), are selected randomly based on the general param-

10 See Annex 3.

eters determined pursuant to the sociological (representative) requirements, with the sequence numbers, their chronological and geographic division as well as the fact of provision of FLA or engagement of own defence lawyer established pursuant to the statistical data on the court decisions delivered during the period of this Research that have been reviewed The expert examination of **mapping in the first part** can be found in the Table attached to the Methodology (see Annex 5).

Data on the cases covered by **the second part** (associated with the suspect/the accused in check list No. 2) are also selected randomly based on the general parameters determined pursuant to the sociological (representative) requirements, with the sequence numbers, their chronological and geographic division, with account of the extent to which they are consistent with the statistical data on the number of the accused held in custody, the decision on whom was delivered during the period of this Research.

The geographic and chronological division of such materials will be established in this Research to the fullest extent possible. The respective parameters studied in the **second part** can be found in the Table attached hereto[11].

The group of consultants responsible for the expert examination will be determined later when the Research is prepared for the launch.

Review (expert examination) of the case files and completion of check lists No. 1 and No. 2, i.e. **collection of primary data**, will be effected from July to October 2020.

Processing and full detailed analysis of the initial data based on the check lists have to be completed by **the end of December 2020**.

2.4. Expert Examination and Analysis of the Selected Court Decisions and Respective Case files in the Civil Actions with the Claims for Paying Compensations in Connection with Unlawful Deprivation of Liberty.

This expert examination covers the terminated (completed) civil cases with the claims for compensation for the damages as a result of unlawful pre-trial detention that were considered by the courts of Ukraine during the period covered by this Research. The following materials will be subject to expert examination:

1. statements of claim for compensation for the damages as a result of the unlawful arrest and pre-trial detention and respective attachments thereto;
2. objections associated with the statements of claim;
3. court decisions on compensation for the damages as a result of the unlawful arrest and pre-trial detention and respective attachments thereto;
4. statements of appeal and cassation appeal from such decisions;
5. decisions of the courts of appeal and cassation appeal.

The expert examination is conducted pursuant to **check list No. 3** (see Annex 3) that is used to assess efficiency of the national remedy: claims for compensation for the unlawful deprivation of liberty. Its purpose is to research the practice of consideration of one type of civil actions by the courts of three instances with a view to assessing efficiency of this remedy and determining the general state of affairs and current trends.

11 However, in order to ensure adequate representativeness of the expert examination, such logic consistency must not be associated only with the other decisions reviewed as regards the same accused. These and other conditions are additionally set in the check lists attached.

The check list is completed and processed in accordance with the specific guidelines. The check list constitutes an integral part of the methodology in this Research.

The expert examination of the cases and completion of check list No. 3, i.e. **collection of input data**, need to be completed **by the end of October 2020**.

Processing and full detailed analysis of the initial data based on the check lists have to be completed by **the end of December 2020**.

2.5. Survey (with the Questionnaires) of Judges, Prosecutors and Attorneys on the Matters within the Scope of this Research.

The survey is based on the questionnaire[12] and constitutes an integral part of the Research. The questionnaire is a universal and anonymous tool to survey all the lawyers participating in the proceedings that pertain to the scope of this Research. The materials are recorded in hard copy during the activities performed within this Research or the project or, alternatively, within separate dissemination and collection mechanisms (this work is performed by a legal entity or individual service providers). The minimum number of questionnaire *per* specific category of the lawyers engaged into the proceedings associated with pre-trial detention is as follows: X prosecutors; X judges, X attorneys (the numbers will be determined in consultation with the sociological expert).

The questionnaires completed in hard copy are returned to the research team (or collected by the member of the research team) to be processed.

The questionnaires must be completed by the **end of September 2020**.

Processing and full detailed analysis of the input data must be completed **by the end of October 2020.**

At the same time, this element of the Research can be considered optional. Its justification can be performed as focus groups within this Research where there is lack of time and for financial reasons[13].

2.6. Focus Groups, Consultations with Representatives of Public Authorities and Civil Society

The proposed Research provides for conducting **a number of one-day moderated focus groups** with up to ten-twelve representatives engaged into the proceedings associated with pre-trial detention, from each category of the lawyers, representatives of the civil society and scholars (five categories in total: judges, prosecutors, attorneys, representatives of the NGOs and scholars).

The focus groups are held to discuss the initial quantitative results after the other elements of this Research under Sections 2.1-2.5 above are implemented. Their purpose is to develop proposals and recommendations on the final report. The consultant engaged by the CoE will moderate focus groups and sum up the results of the research team.

A series of the focus groups are conducted **from August to October 2020**.

12 See Annex 5.

13 See the next Section of the Methodology.

2.7. Consolidation of the Data and Results by Means of the Elements of this Research, Analysis and Preparation of the Final Integral Report on the Research

The final report is drawn up by the group of consultants of the CoE, including the contribution by the research team as prescribed by the Methodology.

The report must analyse the materials received within this Research, in pursuance of Sections 2.1–2.6. Moreover, it must have the section with consolidated observations and opinions on the state of affairs in connection with application of pre-trial detention and house arrest in Ukraine (with the sub-sections on the legislative, practical and institutional matters as well as capacity development). In the report, the Ukrainian authorities will be given specific recommendations on how to bring the national policy, the legal framework and practice in line with the international standards.

The draft report is going to be distributed for the purpose of final consultations with the stakeholders[14] **by the end of December 2020.**

The consultations will cover discussions and/or written consultations on the draft report. If needed, they will be completed with the analysis of results by the lead CoE consultant in the report **at the beginning of 2021 during the next stage of the CoE Project.**

The final report must be presented at the international conference, which is going to be organised at the initial next stage of the CoE Project in 2021.

Annexes

1. Check List No. 1 ASSOCIATED WITH THE DECISION ON PRE-TRIAL DETENTION AND HOUSE ARREST
2. Check List No. 2 ASSOCIATED WITH THE FILES OF THE CRIMINAL PROCEEDINGS
3. Check List No. 3 REGARDING COMPENSATION FOR THE DAMAGES AS A RESULT OF THE ILLEGAL RESTRICTION OF THE RIGHT TO LIBERTY AND SECURITY
4. Research Mapping
5. Questionnaire
6. Flow Chart: Information Flows and Stakeholders' Roles in the Research

14 See Section 1.6 above.

Annex 1.

Check List No. 1 ASSOCIATED WITH THE DECISION ON PRE-TRIAL DETENTION AND HOUSE ARREST

		COMMENTS, EXPLANATIONS AND REFERENCES TO THE NATIONAL LEGISLATION	SYMBOL
GUIDELINES • This check list should be considered as a separate file generated in the system (with a gadget). • Use it for each court decision (ruling) associated with imprisonment. • Complete and generate a separate file for each check list. • Only the verified data must be recorded in the field with account of the necessary format • Contact the project team directly in case there are other questions and to get additional information. • Do not copy decisions or documents from the files that have already been studied. Do not engage the court staff into review and do not impose any functions save for provision of files upon them.			
RESULTS OF THE RESEARCH ASSOCIATED WITH THE DECISION			
1	Check List No.	*Specify the sequence number of the case in the records of this Research. It is NOT the same as the internal case number.*	. . . N1 -. . .
ДАНІ, ПОВ'ЯЗАНІ З РІШЕННЯМ			
2	COURT OF APPEAL (appellate jurisdiction)	*Specify the region based on the jurisdiction of the court of appeal.*	
3	COURT (investigative judge)	*Specify the court and the judge(s) that have delivered the decision.*	
4	CASE NUMBER AND PROCEEDINGS NUMBER	*Date and number of the decision*	
5	TYPE OF THE DECISION	*Decision on application of the measure of restraint – the first decision on application of the measure of restraint in the form of pre-trial detention or house arrest that was delivered by the investigative judges as well as judges of the first-instance court.*	DECISION ON APPLICATION OF THE MEASURE OF RESTRAINT
		Revision – decision following consideration of the motions submitted pursuant to Articles 200, 201 and 331 of the CPC.	REVISION
		Continuation of the measure of restraint at the pre-trial investigation stage – decision on continuation of the pre-trial detention or house arrest delivered by the investigative judge at the pre-trial investigation stage.	CONTINUATION (OF THE DURATION) AT THE PRE-TRIAL INVESTIGATION STAGE
		Continuation of the measure of restraint during the preliminary hearing – decision on continuation of the pre-trial detention or house arrest delivered by the judge (court) during the preliminary hearing.	CONTINUATION (OF THE DURATION) DURING THE PRELIMINARY HEARING

		Continuation of the measure of restraint at the trial stage – decision on continuation of the pre-trial detention or house arrest delivered by the judge (court) at the trial stage.	CONTINUATION (OF THE DURATION) AT THE TRIAL STAGE
		Release for house arrest – decision on releasing from custody and application of the measure of restraint in the form of house arrest.	RELEASE FOR house ARREST
		Dismissal of the motion to apply the measure of restraint in the form of pre-trial detention, and application of the measure of restraint in the form of house arrest.	DISMISSAL OF THE MOTION
6	Qualification of the respective crimes (as in the decision) in the law	*Specify the Article, Part, Clause of the Criminal Code*	

THEMED SURVEY/THEMED QUESTIONS			
TYPICAL VIOLATIONS (case law of the ECHR as regards Ukraine which seems to demonstrate PERSISTENT examples of violations) **LAWFULNESS/GROUNDS FOR PRE-TRIAL DETENTION AND HOUSE ARREST** (Part 3 of Article 5 + Part 4 of Article 5 (habeas corpus)			
Failure to specify adequate and sufficient grounds when authorising/continuing the pre-trial detention and/or dismissing applications regarding habeas corpus (Ignatov (in this case the Court stated the existence in Ukraine of several structural problems related to pre-trial detention), Korban, Volnovakha, Sinkova, Makarenko, Korniychuk, Sadkov, Zherdev, Temchenko, Kleutin, Strogan, Kharchenko).			
The task is to analyse the practice as to the GROUNDS for pre-trial detention (house arrest)). According to Articles 177, 184, 194 and 196 of the CPC, both litigants and judges have to process and justify their stances as required by Clause 3 of Article 5. The judge's opinion has to be specific, clearly worded and based on analysis of evidence and particular circumstances of the case. The stereotype and general references such as standard quotes from the judgements of the ECHR are unacceptable. Specify below if such reasoning (arguments) will be complied with in the decisions on authorising and/or continuing the pre-trial detention. The general criterion is worded in the case of Korban (§§ 154 and 155): "In accordance with the Court's established case-law under Article 5 § 3, the persistence of a reasonable suspicion is a condition sine qua non for the validity of continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish (1) whether other grounds cited by the judicial authorities continue to justify the deprivation of liberty and (2), where such grounds were "relevant" and "sufficient", whether the national authorities displayed "special diligence" in the conduct of the proceedings... Justifications which have been deemed "relevant" and "sufficient" reasons (in addition to the existence of reasonable suspicion) in the Court's case-law have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, and the need to protect the detainee").			
7	Did the court/judge refer to at least ONE of the grounds for application of the measure of restraint provided for by the legislation in the court DECISIONS?	*Specify expressly whether the judges separated their assessment of a reasonable suspicion from the grounds for pre-trial detention.* *Specify if "yes" (i.e. the court/judge(s) justified the decision associated with such ground(s)).*	
THE GROUNDS/MOTIVES FOR CONTINUING THE MEASURE OF RESTRAINT WERE SPECIFIED BY THE COURT/JUDGES			
The court/judge(s) relied upon such grounds while AUTHORISING/ CONTINUING the measure of restraint:		*It can be specified once or in aggregate.* *Leave of all the fields blank if there has been a release.*	

7.1.	Risk of absconding from the pre-trial investigative authorities and/or court (Clause 1 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
7.2.	Risk of destruction, concealment of distortion of any items or records of material significance for establishment of circumstances of the criminal offence (Clause 2 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
7.3.	Risk of impact upon the participants of the criminal proceedings (Clause 3 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
7.4.	Risk of hindering the criminal proceedings in another manner (Clause 4 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
7.5.	Risk of committing another criminal offence or continuing the criminal offence of which the person is suspected/ accused (Clause 5 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
UNACCEPTABLE GROUNDS/REASONS FOR CONTINUATION OF PRE-TRIAL DETENTION			
8	The court/judge(s) mostly justified the decision with the UNACCEPTABLE grounds/ assumptions (the list of which is much broader than in the previous question):	*One or several options can be selected.* *Specify below if "yes"* *Leave of all the fields blank if there has been a release.*	
8.1.	Gravity of the crime/severity of the punishment	*Gravity of the crime or severity of the punishment is used by the court as a key argument in favour of pre-trial detention (house arrest)*	
8.2.	Special status of the accused	*for instance, a police officer, a judge, a politician, a public figure etc.*	
8.3.	Criminal background	*Repeat offences, hypothetical possibility of new crimes, inclination to repeat offences, criminal record or something similar; for instance, "it is the second crime committed by the accused" or "the accused is a repeat offender" etc.*	
8.4.	Frequent trips abroad	*As a justification of the risk of absconding, the court refers to the person's frequent trips abroad in the past.*	
8.5.	Considerable wealth	*In order to justify the risk of absconding, the court refers to the considerable wealth of the suspect.*	

8.6.	Inadequate references to the case law of the ECHR	*Quotes from the judgements of the ECHR / references to the decisions of the ECHR, which are generally associated with the circumstances of the case being heard, or general quotes from the judgements of the ECHR, without an explanation on how they are used in this case.*	
8.7.	Stereotype wordings	*Consider general and abstract references to the conventional causes, stereotype wordings that are well-established in the case law and copied from the other court decisions. It will outweigh description of the facts in the case; for instance, "the case files give sufficient grounds to assume that the accused could avoid the crime" or "it is stated in the law that arrest is applied under such circumstances".*	
8.8.	Too many quotes from the Law	*The effect of "copy and insert" from the regulatory texts, starting with without limitation the words "it is prescribed by the law" or "according to the law" etc. Their number will outweigh the specific circumstances of the case.*	
8.9.	Silence in response to the litigants' arguments	*In particular, silence in response to the defender's arguments. Mere references to the attorneys' stances, without detailed consideration of their arguments; for instance, "the defence disagreed with the motion of the prosecutor" or "the objections of the defence are obviously unjustified" etc.*	
8.10.	Restraining effect as a result of the measure of restraint	*In some cases, the text of the decision is about application of the measure of restraint for instructional and/or preventive purposes, including pre-trial detention as adequate punishment.*	
8.11.	Lack of desire to cooperate with the investigative authorities	*An argument in favour of pre-trial detention stated by the judge(s) is lack of the person's desire to cooperate with the investigative authorities or the person's denial of connection with the crime. Thus, the person's constitutional right not to testify against himself or herself is encroached on.*	
8.12.	The risks have not been mitigated	*When continuing the pre-trial detention (or house arrest), the judge(s) used the reasons like "the risks existing as of the date of selection of the pre-trial detention have not been mitigated" instead of specifying the grounds for continued pre-trial detention.*	
8.13.	house arrest is interpreted as an alternative action that is not associated with deprivation of liberty	*The judge(s) acknowledged that the were no grounds or few sufficient grounds for pre-trial detention of the accused and applied house arrest as an alternative to pre-trial detention. See the case law in the case of Korban.*	
8.14.	The court (judge) initiates consideration of continuation of pre-trial detention (house arrest) at its (his/her) own discretion	*It includes the situations in which the pre-trial detention at the trial stage is about to expire, the prosecutor does not file a motion to continue the pre-trial detention, and the court acting on the basis of Article 331 of the CPC initiates consideration of this matter on its own.*	

8.15.	The decision on pre-trial detention (house arrest) is related to several suspects/the accused	*The court applies or continues the measures of restraint regarding several persons at the same time. However, the court does not separate arguments on each of the suspects/accused and presents them together. Therefore, it is impossible to identify which of the suspects/accused certain arguments are associated with.*	
8.16.	Transfer of the burden of proof	*The court mostly justifies its decision with the fact that the defence has failed to present the arguments sufficient to refute the risks specified by the prosecutor. Therefore, the court transfers the burden of proof from the prosecution to the defence.*	
8.17.	Other practices (specify)	*Specify only the UNACCEPTABLE practices briefly (up to 500 symbols)*	
ANALYSIS OF POSSIBILITY OF APPLYING ALTERNATIVE MEASURES OF RESTRAINT.		*It is impossible to justify why any other alternative restraint or restraint not associated with pre-trial detention has not been applied (Clause 3 of Part 1 of Article 194 and Clause 3 of Part 1 of Article 196 of the CPC).*	
9	Did the COURT (JUDGES) refer to lack of alternatives in their court DECISIONS?	*Specify clearly whether the judges assessed lack of alternatives. Specify if "yes"*	
9.1.	If yes, did the COURT (JUDGES) present arguments in favour of the decision?	*Specify clearly (yes or no) if the court has presented arguments in favour of lack of alternative measures of restraint.*	
9.2.	To your mind, were the arguments specified by the courts sufficient?	*Specify "yes" if the arguments were sufficient and "no" if you believe them to be insufficient.*	
ANALYSIS OF APPLICATION OF THE BAIL.			
10	In its decision on application of the measure of restraint in the form of pre-trial detention, did the court specify the amount of the bail?	*Specify "yes" or "no"*	
10.1.	If the court specified the amount of the bail, did it justify the bail in the respective amount?	*The court generally has to assess in detail the financial condition of the person and calculate the amount of the bail based on this assessment. Specify "yes" or "no"*	
10.2.	To your mind, was such justification sufficient?	*Specify "yes" or "no"*	
11	How would you assess the JUDGE'S arguments as regards the GROUNDS FOR PRE-TRIAL DETENTION?	*See the explanation of the criteria applicable to the assessment below. They are also applicable to the decisions on denial or termination of the pre-trial detention. Specify in the applicable field below.*	

11.1.	Very bad	*There is no clear legal terminology that can be applied to this case; citing legal documents is obviously not associated with this case; there are attributes of the processed called "copy and insert" (so called "copy and insert" effect); there are many mistakes and even grammatical errors; a reader cannot grasp the idea of the text and trace the causes; there is a very formal attitude and "arrogant" language, which creates the impression of an unreasonable decision; no clear consistence and specific arguments etc.*	
11.2.	Bad	*Illogic arguments; it is mostly based on citing respective legal clauses, even without an attempt to apply them in the case; the judge failed to express the court's motives in the context of legal assumptions and arguments of the litigants; there are few explanations of the significance and application of the legislative authority; citing the legislative authority adds no weight to the judge's reflections, and they can be easily ignored as if they did not exist.*	
11.3.	Satisfactory	*The motives demonstrate mediocre and general knowledge of the terms applied and legal standards, but the judge confuses legal rules and matters of defence of human rights (for instance, he or she connects his or her reflections with the reasoned suspicion and grounds for continued pre-trial detention (say, a risk of escaping, hindering etc.) or applies other inadequate standards (for instance, by appealing to the presumption of innocence, confusing it with the presumption of liberty etc.)).*	
11.4.	Good	*The motives demonstrate good knowledge of the case law and legal rules; the judge mostly assesses and applies the judgment on the merits of the case on his own, but he or she does not express an opinion on the arguments of the litigants, thus imposing his or her qualitative judgement.*	
11.5.	Excellent	*The judge considers the arguments of each side (the prosecution and the defence) and adds his or her own arguments on the merits of the case.*	

Annex 2.

Check List No. 2 ASSOCIATED WITH THE FILES IN THE CRIMINAL PROCEEDINGS

		COMMENTS, EXPLANATIONS AND REFERENCES TO THE NATIONAL LEGISLATION	SYMBOL
	GUIDELINES • This check list should be considered as a separate file generated in the system (with a gadget). • Use it per accused (if several persons are accused within the same proceedings, use only one per case). • Complete and generate a separate file for each check list. • Only the verified data must be recorded in the field with account of the necessary format • Contact the project team directly in case there are other questions and to get additional information. • Do not copy decisions or documents from the files that have already been studied. Do not engage the court staff into review and do not impose any functions save for provision of files upon them.		
STATEMENT OF PROGRESS OF THE CASE GENERAL INFORMATION ON THE CASE AND PROCEEDINGS AS REGARDS THE PLACEMENT UNDER DETENTION			
1	Check List No.	*It is NOT the same as the internal case number. The number has to be made of the first letters and sequence number.*	. . . N2 -. . .
1a	IDENTIFICATION DATA OF THE ACCUSED	*Specify the first and last name of the suspect/accused the decision on whom has been studied. It will only be used for the purposes of search in the research data.*	
1b	General quantity of the suspects/accused within the criminal proceedings	*In case there are several suspects/accused within the criminal proceedings, specify their total number.*	
1c	References to the check list(s) 1 or 3	*Specify check list No. 1 or 3 (known/determined) if the decision on the accused has been considered in the respective sections of this Research*	. . . N1– . . . . . . N3 – . . .
CASE (PROCEDURE) – SPECIFIC DETAILS			
2	INVESTIGATION (date of initiation)	*Date of the record with the Unified Register of Pre-Trial Investigations*	…/…/…..
3	CRIMINAL PROCEEDINGS No.		N

4	Date of delivery of a written notice of suspicion	*It means the person the decision on whom is studied within this check list.*	…/…/…..
5	SUSPICION (qualification)	*Under which Article of the Criminal Code was the person informed of suspicion? The initial qualification as of the date of the investigation and the motion to apply the restraint in the form of pre-trial detention (specify above) should be clearly separated since the qualification can change in the course of time. Please, specify all the Article of the Criminal Code under which the suspect was notified of suspicion if there was more than one.*	
6	GRAVITY (of the charges)	*Specify one classification under Article 12 of the Criminal Code. If there are many, select the gravest one. It is only applicable to the charges during the arrest and imprisonment.*	
7	MERITS OF THE CASE (final decision on admission of guilt)	*Specify whether the accused was acquitted or convicted, at least based on the decision of the first-instance court or court of appeal if there has been no final decision yet. The number of charges does not matter. If the accused has been partly acquitted under specific items of the charges and has been convicted under the other ones, he or she is deemed to be partly convicted. The final nature of the decision on the merits of the case means at least the decision delivered by the court of appeal even if the appeal is considered at the level of the Supreme Court in accordance with the law.*	
8	Applicable punishment	*In case the (actual) punishment specified in the respective field is deprivation of liberty, the duration of such punishment must also be specified in accordance with the ultimate verdict.*	. . .years . . . months . . . days
		If there was no deprivation of liberty (including the probational sentence) specify the punishment in the respective field.	
PROCEEDINGS AS TO THE PRE-TRIAL DETENTION			
9	Pre-trial detention / house arrest (general duration)	*Both Articles 185 and 188 of the CPC. The total duration of the measure of restraint in the form of pre-trial detention, including during the periods of the house arrest, if any. They are calculated based on the data below (dies a quo & dies ad quem) and independently.*	. . . years . . . months . . . days
10	Dies a quo (placed into pre-trial detention, house arrest, detained)	*Data when the person was first deprived of liberty (detained / selected the pre-trial restriction in the form of pre-trial detention or house arrest).*	
11	Dies ad quem (ultimate release)	*The date of ultimate release (including non-continuation of the pre-trial detention) or the verdict delivered by the first-instance court. This date also includes application of the measure of restraint not associated with pre-trial detention, namely the obligation not to change the place of residence (settlement or country), including the alternative restraints, such as release on bail, against the obligation, subject to judicial control etc. Please consider that replacement of imprisonment with house arrest is not qualified as a release, and the period under house arrest needs to be included into the overall duration of the pre-trial detention.*	

	Interruption (temporary release from detention)	*Майте на увазі, що зміну ув›язнення на цілодобовий домашній арешт не кваліфікують як звільнення, а період, проведений під домашнім арештом, необхідно включати до загального терміну тримання під вартою.*	
12		*In some case, the total duration of the pre-trial detention can be interrupted by a short-term release followed by return to custody/detention. The days on release should be deducted from the overall duration of the pre-trial detention. For these purposes, specify the number to be included into the table in this field.*	
13	house ARREST (overall duration in days)	*Article 181 of the CPC. Calculate the total quantity of the days spent under house arrest. The overall duration also includes the house arrest if it is applied twice or more times. Please consider that the dates of the start and end of the house arrest need to be included into the above-mentioned overall duration of the pre-trial detention (not later and not earlier). These data are only necessary for the purposes of this Research. If the house arrest has not been applied, leave the field blank. If it is the only house arrest applied, specify the total quantity of days of the pre-trial detention as shown above repeatedly.*	. . . years . . . months . . . days
14	CONTINUATION OF THE PRE-TRIAL DETENTION (total)	*Calculate how many continuations of this nature have been applied by the courts (in accordance with Article 199 and other Articles of the CPC for any period). Do not confuse it with the continuation of the duration that is requested by the prosecutor, but is dismissed by the court. Only the claims that were actually affirmed by the courts are relevant.*	
APPEALS (total)		*The total quantity of the statements of appeal submitted to the court of appeal. Do not specify anything in this box.*	
15a	Appeals by the PROSECUTOR'S OFFICE	*Specify the total quantity of the statements of appeal by the prosecutor's office from the decision of the investigative judge (court) as to pre-trial detention or house arrest. These data cover any appeals from any decision, namely the one on release from detention etc.*	
15b	Appeals by the DEFENCE	*Calculate how many appeals have been submitted by the defence, on any grounds and from any decisions of the investigative judge (court). Do not confuse them with the motions of the defence to replace the measure of restraint.*	
MOTIONS TO REPLACE THE MEASURE OF RESTRAINT IN THE FORM OF PRE-TRIAL DETENTION OR house ARREST (total)		*Загальна кількість клопотань щодо зміни запобіжного заходу, окрім апеляційних скарг, поданих до слідчого судді (суду). Не вводьте жодних даних у цю клітинку.*	
16a	Motions of the PROSECUTOR'S OFFICE to revise	*How many motions based on Article 200 or 331 of the CPC to replace the measure of restraint in the form of pre-trial detention (or house arrest) were filed by the prosecutor's office? Do not confuse them with the statements of appeal.*	
16b	Motions of the DEFENCE to revise	*How many motions based on Article 201 or 331 of the CPC to replace the measure of restraint in the form of pre-trial detention (or house arrest) were filed by the defence? Do not confuse them with the statements of appeal.*	

16C	REVISION BY COURTS (total)	*Was there any revision by court after the pre-trial detention and/or during such detention? Do not confuse it with continuation upon request of the prosecutor's office, regardless of whether it has been approved or dismissed by the judge. This box only applies to the revision requested beyond the scope of the so called "standard continuation procedure" and "initial decision". These are generally motions by the defence. Release from detention as a result of non-continuation differs from release from detention following the revision.*	
17	Release on bail	*Part 3 of Article 183 and 202 of the CPC Specify the quantity of the decisions, if any. If there have been no, leave the field blank.*	
18	Release from detention for house arrest (except for house arrest)	*Articles 181 and 202 of the CPC Specify the quantity of the decisions, if any. If there have been no, leave the field blank.*	
19	Release against the personal guarantee	*Articles 180 and 202 of the CPC Specify the quantity of the decisions, if any. If there have been no, leave the field blank.*	
20	Release against the personal obligation	*Articles 179 and 202 of the CPC Specify the quantity of the decisions, if any. If there have been no, leave the field blank.*	
21	Cancellation (release)	*Article 202 of the CPC. Specify the quantity of the decisions, if any. If there have been no, leave the field blank.*	

Annex 3.

Check List No. 3 Compensation for the Damages as a Result of the Illegal Restriction of the Right to Liberty and Security

CRITERIA		COMMENTS, EXPLANATIONS AND REFERENCES TO THE NATIONAL LEGISLATION	SYMBOL
GUIDELINES • This check list should be considered as a separate file generated in the system (with a gadget). • Use it in any (each) civil claim. • Complete and generate a separate file for each check list. • Only the verified data must be recorded in the field with account of the necessary format • Contact the project team directly in case there are other questions and to get additional information. • Do not copy decisions or documents from the files that have already been studied. Do not engage the court staff into review and do not impose any functions save for provision of files upon them.			
DATE OF THE RESEARCH **GENERAL DATA FOR SCIENTIFIC PURPOSES**			
1	Check List No.	*It is NOT the same as the internal number of the case files/ court number. The number has to be made of the first letters and sequence number.*	. . . N3 – . . .
1a	IDENTIFICATION DATA OF THE ACCUSED	*Specify the first and last name of the accused the decision on whom has been studied. It will only be used for the purposes of search in the research data.*	
1b	References to the check list(s) 1 or 1	*Specify check list No. 1 or 2 (known/determined) if the decision on the accused has been considered in the respective sections of this Research*	. . . N1 –. . . . . . N2 – . . .
GENERAL DATA ON THE CASE FILES **GENERAL INFORMATION ON THE CASE AND PROCEEDINGS AS REGARDS THE LEGAL DEFENCE**			
IN THE CIVIL CASE			
2	CIVIL proceedings (overall duration)	*Overall duration of civil proceedings in all three-level jurisdictions*	. . . years . . . months . . . days
3	Start of the proceedings on the claim	*Date of the civil claim filed to the first-instance court*	. . /. . /20. .
4	End of the proceedings on the claim	*Date of the final decision, including the third-instance court (Supreme Court), if any*	.. . . . /. . / 20. .
THEMED SURVEY/THEMED QUESTIONS			
CLAIMS (CLAIMANT)			
With which JUDGE(S) and UNIT(S) does the claimant associate violation of his or her right to liberty?			

5	COURT OF APPEAL (appellate jurisdiction)	*Specify the field pursuant to the jurisdiction of the court of appeal with which the violation is associated in the claimant's opinion.*	
6	COURT (investigative judge)	*Specify the respective court which, according to the claimant, has committed the violation, out of the list (see above).*	
7	PROSECUTOR'S OFFICE (internal units)	*Which unit of the prosecutor's office is responsible for the proceedings associated with the pre-trial detention, to the extent of the continued pre-trial detention? Do not confuse it with the unit that initiated the investigation or instituted the proceedings on the pre-trial detention, but the case was recently transferred to another prosecution authority. If several prosecution units are engaged, select the last one that requested to continue the pre-trial detention.*	
8	TIME and/or PERIOD?	*WHEN did the probable violation occur? Specify the time or period. For the purpose of the Research, it is enough to specify the year if no more data could be obtained.*	01/01/1900 01/01/1900
COMPLAINTS ON THE MERITS OF THE CASE?		*They can be specified separately or in aggregate*	
9	Unlawful deprivation of liberty	*There can be various situations; most of them are major violations of the procedure and rules of the CPC, for instance, pre-trial detention in excess of the prescribed duration or delay in release; arrest without a protocol; double arrest based on two separate protocols; arrest within the same proceedings after the release within other proceedings; detention after the release etc. Specify if "yes"*	
10	Lack of reasonable suspicion	*It can be based on the decision of the investigative judge on the release from detention due to lack of reasonable suspicion or on the decision of the court of appeal on this matter. However, it can be just the claimant's opinion; in this case, it should be recorded. Specify if "yes"*	
THERE ARE NO GROUNDS FOR PRE-TRIAL DETENTION		*The claimant states that there were no grounds for continued pre-trial detention. Please select one or several grounds for pre-trial detention which, in the claimant's opinion, his or her case lacks.*	
11a	Risk of absconding from the pre-trial investigative authorities and/or court (Clause 1 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
11b	Risk of destruction, concealment of distortion of any items or records of material significance for establishment of circumstances of the criminal offence (Clause 2 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
11c	Risk of impact upon the participants of the criminal proceedings (Clause 3 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	

11d	Risk of hindering the criminal proceedings in another manner (Clause 4 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
11e	Risk of committing another criminal offence or continuing the criminal offence of which the person is suspected/accused (Clause 5 of Part 1 of Article 177 of the CPC).	*Specify if "yes"*	
11 f	Інше (укажіть коротко) Other (briefly) Including as to the cases listed in Article 178 of the CPC	Specify if "yes". Specify briefly by means of the key words below. 500 symbols at most.	
12	CLAIMED as the COMPENSATION (total amount)	The claimant asks to pay the compensation. Please note that these are the CLAIMED AMOUNTS contrary to the awarded compensation, information on which will be presented below. The total amount will be calculated in the table; these boxes do not have to be completed	UAH (Ukrainian hryvnias) ....
12a	Pecuniary damage	It should be converted into UAH.	UAH (Ukrainian hryvnias) ....
12b	Non-pecuniary damage	It should be converted into UAH.	UAH (Ukrainian hryvnias) ....
12c	Costs and expenses	It should be converted into UAH.	UAH (Ukrainian hryvnias) ....
12d	Total amount (only in case it is indivisible)	It should only be completed if the claimant has not divided the compensation into one or all the above-listed types	UAH (Ukrainian hryvnias) ....
OBJECTIONS (BY THE DEFENDANT)			
DEFENDANT'S OBJECTIONS		Specify briefly with the key words. Sum up all the objections by the defendant if there are several of them. In some situations, representatives of several authorities speak at the hearing. Their opinions generally coincide. Specify only the coordinated stances and specify only one item from the list below.	
13	ALL obviously unjustified	The civil claim needs to be fully dismissed; say, it is not based on evidence; the claimant's rights were not violated on the merits (the pre-trial detention was lawful etc.). Specify if "yes"	
14	PARTLY admissible claims that are excessive in terms of amounts	The defendant's attorney agreed on the merits of the case, but objected to the amounts claimed; in his opinion, the claims for compensation were excessive, and the amounts had to be justified. Specify if "yes"	
15a	Pecuniary damage	Where possible, specify the amount of the compensation with which the defendant's attorney agreed.	UAH (Ukrainian hryvnias) ....

15b	Non-pecuniary damage	Where possible, specify the amount of the compensation with which the defendant's attorney agreed.	UAH (Ukrainian hryvnias) ....
15c	Costs and expenses	Where possible, specify the amount of the compensation with which the defendant's attorney agreed.	UAH (Ukrainian hryvnias) ....
15d	The compensation is at the court's discretion	It is usually done this way when the defendant asks the court to determine the amounts at the discretion of the judge, who is unable to develop his or her own stance. Specify if "yes"	
16	FULLY admissible	Both the merits of the case and the amounts claimed as compensation were fully affirmed. Specify if "yes"	
FINAL DECISION			
FINAL DECISION ON THE MERITS OF THE CASE		Record only the form of the final and irreversible decisions	
17a	The claim is fully granted	All the claims on the merits and for the compensation are unconditionally satisfied. Specify if "yes"	
17b	The claim is partly granted	The civil claim is granted partly only, either on the merits of the case or for the amount, with the partial compensation. Specify if "yes"	
17c	The claim is dismissed:	Dismissal of the civil claim. Specify if "yes" (and complete the respective fields below).	
17d	Other grounds for non-admissibility (specify)	Specify if "yes". Specify briefly by means of the key words below. 500 symbols at most.	
PRINCIPAL violations detected by the courts		Specified pursuant to the list	
18	Unlawful deprivation of liberty	There can be various situations; most of them are major violations of the procedure and rules of the CPC, for instance, pre-trial detention in excess of the prescribed duration or delay in release; arrest without a court order; double arrest based on two separate orders; arrest as a result of another charge following the release; detention after the release etc.	
19	Lack of reasonable suspicion	It can be based on the decision of the investigative judge on the release from detention due to lack of reasonable suspicion or on the decision of the court of appeal on this matter. However, it can be just the claimant's opinion; in this case, it should be recorded.	
20	There are no grounds for pre-trial detention	The claimant states that there were no grounds for continued pre-trial detention. Please select one or several grounds for pre-trial detention which, in the claimant's opinion, his or her case lacks.	
20a	Risk of absconding from the pre-trial investigative authorities and/or court (Clause 1 of Part 1 of Article 177 of the CPC).	Specify if "yes"	

20b	Risk of destruction, concealment of distortion of any items or records of material significance for establishment of circumstances of the criminal offence (Clause 2 of Part 1 of Article 177 of the CPC).	Specify if "yes"	
20c	Risk of impact upon the participants of the criminal proceedings (Clause 3 of Part 1 of Article 177 of the CPC).	Specify if "yes"	
20d	Risk of hindering the criminal proceedings in another manner (Clause 4 of Part 1 of Article 177 of the CPC).	Specify if "yes"	
20e	Risk of committing another criminal offence or continuing the criminal offence of which the person is suspected/accused (Clause 5 of Part 1 of Article 177 of the CPC).	Specify if "yes"	
20f	Detention in degrading conditions	It is not associated with the pre-trial detention itself, but it should be recorded for the purposes of the Research. Specify if "yes"	
20g	Other violations (specify)	Specify if "yes". Specify briefly by means of the key words below. 500 symbols at most.	
21	Awarded COMPENSATION (total amount)	The final compensation is awarded by the courts.	UAH (Ukrainian hryvnias) ....
21a	Pecuniary damage	It should be converted into UAH. In case the decision is dismissed, leave the box blank.	UAH (Ukrainian hryvnias) ....
21b	Non-pecuniary damage	It should be converted into UAH. In case the decision is dismissed, leave the box blank.	UAH (Ukrainian hryvnias) ....
22c	Costs and expenses	It should be converted into UAH. If the refusal has been received, leave the box blank.	UAH (Ukrainian hryvnias) ....
21d	Total amount (only in case it is indivisible)	It should only be completed if the courts have not divided the compensation into one or all the above-listed types	UAH (Ukrainian hryvnias) ....
MOTIVES OF THE COURTS (INEXHAUSTIVE CIRCUMSTANCES OR WITHDRAWAL FROM PRACTICE; OTHER)			
22	Is there any reference to the amounts awarded by the ECHR in similar cases?	References shall be applicable and clearly describe the ECHR as the respective authority responsible for determination of the compensation. The reference is unreasonable in any other case. Specify if "yes".	

23	Has the duration of the pre-trial detention been calculated?	The duration of the pre-trial detention is the first criterion to assess the amount of the compensation for the non-pecuniary damage in case of the unlawful or unreasonable pre-trial detention. Specify if "yes".	
SPECIAL reasons for the compensation		These reasons can appear in the court decisions as substantiation of the specific amount of the compensation awarded.	
24a	Unlawful as a result of acquittal	It can be a certain reason used by the courts. Consider that the verdict of non-guilty itself is not a sufficient ground for compensation for the unlawful pre-trial detention. However, did the national court justify their motives when they referred to that component? Specify if "yes".	
24b	Lack of reasonable suspicion	the same.	
24c	Unlawfulness due to other procedural defects	For instance, if the terms of the pre-trial detention prescribed by the arrest warrant were exceeded. Specify if "yes".	
24d	Absence of one or several out of four acceptable grounds for pre-trial detention	For instance, risk of absconding, hindering, probability of repeated offence, participation in civil commotion. Specify if "yes".	
OTHER TYPES OF NON-PECUNIARY DAMAGE		There is a number of other reasons that can be used by the courts and are associated with the claimant's personality.	
25a	Degrading	For instance, "degrading treatment or mental suffering" etc. Specify if "yes".	
25b	Presumption of innocence	For instance, "the claimant has suffered from the criminal charges" etc. Specify if "yes".	
25c	Loss of reputation	the same.	
25d	Detention in degrading conditions	Specify if "yes".	
25e	Health problems	Specify if "yes".	
25f	Labour rights	Specify if "yes".	
25g	Other reasons (specify)	Specify if "yes". Specify briefly by means of the key words below.	

Annex 4.
Research Mapping. EXAMPLE FROM MOLDOVA. TO BE DETERMINED BY THE SOCIOLOGIST AT THE LATER STAGE

Statistical collection: quantity of motions to apply pre-trial detention affirmed by the courts and courts of appeal, by years and according to the court's data.

Source of statistics: Statistical reports on the arrest warrants by cases and years (2013 to 2017), as provided by the Superior Council of Magistracy.

Type of the collection: stratified, probabilistic.

Stratification criteria: type of court, region

Scope of collection:

- 400 decisions on pre-trial detention
- Pre-trial detention was applied in 200 court cases.

Selection procedure:

- Random selection from the list of courts of each pre-identified sub-group following the stratification at the level of the region.
- Random selection of cases.

Approved distribution of arrest warrants:

	ZONE	2013	2014	2015	2016	2017
COURTS	Chișinău	1554	2850	1821	2375	2023
	Bălți	126	262	139	165	200
	North	296	784	391	410	377
	South	204	511	217	264	335
	Centre	475	1176	596	640	656
	Comrat	77	249	127	100	75
	Total	2733	5832	3291	3954	3666
						19476
COURTS OF APPEAL	Chișinău	175	175	164	197	164
	Bălți	30	30	28	33	28
	Cahul	5	5	4	7	4
	Comrat	4	4	3	5	3
	Total	214	214	200	241	200

Allocation and consideration of decisions and cases:

Type	Region	Court	DECISIONS						CASES					
				2014	2015	2016	2017	TOTAL	2013	2014	2015	2016	2017	TOTAL
СУДИ	Chișinău	Sectorul Botanica	5	13	7	7	6	38	1	3	2	2	2	10
	Chișinău	Sectorul Buiucani	8	10	8	14	9	48	2	2	2	4	2	12
	Chișinău	Sectorul Centru	11	18	12	16	16	74	3	5	3	4	4	19
	Chișinău	Sectoru Ciocana	2	4	2	3	3	14		1		1	1	3
	Chișinău	Sectorul Rîșcani	4	10	7	6	5	32	1	3	2	1	1	8
	Bălți	Bălți	2	5	3	3	4	17	1	1	1	1	1	4
	North	Dondușeni	2	2		3	4	11		1		1	1	3
	North	Fălești	2	2	3	2	2	11	1		1	1		3
	North	Ocnița	1	6	2	1	1	11		1	1		1	3
	North	Soroca	1	5	2	1	2	11		1		1		2
	Centre	Anenii Noi	1	4	2	1	2	10		1				1
	Centre	Criuleni	1	4	2	1	2	10		1	1			2
	Centre	Hîncești	1	3	1	2	2	10		1			1	2
	Centre	Nisporeni	1	3	1	3	2	10	1	1		1	1	4
	Centre	Rezina	1	3	2	2	2	10	1	1	1			3
	Centre	Șoldănești	1	4	1	2	2	10		1			1	2
	Centre	Ungheni	2	2	2	2	2	10	1	1		1		3
	South	Cahul	2	2	1	2	3	10		1		1	1	3
	South	Cimișlia	1	4	3	1	1	10		1	1			2
	South	Taraclia	1	6		2	1	10		1		1		2
	Autono-mous Territorial Unit of Gagauzia	Ceadîr-Lunga	2	4	3	2	1	12		1	1	1		3
COURTS OF APPEAL	Chișinău		4	4	3	4	3	18	1	1	1	1	1	5
	Bălți		1	1		1	1	4				1		1
	Cahul							0						0
	Comrat							0						0

Annex 5.
Questionnaire

The purpose of this QUESTIONNAIRE is to assess application of the pre-trial detention in Ukraine. The information you furnish will be processed confidentially and used only for the purposes of the Research. The information you furnish is impersonalised so nobody can obtain your personal data and associate it with the data you have provided. Complete only the fields that are suitable for you.

Background information

Your speciality or occupation

Judge/court staff	☐
Prosecutor	☐
Attorney	☐
Investigator	☐
Civil activity/human rights defender	☐
Scientific worker/scientist	☐
Other (explain below)	☐

What is your period of service in your field?

0 to 2 years	☐
2 to 5 years	☐
more than 5 years	☐
more than 10 years	☐

How often is your professional activity related to the process of selection of measures of restraint? (where there are such cases)?

Never	☐
Rarely	☐
Often	☐
Regularly	☐

Determine one or several problems associated with application of isolation measures of restraint/ practice.

Lack of clarity of the law	☐
Lack of uniform case law	☐
Accusative approach	☐
Low level of justification of motions to apply measures of restraint	☐
Low level of justification of rulings on applying measures of restraint	☐
Other (please explain below)	☐

How would you assess conformity of application of the pre-trial detention to the national laws of Ukraine (within the range from 1 (negative) to 10 (positive) points)?

☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
1	2	3	4	5	6	7	8	9	10
Negative					Positive				

At which stage of deprivation of liberty are the requirements of the national law violated most often?

Application of the measure of restraint	☐
Continuation of the measure of restraint at the pre-trial investigation stage	☐
Continuation of the measure of restraint at the trial stage	☐
Neither of the options above	☐

To your mind, what decisions on application of measures of restraint are most often associated with violations of the effective laws?

Pre-trial detention (for the first time or continued)	☐
house arrest (for the first time or continued)	☐
Release from detention for house arrest	☐
Neither of the options above	☐

Is justification of the decisions on application of the measure of restraint in the form of measure of restraint and house arrest materially different?

Yes, the decisions on pre-trial detention are generally better justified	☐
Yes, the decisions on house arrest are generally better justified	☐
The level of justification of the decisions on these measures of restraint is practically the same	☐

Themed questions with multiple choice

PERSISTENT PROBLEM

Does Ukraine really have the alleged problem of excessive abuse of the measure of restraint in the form of pre-trial detention?

Yes, it does, and the problem is quite serious.	☐
No, it is not a problem at all.	☐
Yes, it does, but mostly in individual rare cases. It is not a serious problem.	☐

What principal difficulties did you face in the proceedings as regards selection of the measure of restraint in the form of pre-trial detention?

First of all, it is legal regulation since the law still is imperfect.	☐
First of all, it is practical application since legal traditions and customs are obsolete and inconsistent with the effective legislation.	☐

What principal difficulties did you face in the proceedings as regards selection of the measure of restraint in the form of house arrest?

First of all, it is legal regulation since the law still is imperfect.	☐
First of all, it is practical application since legal traditions and customs are obsolete and inconsistent with the effective legislation.	☐

SPECIFIC PROBLEMS

Do you have difficulty understanding the term "reasonable suspicion"?

Yes	☐
No	☐

What are the defects of the legal structure of reasonable suspicion (several answers are acceptable)?

The prosecutor's office does not (duly) refer in its motions/appeals to existence of the reasonable suspicion/its continued existence.	☐
The defence does not (duly) refer to this matter.	☐
There is no established case law in this context.	☐
Other (specify briefly).	☐

What are the difficulties associated with substantiation of the pre-trial detention?

The prosecutor's office does not (duly) refer in its motions/appeals to existence of the respective grounds/their continued existence.	☐
The defence does not (duly) refer to this matter.	☐
Insufficiency of the evidence that would confirm existence of grounds for pre-trial detention.	☐
Lack of justification of existence of the grounds for pre-trial detention in the court decision.	☐
There is no established case law in this context.	☐
Other (please explain below briefly).	☐

What are the difficulties associated with substantiation of the house arrest?

The prosecutor's office does not (duly) refer in its motions/appeals to existence of the respective grounds/their continued existence.	☐
The defence does not (duly) refer to this matter.	☐
Insufficiency of the evidence that would confirm existence of grounds for house arrest.	☐
Lack of justification of existence of the grounds for house arrest in the court decision.	☐
There is no established case law in this context.	☐
Other (please explain below briefly).	☐

Shall the person who has been placed into pre-trial detention (house arrest) have the right to claim monetary compensation?

No, until he or she is ultimately acquitted.	☐
Yes, despite the decision on the merits of the criminal charges.	☐
Yes, only if the criminal charges are not severe.	☐
No, if the person is released immediately after the detention is recognised to be unlawful.	☐

What is the regime and connection between pre-trial detention and house arrest?

house arrest is a less harsh measure of restraint since it provides for a lower degree of interference with the person's right to liberty, so it should be assessed to be an alternative to pre-trial detention.	☐
In terms of interference with the person's right to liberty, these measures of restraint are equal, and application thereof requires the same serious justification.	☐

CONTEXTUAL QUESTIONS

The prosecutor files a motion to continue the measure of restraint in the form of pre-trial detention. The defence asks to dismiss the motion and to release the suspect for house arrest. The court agrees with the stance of the defence. In the court decision on this matter,

with account of the fact that the person himself or herself filed a motion to apply the house arrest, it is enough to state that there are no grounds to satisfy the prosecutor's motion.	☐
with account of the fact that the person himself or herself filed a motion to apply the house arrest, it is enough to state that there are no grounds to satisfy the prosecutor's motion, and to present arguments on this matter.	☐
the court should justify the need to apply the house arrest. However, as it is a measure of restraint alternative to pre-trial detention, which provides for a much lower degree of interference with the person's right to liberty, the requirements for justification of such decision are lower.	☐
the court should justify the need to apply the house arrest. As both pre-trial detention and house arrest are different forms of deprivation of liberty, the requirements for justification of the decision in the content of the need to deprive the person of liberty are the same.	☐

The suspect is a top-rank officer in one of the law enforcement authorities who has been suspended from the office within the pre-trial investigation. The suspect has considerable wealth and often travels abroad. He is suspected of an especially grave crime of non-violent nature as a member of the organised group, and the possible sentence is deprivation of liberty for up to twelve years. The suspect refuses to plead guilty or cooperate with the investigators. Are the circumstances sufficient to apply the measure of restraint in the form of pre-trial detention or house arrest?

Yes, absolutely.	☐
Yes, provided that the prosecutor furnishes evidence of existence of such circumstances and explains why these circumstances confirm existence of grounds for application of these measures of restraint.	☐
These circumstances themselves do not confirm or refute existence of the risks under Article 177 of the CPC of Ukraine.	☐
No. Although neither of the circumstances is a serious argument in favour of the measure of restraint in the form of pre-trial detention/house arrest, the suspect has been suspended from the office, which neutralises the risks to a sufficient extent.	☐
It is sufficient to apply the measure of restraint in the form of house arrest. More serious arguments need to be presented to apply the measure of restraint in the form of pre-trial detention since this measure of restraint includes deprivation of the person's liberty.	☐

Which of the facts confirms existence of the high risk that the person might abscond from the pre-trial investigative authorities and/or court? ☐

The person has two passports to travel abroad, and he or she travels abroad quite often.	☐
The person has real estate abroad and considerable wealth.	☐
The person is suspected of an especially grave crime.	☐
Neither of the above.	

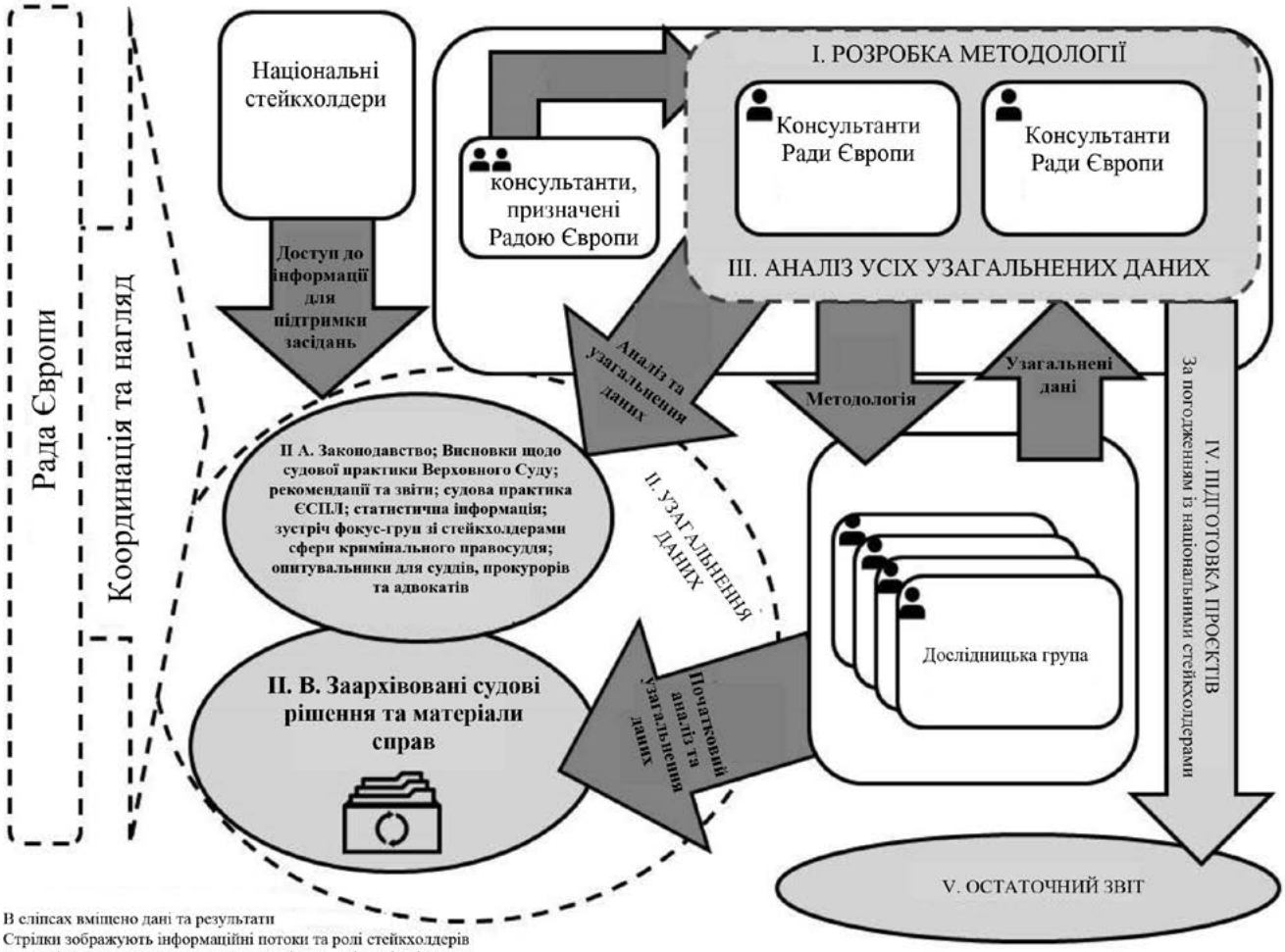
If there is no reasonable suspicion, should the investigative judge refuse to apply the pre-trial detention and apply another measure of restraint?

No, since it is a general requirement for application of restraints of such nature.	☐
Yes, provided that the person is charged with an especially grave crime.	☐

Shall the person be eligible for monetary compensation for unlawful use of the measure of restraint in the form of house arrest or pre-trial detention if the initial charges with the grave crime for which he or she had been arrested was ultimately requalified by the court as a minor offence?

No, because he or she was found guilty in the end, and the arrest was a reasonable means to achieve the result by delivering a verdict against the guilty person.	☐
Yes, because regardless of being guilty of the minor offence the initial charges with the grave offence were ultimately dismissed and were not a ground for his or her arrest.	☐
No, he or she is not eligible for monetary compensation since even if the arrest was unjustified, only admission of the offence without monetary compensation would be sufficient.	☐
Yes, but only with an insignificant amount since he or she was found guilty of the crime and arrested without any grounds, which is a way of punishment, thus reducing the financial burden.	☐
Yes, since any "unlawful" pre-trial detention is violation of the person's right to liberty and security, so compensation will be an element of restitution of the violated rights.	☐

Annex 6.
Flow Chart: Process and Roles of the Stakeholders in the Research of Application of Pre-Trial Detention



В еліпсах вміщено дані та результати
Стрілки зображують інформаційні потоки та ролі стейкхолдерів
Римські цифри та заголовки з великої літери – цільові орієнтири

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