A COMPARATIVE STUDY ON LEGISLATION AND PRACTICE REGARDING ARREST, CUSTODY AND PRE-TRIAL DETENTION IN SELECTED COUNCIL OF EUROPE MEMBER STATES

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A. INTRODUCTION

1. This Study provides a comparative perspective on law and practices relating to the initial apprehension of a suspected offender, the subsequent deprivation of liberty based upon that act and pre-trial detention in five jurisdictions in Council of Europe member States.

2. The possibility of preparing such a study follows a request from the Human Rights Department of the Ministry of Justice of Turkey ("the Ministry of Justice"). The Study is intended to become a resource for the Ministry of Justice to further promote the right to liberty and security, as guaranteed by Article 5 of the European Convention on Human Rights ("the European Convention") and Article 19 of the Constitution of Turkey.

3. The Study has been prepared pursuant to the Council of Europe Action HF-14, within the framework of the European Union - Council of Europe joint programme Horizontal Facility for the Western Balkans and Turkey (2019-2022). Its author is Jeremy McBride,[1] with the preparation of the sections on comparative law and practice drawing upon the invaluable reports and clarifications prepared by five national experts[2].

4. The jurisdictions on which the comparison has been based are Denmark, England and Wales (one of the three jurisdictions within the United Kingdom), France, Germany and Spain.

5. The selection of these jurisdictions was based on several considerations. Firstly, the aim was to show the approach in jurisdictions with different legal traditions; those based on civil law, common law and a Nordic mix of those two. Secondly, France, Germany, Spain and the United Kingdom are, like Turkey, large States and have some experience of combating terrorism. Thirdly, Germany and Spain also have some similarity to Turkey in that elements of the criminal justice are regionally-based. Fourthly, as in Turkey, there is a close link between the prosecution and the judiciary in France. Finally, Denmark is also interesting because its practice led to a major ruling by the European Court of Human Rights ("the European Court") on preventive detention.[3]

6. The focus of the Study has been shaped by the list of questions prepared by the Ministry of Justice in connection with its request for a comparative study to be undertaken. These questions all dealt with powers and obligations related to deprivation of liberty in the criminal justice process. In particular, the questions involved four broad sets of issues connected with deprivation of liberty in the criminal justice process, namely, the arrest and initial detention of suspects, pre-trial detention, preventive detention and compensation for deprivation of liberty that is unlawful.

7. These questions were thus connected with the way in which member States fulfil the requirements set out in paragraphs (1)(c) and (3)-(5) of Article 5 of the European Convention.

8. In order to obtain information about the law and practice in the selected jurisdictions, a questionnaire common for all five jurisdictions was devised. The questionnaire was based on the questions prepared by the Ministry of Justice. However, these were refined to ensure that the concepts used in the questionnaire were not restricted to the Turkish legal system and also took account of the requirements of the European Convention, as elaborated in the case law of the European Court.

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3 *S., V. and A. v. Denmark* [GC], no. 35553/12, 22 October 2018.

9. The responses to the questionnaire have been integrated to provide a comparative analysis, indicating where the same or a similar approach is being taken by the jurisdictions concerned and highlighting any significant differences between them. An overview of the requirements of the European Convention regarding the four sets of issues addressed precedes the comparative analysis in respect of each of them.

10. As already indicated, terminology can be specific to a particular legal system, and so it is not infrequent that two systems may use the same or very similar terms in different ways. In order to avoid any misunderstandings in this regard, the Study has sought to use the same terminology throughout, even though a particular term – as translated into English - may not be how it is used or understood in all the jurisdictions surveyed or in Turkish criminal law and procedure.

11. Thus, for the purpose of the Study, the following terms – as used in the text that follows[4] - should be understood in the light of the explanation accompanying them:

- Offence – any basis for imposing some form of criminal liability, no matter what degree of seriousness is involved and regardless of its particular classification in national law;
- Preventive measure – various restrictions or requirements for certain purposes linked to the proceedings brought against a person accused of a crime and that may be imposed on her or him while those proceedings are being pursued;
- Arrest – the apprehension of someone in connection with the possible commission of an offence with a view to criminal proceedings being brought against her or him;
- Custody – any period of deprivation of liberty under the control of a law enforcement officer, whether in a police station, other law enforcement premises or elsewhere, following an arrest where the person concerned is held before either: (i) being released, or (ii) brought before a court for the first time for the purpose of determining whether s/he should be released or have any preventive measures imposed on her or him; and
- Pre-trial detention – a particular form of preventive measure involving deprivation of liberty that can only be imposed by a court.

12. The Study first provides, by way of background, an overview of the criminal justice systems in the five jurisdictions surveyed. It then looks at the requirements of the European Convention and the law and practice of the five jurisdictions relating to arrest and custody, pre-trial detention, preventive detention and compensation.

13. The Study does not deal with the specifics of arrest and further deprivation of liberty in connection with cross-border and extradition proceedings.

B. OVERVIEW OF THE CRIMINAL JUSTICE SYSTEMS

14. This section provides some background regarding the criminal justice systems in the five jurisdictions that have been surveyed. In particular, it reviews: the different legal traditions involved; the constitutional and legislative underpinnings of each system; the key actors and institutions; and the different stages of the criminal process insofar as this relates to custody and pre-trial detention. Fuller accounts of these systems are in the annex to the Study.

[4] Specific national terms will be used in the footnotes when referring to provisions in national law.

15. Three of the jurisdictions (France, Germany and Spain) belong to the continental civil law tradition, whereas a fourth one is based on the common law (England and Wales) and the fifth (Denmark), while sharing traits with both those traditions, has its own distinct characteristics.

16. In four of the jurisdictions,[5] there is a constitution or constitutional law which has human rights guarantees, including ones relevant to the criminal justice process.[6] The constitution or constitutional law has priority over all other sources of law generated within these jurisdictions.

17. Also, in one of these four jurisdictions,[7] provisions in treaties such as the European Convention will - pursuant to the constitution - be accorded priority over their own legislative provisions. In a second one, the European Convention is part of the domestic legal order, but, rather than having a relationship of hierarchical superiority with respect to the law, it affords a resistance to its modification by law.[8] In the other two,[9] the European Convention has been incorporated into the legal system by legislation. As such, it is applied as an aid to the interpretation of their constitutional guarantees and legislative provisions.

18. In England and Wales, the jurisdiction without a constitution in the sense of a single constitutional document on which the legal system is founded, the provisions of the European Convention have been given legal effect through a law,[10] which requires – so far as possible – all legislation to be read and given effect in a way which is compatible with Convention rights and makes it unlawful for a public authority – including courts - to act in a way which is incompatible with those rights. It is not possible to invalidate legislative provisions which cannot be given effect in a manner compatible with Convention rights, but they can be the subject of a declaration of incompatibility by certain courts, which may lead to the adoption of a legislative amendment.

19. In all the jurisdictions, reliance on constitutional guarantees together with legislation implementing the European Convention and judgments of the European Court have – whether by these being taken into account in domestic rulings, or by being amended in response to judgments finding a violation in respect of a matter determined at the national level – shaped the evolution of law and practice relating to arrest, custody and pre-trial detention.

20. Only one of the jurisdictions is a federal one,[11] which leads to a division of competence in the discharge of certain responsibilities relating to the criminal justice system. In particular, the states (*Länder*) can adopt legislation on the modalities of the enforcement of pre-trial detention and are responsible for enforcing but not imposing pre-trial detention.

21. The principal legislation governing the criminal justice process in two of the jurisdictions is the Code of Criminal Procedure [12] and in the other three, there is similar specific legislation[13].

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5 The exception is England and Wales.

6 Denmark (the Constitutional Act), France (Constitution of the Fifth Republic), Germany (*Grundgesetz* (Basic Law ("BL")) and Spain (the Spanish Constitution, 1978 ("CE")).

7 France.

8 Spain (Article 96 CE). Therefore, the relationship between a treaty and national law is established in terms of applicability, not hierarchy; STC 140/2018. Furthermore, Article 10.2 CE specifically requires that fundamental rights be interpreted in accordance with international human rights treaties.

9 Denmark and Germany.

10 The Human Rights Act 1998.

11 Germany.

12 France ("CCrP") and Germany ("CCP").

13 Denmark (Administration of Justice Act), England and Wales (Police and Criminal Evidence Act 1984 ("PACE") and Spain (Criminal Procedure Act ("LECrim").

22. Although the approach of the criminal justice process is essentially adversarial in two of the jurisdictions,[14] there is an inquisitorial element to it in a third[15] and in the two others,[16] the starting approach might be described as inquisitorial but both jurisdictions also have strong adversarial elements. These differences between the approaches in the jurisdictions surveyed do not, however, have any implications for the exercise of powers of arrest and the imposition of pre-trial detention, with proceedings in respect of the latter all being adversarial.

23. Offences in all jurisdictions except Denmark,[17] are divided into different categories by reference to their gravity and the courts in which persons accused of them will be tried.[18] This can have implications for the exercise of powers of arrest and the imposition of pre-trial detention.

24. The exercise of powers of arrest is primarily that for the police, although in some jurisdictions, arrests can also be effected by persons other than the police.[19]

25. Responsibility for investigating offences is generally undertaken by the police,[20] but in two of the five jurisdictions, there are other specialised bodies performing this role.[21] Moreover, in two of them there is also a judicial role in respect of the investigation of some or all offences.[22]

26. In one jurisdiction, the public prosecutor is required to initiate an official investigation where there are indications of an offence having been committed.[23] On the other hand, the conduct of investigations in those jurisdictions where these are only undertaken by the police is generally subject to direction by public prosecutors.[24] However, in one of these jurisdictions, it is the local police chief – who is also

[14] Denmark and England and Wales.

[15] Germany.

[16] France and Spain.

[17] Criminal cases are handled in one of the 24 district courts as first instance and the particular combination of juridical judges and lay-judges in them depends on whether the case is a matter of imprisonment for less than four years or for four years or more. The combination will thus either be one juridical judge and two lay-judges for an offence attracting the lesser penalty or three juridical plus six lay-judges for an offence attracting the greater one, chapter 62 of the Administration of Justice Act.

[18] England and Wales (summary, either way and indictable only offences. Summary offences can attract imprisonment of up to 6 months, while either way and indictable only offences can be punished by longer terms of imprisonment, including life imprisonment in the last category. Summary offences are tried in magistrates' courts, either way offences in those courts or the Crown Court depending on whether it is seen as a serious offence by the magistrates' court or the accused wants to be tried by a jury and the last category are tried only in the Crown Court with a judge and jury. In addition there are Youth Courts, which are special magistrates' courts dealing with all but the most serious charges against those aged between 10 and 17); France (major indictable offences (*crimes*), minor indictable offences (*délits*) and summary offences (*contraventions*), tried respectively by the Assize Court, criminal courts and police courts); Germany (less serious cases (with an expected maximum penalty of 4 years' imprisonment) are dealt with at the local courts and more serious cases are heard before the district court)); and Spain (single-judge courts are competent to deal with offences punishable by up to 5 years' imprisonment with a fine or with other sanctions up to 10 years and beyond these limits cases will be dealt with by a panel of 3 judges).

[19] See para. 59 below.

[20] Denmark (each police district is organised in accordance with its' own needs. However, although it is common to have an investigation unit in the district, the police is, in principle, one corps, though); England and Wales (all police investigate, The Criminal Investigation Department in each local, i.e., territorially-based, police force investigates crimes of a more serious nature, which may require specialist skills to ensure more complex or serious crimes are investigated fully. There is also the National Crime Agency which leads the United Kingdom's response, locally, regionally and nationally, to reduce the impact of serious and organised crime. It also assists front-line policing with specialist skills and expertise to support major crime investigations such as abduction, serial sexual crimes and no body murder. There are national specialist units investigating, e.g., United Kingdom Football Policing Unit and the National Domestic Extremism Unit); France (*police judiciaire*); Germany (all officers of the "Criminal Police" (as opposed to local or police with general obligations to maintain order and security) are responsible for investigating); and Spain (there are different police forces involved in criminal investigations under the direction of a judge: the national police, the regional police or the Guardia Civil. All of them have the status of judicial police insofar as they act in a criminal investigation, but there is no distinct branch dedicated to investigation, without prejudice to some specialised units; Article 282 LECrim).

[21] England and Wales (apart from "local" police forces and specialist police forces (the British Transport Police, the Civil Nuclear Constabulary and the Ministry of Defence Police), investigation and prosecution can be undertaken by other agencies, including the Health and Safety Executive and the Serious Fraud Office) and Germany (tax and customs agencies).

[22] France (cases of major indictable offences are referred to the investigating judges (*juge d'instruction*) automatically, whereas minor indictable offences are referred to them only if the public prosecutor considers that the police investigation does not enable the case to be heard as it stands) and Spain (the examining magistrate (*juez de instrucción*) is in charge of leading criminal investigations. There is, however, a draft proposal under consideration to assign direction of the investigation to the public prosecutor).

[23] Germany.

[24] In France, public prosecutors have the status of judicial magistrate/magistrate of the judicial order but they are not independent of the Executive or the parties.

the head of the prosecutors – that is responsible for overseeing the conduct of prosecutions, apart from serious cases which are handled by the district attorney.[25]

27. Prosecutors in all jurisdictions are responsible for initiating prosecutions or approving a charging decision by the police.[26] Moreover, the responsibility for seeking the imposition or continuation of pre-trial detention (or other preventive measures) is generally vested in the public prosecutor in all jurisdictions. However, in one of them, this possibility is open to certain other persons.[27]

28. Decisions relating to the imposition of pre-trial detention are taken in Denmark and England and Wales by courts dealing with criminal proceedings generally,[28] whereas there is a specialist court or judge with this responsibility in France, Germany and Spain.[29]

29. None of the judges in the courts determining issues relating to pre-trial detention (or other preventive measures) prior to trial will generally be responsible for trying the case on its merits.[30] However, where an issue relating to the pre-trial detention (or other preventive measure) arises in the course of the trial, it will be determined by the trial court .

30. A prosecutor in France who was involved in the investigation phase of a case can also be responsible for the prosecution itself.[31] Similarly, the law in Denmark, Germany and Spain does not establish any obstacle to the same prosecutor acting in both stages of the proceedings. However, this will not occur in England and Wales.

C. ARREST AND CUSTODY

1. The European Convention on Human Rights

31. Article 5(1)(c) of the European Convention authorises:

> The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

32. As such, there are no requirements as to who can make the arrest, the need for such a step to be authorised in advance or the nature of the offence involved. It is enough for the arrest to be effected in relation to conduct that is criminal without having a specific offence in mind at the time.[32] However,

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[25] Denmark.

[26] Although in minor cases, the police in England and Wales decide whether to caution a suspect, take no further action or issue a fixed penalty notice, rather than refer them to the Crown Prosecution Service. In addition, for certain offences, the Director of Public Prosecutions or the Attorney-General must authorise a prosecution.

[27] Spain (those affected by the crime (*acusación particular*) and any interested party (*acusación popular*)).

[28] i.e., the district courts in Denmark and magistrates courts and the Crown Court in England and Wales.

[29] In France, it is the responsibility of the liberties and detention judge, in Germany it is the investigation judge and in Spain it is normally the nearest examining magistrate but the Central Examining Courts in Madrid in the case of crimes allegedly committed by armed gangs or terrorists. The examining magistrates also have a role in authorising investigative measures such as search, phone tapping and taking DNA samples.

[30] Such a restriction applies as a matter of case law to members of the Court of Appeals Investigation Chamber who have taken a decision concerning the imposition or continuation of pre-trial detention in cases involving crimes but the case law of the Court of Cassation does not regard such a prior role as sufficient to call into question the impartiality of members of this chamber if they take part in the trial of cases concerned with délits; see the different view of the European Court in *Chesne v. France*, no. 29808/06, 22 April 2010, in which it found a violation of Article 6(1) of the European Convention on this account. Moreover, in Germany, the *Ermittlungsrichter* ("investigation judge", who is not involved in investigations but will be involved in certain decisions about coercive measure during investigation) may in smaller courts have a split portfolio so that s/he can also be responsible for normal case trials. Furthermore, although the trial judge in England and Wales will not determine the issue of pre-charge detention and probably not the first bail application, it may well be that s/he will deal with bail applications as the trial gets closer.

[31] Articles 39 and 34 of the CCrP.

[32] *Brogan and Others v. United Kingdom* [P], no. 11209/84, 29 November 1988.

the arrest must be for the purpose of enforcing the criminal law against the person concerned. Furthermore, it must actually be necessary for this purpose[33] and not be arbitrary[34]. In particular, it must not be used to achieve some other objective, including the bringing of proceedings against someone else.[35]

33. It is always essential that there be a reasonable suspicion that the person arrested has committed an offence, is about to do so, or is fleeing after having committed one. This does not entail the need for any definite proof since this standard is not the same as that required for a conviction.[36] However, there must exist an objective link between the person concerned and the offence concerned.[37]

34. Moreover, it is crucial that the facts said to give rise to a reasonable suspicion actually involve the constituent elements of an offence.[38] Furthermore, the need for a reasonable suspicion exists, even in respect of arrests during a state of emergency.[39]

35. Article 5(1)(c) does not specify any limit to the period during which an arrested person can be kept in custody. However, this is governed by the requirements in Article 5(3), namely, that:

> Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

36. As an arrested person must be brought before a judge or someone authorised to exercise judicial power, this has resulted in the European Court finding that prosecutors are precluded from performing this role as their ability to intervene in the subsequent criminal proceedings would mean that their independence and impartiality would be open to doubt.[40]

37. In determining whether the first appearance of an arrested person before a court has occurred "promptly", the European Court will take account of the specific circumstances of a case. In particular, it has emphasised that any delay will not be excused by judicial and other holidays,[41] the intensification of investigation where the allegations are contested[42] or the nature of the offence[43]. However, genuine practical difficulties can be regarded by the European Court as relevant to determining whether the first appearance occurred promptly,[44] so long as there is no subsequent, unconnected delay45.

38. An interval of over four days between an arrest and the first appearance of the person concerned will generally be considered to be too long,[46] except where there has been a derogation under Article 15 in respect of a state of emergency[47].

39. Moreover, it should be noted that Recommendation Rec(2006)13 of the Committee of Ministers has emphasised the need for the interval between apprehension and first appearance before a court to be short in most cases:

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33 *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.
34 *Witold Litwa v. Poland*, no. 26629/95, 4 April 2000.
35 *Giorgi Nikolaishvili v. Georgia*, no. 37048/04, 13 January 2009.
36 *Murray v. United Kingdom* [GC], no. 14310/88, 28 October 1994.
37 *Fox, Campbell and Hartley v. United Kingdom*, *no.* 12244/86., 30 August 1990.
38 *Kandzhov v. Bulgaria*, no. 68294/01, 6 November 2008.
39 *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018.
40 *Assenov and Others v. Bulgaria*, no. 24760/94, 28 October 1998.
41 *Koster v. Netherlands*, no. 12843/87, 28 November 1991
42 *Vassis and Others v. France*, no. 62736/09, 27 June 2013.
43 *Ipek and Others v. Turkey*, no. 17019/02, 3 February 2009 (terrorist offences)
44 *Medvedyev and Others v. France* [GC], no. 3394/03, 29 March 2010.
45 *Vassis and Others v. France*, no. 62736/09, 27 June 2013.
46 *Brogan and Others v. United Kingdom* [P], no. 11209/84, 29 November 1988 and *McKay v. United Kingdom* [GC], no. 543/03, 3 October 2006.
47 *Brannigan and McBride v. United Kingdom* [GC], no. 14553/89, 26 May 1993.

14. [2] The interval between the initial deprivation of liberty and this appearance before such an authority should preferably be no more than forty-eight hours and in many cases a much shorter interval may be sufficient.

40. Furthermore, reliance on the maximum period allowed to elapse by national law will not always be considered to be justified where there are no special difficulties or exceptional circumstances seen as preventing the authorities from bringing the arrested person before a court much sooner.48

41. In any event, a failure to comply with a national deadline shorter than 4 days will result in the deprivation of liberty becoming unlawful for the purpose of Article 5.

42. However, although an arrest should be for the purpose of bringing criminal proceedings, the fact that it is ultimately decided not to pursue any prosecution will have no bearing on the issue of whether or not a deprivation of liberty was lawful for the purpose of Article 5(1).49

43. It is not, therefore, inconsistent with this provision or Article 5(3) for an arrested person to be released without charge – regardless of whether there might be an intention to undertake further investigations as to the existence of an offence – before the deadline s/he first appears before a court following her or his arrest.

44. The key aspects of the requirement under Article 5(2) of the European Convention to give reasons for an arrest and any charge against the person concerned are the *content* of the information, its *form* and the *time* within which it must be given. It is important to use simple, non-technical language.

45. The rationale for this requirement is to enable this person, should s/he so wish, to apply to a court to challenge the lawfulness of her/his deprivation of liberty under paragraph 4 of Article 5. There is, thus, a need for sufficient information to be given about the essential legal and factual grounds for the deprivation of liberty.[50]

46. In assessing whether this has been done, some account can be taken of the competence of person arrested[51] and the information can be given in an oral or written form. However, the means used should be one that the individual concerned can comprehend.[52] Moreover, the reasons must be given promptly, i.e., within a matter of hours.[53]

47. There is no specific requirement in the European Convention about an arrested person being able to inform family members or others about her or his arrest.

48. However, Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, provides for rights to have a third person informed of the deprivation of liberty, communicate, while deprived of liberty, with third persons and communicate with consular authorities.[54]

48 *Khandzhov v. Bulgaria*, no. 68294/01, 6 November 2008.

49 *Brogan and Others v. United Kingdom* [P], no. 11209/84, 29 November 1988.

50 See, e.g., *Dıkme v. Turkey*, no. 20869/92, 11 July 2000, *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, 21 April 2011 and *T. and A. v. Turkey*, no. 47146/11, 21 October 2014.

51 *H. B. v. Switzerland*, no. 26899/95, 5 April 2001.

52 *A. H. v. Hungary*, no. 28973/11, 8 November 2012.

53 See, e.g., *Murray v. United Kingdom* [GC], no. 14310/88, 28 October 1994, *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012 and *Zuyev v. Russia*, no. 16262/05, 19 February 2013.

54 *Article 5* **The right to have a third person informed of the deprivation of liberty** 1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to have at least one person, such as a relative or an employer, nominated by them, informed of their deprivation of liberty without undue delay if they so wish. 2. If the suspect or accused person is a child, Member States shall ensure that the holder of parental responsibility of the child is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto,

49. In addition, Recommendation Rec(2006)13 of the Committee of Ministers provides that

> 27. [1] A person who is the national of another country and whose remand in custody is being sought shall have the right to have the consul of this country notified of this possibility in sufficient time to obtain advice and assistance from him or her.
>
> [2] This right should, wherever possible, also be extended to persons holding the nationality both of the country where their remand in custody is being sought and of another country.
>
> 32. [1] A person whose remand in custody is being sought (or sought to be continued) shall have the right to have the members of his or her family informed in good time, about the date and the place of remand proceedings unless this would result in a serious risk of prejudice for the administration of justice or for national security.
>
> [2] The decision in any event about contacting family members shall be a matter for the person whose remand in custody is being sought (or sought to be prolonged) unless he or she is not legally competent to make such a decision or there is some other compelling justification.[55]

50. The fulfilment of these requirements can contribute to ensuring fulfilment of the obligation under Article 5 of the European Convention to account for the whereabouts and fate of anyone who has been deprived of her or his liberty.

51. The need to be able to do this is something that the European Court has found implied in Article 5 of the European Convention.[56]

52. Fulfilment of this responsibility entails in the first place proper record-keeping as regards any and every deprivation of liberty.

53. However, it also involves a duty to undertake an effective investigation into arguable claims that someone has been wrongly deprived of his or her liberty. Such an investigation should result in a prosecution of any law enforcement officer who may be responsible for the wrongful deprivation of liberty where this is called for on the facts established. This is something which prosecutors should particularly seek to ensure occurs. However, it is also something that judges should not ignore.[57]

54. The arrest of a person for the purpose of questioning her/him as a witness in connection with criminal proceedings could be a form of detention permitted under Article 5(1)(b) of the European Convention where this is provided for in the law.[58] However, such an arrest must genuinely be for that purpose and would not be so justified where the person is already considered to be a suspect.[59]

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unless it would be contrary to the best interests of the child, in which case another appropriate adult shall be informed. For the purposes of this paragraph, a person below the age of 18 years shall be considered to be a child. 3. Member States may temporarily derogate from the application of the rights set out in paragraphs 1 and 2 where justified in the light of the particular circumstances of the case on the basis of one of the following compelling reasons: (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person; (b) where there is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised. 4. Where Member States temporarily derogate from the application of the right set out in paragraph 2, they shall ensure that an authority responsible for the protection or welfare of children is informed without undue delay of the deprivation of liberty of the child. *Article 6* **The right to communicate, while deprived of liberty, with third persons** 1. Member States shall ensure that suspects or accused persons who are deprived of liberty have the right to communicate without undue delay with at least one third person, such as a relative, nominated by them. 2. Member States may limit or defer the exercise of the right referred to in paragraph 1 in view of imperative requirements or proportionate operational requirements. *Article 7* **The right to communicate with consular authorities** 1. Member States shall ensure that suspects or accused persons who are non-nationals and who are deprived of liberty have the right to have the consular authorities of their State of nationality informed of the deprivation of liberty without undue delay and to communicate with those authorities, if they so wish. However, where suspects or accused persons have two or more nationalities, they may choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate. 2. Suspects or accused persons also have the right to be visited by their consular authorities, the right to converse and correspond with them and the right to have legal representation arranged for by their consular authorities, subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned. 3. The exercise of the rights laid down in this Article may be regulated by national law or procedures, provided that such law or procedures enable full effect to be given to the purposes for which these rights are intended.

55 "Remand in custody" in this context means pre-trial detention.

56 *Kurt v. Turkey*, no. 24276/94, 25 May 1998.

57 See, e.g., *Bazorkina v. Russia*, no. 69481/01, 27 July 2006 and *Varnava and Others v. Turkey* [GC], nos. 16064/90, 18 September 2009.

58 *Iliya Stefanov v. Bulgaria*, no. 65755/01, 22 May 2008.

59 *Makarenko v. Ukraine*, no. 622/11, 30 January 2018.

2. Comparative law and practice

a. *Arrest without any prior authorisation*

55. In all the jurisdictions surveyed, it is possible for a law enforcement officer[60] to arrest – without the need for any prior authorisation – in one or more of the following situations (often termed *in flagrante delicto*), i.e., where someone is committing an offence[61] or is reasonably suspected of doing so,[62] or where the fact of the person doing this is objectively assessed at the time of the act by the person making the arrest,[63] there is strong evidence of the offence being committed[64] or there is practical certainty of it being committed on the basis of direct evidence, the perception of the person who witnessed the events, without the need for any further investigation[65].

56. Moreover, there are also powers of arrest without prior authorisation in certain circumstances after an offence has been, or is considered to have been, committed in England and Wales,[66] France,[67] Germany[68] and Spain[69]

57. These powers of arrest apply to all offences in England and Wales, Germany and Spain , to almost all offences in Denmark[70] but only to offences punishable by imprisonment in France.

58. However, the exercise of these powers is subject to certain conditions in Denmark,[71] England and Wales[72] and Germany[73] . Moreover, arrest for minor offences in practice only occurs in Spain in exceptional situations and there are also some conditions applicable to the exercise of powers of arrest there.[74]

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[60] In Denmark and England and Wales, this term applies to any police officer, but in France, it is applicable for present purposes to just members of the investigative branch of the police (*police judiciaire*), while in Germany it covers police officers and public prosecutors.

[61] England and Wales; section 24(1) of PACE.

[62] Denmark (Chapter 69 of the Administration of Justice Act) and England and Wales (section 24(1) of PACE; this power also covers arrest of someone about to commit an offence or reasonably suspected of being about to do so). In Denmark, there is also specific provision for the arrest as a suspect of everyone present in a crowd where there was an assault or threat of one on someone or there has been a fight with numerous participants leading to murder or serious bodily harm and it cannot be determined who did it; section 755(3) of the Administration of Justice Act.

[63] France.

[64] Germany; the assessment must be made with due diligence.

[65] Spain; Articles 553 and 795 LECrim.

[66] i.e., where there are reasonable grounds for suspecting that an offence has been committed, anyone guilty of the offence or reasonably suspected of being guilty of it; section 24(2) of PACE.

[67] i.e., where it has just been committed or where, immediately after the act, the person suspected is chased by hue and cry or is found in possession of articles or has on or about her or his person traces or clues that give grounds to believe that they have taken part in the commission of the offence; Article 53, para.1 CCrP.

[68] If a person is caught in the act or is being pursued, anybody can arrest (see fn. 78), which also means that police can arrest in these "exigent" cases without prior judicial authorisation; section 127 (1) and (2) CCP

[69] Articles 492.4 and 795 LECrim allow this where the person is caught immediately after committing the crime with effects, instruments or traces which allow for an assumption of their participation in it and where there are reasonable grounds to believe that an offence has been committed and that the person to be arrested has participated in it.

[70] Those subject to public prosecution (the vast majority) but not those subject to private prosecution.

[71] The arrest must be necessary to prevent further such prosecutable behaviour, to secure the presence of the person or to prevent her or him from interacting with other specific persons.

[72] Section 24 of PACE requires that the arrest must be "necessary", which means that it must be required to: ascertain the suspect's name or address (i.e., the police officer does not know the person's name/address, cannot readily find out their name/address, or reasonably believes that the suspect has given a false name/address), to prevent the suspect from causing physical injury to themselves or any other person, suffering physical injury, causing loss of or damage to property, committing an offence against public decency or causing an unlawful obstruction of the highway; prevent any prosecution for the offence from being hindered by the disappearance of the person in question; protect a child or other vulnerable person from the suspect; or allow the prompt and effective investigation of the offence or of the conduct of the suspect.

[73] The existence of flight, the risk of flight or the risk of tampering with evidence, collusion or other influences/threats to witnesses. In addition, an arrest is subject to a proportionality requirement, i.e., it must not be disproportionate to the significance of the matter or to the sanction likely to be imposed; section 112(1) in conjunction with section 127 CCP. As a result, the latter requirement makes it likely that for certain petty crimes an arrest will generally be hard to justify. Nonetheless, arrests are common for fare-dodging and shoplifting; see further C. Morgenstern and C. Kromrey, *Menschenwürde und das Auslieferungsverfahren.Zeitschrift für Internationale Strafrechtsdogmatik (ZIS),* S. 106-1242016: 6 and *seq.* and C. Morgenstern, *Die Untersuchungshaft. Eine Untersuchung unter rechtsdogmatischen, kriminologischen, rechtsvergleichenden und europarechtlichen Aspekten* (Baden-Baden, Nomos), 515 and *seq.* with further references.

[74] According to them, taking the person into police custody would be possible only when the person is caught *in flagrante delicto* or when there are indications of the person's participation in a crime, provided that, in this case, there is a risk of flight, concealment, alteration, loss or

59. There are also powers for persons other than law enforcement officers to arrest someone without the need for any prior authorisation but under certain conditions in Denmark,[75] England and Wales,[76] France,[77] Germany[78] and Spain[79].

b. *Arrest involving prior authorisation*

60. There are some circumstances in which prior authorisation for an arrest is either required or may be sought in all of the jurisdictions surveyed.

61. These vary from: the absence of any imminent danger that the person concerned could evade the procedure;[80] the position held by the person concerned;[81] and the need to secure the attendance at court of a person who is not currently being detained[82] .

62. In addition, in England and Wales, there is the possibility of issuing either a summons to appear before a magistrates' court to a person who has, or is suspected of having, committed an offence or a warrant to arrest such a person.[83] However, it is rare for an arrest warrant to be sought because of the powers of arrest already considered.

c. *Impermissibility of arrest*

63. There is some variation in the approach in the jurisdictions surveyed as to whether there are any offences for which an arrest is not permissible. However, in many respects the practice is very similar .

64. In Denmark, the only offences for which arrest is not possible are those that can just be the object of a private prosecution.[84] Nonetheless, in many cases, it will not be considered necessary to take the person arrested to a police station and s/he will be released before that could occur.

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destruction of the sources of evidence or of criminal repetition or attack on the victim's legal assets; Articles 453 and 495 LECrim. In the case of a minor offence, an arrest would only be made when the person has no known address and does not provide sufficient guarantees in the opinion of the authority or agent making the arrest.

[75] i.e., any private individual who find the person committing an offence subject to public prosecution or immediately after having done so. However, the individual concerned must hand the person so arrested over to the police as soon as possible.

[76] The power of arrest by persons other than the police under section 24A of PACE applies to anyone committing or reasonably suspected of committing indictable offences – those for which a sentence greater than 6 months' imprisonment can be imposed – and anyone guilty of such an offence or reasonably suspected of being guilty of having done so. The arrest must be necessary (i.e., to prevent the person in question from: causing physical injury to himself or any other person; suffering physical injury; causing loss of or damage to property; or making off before a police officer can assume responsibility for him) and it must appear to the person making the arrest that it is not reasonably practicable for a police officer to make it instead.

[77] I.e., ordinary police officers and private individuals can arrest someone under the same conditions applicable to the police judiciaire officers, but then they must bring her or him before the nearest senior police authority (the senior investigating officer (*officier de police judiciaire*) or a mayor or ship's captain); Article 73, para. 1 CCrP.

[78] If a person is caught in the act or is being pursued, any person is authorised to arrest him provisionally, even without judicial order, if there is reason to suspect flight or if his identity cannot be immediately established. In these cases, the police has to be called immediately and the provisional arrest may only last as long as it is necessary to involve the authorities; section 127 (1) CCP

[79] Pursuant to Article 490 LECrim, "Any person may arrest a person intending to commit a crime at the time they go to commit it and an offender in flagrante. The individual must immediately bring the detainee before the police or court, within a maximum period of 24 hours from the time of arrest; Article 496 LECrim.

[80] Germany (Article 104(2) BL; a judicial warrant is required in such cases).

[81] France (Article 26 of the Constitution provides that a member of parliament (upper or lower house) may be arrested or otherwise deprived of their liberty only with the authorisation of the Bureau of the parliamentary assembly of which they are a member in respect of a major or minor indictable offence, with the exception of one that is flagrant) and Spain (except in cases of *flagrante delicto*, judges and magistrates may only be detained by order of the competent judge, with immediate notification of the detention to the President of the Court or High Court to which they report (Article 398 of the Law on the Judiciary). In addition, prosecutors may not be arrested without the authorisation of the superior to whom they report, except by order of the competent judicial authority or in the case of *flagrante delicto* (Article 56 of the Organic Statute of the Public Prosecutor's Office). Also, career consular officials may only be subject to provisional arrest or detention in the event of a serious crime and only pursuant to a decision of the competent judicial authority, the arrest being communicated immediately to their State through diplomatic channels (Article 41.1of the Vienna Convention on Consular Relations).

[82] Denmark (section 757 of the Administration of Justice Act) and England and Wales (for failure to attend court at the end of a period of bail, in answer to a summons or repeatedly for a traffic offence; Criminal Procedure Rules and Practice Direction 2020, https://www.gov.uk/guidance/rules-and-practice-directions-2020#custody-and-bail).

[83] Section 1 of the Magistrates Court Act 1980. A warrant will only be issued if the offence is an indictable one (see fn. 18) or punishable by imprisonment or the person's address is not sufficiently established for a summons to be served on them.

[84] These are essentially ones that impact on a person's private life.

65. The restrictions in France as to the possibility of arresting someone apply to both the nature of the offence and the alleged perpetrator. Thus, it is not possible to arrest someone for a summary offence or an offence that that is only punishable by a fine and there is also a restriction on arresting Members of Parliament.[85]

66. The formal position in Spain is a little unclear as it had been provided that no arrest might be made for "simples faltas" (simple misdemeanours) unless the alleged offender did not have a known address in the opinion of the agent arresting her or him.[86] However, the category of misdemeanours as a less serious criminal offence has been replaced by the category of "delito leve" (minor offence")[87] without addressing the issue of arrest for them, but providing that the investigation and prosecution of minor offences is to be carried out in accordance with the procedure foreseen for misdemeanours. In practice, the approach followed has been to operate on the premise that arrest is not possible where the exception for "simples faltas" was applicable. Also, the criterion of a known address is to be interpreted in a material and teleological sense so that it is enough that it is known where the person concerned can be found even if s/he does not have an official address.[88]

67. In England and Wales and Germany, although there are no restrictions on the offences for which an arrest can be made, the conditions linked to necessity and/or risk of evading the procedure[89] mean that, in practice, arrests do not occur for all offences.

d. *Notification of reasons*

68. There is a requirement to notify a person of the reasons for her/his arrest "as soon as possible" in Denmark,[90] "as soon as practicable" in England and Wales,[91] "immediately" in France[92] and in Spain[93] and "when arrested" in Germany[94].

69. In England and Wales, this requirement must be fulfilled even if the reasons for the arrest are "obvious", it must be in writing in France and Spain, accompanied by a notification of the rights exercisable by the suspect and, in Germany, where the arrest is based on a warrant, this must be given to the person concerned and, if s/he does not speak German and a translation is not yet possible, an oral explanation must be provided as soon as possible.[95]

70. In Spain, there is a specific requirement that simple and accessible language be used. Moreover, in all cases, the notification must be in a language which the person understands, so that there is provision for interpretation to be provided for this purpose.[96]

e. *Other notification requirements*

71. There are some similarities in the approach followed in the jurisdictions surveyed as regards notifying certain persons after someone has been arrested, but also some differences, both as to who ought to be notified and the conditions in which this is to take place.

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85 Under Article 26 of the Constitution no Member of Parliament may be investigated, arrested or detained in respect of opinions expressed or votes cast in the performance of their official duties.

86 Article 495 LECrim.

87 Pursuant to the reform of the Penal Code in 2015.

88 See Faraldo Cabana, P, *Los delitos leves. Causas y consecuencias de la desaparición de las faltas*, Valencia (Tirant lo Blanch), 2016, p. 200.

89 See para. 58 above.

90 Article 758(2) of the Administration of Justice Act.

91 Section 28 of PACE and Code G.2.2.

92 Article 63-1, al. 1er and 2e, CCrP.

93 Article 520 LECrim.

94 Sections 114 and 127(4) CCP.

95 Moreover, there is a right to translation at all stages of the criminal proceedings; section 114a CCP and section 397 (3) and sections 185 and 187 of the Courts Constitution Act.

96 England and Wales (PACE Code C 13.2); France (Article 63-1, al. 1er and 13) and Spain (Article 520.1 LECrim).

72. Thus, where a person has been arrested, s/he has the right to notify this fact or have it notified to: a person known to them or likely to have an interest in her or his welfare in England and Wales;[97] a relative (i.e., a person with whom s/he lives), a parent or family member, brother or sister in France;[98] a relative (including parents or legal guardian in the case of juveniles) or a trusted person in Germany ;[99] and a family member or person of her or his choice in Spain[100] .

73. In France, the notification right extends also to the arrested person's employer.

74. There is a duty to inform an arrested person of her or his rights regarding notification in England and Wales.

75. In England and Wales, if the person chosen cannot be contacted, it is possible to choose up to two alternatives. Moreover, if the arrested person does not know anyone to contact for advice or support or cannot contact a friend or relative, the custody officer is required to bear in mind any local voluntary bodies or other organisations that might be able to help.

76. However, in Denmark an obligation regarding notification only arises when children and adolescents are arrested, and that only extends to a requirement to notify their parents and the social security.

77. In England and Wales, a parent or guardian, should not be an appropriate adult for the purpose of notification if they have received admissions prior to attending to act as the appropriate adult or they are suspected of involvement in the offence, the victim, a witness or involved in the investigation. If a juvenile's parent is estranged from the juvenile, they should not be asked to act as the appropriate adult if the juvenile expressly and specifically objects to their presence.[101] An alternative should, therefore, be found.

78. Notification is generally at the request of the arrested person. However, in Denmark, Germany and Spain it can occur against the will of children and adolescents. In addition, in Spain, it can be against the will of anyone in the case of informing consular representatives.[102] In France, there are obligations regarding notification in the case of minors over 10 years' old.[103]

79. There is also provision for notifying consular representatives where the persons arrested are foreign nationals in England and Wales, [104] France,[105] Germany[106] and Spain[107].

80. The notification is made by the arrested person her or himself in England and Wales, Germany and Spain,[108] but by the police in France.

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97 PACE Code C, section 5.

98 Article 63-2, CCrP

99 Section 114 (1) CCP ("An arrested accused shall be given the opportunity without delay to notify a relative or a person trusted by him, provided the purpose of the investigation is not significantly endangered thereby").

100 Article 520.1(e) LECrim.

101 PACE Code C, Note for Guidance 1B.

102 Article 520.3 LECrim. See Criteria for the Practice of Proceedings by the Judicial Police, Agreement of the National Commission of the Judicial Police of 3 April 2017, p. 73. There is a proposal to make any informing of consular authorities only if the detainee so requests.

103 A minor aged between 10 and 13 may not be placed in custody but can be subject to a measure of "being retained" for more serious offences and a short time. Her/his legal representatives (e.g., parents) and the person or institution to which s/he is entrusted (e.g., foster family) must be informed; Article. L. 413-1 of the Code for Juvenile Criminal Justice. Similarly, there is an obligation to inform such persons in the case of minors of at least 13 years' old, who can be placed in custody; Article L. 413-7 of the Code for Juvenile Criminal Justice. A minor younger than 10 years cannot be subject to deprivation of liberty for the purpose of investigation.

104 This extends to High Commissions (in the case of Commonwealth countries), embassies (in the case of other countries) and consulates.

105 Article 63-1, 3, para. 1 CCrP.

106 Sections 127 and 114b (4) CCP.

107 Article 520.1(g) LECrim. If the person has two or more nationalities, s/he may choose which consular authorities are to be informed.

108 Article 520.2(f); this communication is to take place in the presence of a police officer or an official designated by the judge or prosecutor.

81. However, in England and Wales, an arrested person, who is a citizen of a country with which a bilateral consular convention or agreement is in force requiring notification of arrest, must also be informed that notification of her or his arrest will be sent to the appropriate High Commission, Embassy or Consulate as soon as practicable, whether or not s/he requests it, unless s/he claims that s/he is a refugee, has applied for or intends to apply for asylum.[109] Consular officers may, if the detainee agrees, visit one of their nationals in police detention to talk to them and, if required, to arrange for legal advice. Such visits shall take place out of the hearing of a police officer.

82. Notification should take place as soon as possible in Denmark,[110] as soon as practicable in England and Wales, within three hours – insofar as humanly possible – in France and without undue delay in Germany[111] and in Spain.[112]

83. However, notification can be delayed: in Denmark, as regards parents of a child where this would be seen as harmful for the investigation or the welfare of the child;[113] in England and Wales, where it would lead to interference with, or harm to, evidence or physical harm to other people, as well as where it would lead to other suspects who have yet to be arrested being alerted, it would hinder the recovery of property obtained in consequence of the commission of the offence or of value of the property constituting the benefit derived by the arrested person from the offence;[114] in France, where this is necessary to allow the collection or preservation of evidence or to prevent a serious threat to a person's freedom or physical safety;[115] in Germany, where the purpose of the investigation would be significantly endangered thereby;[116] and in Spain, in cases of organised crime and terrorism[117] or where it would negatively affect the investigation[118] .

84. In addition to notification, communication by the arrested person in writing, by telephone or face to face with a person that has been informed that s/he is in police custody is possible in France, if the police deem that this would not be incompatible with police custody and would not facilitate the commission of an offence.[119]

85. Similarly, in England and Wales, an arrested person should be given writing materials, on her or his request, and allowed to telephone one person for a reasonable time. However, either or both of these privileges may be denied or delayed where a person is arrested in connection with an arrestable offence if a police officer of inspector rank or above considers that sending a letter or making a telephone call may result in the consequences justifying delayed notification. Any delay or denial should be proportionate and last no longer than necessary. Moreover, before any letter or message is sent, or telephone call made, the arrested person must be informed that what they have written or said may be read or listened to, and may be given in evidence. Also, a telephone call may be terminated if it is being abused.

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[109] In such cases, notwithstanding the provisions of consular conventions, the custody officer must ensure that UK Visas and Immigration (UKVI) is informed as soon as practicable of the claim. UKVI will then determine whether compliance with relevant international obligations requires notification of the arrest to be sent and will inform the custody officer as to what action police need to take; PACE Code C, 7.5.

[110] Chapter 75b of the Administration of Justice Act.

[111] This term is understood to mean "without culpable delay", meaning that the authorities must react immediately once they have clarified whether the arrested person is requesting the notification.

[112] In the event of a change of mind by an arrested person not initially wanting to inform someone, this should occur when it is sought for this to occur.

[113] Section 821d of the Administration of Justice Act. In such a case a social welfare person must then be called in.

[114] PACE Code C, Annex B. This is only possible in connection with an indictable offence and only for as long as the grounds exist and in no case beyond 36 hours. If the grounds cease to exist within this time, the arrested person must, as soon as practicable, be asked if they want to exercise the right, the custody record must be noted accordingly and action taken.

[115] Where police custody is extended beyond 48 hours, under the procedure applicable to organised crime, such a decision is taken by the liberties and detention judge except where it is a matter of notifying the consular representatives.

[116] Section 114 c (1) CCP. The vagueness of the provision is seen as giving law enforcement officials significant leeway and has been criticised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; see the report on its visit from 25 November to 7 December 2010, CPT/Inf (2012) 6.

[117] Article 384 bis LECrim. The possibility of incommunicado detention must be judicially authorised within 24 hours.

[118] An interpretation of the term "without undue delay"; *op.cit*, fn. 102, p. 45.

[119] Article 63-2, II CCrP. This can be for no longer than 30 minutes and will take place under the supervision of a police officer, in her or his own presence or of someone designated by her or him.

86. Also, in Spain, every arrested person has the right to communicate by telephone, without undue delay, with a third party of his choice. This communication takes place in the presence of a police officer or an official designated by the judge or prosecutor.[120] However, this communication may be restricted if incommunicado detention is agreed due to the urgent need to avoid serious consequences that could endanger the life, liberty or physical integrity of a person or for immediate action by the investigating judges to avoid seriously jeopardising the criminal proceedings.[121]

87. Such communication is in practice possible in Germany but this is not regulated explicitly by any legal provision.

88. Furthermore, in England and Wales, the arrested person, if s/he agrees may, at the custody officer's discretion, receive visits from friends, family or others likely to take an interest in their welfare, or in whose welfare s/he has an interest. Also, if a friend, relative or person with an interest in the arrested person's welfare enquires about her or his whereabouts, this information shall be given if the arrested person agrees.

f. *Duration of custody following arrest*

89. In all the jurisdictions surveyed, the bringing of a person into custody following her/his arrest is generally a matter for the police, as is its continuation until the obligation to bring her/him before a court,[122] except where an extension of the normal deadline requires authorisation by a court or a public prosecutor[123]. The possibility of bringing and keeping a person in police custody applies in all the jurisdictions surveyed to any offence for which an arrest is permissible.

90. In Denmark, there is a general requirement to release someone who has been arrested as soon as possible once the reason for the arrest is no longer present.[124]

91. Similarly, there are stipulations in England and Wales that all persons in custody must be dealt with expeditiously and released as soon as the need for the detention no longer applies.[125] In particular, where it is no longer necessary to detain a person to secure or preserve evidence or to obtain it by questioning, but the police are not in a position to charge her or him, s/he must be released.[126]

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120 Article 520.2(f) LECrim.

121 Articles 509 and 527.1(b) LECrim.

122 But see the possibility noted in para. 92 of this being something in France about which a public prosecutor can issue an instruction.

123 See paras 94-98 below.

124 Section 760(2) of the Administration of Justice Act.

125 Paragraph 1.1 of PACE Code of Practice C.

126 However, it is open to the police to release him on bail or without bail where there is a need for further investigation of any matter for which s/he was detained (ss. 37(2), 34(2) and 34(5) of PACE). Where s. 37(2) PACE is cited and the custody officer has authorised the release of the suspect, having determined that there is currently insufficient evidence to charge, s/he may be released pending the obtaining of further evidence with bail where the pre-conditions for bail are satisfied or without bail (release under investigation) where the pre-conditions for bail are not met. When bail is granted, conditions of bail can be attached where necessary to prevent the suspect from failing to surrender, offending on bail, interfering with prosecution witnesses or otherwise obstructing the course of justice, or for his own protection. Where s. 34 PACE is cited (e.g., where detailed and lengthy investigation is required and no assessment of the evidence can be made), no conditions of bail can be imposed; *R (on an application by Torres) v. Metropolitan Police Commissioner* [2007] EWHC 3212. The police have a power of arrest where an officer has reasonable grounds for believing that conditions imposed on pre-charge bail have been breached (section 46A(1A) PACE). If a charge for breach of the bail conditions is not authorised, the suspect can be released without charge, either on bail or without bail (section 37C(2)(b) PACE). Section 37C(4) states that if a person is released on bail under s. 37C(2)(b), then that person shall be subject to whatever conditions applied immediately before his arrest for breach. There is no power to vary the conditions of bail that previously applied. Where there is sufficient evidence and the suspect is charged with an offence (s. 37(7)(d) PACE), the police can keep him in detention or release him on bail to appear at court at a future date and may impose conditions on that bail (s. 47(1A) PACE). It should be noted that (either pre or post charge) the police cannot impose conditions on a suspect that contain electronic monitoring requirements or to: reside at a bail hostel; attend an interview with a legal adviser; make her or himself available for enquiries and reports. Conditions imposed by a custody officer may be varied either by the same custody officer or by another custody officer serving at the same police station on receipt of a request from the person to whom bail was granted or the magistrates' court on application by the suspect (s. 47(1E) PACE).

92. In France, the senior investigating officer will decide whether the person brought before her or him is to be kept in police custody where there are one or more plausible reasons to suspect that the person has committed an offence punishable by imprisonment and certain other conditions are fulfilled.[127] This decision can be taken at her or his own initiative or on the instruction from the public prosecutor.

93. Furthermore, in Spain an arrest may not last longer than the time strictly necessary to carry out the investigations aimed at clarifying the facts.[128]

94. In all the jurisdictions surveyed, there is a deadline – sometimes initial but in one instance definitive - within which a person who has been arrested must be brought before a court if s/he has not been released before its expiry.

95. This deadline varies from 24 hours[129] through 47 hours and 59 minutes[130] to 72 hours[131]

96. In the jurisdictions where the deadline is 24 hours, this can be extended variously by: a further period of 12 hours and then up to a total of 96 hours;[132] by a period of 24 hours and then a further 48 hours;[133] and by 24 hours and then up to 96 hours[134].

97. In one jurisdiction, an even longer extension can be granted to the initial deadline of 72 hours.[135]

[127] Articles 62-2, paras. 1 and 2 and 62-3, para. 2 CCrP. The conditions are threefold: (1) the police custody must be necessary to the investigation; (2) it must be proportionate to the seriousness of the offence; and (3) police custody must be the only means of achieving at least one of a series of objectives defined by law (namely (a) permitting the execution of investigations requiring the person's presence or participation; (b) guaranteeing the appearance of the person before the public prosecutor to enable the latter to decide how best to proceed with the investigation; (c) preventing the person from tampering with clues or evidence; (d) preventing the person from putting pressure on witnesses or victims or their families or friends; (e) preventing the person from conspiring with possible co-offenders or accomplices; or (f) enabling measures to be taken to put a stop to the crime or offence). The continued detention of a person who had not been formally taken into custody under a provision replaced by the present one – and thus did not enjoy the safeguards in Article 63 CCrP (see paras. 68, 70, 72, 76 and 84 above) – was held to be a violation of Article 5(1) of the European Convention in *Jarrand v. France*, no. 56138/16, 9 December 2021.

[128] Article 17.2 of the Constitution. The clarification relates to the identity of the arrested person and her or his statement. Custody going beyond what is necessary, even if the 72-hour deadline is not exceeded, will be illegal and thus an offence under Article 164 of the Criminal Code.

[129] Denmark, England and Wales and France.

[130] Germany (Article 104(2) BL, which provides that nobody can be held in custody beyond the end of the day following that of the arrest). This is reinforced by a requirement that an arrested person must be brought before a judge "without delay".

[131] Spain (Article 17.2 of the Constitution and Article 520.1 LECrim). In the case of arrests carried out by private individuals, including private security workers, there is a deadline of 24 hours either to release the person concerned or to hand him over to a judge; P. Faraldo Cabana, *Los delitos leves. Causas y consecuencias de la desaparición de las faltas*, Valencia (Tirant lo Blanch), 2016, p. 200. Those arrested in marine areas for allegedly committing crimes of piracy, terrorism, illegal trafficking of toxic drugs, human trafficking, against the rights of foreign citizens and against the safety of air navigation must be released or placed at the disposal of the competent judicial authority as soon as possible, without exceeding a maximum period of seventy-two hours. They may be brought before the judicial authority by telematic means available on board the ship or aircraft when, due to distance or isolation, it is not possible to bring the detainees to the physical presence of the judicial authority within the aforementioned time-limit; Article 23.4.d of the Law of Judiciary).

[132] England and Wales (under section 42 of PACE, a person can be detained without charge for up to 36 hours from the relevant time if: (a) an officer of the rank of superintendent or above who is in charge of the police station at which the person is detained and not directly involved in the investigation has reasonable grounds for believing that further detention is necessary to secure or preserve evidence relating to the offence for which they are under arrest or to obtain such evidence by questioning them; (b) the offence for which they are under arrest is an indictable offence (see fn. 18); and (c) the investigation is being conducted diligently and expeditiously. Detention without charge beyond 36 hours can be authorised by a magistrate (ss43 and 44 PACE). Such an extension will be for such a period as the court thinks fit having regard to the evidence before the court, up to a maximum of a further 36 hours (i.e., 72 hours in total). A warrant can be extended for a further period of 36 hours subject to an overall maximum period of detention of 96 hours from the relevant time. The application for a warrant of further detention must be made on oath by a police officer and supported by an information. A magistrates' court can only issue a warrant of further detention if it is satisfied that there are reasonable grounds for believing that further detention is justified because: the court has reasonable grounds for believing that the person's further detention is necessary for the purpose of obtaining evidence of an indictable offence for which the person has been arrested and that the investigation is being conducted diligently and expeditiously).

[133] France (The first extension to the initial 24 hours must be by a reasoned authorisation in writing of the public prosecutor (Article 63, II, para. 1 CCrP). The public prosecutor may make this authorisation conditional on the person detained being first brought before him or her, if necessary, using audio-visual technology; Article 63, II, paras. 2 and 3. The second extension – which may be two extensions of 24 hours or one of 48 hours and is not applicable if the penalty for the offence is no more than one year's imprisonment – must be with the authorisation of the liberties and detention judge and then it can only be given in the context of the procedure applicable to organised crime). The time at which police custody begins is the time, where applicable, at which the individual was arrested prior to being placed in police custody (e.g. they were apprehended *in flagrante delicto*, detained under an arrest warrant or taken into custody following a random identity check).

[134] Denmark (i.e., by three additional periods of 24 hours, i.e., 72 hours).

[135] Spain (up to 5 days in cases of a person integrated or related to armed gangs or terrorist or rebel individuals (Article 520 bis 1 in relation to Article 384 bis LECrim). In these cases, such an extension be requested by means of a reasoned communication within the first forty-eight hours of the arrest and that it be authorised by the judge within the following twenty-four hours. In addition, the period may be extended to 10 days if an *estado de excepción* (a type of state of emergency) is declared (Article. 16 of Law 4/1981 on states of alarm, exception and siege) and the custody is necessary for the preservation of public order, provided that, at least, there are well-founded suspicions that the person is going to

98. In two other jurisdiction, provision is made for extended periods of custody in terrorist cases.[136]

g. *Record-keeping*

99. In all the jurisdictions surveyed, other than Denmark,[137] there are record-keeping requirements in respect of all persons who have been arrested, which concern her/his identity and actions taken while s/he is in police custody.[138]

100. Apart from in Spain,[139] there are no legal requirements in the jurisdictions surveyed regarding video-recording in the custody areas of police stations. However, this occurs in practice in England and Wales.[140] Also, there is video surveillance of detention cells and some waiting rooms in Denmark and some cells in Germany are equipped with CCTV to monitor vulnerable suspects with a risk of self-harm.

h. *Protection against discrimination*

101. In all the jurisdictions surveyed, other than Denmark,141 the general legislation prohibiting discrimination will be applicable to the treatment of arrested persons.[142] However, for England and Wales there is also a specific reaffirmation of the obligation under this legislation in connection with detention and the treatment and questioning of persons by police officers.[143]

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provoke disturbances of public order. However, the arrest must be reported to the competent judge within 24 hours. The authorisation of the judge is not required).

136 England and Wales (suspects arrested under section 41 of the Terrorism Act 2000, may be detained without charge for a maximum period of detention of 14 days. This must be authorised by a judge, who has to be satisfied that there are reasonable grounds to believe that further detention is necessary to obtain relevant evidence and that the police investigation is being conducted diligently and expeditiously) and France (e.g., where there is a serious threat of a terrorist attack, police custody may be further extended by the liberties and detention judge for a period of 24 hours, renewable once, i.e., leading to a maximum duration of 6 days for the police custody in that case).

137 However, Article 744 of the Administration of Justice Act does provide that "The police shall as soon as possible draw up a report on the hearings which are carried out and on other investigative steps, unless information hereof exists in another way".

138 England and Wales (PACE Code C. This record also must be made for persons who go to a police station voluntarily or attending a police station in answer to street bail. All must be recorded as soon as practicable. It should cover any action that requires the authority of an officer of a specified rank and the record or a copy of it should accompany a detainee transferred to another police station, showing the time and reason for transfer. It should also show the time a person is released from detention. Responsibility for the custody record's accuracy and completeness rests with the custody officer. The record may be inspected by the detainee's lawyer and an appropriate adult as soon as practicable after their arrival at the station and at any other time on request, When a detainee leaves the police detention or is taken before a court they, their legal representative or appropriate adult shall be given, on request, a copy of the custody record as soon as practicable); France (this should cover measures verifying the person's identity, statements by her/him and her/his interrogation, details about the way the police custody unfolded (reasons for custody, duration, details about the timing of hearings and breaks, requests made by the suspect e.g. to see a doctor, a lawyer, call a relative, etc. and whether a strip-search was carried out, etc.); Articles 41-4, 63-1, 64-1 and 429 CCrP)); Germany (there is no coherent regulation regarding this in the CCP but the requirements are rather scattered in different legislation; e.g., in the various Acts for the Execution of Pre-trial Detention (Untersuchungshaftvollzugsgesetze) of the 16 States (Länder) and the "Guidelines for Criminal and Administrative Proceedings for the Public Prosecution Service");and Spain (custody staff must record all the relevant events in the "Libro de Registro-Custodia de detenidos", which is digitalised, using a computer application. The events to be covered are: the circumstances surrounding the arrest; the identification of the officers involved; the personal details of the suspect; her/his personal belongings; and any possible medical reports and details of the arrest. The time of departure and destination (prison, court, release or other) should be precisely stated. The requirements are set out in "Instrucción 12/2009, del Secretario de Estado de Seguridad, por la que se regula el "Libro de Registro y Custodia de Detenidos" (Instruction 12/2009, of the Secretary of State for Security.

139 Instruction No. 4/2018, from the Secretariat of State for Security, para. 2(f). It is being gradually implemented and the necessary arrangements may not yet be in place in all police stations.

140 The arrangements adopted by police forces follow guidance provided by the College of Policing; https://www.app.college.police.uk/app-content/detention-and-custody-2/buildings-and-facilities/cctv/.

141 There is no general legislation on discrimination in Denmark but there are laws dealing with discrimination based on handicap and on race and it is offence under Article 266b pf the Penal Code to make statements by which a group of persons are threatened, taunted or debased due to his race, colour of skin, national or ethnic origin, belief or sexual orientation.

142 Moreover, in France, Article 1-P CCrP provides that "coercive measures [should] … not be such as to infringe human dignity" and, in Spain, the prohibition of discrimination in Article 14 CE is applicable to deprivation of liberty. For Germany, the protection against discrimination also results from constitutional requirements (Article 3 BL). Although the CCP contains no explicit provisions dealing with the risk of discrimination, the detailed rules for access to lawyers, translation, contact to relatives or consular staff, as well as the information about these rights are understood as safeguards against arbitrary decisions and discrimination and as protection of more vulnerable suspects (sections 114b and 114c CCP).

143 In PACE Code C

i. *Exercise of judicial supervision*

102. In all the jurisdictions surveyed, the issue of the continued detention of an arrested person must be considered – within the initial deadlines prescribed, or any extension of them that does not exceed 96 hours – by a court that has the power to determine whether this would be justified or, if not, to order her or his release.[144]

103. In addition, all the courts concerned have the power to verify the lawfulness of the detention.

104. Moreover, there is a separate basis available to an arrested person for challenging the lawfulness of her or his detention in England and Wales,[145] Germany[146] and Spain[147].

105. In all the jurisdictions surveyed, the transition from deprivation of liberty based upon an arrest to such a deprivation based upon an order for pre-trial detention – in those cases where that can be imposed – is something that always must be determined by a court.

D. PRE-TRIAL DETENTION

1. The European Convention on Human Rights

106. The imposition or continuation of pre-trial detention will only be consistent with Article 5(3) of the European Convention if: this is lawful; there is a reasonable suspicion that an offence has been committed by the person concerned; and there is an admissible ground for such a measure to be imposed.

107. Moreover, for the purpose of Article 5(3), house arrest – i.e., a complete prohibition on leaving certain premises rather than a requirement to stay in them for a certain period each day (such as the requirement not to leave one's home at night[148]) - is regarded by the European Court as amounting to a deprivation of liberty, and thus a form of pre-trial detention, for the purpose of Article 5 of the European Convention.[149]

108. Lawfulness does not just mean that the pre-trial detention has a formal legal basis. In addition, the provision being relied upon must not be applied in a manner that is either inconsistent with the principle of legal certainty or unreasonable,[150] the requirements of constitutional guarantees must be observed, and any related limits on the use of specific law – such as an amnesty, pardon or the operation of a limitation period – must be duly taken into account[151].

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144 This is the case even where there is an extension, such as in England and Wales under section 41 of the Terrorism Act – which allows detention to continue without charge for up to 14 days before any decision is taken to impose pre-trial detention – as the extension decision is taken in circumstances where the court concerned has adequate jurisdiction to review the lawfulness of the detention of the person concerned and has the necessary power to order her or his release. Moreover, so long as such a court has to be satisfied that there were reasonable grounds for believing that further detention was necessary and that the investigation was being conducted diligently and expeditiously, as well as that the arrest was lawful, it will not matter that there is no possibility of conditional release during the period of the detention. See, in this connection, *Magee and Others v. United Kingdom*, no. 26289/12, 12 May 2015.

145 Through either habeas corpus or judicial review proceedings.

146 If the arrested person considers that the arrest itself was illegal from the outset, because its preconditions were not fulfilled, she or he can request an *ex post* review before the same judge before whom s/he must be brought after the arrest. The judge can then declare that the arrest was not justified. This procedure is not explicitly regulated in the CCP but has been clarified by a decision of the Federal Court of Justice (*Bundesgerichtshof*), FCJ, 5 August 1998 - 5 ARs (VS) 1–97. The procedure follows the rules provided in section 98 (2) CCP for cases of seizure in which suspects request a review.

147 Through an application for *habeas corpus*. This will be under the procedure regulated by Law 6/1984. Standing to bring the procedure is attributed to the person deprived of liberty, their spouse or similar person, descendants, ascendants, siblings, the Public Prosecutor's Office and the Ombudsman. It can also be initiated *ex officio*. If the judge initiates the procedure, it must be resolved within a maximum period of 24 hours

148 *De Tommaso v. Italy* [GC], no. 43395/09, 23 February 2017.

149 *Buzadji v. Republic of Moldova* [GC], no. 23755/07, 5 July 2016.

150 *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.

151 *Gusinskiy v. Russia*, no. 70276/01, 19 May 2004.

109. The existence of a reasonable suspicion that a person has committed an offence, or was attempting to do so, is a precondition for any deprivation of liberty in the criminal justice process. Such a suspicion must therefore exist not only at the initial apprehension of a person, but also throughout her or his pre-trial detention.[152]

110. Not only must concrete evidence in support of the asserted reasonable suspicion be presented to the court responsible for the decision to impose or order the continuation of pre-trial detention, but that court must also check the reliability of the evidence submitted, i.e. to determine whether the facts or information relied upon were well-founded.[153]

111. The non-fulfilment of the requirement of a reasonable suspicion at the time of imposing a preventive measure cannot be remedied for the purpose of Article 5 of the European Convention by either the subsequent gathering of evidence or a subsequent conviction (although the former could possibly contribute to justifying the imposition of a preventive measure at a later point in time).[154] Moreover, as with arrest, the requirement of a reasonable suspicion for imposing any preventive measure involving detention must continue to be observed even in a state of emergency.[155]

112. Although the issues of lawfulness and the existence of a reasonable suspicion should be determined at the initial automatic review of arrest in which the imposition of pre-trial detention is first being considered, these alone will not be enough to justify subjecting a person to pre-trial detention as there must also be relevant and sufficient reasons for taking such a measure.[156]

113. The relevant grounds are one or more of the following considerations: a risk of flight (or of absconding); a risk to the administration of justice, such as through collusion, evidence being tampered with or pressure being brought to bear on witnesses; a risk of further offences; and a threat to public order and the need for the protection of person to be detained.[157]

114. It is only possible to rely upon any one of these considerations where this possibility is specifically provided for in the national law.[158]

115. Moreover, these considerations are exhaustive and so it is not possible to justify the imposition (or continuation) of pre-trial detention by other factors, such as: the seriousness of the offence and the concomitant penalty that might be imposed;[159] the lawfulness of the collected evidence;[160] concern for the length of the proceedings or a refusal to plead guilty;[161] and the need to conduct further investigations[162].

116. Furthermore, there must also be sufficient substantiation for the relevant consideration being relied upon. This will not exist where: there is a mere reference to the legal provision without showing how the specific facts in the case make it applicable; [163] only formulaic reasoning is used;[164] or there is a failure to consider the specific circumstances of the case[165].

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152 *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.
153 *Stepuleac v. Moldova*, no. 8207/06, 6 November 2007.
154 *Alparslan Altan v. Turkey*, no. 12778/17, 16 April 2019.
155 *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018.
156 *Buzadji v. Republic of Moldova* [GC], no. 23755/07, 5 July 2016.
157 *Merabishvili v. Georgia* [GC], no. 72508/13, 28 November 2017.
158 *Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009.
159 *Mamedova v. Russia*, no. 7064/05, 1 June 2006.
160 *Patsuria v. Georgia*, no. 30779/04, 6 November 2007.
161 *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.
162 *Piruzyan v. Armenia*, no. 33376/07, 26 June 2012.
163 *Boicenco v. Moldova*, no. 41088/05, 11 July 2006.
164 *Mamedova v Russia*, 7064/05, 1 June 2006.
165 *Patsuria v. Georgia*, no. 30779/04, 6 November 2007.

117. There cannot be a bar on the court considering the possibility of releasing a person on account of the nature of the offence,[166] or the existence of her or his previous convictions,[167] although these can be relevant to determining whether there is sufficient substantiation for one of the relevant considerations.

118. In all cases, the imposition or continuation of pre-trial detention should only occur where the court is first satisfied that one or more non-custodial measures would not be sufficient to allay concerns about particular considerations that are applicable to the case before it.[168]

119. It is not appropriate, therefore, to start from the assumption that pre-trial detention or house arrest is required where a relevant risk has been substantiated.[169]

120. In deciding to impose or continue pre-trial detention, account should also be taken of its impact on the health of the person concerned;[170] the need for it to be very much a last resort in the case of children;[171] and its inappropriateness given the nature of the offence involved[172].

121. Whenever the continuation of pre-trial detention is sought by the prosecution (or others authorised to seek it), and its discontinuance or change is sought by the person detained, the court must first consider whether there are still relevant and sufficient reasons for requiring the imposition of any such measures.

122. In particular, the level of substantiation expected should then be greater.[173]

123. In particular, there will be a need to consider whether the entirely valid reasons that were originally invoked to justify the imposition of pre-trial detention have ceased to be applicable on account of the passage of time. This may be because of more information becoming available,[174] certain evidence becoming less compelling,[175] a change in the personal situation of the detained person[176] or the consideration relied upon no longer existing or having been significantly diminished[177].

124. It cannot be assumed, therefore, that the reasons on which the imposition of pre-trial detention was previously based continue to be a sufficient justification for its continuation. Moreover, attention must be given to the possibility of it being replaced by a less restrictive measure.

125. Even where the imposition or continuation of pre-trial detention has been justified in the past, there may come a point where it will be regarded as having lasted for too long and thus result in a violation of Article 5(3) of the European Convention.

126. The determination as to whether a particular length is acceptable will turn on how reasonable it is in the light of the particular circumstances of the case. There can, therefore, be no automatic assumption as to admissibility/inadmissibility of any given period of time other than the need to comply with any specific restrictions as to duration in national law; exceeding these will necessarily mean that the deprivation of liberty has become unlawful for the purpose of the European Convention.

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166 *Boicenco v. Moldova*, no. 41088/05, 11 July 2006.
167 *Caballero v. United Kingdom* [GC], no. 32819/96, 8 February 2000.
168 *Khayredinov v. Ukraine*, no. 38717/04, 14 October 2010.
169 *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011.
170 *Ławomir Musiał v. Poland*, no. 28300/06, 20 January 2009.
171 *Nart v. Turkey*, no. 20817/04, 6 May 2008.
172 *Kovyazin and Others v. Russia*, no. 13008/13, 17 September 2015.
173 *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011.
174 *Kuc v. Slovakia*, no. 37498/14, 25 July 2017,
175 *Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009.
176 *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011
177 *Ibid.*

127. The relevant factors to consider for this purpose are: the duration of the relevant considerations;[178] the difficulty of the investigation;[179] the international dimension of the alleged offence;[180] the strength of the evidence for the use of pre-trial detention;[181] the existence of any periods of inactivity in the proceedings;[182] the age of the person concerned;[183] and the mere restatement of reasoning without further reflection on its justifiability[184].

128. Article 5(3) of the European Convention specifically provides for the first determination as to whether pre-trial detention or another preventive measure should be imposed on a person following her or his arrest, or whether s/he should be released.

129. However, Article 5(3) is also the basis for requiring periodic review – until the conclusion of any trial – as to whether pre-detention should be continued or replaced by another measure, or whether the person concerned should be released.[185]

130. Such review must be initiated by the prosecution.[186]

131. Pre-trial detention must be brought to an end whenever it becomes clear that either it is no longer warranted by the particular circumstances of the case,[187] or its overall duration has ceased to be reasonable.

132. In considering whether pre-trial detention is lawful in a challenge under Article 5(4) – which the detained person should be entitled to bring[188] – the relevant court should examine not only compliance with the procedural requirements set out in the law, but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention[189].

133. No specific period for review for the purpose of Article 5(3) has been prescribed by the European Court, but it has indicated that it must take place with due expedition, in order to keep any unjustified deprivation of liberty to an acceptable minimum.[190]

134. Moreover, Recommendation Rec(2006)13 of the Committee of Ministers specifies that:

> 17. [2] The interval between reviews shall normally be no longer than a month unless the person concerned has the right to submit and have examined, at any time, an application for release.

135. A challenge to the lawfulness of detention for the purpose of Article 5(4) must be decided "speedily".

136. Where it follows on the imposition of pre-trial detention, it needs to be heard and determined within a matter of days.[191] However, after an initial challenge, it should be possible to bring further such challenges at reasonable intervals, which should be relatively short.[192] Also, the duty of expedition

178 *Van der Tang v. Spain*, no. 19382/92, 13 July 1995.
179 *Contrada v. Italy*, no. 27143/95, 24 August 1998.
180 *Chraidi v. Germany*, no. 65655/01, 26 October 2006.
181 *Labita v. Italy* [GC], no. 26772/95, 6 April 2000.
182 *Punzelt v. Czech Republic*, no. 31315/96, 25 April 2000.
183 *Assenov and Others v. Bulgaria*, no. 24760/94, 28 October 1998.
184 *Makarenko v. Ukraine*, no. 622/11, 30 January 2018.
185 *McKay v. United Kingdom* [GC], no. 543/03, 3 October 2006.
186 *Ibid*.
187 *Kudla v. Poland* [GC], no. 30210/96, 26 October 2000.
188 Article 5(4) provides that: everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
189 *Garcia Alva v. Germany*, no. 23541/94, 13 February 2001.
190 *McKay v. United Kingdom* [GC], no. 543/03, 3 October 2006.
191 *Vasiliy Vasiliyev v. Russia*, no. 16264/05, 19 February 2013.
192 *Bezicheri v. Italy*, no. 11400/85, 25 October 1989 and *Jurjevs v. Latvia*, no. 70923/01, 15 June 2006.

in determining challenges to the lawfulness of pre-trial detention also applies to the hearing of any appeals against rulings on such challenges.[193]

137. A limited adjustment as regards the requirement to determine challenges to pre-trial detention "speedily" may be made in an emergency situation, notwithstanding the absence of a derogation under Article 15.[194]

138. The European Court has recognised that judicial supervision required under Article 5(4) may, in particular cases, be afforded by the judicial supervision required under Article 5(3), i.e., in the course of the periodic review as to the continuation of pre-trial detention. This will turn on the scope of the issues that were addressed in that review; in particular, the periodic review will need to have put in question the lawfulness of the pre-trial detention concerned.[195]

139. Where that occurs, this is, of course, relevant for determining the adequacy of intervals between challenges to lawfulness.

140. The detained person should be present at Article 5(3) review proceedings.[196]

141. Furthermore, her or his presence will be necessary in Article 5(4) proceedings if a contribution by her or him is likely to material in them[197] or s/he is not legally represented[198]. However, it may be less essential in appeals against a first instance ruling.[199]

142. The detained person's presence – where required – may be through a video link so long as that does not put her/him at any significant disadvantage in the proceedings.[200] Nonetheless, where a video link is used, it will be necessary to have arrangements in place that enable the suspect to see and hear all the other participants in the proceedings and to be able to communicate with her/his lawyer before and during them.

143. There is no general requirement that hearings in either form of judicial supervision should be in public.[201]

144. Moreover, there is no absolute requirement under the European Convention to be legally represented in either form of proceedings.

145. However, Recommendation Rec(2006)13 of the Committee of Ministers provides that:

> 25. [2] The person whose remand in custody will be sought shall have the right to assistance from a lawyer in the remand proceedings and to have an adequate opportunity to consult with his or her lawyer in order to prepare their defence. The person concerned shall be advised of these rights in sufficient time and in a language which he or she understands so that their exercise is practicable.
>
> [3] Such assistance from a lawyer shall be provided at public expense where the person whose remand in custody is being sought cannot afford it.

146. The proceedings should be adversarial and always ensure equality of arms between the parties, which will not be the case where the suspect and/or her/his legal representative does not have access to the investigation file.[202]

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193 *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011.
194 *Mehmet Hasan Altan v. Turkey*, no. 13237/17, 20 March 2018.
195 *Ermakov v. Russia*, no. 43165/10, 7 November 2013.
196 *De Jong, Baljet and Van Den Brink v. Netherlands*, no. 8805/79, 22 May 1984 and *Mamedova v. Russia*, no. 7064/05, 1 June 2006.
197 *Mamedova v. Russia*, no. 7064/05, 1 June 2006.
198 *Idalov v. Russia* [GC], no. 5826/03, 25 February 2012.
199 *Batiashvili v. Georgia*, no. 8284/07, 10 October 2019.
200 *Trepashkin v. Russia (No. 2)*, no. 14248/05, 16 December 2010.
201 *Reinprecht v. Austria*, no. 67175/01, 15 November 2005 and *Lebedev v. Russia*, no. 4493/04, 25 October 2007.
202 *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012.

147. Nonetheless, this does not mean that some material may not be withheld where this is strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. However, this should not have the effect of impeding the case being made on behalf of the person concerned.[203] Moreover, any restriction must be based on the specific circumstances of the case and not a general order.[204]

148. Where there are restrictions on access to some materials, the interests of the person concerned can still be secured through the use of a special procedure involving the appointment of a special advocate with security clearance.[205]

149. Access to the case file is not sufficient in itself since there must also be adequate time to review it, with account being taken of the volume of material to be inspected in determining whether the time allowed was adequate.[206] However, it is accepted by the European Court that this time may well be limited at the first hearing.[207]

150. There is no requirement under Article 5 to take account of any period spent in pre-trial detention or subject to any other measure of restraint in the calculation of the sentence that is imposed following a conviction. However, where the period of pre-trial detention concerned is contrary to Article 5, its deduction from a sentence of imprisonment can eliminate the need for an award of compensation.[208]

2. Comparative law and practice

a. *Choice of preventive measures*

151. There is a single set of proceedings[209] to consider whether pre-trial detention is to be imposed or continued and to determine whether less intrusive or restrictive preventive measures might be an appropriate way of allaying any risks that might result from an accused person remaining at liberty in Denmark,[210] England and Wales,[211] Germany[212] and Spain[213].

[203] *Svipsta v. Latvia*, no. 66820/01, 9 March 2006 and *Batiashvili v. Georgia*, no. 8284/07, 10 October 2019

[204] *Ahmet Hüsrev Altan v. Turkey*, no. 13252/17, 13 April 2021.

[205] *Sher and Others v. United Kingdom*, no. 5201/11, 20 October 2015.

[206] *Černák v. Slovakia*, no. 36997/08, 17 December 2013 and *Schöps v. Germany*, no. 25116/94, 13 February 2001

[207] *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011.

[208] See para. 245 below.

[209] For the courts dealing with them, see para. 28 above.

[210] The alternative measures to pre-trial detention are bail (which is rarely used) and requirements to report to the police, to accept drug or alcohol treatment and to stay in a social institution.

[211] A defendant can be granted unconditional or conditional bail. Where the court grants unconditional bail, the only obligation is to attend court at the date, time and location specified, which is commonly fixed at the time bail is granted (section 3(1) of the Bail Act 1976). Failure to surrender without a reasonable excuse is an offence (section 6). A defendant may, however, be required by the court to comply with any conditions that the court deems "necessary" to ensure that s/he: surrenders to custody; does not commit an offence while on bail; does not interfere with witnesses or otherwise obstruct the course of justice; makes himself available for inquiries or reports to be made to assist the court in sentencing; and attends an interview with a legal representative (section 3(6)).The conditions that tend to be imposed are: reporting to a police station; a "doorstep condition" to enforce a curfew or a residence condition; not to drive; financial sureties; electronic tagging with or without GPS location monitoring; and, in murder cases, undergoing a medical examination. Bail conditions should only be imposed in order to address any of the risks that would be inherent in granting unconditional bail. In proposing (or considering) conditions of bail, prosecutors must ensure that that they are necessary, reasonable, proportionate and capable of being enforced. Consideration should also be given to the extent to which they meet the objections to bail. The defence may apply to vary the defendant's bail conditions (section 3(8)(a)). The application should be made to the court which granted bail (or to the Crown Court where the proceedings have been sent or committed). The Prosecution can make a similar application (section 3(8)(b)). Section 16(1) of the Criminal Justice Act 2003 enables a defendant to appeal to the Crown Court against the imposition of the bail conditions. Once the Crown Court has disposed of the appeal, no further appeal can be made under section 16 unless a further application under Section3(8)(a) is made to the Magistrates' Court (section 16(8)).

[212] *Aussetzung des Vollzugs des Haftbefehls*, section 116 CCP. The alternative measures are: an obligation to report to a specified authority; an obligation to reside at a specified place house arrest; financial surety; and "other suitable measures".

[213] The alternative measures comprise: payment of bail (article 529 LECrim); regular appearance before the judicial authority (Article 530 LECrim); prohibition to approach certain places and persons or to communicate with them (Articles 544 bis and 544 ter LECrim); and house arrest can be substituted for pre-trial detention in two cases, namely, serious illness and admission to a centre to continue detoxification treatment (Article 508 LECrim).

152. In those jurisdictions, pre-trial detention can only be imposed if specifically requested by the prosecution.

153. However, the formal position in Germany is that the arrest warrant required for pre-trial detention must be issued by the judge, who then – because of the principle of proportionality – can and must suspend it where satisfied that non-custodial measures would be sufficient.

154. In France, only the liberties and detention judge has the power to place a person in pre-trial detention at the request of the investigating judge.[214] On the other hand, less restrictive measures – "judicial supervision" and "house arrest under electronic surveillance " – can be ordered both by that judge and by the investigating judge.[215]

b. *Basis for imposing pre-trial detention*

155. Pre-trial detention can only be imposed in Denmark and England and Wales where there are reasonable grounds to believe that the person concerned has committed a crime,[216] in France where there is strong or concordant evidence of guilt,[217]in Germany where there is a strong (literally an "urgent" or "exigent") suspicion that the suspect has committed the alleged offence,[218] and in Spain where there are sufficient grounds to believe that the person concerned is criminally responsible for the offence[219].

156. Moreover, in all the jurisdictions – with the exception of Germany where the principle of proportionality should preclude pre-trial detention in respect of minor offences[220] – the crime must also be one for which imprisonment can be imposed following conviction.[221] Moreover, in two of them, the imprisonment that can be imposed must normally have a specified minimum length[222] and, in one of them, this is usually required[223].

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214 Article 137-1 of the CCrP.

215 Article 138, paras. 5, 6 and 10 of the CCrP. Judicial supervision may include reporting to an authority designated by a judge, periodically or when summoned, and providing a pecuniary guarantee. There are no rules governing the duration of judicial supervision: the obligations remain in place until the judge changes or lifts them, at his or her own initiative, or at the request of the person concerned. House arrest, on the other hand, cannot be ordered for more than 6 months at a time, and for no longer than 2 years in all. This measure obliges the person concerned to stay at home or in the place decided by the judge and to leave the house only under the conditions and reasons set out by the judge (Article 142-5 of the CCrP), and so does not apply 24/7. Unlike house arrest under electronic surveillance, judicial supervision may be ordered without an adversarial hearing. A person placed under house arrest may also be subjected to judicial supervision measures. Depending on the seriousness of the offence, house arrest may be combined with fixed or mobile surveillance.

216 Denmark (section 762 of the Administration of Justice Act) and England and Wales (as the person will have been charged, the Crown Prosecution Service will have had to be satisfied that there was enough evidence to provide "a realistic prospect of conviction").

217 The level of suspicion required for the placement in pre-trial detention of a person (necessarily already under investigation) is higher than that required for police custody, even when there are one or more plausible reasons to suspect that the person concerned has committed or attempted to commit an offence, as these reasons do not have to be strong or concordant in the case of police custody. Based on Article 5(1)(c) of the European Convention, the criminal division of the Court of Cassation has found that the investigating section must make sure that the legal conditions for pre-trial detention are met, and in particular, that serious or concordant evidence exists that the person under investigation took part in the offence concerned; Court of Cassation, criminal division, 14 October 2020, appeal no. 20-82.961, § 9: *Bulletin des arrêts de la Chambre criminelle de la Cour de cassation*, to be published. This verification must be thorough; the judges are obliged to verify, in the light of the precise and detailed facts in the case file, on the one hand the existence of activities capable of establishing the offences for which the person is under examination, as classified at this stage in the procedure, and, on the other hand, the likelihood that they were committed by the individual concerned; Court of Cassation, criminal division, 9 February 2021, appeal no. 20-86.339, § 7: *Bulletin des arrêts de la Chambre criminelle de la Cour de cassation*, to be published.

218 Section 112(1) and 113 CCP. This entails a high probability of the person concerned actually having committed the offence, assessed with the state of knowledge at the time of the decision. The prosecution must present the necessary evidence with the request.

219 Article 503.1.1 and 2 LECrim. There is no further specific requirement as to the concrete evidence regarding this.

220 This possibility is not, however, specifically excluded.

221 However, there are two exceptions to this in England and Wales. Firstly, bail can be refused to someone who has been charged with a non-imprisonable offence where s/he has previously failed to surrender and there is a belief that s/he would do so again or following a breach of bail (Schedule 1 of the Bail Act 1976). Secondly, the court is satisfied that there are substantial grounds for believing that a defendant, if released on bail, would commit an offence by engaging in conduct involving domestic violence (Schedule 11 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 Sch.11 of the Legal Aid Sentencing and Punishment of Offenders Act 2012).

222 Denmark (1.5 years' imprisonment), France (a major indictable offence (*crime*, in French) or a minor indictable offence (*délit*) punishable by 3 years' imprisonment or more; Article 143-1 of the CCrP).

223 Spain. In general, the offence must be punishable by two years' imprisonment or more, but pre-trial detention may be ordered if the offence

157. In addition, there is also a requirement in the jurisdictions surveyed to demonstrate that certain risks would arise if the person were released.

158. Thus, in all of them, those risks can be ones of flight, interfering with the administration of justice (such as by destroying evidence, intimidating witnesses and collusion with them) and committing further offences.[224]

159. Furthermore, the risk of disruption of public order can be a reason for imposing pre-trial detention in France,[225] but not in Denmark, England and Wales, Germany and Spain.[226]

160. Moreover, in France, pre-trial detention can also be imposed where the object is to protect the person under judicial examination, i.e., the suspect.

161. Similarly, in England and Wales, a defendant need not be granted bail[227] if the court is satisfied that s/he should be kept in custody for her or his own protection or, if s/he is a child or young person, for her or his own welfare.[228]

162. In Germany, there is also a possibility of imposing or continuing pre-trial detention on the person suspected of having committed a crime on account of its gravity. It is applicable in very few cases – severe terrorist offences, causing very severe bodily harm and all capital offences – and is in practice rarely used.[229] Moreover, this possibility has been criticised almost unanimously by scholars for systematic reasons: if there is no risk for the proper conduct of the criminal procedure, there is no need to detain. Certainly, the mere quality of the offence itself does not impede the process, nor does it justify detention for preventive reasons. According to the Constitutional Court, the provision

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has a shorter penalty, if the person concerned has a criminal record that has not been expunged, or is not likely to be expunged, as a result of conviction for an intentional crime. In addition, where the ground for imposing pre-trial detention is committing new crimes, the two years' penalty is not required where there are rational indications of organised criminal activity or habitual criminality, or where the aim is to prevent a further attack on the victim).

[224] Denmark (section 762 of the Administration of Justice Act), France (Article 144 of the CCrP; in addition to preventing renewal of an offence, putting an end to it is also specified as a reason for which pre-trial detention can be imposed); England and Wales (the possibility of a further offence additionally must be one involving conduct that would, or would be likely to, cause (a) physical or mental injury to an associated person, or (b) an associated person to fear physical or mental injury); Germany (section 112(2) and 112a CCP. The risk of repeating or continuing an offence applies only to listed ones of a serious nature and has been expanded over the years. Thus, the suspicion must relate to a sex offence or stalking (sections 174, 174a, 176 to 179, or pursuant to section 238 subsections (2) and (3) of the Criminal Code) or there must be a suspicion that the suspect has "repeatedly or continually committed a criminal offence which seriously undermines the legal order" such as terrorist offence, a violent assault, aggravated theft, fraud, robbery or other serious economic crimes, arson or a serious drug offence (pursuant to section 89a, pursuant to section 125a, pursuant to sections 224 to 227, pursuant to sections 243, 244, 249 to 255, 260, pursuant to section 263, pursuant to sections 306 to 306c or section 316a of the Criminal Code or pursuant to section 29 subsection (1), numbers 1, 4 or 10, or subsection (3), section 29a subsection (1), section 30 subsection (1), section 30a subsection (1) of the Narcotics Act). The fact that fraud and aggravated theft are included in this list opens § 112a CCP up to a wide range of criminal cases. Nonetheless, it does not include minor offences such as simple theft or assault. Moreover, it must be established that there is an imminent risk that the offender "will commit further serious criminal offences of the same nature or will continue the criminal offence") and Spain (Article 503.1 and 503.2 LECrim. In all cases, the criteria are elaborated in the legislation. In respect of committing further offences, it is specifically provided that this includes acting against the legal assets of the victim, especially in cases of domestic and gender violence).

[225] Article 144, 7° CCrP. Disturbance of public order only applies in criminal matters. Secondly, the disturbance must be classified as exceptional and persistent. Thirdly, it must also be the result of the gravity of the offence, the circumstances in which it was committed, or the extent of the damage it caused. Lastly, the disruption of public order must not be the result of the media impact of the case alone. The disruption of public order must thus be on a rather more serious level than a simple "risk"; it must be proven to exist and not simply feared. Moreover, public indignation as reflected in the media coverage of the case is not enough to establish its existence.

[226] Historically, social alarm (*alarma social*) caused by the commission of a crime had been one of the circumstances for which pre-trial detention could be ordered in Spain. However, the Constitutional Court called into question whether this was a constitutionally valid purpose on which to base pre-trial detention (STC 47/2000) and this was reaffirmed by it in STC 191/2004 and STC 29 and 30/2019. The allusion to the criterion of "social alarm" disappeared from the text of Articles 503 and 504 LECrim when these were modified in 2003.

[227] In the context of England and Wales, "bail" is understood as covering release of a person from custody, with or without conditions, and is not limited to release subject to the provision of a financial security as is the case in many legal systems.

[228] Schedule 1 of the Bail Act 1976.

[229] Section 112(3) CCP provides that: "Remand detention may also be ordered against an accused who is strongly suspected pursuant to section 308 (1) to (3) of the Criminal Code of having committed an offence under section 6 (1) no. 1 or section 13 (1) of the Code of Crimes against International Law or section 129a (1) or (2), also in conjunction with section 129b (1) or under section 211, 212, 226, 306b or 306c of the Criminal Code or insofar as life or limb of another have been endangered by the offence, even if there are no grounds for arrest pursuant to subsection (2)".

only meets constitutional requirements when one of the other grounds listed is at least plausible; the judge therefore has to consider them as well.[230]

163. Also, in England and Wales, the defendant need not be granted bail if the offence is an indictable one and it appears to the court that s/he was on bail in criminal proceedings on the date of the offence.[231]

164. Furthermore, in France, the decision to place a person in pre-trial detention can also be on the fact that s/he had breached obligations foreseen as part of judicial supervision measures or house arrest under electronic surveillance.[232]

165. Before imposing pre-trial detention, there is always a need, in all the jurisdictions surveyed, for the court to be satisfied that less intrusive or restrictive measures would be inadequate to deal with the risks considered to exist.[233]

166. Moreover, in all the jurisdictions surveyed, specific reasoning must always be given by the court concerned as to why the conditions which permit the imposition or continuation of pre-trial detention are considered to have been fulfilled.

c. *Requirements relating to particular offences*

167. In none of the jurisdictions surveyed,[234] other than Denmark and England and Wales, are there any special rules governing decisions about the imposition of pre-trial detention based on the specific nature of the offence which a person has been alleged to have committed . However, in neither of those two jurisdictions is the offence concerned a basis for presuming that a risk that could justify the imposition or continuation of pre-trial detention exists.

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230 FCC, 15 December 1965, 1 BvR 513/65 (Official Collection: BVerfGE 19, 342 [350]). This ruling restricts the use of section of section 112(3) so that it cannot be used as stand-alone ground; there must also be some indication that the other grounds for detention may apply. In practice this means that, if for example the flight of a person is factually excluded because s/he is very old and frail and cannot move properly, it may not be used simply because s/he is defendant in a capital crime case. This, for example, became important in a recent case with a very old Nazi-suspect accused of aiding/abetting murder in thousands of cases. As this suspect was living in residential care, section 112 (3) could not be used in her case.

231 Schedule 1 of the Bail Act 1976. This also provides that bail need not be granted where the defendant is in custody in pursuance of a sentence of a court, or a sentence imposed by an officer under the Armed Forces Act 2006.

232 Article 141-2 and 142-8 CCrP. As to judicial supervision measures and house arrest under electronic surveillance, see para. 154 above.

233 This is made clear in various ways in: Denmark (section 765 of the Administration of Justice Act requires the imposition of less intrusive measures if the conditions for the use of pre-trial detention are present but the purpose of remand in custody can be achieved by them and the accused consents); England and Wales (section 4(1) of the Bail Act 1976 creates a rebuttable presumption in favour of bail: "a person to whom this section applies shall be granted bail except as provided in Sch.1 to this Act". As a result, in order to refuse bail, the court has to be satisfied that there are "substantial grounds" for believing that the defendant, if released, would: fail to surrender to custody; commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person, or would commit an offence while on bail by engaging in conduct that would, or would be likely to, cause (a) physical or mental injury to an associated person; or (b) an associated person to fear physical or mental injury); France (placing someone in pre-trial detention requires the conviction that less coercive preventive measures would have been insufficient considering the risks involved, the principle being that the person under investigation is presumed innocent and remains free. However, for the needs of the investigation, or as a precautionary measure, they may be subjected to one or more obligations of judicial supervision or, if these prove insufficient, placed under house arrest with electronic surveillance, and lastly, only exceptionally, if the required results cannot be obtained by judicial supervision or house arrest, the person may be placed in pre-trial detention (Article 137 CCrP). Moreover, pre-trial detention may be ordered only if it is demonstrated, in the light of the precise and detailed elements resulting from the proceedings, that this measure is the sole means of achieving one or more of the objectives set by the legislator (Article 144 CCrP). At the same time, the pre-trial detention order, issued after an adversarial debate, must be reasoned in law and in fact as regards the inadequacy of judicial supervision or house arrest with electronic surveillance and the reason(s) for the detention (Article 137-3 CCrP)); Germany (the proportionality requirement means that less restrictive measures, where sufficient, other than pre-trial detention must be chosen; *Aussetzung des Vollzugs des Haftbefehls*, section 116 CCP); and Spain (it is specifically provided that pre-trial detention will only be adopted "where, objectively, it is necessary" and "where there are no less onerous measures for the right to liberty by which the same purpose as provisional detention may be achieved"; Article 502 LECrim. Furthermore, the Constitutional Court has reiterated that there is a reinforced duty of motivation in order to grant pre-trial detention. The pre-trial detention order must express the justification of the constitutional legitimacy of the deprivation of liberty. More specifically, the premise of the measure and the constitutionally legitimate aim pursued, as well as the balancing of the specific circumstances that allow the adoption of such a decision; SSTC 29 and 30/2019, 28 February, FJ 3).

234 E.g., in France, not even the most serious offences would automatically entail the imposition of pre-trial detention.

168. Thus, in Denmark, there is a possibility of imposing pre-trial detention for certain offences where the law provides that immediate imprisonment is required "for the enforcement of the law".[235]

169. In England and Wales, it is specifically provided that bail can only be granted if there are considered to be exceptional circumstances that would justify it in cases where a person has been charged with an offence of murder, attempted murder, manslaughter, rape or a serious sexual offence and has previously been convicted of such an offence in the United Kingdom.[236] This provision was adopted in the course of proceedings before the European Court, in which it was conceded that a complete bar on the granting of bail in such circumstances was in violation of Article 5(3) of the European Convention.[237]

170. In addition, bail may not be granted to someone charged with murder unless the court is satisfied that there is no significant risk that, if released on bail, that person would be likely to cause physical or mental injury to another person[238] and the decision on bail can only be taken by a Crown Court judge rather than by magistrates[239].

171. Furthermore, in certain parts of the country, an exception is made to the possibility of bail being granted in the case of adult drug users where their alleged offending is drug-related and they have failed to comply with a requirement to undergo drug testing.[240]

172. Finally, a person charged with treason can only be granted bail by order of a judge of the High Court or the Secretary of State.[241]

d. *Responsibility for deciding*

173. There are no circumstances in which the determination of arguments for and against the imposition or continuation of pre-trial detention can be made by an authority other than a court in any of the jurisdictions surveyed.

174. The exclusion of any determination of this issue by an authority other than a court is underpinned by a constitutional provision in France[242] and a ruling of the Constitutional Court in Spain[243].

e. *Access to the case file*

175. There are different approaches in the jurisdictions surveyed regarding access to information in the case file but the eventual outcome is, or will be, similar in many cases.

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235 i.e., where there is either an extra strong (confirmed) suspicion of a crime that may lead to imprisonment of 6 years or more *and*, due to the seriousness of the crime, immediate imprisonment is needed "for the enforcement of the law" in case of specific offences (such as assault of a civil servant or some sexually related crimes) for which a minimum sentence of 60 days' imprisonment *is to be expected* and "the enforcement of the law" prescribes immediate imprisonment is needed (respectively section 762.2.1 and 2 of the Administration of Justice Act. Pre-trial detention may never be used if the *expected* sentence will be a fine or imprisonment for 30 days or less (section 762.3 of the Administration of Justice Act).

236 Section 25 of the Criminal Justice and Public Order Act 1994.

237 *Caballero v. United Kingdom* [GC], no. 32819/96, 8 February 2000.

238 Section 114 of the Coroners and Justice Act 2009.

239 Section 115(1) of the Coroners and Justice Act 2009.

240 Paragraphs 6A to 6C of Part 1 of the Schedule 1 of the Bail Act 1976.

241 Magistrates Court Act 1980, s. 41.

242 Thus, Article 66 provides that "No one shall be arbitrarily detained. The Judicial Authority, guardian of the freedom of the individual, shall ensure compliance with this principle in the conditions laid down by statute".

243 The Constitutional Court has established the principle of "judicial adoption of the measure" as the guiding principle for pre-trial detention, despite the fact that the Constitution does not expressly impose that this measure must be adopted judicially. This requirement is justified from the perspective that any measure restricting fundamental rights requires a reasoned judicial decision and for consistency with the provisions of Article 5 of the European Convention. In particular, the Constitutional Court considers that Article 5(3) contemplates a procedure for immediate judicial supervision of the precautionary deprivation of liberty verified within criminal proceedings, which aims to reduce as far as possible the risk of arbitrariness and to ensure the pre-eminence of the law; SSTC 29 and 30/2109, 28 February, FJ 3, citing the judgment of the European Court in *Ali Osman Özmen v. Turkey*, no. 28110/08, 5 July 2016

176. Thus, in Denmark a defence lawyer has the right to see all documents in the case file unless a refusal to allow this is required in the interests of national security. Permission must, however, be sought from the police in order to show any of the documents to the suspect and any refusal must be reasoned.[244]

177. In England and Wales, there is no right of access to the case file as such. However, any evidence that the prosecution proposes to rely upon at trial must be disclosed to the defence beforehand. Police officers are obliged to record, retain and reveal to the prosecutor material obtained in a criminal investigation which may be relevant to the investigation, and related matters. Any "unused" material that the investigator retains must be listed on a schedule of non-sensitive or sensitive material. Relevant material includes that "[w]hich has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case". These schedules are sent to the prosecutor who decides what, if any, of the material listed "might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". This decision is usually based on the written description, although the prosecutor can ask to see the material or request further details. This material is then made available to the defence, along with copies of the schedules. Access to this material may not be available for reviews of pre-trial detention or challenges to its lawfulness at an early stage in the proceedings.[245]

178. In France, the case file is put at the disposal of a suspect's lawyer, at the latest, four working days before each interrogation of the person under judicial examination or each hearing of the civil party. After the first appearance of the person under judicial examination or the first hearing of the civil party, the case file is also put at the permanent disposal of the lawyer during working days, subject to the requirements of the proper functioning of the investigating judge's office. After the first appearance or first examination, the lawyer may request to be provided at their expense with a copy of any or all of the documents and instruments of the case file. Moreover, the lawyer may transmit a reproduction of the copies obtained in this way to the suspect. The lawyer must notify the investigating judge of the list of documents or procedural acts, copies of which s/he wishes to give to the suspect and the investigating judge has five working days from receiving the application to refuse to deliver some or all of these copies by making a specially reasoned order in respect of the risks of pressure on the victims, the person under judicial examination, their lawyers, the witnesses, the investigators, the experts or any other person taking part in the proceedings. This decision is to be made known to the lawyer immediately and, failing a response from the investigating judge within the time limit, the lawyer may give the suspect the copy of the documents or acts in the list that he provided.[246]

179. In Germany, the defence lawyer should be authorised to inspect those files which are available to the court or which would have to be submitted to the court if charges were preferred, as well as to view items of evidence in official custody. However, If the fact that the investigations have been concluded has not yet been recorded in the file, the defence lawyer may be refused inspection of the files or of individual parts of the files, as well as the viewing of items of evidence in official custody insofar as this may jeopardise the purpose of the investigation. Furthermore, it is specifically provided that, if the conditions in the first sentence are met and the accused is in remand detention (or, in the case of provisional arrest, this has been requested), information of relevance for the assessment of the lawfulness of such deprivation of liberty must be made available to the defence lawyer in a suitable form so that, to this extent, as a rule, inspection of the files must be granted. Moreover, at no stage of the proceedings may the defence lawyer be refused inspection of records drawn up of the examination of the accused or of such judicial investigatory acts to which s/he was or should have been admitted, nor may s/he be refused inspection of expert opinions. An accused who has

[244] Section 729 of the Administration of Justice Act.

[245] The current law is set out in the Criminal Procedure and Investigations Act 1996 as amended; the Code of Practice issued under section 23 of the CPIA 1996 and Part 15 of the Criminal Procedure Rules 2020,

[246] Article 114-1 CCrP. A refusal is subject to appeal and the lawyer can give the suspect the copy of the documents or acts mentioned on the list if this is not determined within five working days.

no defence lawyer must be authorised to inspect the files and to view, under supervision, items of evidence in official custody insofar as the purpose of the investigation, even in other criminal proceedings cannot be endangered thereby and the overriding interests of third parties meriting protection do not constitute an obstacle thereto. If the files are not kept in electronic form, instead of granting inspection of the files, copies of the files may be made available to the accused. [247]

180. In Spain, there is a general provision allowing the judge, ex officio or at the proposal of the parties or the public prosecutor, to declare secrecy for the parties (not for the public prosecutor) for a period not exceeding one month, but extendable, provided that this is necessary to avoid a serious risk to the life, liberty or physical integrity of another person or to prevent a situation that could seriously compromise the outcome of the investigation or the proceedings.[248] However, this is subject to a provision introduced in 2015, providing that the suspect's lawyer or the suspect will, in any case, have access to the elements of the proceedings that are essential to challenge the deprivation of liberty of the investigated or accused person.[249] Furthermore, the Constitutional Court has reiterated that when it is a question of an investigated or accused person in an effective or potential situation of deprivation of liberty, this provision – and Article 7.4 of Directive 2012/13/EU of 22 May 2012 - exclude the possibility of a temporary restriction of rights to specific knowledge of the facts with which the accused is charged and the reasons for the deprivation of liberty, as well as access to the essential elements of the proceedings in order to question and challenge the legality of the deprivation of liberty.[250] The determination of what these elements are will necessarily be casuistic, depending on the particular circumstances that have justified the situation of deprivation of liberty.[251]

f. *Right to appeal*

181. There is a right of appeal against a decision imposing or continuing pre-trial detention in all the jurisdictions surveyed.[252]

[247] Section 147 CCP. The public prosecution office is responsible for deciding whether to grant inspection of the files in preparatory proceedings and after final conclusion of the proceedings but, in all other cases, it is the presiding judge of the court seized of the case who is competent to decide. A refusal of inspection by the prosecution office can be appealed to the competent. Refusal decisions are to be given without reasons if their disclosure might jeopardise the purpose of the investigation. If the reason for refusing inspection of the files has not already ceased to exist, the public prosecution office shall revoke the order no later than upon conclusion of the investigations. The defence lawyer or an accused who has no defence lawyer shall be notified as soon as s/he once again has the unrestricted right to inspect the files. The current provisions in section 147 CCP were adopted in execution of the judgment of the European Court in *Mooren v. Germany*, no. 11364/03, 9 July 2009, in which it had found that the refusal to grant the applicant's lawyer access to the case file had not complied with the fairness requirements under Article 5(4).

[248] Article 302 LECrim.

[249] Article 505.3.

[250] SSTC 21/2018, FJ 8, and 83/2019, FJ 6 c.; "the secrecy of the investigation will have to coexist in these cases with accessibility to the case file that restricts the level of knowledge by the person under investigation of the result of the investigation to that which is essential - in the sense of substantial, fundamental or elementary - for an adequate exercise of his defence against the deprivation of liberty"

[251] SSTC 21/2018, FJ 7, and 83/2019, FJ 5)" (STC 180/2020, of 14 December, FJ 2

[252] Denmark (chapter 70 of the Administation of Justice Act. It is rarely used, possibly because time spent in a pre-trial prison is deducted from a sentence imposed following conviction, and also because daily life has already been disrupted); England and Wales (when the defendant's first bail application is unsuccessful, and s/he is remanded in custody, s/he may make another fully argued bail application at the next hearing which, unless s/he consents to being remanded in her/his absence, will be within eight clear days (section.128(6) of the Magistrates Court Act 1980). At this hearing, any arguments made in the first application can be repeated (Schedule.1, Pt IIA, para.2). Should this second application be unsuccessful, at subsequent hearings, the court "need not hear arguments as to fact or law which it has heard previously" (Schedule.1, Pt IIA, para.3). This is so even though the court should consider the question of bail at each hearing (Schedule.1, Pt IIA, para.1). Therefore, if there has been no material change in circumstances since the last application, the defendant is not entitled to reopen the matter (*R. v. Nottingham Justices Ex p. Davies* [1981] Q.B. 38 and R. (*on the application of B) v. Brent Youth Court* [2010] EWHC 1893 (Admin)). A refusal of bail may be challenged by way of judicial review (*R. (on the application of M) v. Isleworth Crown Court* [2005] EWHC 363 (Admin); *R. (on the application of Shergill) v. Harrow Crown Court* [2005] EWHC 648 (Admin); *R. (on the application of Allwin) v. Snaresbrook Crown Court* [2005] EWHC 742 (Admin)); France (this appeal is heard by the investigating section of the court of appeal. The court is required to deliver a reasoned judgment as soon as possible, and no later than 10 days after the appeal in the case of a pre-trial detention order, and within 15 days of the appeal when a request for release or an appeal against the extension of pre-trial detention has been rejected (Article 194 d CCrP). These deadlines are extended by five days when the person concerned asks to attend the hearing in person; Germany (there are two possibilities to appeal, which cannot both be used at the same time (section 117(2) CCP). The most frequently used is the review decided by the detention judge (*Haftprüfung*), that can, in principle, be lodged at any time subject to some restrictions when repeated (section 117 CCP). Secondly, a detention appeal (*Haftbeschwerde*) exists, which is decided by the Regional Court (*Landgericht*), and which can only be used once against a detention decision. However, unlike the first option, it can also be directed against a decision about the suspension of an arrest warrant, usually regarding conditions. A further appeal against the Regional Court's decision is possible to the Higher Regional Court (*Oberlandesgericht*) (Articles 304 and 310 CCP)); and Spain (pursuant to Articles 507 and 766 LECrim, the order granting or extending pre-trial detention can be appealed (*recurso de reforma*) before the same judge who issued the decision

182. The detained person generally has the right to attend the hearing in person and to be accompanied by a lawyer in all the jurisdictions surveyed.[253]

183. Apart from Germany, where pre-trial detention hearings are held in private, the hearing is normally held in public in all the jurisdictions, as is the pronouncement of the judgment.[254]

184. In none of the jurisdictions will an appeal suspend the execution of the disputed order.[255]

g. *Reviews*

185. In all jurisdictions surveyed, there is provision for automatic review of the imposition of pre-trial detention, and thus whether there is any basis for its continuation.

186. However, the intervals between such reviews vary significantly; at least every 4 weeks in Denmark after an initial period of up to 4 weeks;[256] every 3 months in Germany after the initial period of 6 months;[257] in France, every 4 months in the case of offences qualifying as "délits" or every 6 months in the case of offences qualifying as "crimes" after an initial period of respectively 4 months or a year;[258] and every 6 months after the initial period of 12 months in Spain[259]. In England and Wales, there will

and, subsidiarily or directly, before the Provincial Court (*recurso de apelación* before the higher collegiate court). The appeal must be processed on a preferential basis and be resolved within 30 days. When the proceedings are ordered to be kept secret, there is the possibility of limiting the content of the detention order that is notified to the defendant. In this case, an appeal may be lodged against both the mutilated decision and the full decision when it is notified to the person. There is a proposal to reduce the deadline for determining appeals to 10 days).

253 Denmark (this can be via video link for the detained person but the lawyer is expected to attend the court itself)); France (as regards the detained person, this is if s/he or her or his lawyer so requests; Article 199, para. 5 CCrP. Moreover, if the person has chosen to be assisted by a lawyer, the lawyer must be invited to attend the appeal hearing. However, in the case of an appeal against an order rejecting a request for release, the president of the investigating section may refuse permission for the person to attend the hearing. This decision must be reasoned but is not open to appeal. If the public prosecutor appeals against a decision to refuse placing a person in pre-trial detention, or against a release order, the person concerned has the right to attend the hearing); Germany (In both procedures, an oral hearing can be ordered by the judge, or it can be requested by the detainee (section 118(1) and (2) CCP). The oral hearing must take place no later than 2 weeks after the request was received by the court (unless the suspect agrees to a later date). However, while the request for a review can be repeated at any time, a new oral hearing cannot be requested earlier than two months after the last one took place and pre-trial detention must have lasted at least three months (Article 118(4) CCP). Moreover, no oral hearings take place during trial and after the defendant is sentenced to a prison sentence, even if s/he appeals the first convictions and legally remains a pre-trial prisoner. This is because the regular trial sessions ensure that the court deals with the case continuously and in person and has an *ex officio* duty to release a pre-trial detainee when detention is no longer necessary (section 120(1) CCP). Being accompanied by a lawyer is mandatory); and Spain (the appellant of a pre-trial detention order may request in the appeal the holding of a hearing, which will be agreed by the respective Provincial Court (Article 766.5 LECrim). The hearing is not, therefore, mandatory but will necessarily be held if it is requested by the appellant. The hearing will always be attended by the parties, the prosecution and the suspect's lawyer. However, the decision to have the suspect present (who would have been present at the mandatory hearing under Article 505 LECrim to adopt the measure) depends on whether the appellate court considers it necessary. Recently, the Constitutional Court has emphasised the guarantees of contradiction and equality of arms as minimum procedural guarantees required by the jurisdictional nature of the measure, in line with the case law of the European Court. It has stressed that "in incidents relating to the preventive deprivation of liberty in criminal proceedings, an adversarial hearing and equality of arms between the prosecution and the defendant are essential", which imply "prior information on the reasons for the deprivation of liberty and, in particular, access to the essential proceedings". These guarantees apply to the hearing that must take place before the measure is ordered and at the appeal hearing, if it is held; STC 180/2020).

254 Denmark (a hearing can be behind closed doors in limited circumstances, such as the case being at an early stage or a public hearing would be harmful for the person charged or close relatives); England and Wales (usually anyone can attend hearings and report on proceedings but in some circumstances, restrictions can be imposed (Criminal Procedure Rules and Practice Directions 2020, part 6). Youth Court proceedings are open to the press but not the public and restrictions are in place regarding naming the defendant); France (Article 199, para. 2 CCrP. However, prior to the start of the proceedings, the public prosecutor, the person under investigation or the complainant or their lawyers can object to a public hearing. This can be on the basis that holding the hearing in public would hinder the special investigations needed, adversely affect the presumption of innocence, the serenity of the proceedings, the dignity of the person concerned or the interests of a third party, or if the case concerns facts related to the procedure applicable to organised crime; Articles 706-73 and 706-73-1 CCrP. The investigating section rules on that objection, after hearing the parties, in chambers); and Spain (In principle there is no reason to exclude these hearings from the rule of publicity of the proceedings).

255 However, in France, in the event of an order to place a person in pre-trial detention, it is possible to combine the appeal with an urgent application for their release, provided that this is done no later than the day after the pre-trial detention order. The urgent application is made either to the president of the investigating section, who must rule within 3 working days (Article 187-1 CCrP) or directly to the investigating section, which has 5 working days to pronounce judgment (Article 187-2 CCrP).

256 Section 767 of the Administration of Justice Act.

257 Section 118(1) CCP.

258 Article 145-1 and 2 CCrP.

259 Article 324 LECrim. There is a proposal to require that the periodic control of pre-trial detention, with a mandatory ex officio control, should become more frequent and take place on a quarterly basis.

be an interval of up to 28 days in proceedings determined by magistrates' courts but no period is specified for proceedings determined in the Crown Court.[260]

h. *Use of video links in proceedings*

187. Hearings to determine whether pre-trial detention should be imposed or continued can be held through a video link in England and Wales[261].

188. The use of such a link is not, however, possible in the hearing concerned with an initial decision in Denmark,[262] France[263] and Germany[264].

189. Its use is, however, possible in France in respect of all hearings held before the liberties and detention judge with a view to the extension of pre-trial detention or for the examination of an application for release, as well as in any hearings related to pre-trial detention before the investigating section. This is also possible in Germany in respect of reviews upon request and the ex officio review after six months that may lead to the continuation of pre-trial detention.

190. In Denmark, the use of a video link is subject to a condition that this is accepted by both the prosecution and the defence. However, in France, the decision on using a video link is a matter for the judge or section, although a detainee may refuse the use of such a link, except where there is reason to believe that transporting her or him should be avoided because of a serious risk of escape or disturbance of the peace.[265] The possibility of using a video link for reviews upon request and ex-officio reviews exists in Germany when it is difficult to organise the bringing of the detainee to the court in person.[266]

191. The use of video links in pre-trial detention proceedings was not generally possible in Spain before the situation linked to the Covid-19 pandemic. Temporary provision was then made for procedural acts to be preferably carried out by telematic presence, provided that the courts, tribunals and public prosecutors' offices had the necessary technical means at their disposal to do so. However, it was also specified that the physical presence of the person concerned will be required – at her or his own request or that of her or his lawyer – at the hearing required to adopt pre-trial detention, unless there are justified reasons or force majeure preventing this. In addition, it was specified that, when the person's physical presence is required, the physical presence of her or his lawyer will also be necessary, at the request of the latter or of the person concerned.[267]

192. However, there was already provision in Spain for the transfer to judicial custody of detainees in marine areas to be carried out by the telematic means available to the ship or aircraft, when due to

[260] The court should consider the question of bail at each hearing (Bail Act 1976, Schedule 1, Part IIA, para.1). If there has been no material change in circumstances since the last application, the defendant is not entitled to reopen the matter (*R. v Nottingham Justices Ex p. Davies* [1981] Q.B. 38 and *R. (on the application of B) v Brent Youth Court* [2010] EWHC 1893 (Admin)). In the magistrates' court, a defendant can only be remanded in custody for a maximum of eight days, except where it has previously remanded her or him in custody and it has a set a date for the next stage of those proceedings. In those circumstances, having heard representations from the defendant's representatives, s/he can be remanded in custody for a period ending in that date or for a period of 28 days, whichever is the less - s. 128A of the Magistrates Courts Act 1980. There is no maximum period of remand into custody in the Crown Court, where the judge is able to adjourn cases to the next stage in the proceedings.

[261] Preliminary hearings, including those considering bail, may be held via live video link and where the live link is used, the defendant is deemed to be present; section 57A(2) of the Crime and Disorder Act 1998).

[262] Section 748b of the Administration of Justice Act. The defence lawyer must be in the same room as the suspect and a video.

[263] Unless the person is already detained for some other reason.

[264] If the suspect is arrested too far away from the local court that is competent for his or her case to organise a hearing in the time limit set, s/he must be brought before "the nearest local court"; section 115a CCP.

[265] Article 706-71, para. 4 CCrP.

[266] Sections 118a (2) and 122 (2) CCP, when "great distance or sickness of the accused or other insurmountable obstacles prevent his being brought to the hearing".

[267] Law 3/2020, of 18 September, on procedural and organisational measures to deal with COVID-19 in the field of the Administration of Justice: Article 14, Conduct of procedural acts by means of telematic presence. Similar provisions are envisaged in the Draft Bill on Procedural Efficiency Measures for the Public Justice Service that is being considered for adoption once the pandemic has passed.

the distance or their isolation it is not possible to bring the detainees to the physical presence of the judicial authority within the maximum period of 72 hours.[268]

i. *Deadlines for completing investigations*

193. In Denmark the only effective deadlines for investigations are those deriving from the limitation periods applicable to bringing prosecutions in respect of the offences concerned.[269]

194. In England and Wales, there are no formal deadlines for investigations. However, the duration of investigations is effectively curtailed in many, but not all cases, either by the limits on the conduct of proceedings once a person has been arrested and then released on conditional police bail or by the "custody time limits" where pre-trial detention has been imposed.

195. Thus, where a person has been released on conditional police bail, its duration is limited to a maximum of a year from her or his arrest.[270] The "custody time limits" are shorter and are discussed in the following sub-section.

196. However, where persons are released by the police "under investigation" (i.e., with no bail conditions), there is no deadline for the investigation other than the statutory time limit for bringing proceedings in offences classified as summary-only. In the cases of offences not so classified, the only possibility of challenging a lengthy investigation is through an application to stay any prosecution for "abuse of process" on the basis that that the delay has led to prejudice. Such applications rarely succeed.[271]

197. There are also no specific deadlines in France and Germany within which investigations should be completed.

198. However, in both France and Germany, investigations are subject to the general requirement that they must not exceed a reasonable length of time.[272]

199. Moreover, in France, there are additionally provisions that impose a requirement to justify the continuation of an investigation after the elapse of two different periods of time, with the later one being 2 years after it had been opened.[273]

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[268] Article 520 ter LECrim.

[269] These periods depend upon the maximum sentence of imprisonment that can be imposed, ranging from 2 years where it is 1 year to 15 where it is more than 10 years, without any limit for sentences of life imprisonment.

[270] After such release, there is an initial deadline of 28 days for the person to return to the police station. Then, unless the case has been sent to the Crown Prosecution Service for a charging decision to be made, police bail can only be extended up to a maximum of 3 months from the arrest where a senior officer has reasonable grounds for believing: (a) the person to be guilty of the offence; (b) further time is needed to either make a charging decision or for investigation; (c) the investigation has proceeded diligently and expeditiously to date; and (d) the continued imposition of bail is necessary and proportionate. The police have no further power to extend bail beyond that period but this can be authorised by a magistrates' court first for 3 months and then on further application by 3 months or 6 months. The magistrates' court must be satisfied that further time for the investigation is needed, that the investigation has proceeded diligently and expeditiously and the continued imposition of bail is necessary and proportionate.

[271] See, e.g., *R. v. S.* [2006] EWCA 756.

[272] Thus, in France Article 175-2, para. 1 CCrP provides that in all cases the length of the investigation must not exceed a reasonable length of time, regard being had to the seriousness of the charges brought against the person under judicial examination, the complexity of the investigations needed to establish the truth, and the exercise of the rights of the defence. Similarly, in Germany, criminal procedure is governed by the principle of a speedy procedure (*Beschleunigungsgrundsatz*); every accused has the right to a trial and decision within a reasonable time. This principle cannot be found directly in the law but is based on several norms, namely the principle of the rule of law in the constitution and Article 6 of the European Convention.

[273] The first requirement gives the parties (respondent and civil party) or the assisted witness the possibility of asking the investigating judge to close the investigation after a period of one year in the case of a minor indictable offence and eighteen months in more serious criminal cases, or upon expiry of the shortest expected duration of the investigation the investigating judge may have announced to them when they were first heard or questioned (Articles 89-1, para. 2, 116, para. 8 and 175-I CCrP. The second requirement arises if the investigation has not been concluded two years after it was opened; the investigating judge must then deliver a reasoned judgment, with reference to the seriousness of the charges, the complexity of the investigations and the exercise of the rights of the defence, explaining the reasons justifying the continuation of the investigation and specifying the prospects for its completion.

200. In Spain, a single initial period of 12 months is prescribed for conducting the judicial investigation into an alleged offence. However, this can be extended for successive and unlimited periods of up to six months, with no other limit on them than that they are necessary to achieve the purposes of the investigation.[274] As a result, there is effectively no time limit for the investigation to be completed insofar as the judge finds that there is still a need to carry out further proceedings.[275]

j. *Duration of pre-trial detention*

201. Specific periods for the length of both the initial imposition of pre-trial detention, and any continuation of it, are prescribed in Denmark,[276] France[277] and Germany[278] .

202. In France, it is also specified that pre-trial detention may not exceed a reasonable length of time regard being had to the seriousness of the charges against the accused and the complexity of the investigations necessary to establish the truth.[279]

203. On the other hand, in Spain it is prescribed that pre-trial detention will last for the time necessary to achieve any of the purposes for which it is intended and for as long as the reasons that justified its adoption subsist.[280]

204. However, a maximum duration for pre-trial detention is also prescribed in both France and Spain and in two of the other jurisdictions surveyed, with this being determined by quite different considerations.

205. Thus, it depends upon both the penalty and the age of the person concerned in Denmark,[281] whereas in England and Wales it is determined by the date set for the trial,[282] the seriousness of the offence in France[283] and the nature of the risk on which the decision to impose pre-trial detention was based in

[274] Article 324 LECrim. This arrangement does not apply in the case of proceedings before the Jury Court, for the rapid prosecution of certain crimes (certain crimes, punishable by less than five years' imprisonment if committed *in flagrante delicto*), and for the trial of minor crimes, which do not have any investigation period.

[275] The judicial body has the power to decree the extension of the investigation deadlines *ex officio* by means of an order.

[276] It may be first imposed for up to 4 weeks and then prolonged for periods of up to 4 weeks if the investigation proceeds and the suspicion is as strong as when it was originally imposed.

[277] The initial imposition for minor indictable offence and major indictable offence is for periods of respectively 4 months and 1 year, with respective extensions of 4 and 6 months (but see also fn. 283); Article 145-1 and 2 CCrP.

[278] The initial imposition can be for 6 months (section 121(1) CCP). It may only be prolonged if the particular difficulty or the unusual extent of the investigations or some other important reason make it necessary. The Higher Regional Court must review the case after the initial six months *ex officio* and then every three months. However, it may be continued once the trial has started (section 121(3) CCP.

[279] Article 144 CCrP.

[280] Article 504.1 LECrim. As a result, there is no initial period of pre-trial detention.

[281] For persons over 18, it cannot exceed 6 months where the maximum sentence is less than 6 years' imprisonment and 1 year where the penalty is greater than that and for those aged 15-18, the respective periods are 4 and 8 months; section 768 of the Administration of Justice Act. These limits were introduced in 2008 after many instances of lengthy pre-trial detention. There is a defined exception introduced for "special conditions", which may relate to the seriousness of the crime, but there are no statistics regarding its use.

[282] The custody time limits run from the court appearance when pre-trial detention is first imposed and are 56 days in cases being tried summarily or heard in the Youth Court, 182 days for cases being tried in the Crown Court (less any days that the person spent in the custody of the magistrates' court prior to the case being sent there) and 112 days if use is made of the voluntary bill of indictment procedure (by which the prosecution can seek the referral of a case to the Crown Court where it was not sent there by the magistrates' court); section 22 of the Prosecution of Offences Act 1985, Prosecution of Offences (CTL) Regulations 1987 and the Criminal Procedure Rules. The periods of 182 and 112 days were extended respectively to 238 and 168 days during the Covid-19 pandemic. Custody time limits can also be extended for "good and sufficient cause" (e.g., delays caused by demands on the forensic service providers) but there is a need to demonstrate that the prosecution has acted with "all due diligence and expedition".

[283] In the case of a minor indictable offence there are two possibilities (Article 145-1 CCrP). Firstly, if the person under examination has not previously been sentenced, in respect of a major or minor indictable offence, to an unsuspended prison sentence of at least one year, and when he or she is facing a sentence of 5 years or less, their pre-trial detention cannot exceed 4 months and therefore cannot be extended. Secondly, in all other cases, regard being had to the person's past record and/or the penalty they face, the pre-trial detention may, exceptionally, be extended up to 4 months. That extension may be renewed once. So the maximum duration of pre-trial detention is one year (4 months initially, plus a 4-month extension, subsequently renewed for another 4 months). In certain circumstances this maximum duration can be increased to 2 years (three additional 4-month renewals), either where an event constituting the offence was committed outside the national territory, or when the person is charged with drug trafficking, conspiracy, living off immoral earnings, extortion or any offence committed by an organised gang, and faces a 10-year prison sentence. Even more exceptionally, a final 4-month extension may be added to these 2 years if the investigating judge needs to continue the investigation and releasing the accused would create a particularly serious risk to people or property. In this last case,

Spain[284].

206. However, there is no specific maximum duration prescribed for pre-trial detention in Germany.[285]

k. *Relevance for sentencing*

207. Periods spent in pre-trial detention are to be taken into account in calculating any sentence of imprisonment imposed in the event of a conviction in England and Wales,[286] France,[287] Germany[288] and Spain[289].

208. In Denmark periods of pre-trial detention do not affect the sentence imposed but are deducted administratively by the prison in which it is served.[290]

209. The calculation of the sentence to be imposed also takes account of periods spent on bail under a qualifying curfew condition in England and Wales[291] and period spent subject to house arrest under

however, it is the investigating section of the court that takes the decision, based on a reasoned order submitted by the investigating judge. In the case of a major indictable offence the initial pre-trial detention of up to one year can be extended by up to 6 months (Article 145-2 CCrP). Beyond those 18 months there are two possibilities. Firstly if the penalty facing the person under examination is less than 20 years' imprisonment the pre-trial detention cannot, in principle, exceed 2 years. That duration is increased to 3 years if one of the events constituting the offence was committed outside the national territory, and to 4 years if the person is charged with more than one crime or with drug trafficking, terrorism, living off immoral earnings, extortion or any offence committed by an organised gang. Secondly, in all other cases pre-trial detention cannot exceed 3 years. That duration is increased to 4 years if one of the events constituting the offence was committed outside the national territory or if the person is charged with more than one crime or with drug trafficking, terrorism, living off immoral earnings, extortion or any offence committed by an organised gang. In both of these possible scenarios, in all cases and even more exceptionally, a final 4-month period may be added when the investigating judge needs to continue the investigation and releasing the suspect would create a particularly serious risk to people or property. In this last case, however, it is the investigating section of the court that takes the decision, based on a reasoned order submitted by the investigating judge. In this last case, however, it is the investigating section of the court that takes the decision, based on a reasoned order submitted by the investigating judge. All the extensions are ordered by the liberties and detention judge (save in the case just mentioned) at the request of the investigating judge. In practice, therefore, it is up to the investigating judge to follow the duration of the detentions in the cases for which he or she is responsible, and to refer the matter to the liberties and detention judge in good time.

[284] Thus, if it is imposed to combat the risk of absconding or the risk of repetition of the offence, its duration may not exceed 1 year if the offence is punishable by imprisonment for 3 years or less and 2 years if the offence is punishable by imprisonment of more than 3 years. However, when there are circumstances that make it foreseeable that the case cannot be tried within those periods, the judge order a single extension of up to 2 years if the offence is punishable by imprisonment for more than 3 years or of up to 6 months if the offence is punishable by imprisonment for 3 years or less (Article 505 LECrim). The extension may only be granted as long as the first period of pre-trial detention has not expired. If the accused is convicted and has appealed, pre-trial detention may be extended up to the limit of half of the sentence actually imposed in the judgement. However, where pre-trial detention is ordered to avoid the risk of alteration, destruction or concealment of the sources of evidence, its duration may not exceed six months. Once the maximum time limits for pre-trial detention have expired, the defendant must be released but this does not prevent the pre-trial detention from being imposed again in the event that the person, without legitimate reason, fails to appear at any summons from the judge or court. In such a case, the pre-trial detention shall be for the duration of the proceedings for which the defendant was summoned. Normally, the suspect will have been summoned to attend the oral trial, for which reason it may be extended for the duration of the trial. As soon as it is established that the pre-trial detention measure has already exceeded two thirds of its maximum duration, the judge or court hearing the case and the Public Prosecutor will communicate this circumstance to the president of the (judicial) Governing Chamber and the Chief Prosecutor, so that the necessary measures can be adopted to ensure that the proceedings are carried out as quickly as possible. These measures expressly include giving preference to the proceedings in question over other proceedings (Article 504.6 LECrim). There is a proposal to tighten up the maximum terms of pre-trial detention by increasing the penalties for the offences for which it can be extended the longest and reducing the length of extensions. Thus, in general, for offences punishable by 5 or more years' imprisonment, pre-trial detention of up to 2 years with an extension of one year would be possible. In the case of offences punishable by imprisonment of between 2 and 5 years, the duration is 1 year with an extension of 6 months. The 6-month period is maintained for cases where there is a risk of destruction of evidence.

[285] Statistics show that currently about a quarter of all remand detainees had been serving more than six months of pre-trial detention at the time of their conviction (Morgenstern 2018: 548 and *seq*.). Because the six-month-deadline is met once the application for a continuation order is filed with the Higher Regional Court or the main proceedings commenced, detention in complicated cases may last much longer than six months. In 2014, the Constitutional Court stated that pre-trial detention of more than one year can only be justified in 'very exceptional cases'; FCC, 30 July 2014, 2 BvR 1457/14. The effect of this decision is however not visible in the statistics. Many decisions by German courts as well as by the European Court (see, e.g., *Patalakh v. Germany*, no. 22692/15, 8 March 2018) show that indeed proceedings often take a long time and the Higher Regional Courts sometimes release suspects even in serious cases because the judicial authorities have not pursued cases with due diligence and speed and specific difficulties or complexities were not visible to an extent that would have justified the extension. See, e.g., Oberlandesgericht Stuttgart, 21 April 2011 - 2 HEs 37-39/11; Kammergericht Berlin, 6 August 2013 - (4) 141 HEs 41/13 (19-21/13) - 4 Ws 100-101, 104/13; FCC, 3 February 2021 – 2 BvR 2128/20, for more details Morgenstern 2018: 538 and *seq*,

[286] Section 240ZA of the Criminal Justice Act 2003.

[287] Article 716-4 and 142-11, CCrP.

[288] Section 51 CCP. The court may, however, order that such time not be credited in whole or in part if, in the light of the convicted person's conduct after the offence, this is not justified, although this exception is rarely applied. Moreover, when crediting a fine against time spent in pre-trial detention or vice versa, one day in which a person is deprived of their liberty corresponds to one daily rate.

[289] Article 58 of the Criminal Code.

[290] Section 86 of the Criminal Law.

[291] Section 325 of the Sentencing Act 2020.

electronic surveillance in France[292]. Moreover, although periods spent in Germany under restrictions when the arrest warrant is suspended (the equivalent of conditional bail) are not credited by way of a fixed rate, they can be credited by the court when sentencing but there is no legal provision governing this. Furthermore, there is also some allowance made in Spain for the obligation to appear in court as a consequence of provisional bail and the imposition of measures of withdrawal of passport or prohibition on leaving the country.[293] Apart from these possibilities, time spent subject to preventive measures has no impact on the calculation of sentences in any of the jurisdictions surveyed.

E. PREVENTIVE DETENTION

1. The European Convention on Human Rights

210. Although Article 5(1)(b) authorises deprivation of liberty to secure the fulfilment of an obligation prescribed by law, the European Court will only regard an obligation not to commit a criminal offence as being sufficiently "specific and concrete" for the purposes this provision if the place and time of the imminent commission of the offence and its potential victim(s) have been sufficiently specified.[294]

211. Moreover, any such deprivation of liberty must be aimed at or directly contribute to securing the fulfilment of the obligation and not be punitive in character, the nature of the obligation whose fulfilment is sought must itself be compatible with the Convention and the basis for the deprivation of liberty will cease to exist as soon as the relevant obligation has been fulfilled.

212. The European Court has also recognised that, even in the absence of specific orders not to do something which could lead to the commission of an offence (i.e., deprivation of liberty that comes within Article 5(1)(b)), short-term detention, reasonably considered necessary to prevent a person committing an offence is a distinct ground for deprivation of liberty under Article 5(1)(c) of the European Convention, even though there is no compliance with the requirement in this provision of bringing the person concerned before the competent legal authority.[295] In such cases, the latter will not be problematic on account of either the risk having passed or a prescribed short time-limit for the deprivation of liberty having expired.

213. However, it must additionally be shown that: the deprivation of liberty was not arbitrary; the offence being prevented is concrete and specific as regards, in particular, the place and time of its commission and its victims; and that there are facts or information which would satisfy an objective observer that the person concerned would in all likelihood have been involved in the concrete and specific offence had its commission not been prevented by the deprivation of liberty. Thus, in such cases, the European Court envisages that a person will generally have been released without ever being brought before a court.

214. Furthermore, the period that a person is deprived of her/his liberty involved must always be a significantly shorter than that regarded as "prompt" for the purpose of bringing the person before the competent legal authority.[296]

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[292] Article 716-4 and 142-11, CCrP.

[293] Thus, one day of imprisonment is deducted for every 10 fortnightly appearances (Article 59 of the Criminal Code and the Supreme court's judgment, STS no. 1045/2013) and one day of imprisonment for every 6 months of withdrawal of passport or prohibition on leaving Spain (Supreme Court Judgment, STS no. 611/2020).

[294] As was found to have occurred, e.g., in *Ostendorf v. Germany*, no. 15598/08, 7 March 2013, in which the applicant was considered to have been made aware of the fact that the police intended to avert a hooligan brawl and that he was under a specific obligation to refrain from arranging and/or participating in such a brawl in the city of Frankfurt or its vicinity on the day in question. *Cf. Schwabe and M.G. v. Germany*, no. 8080/08, 1 December 2011.

[295] *S., V. and A. v. Denmark* [GC], no. 35553/12, 22 October 2018.

[296] See paras. 37-38 above.

215. In addition, the possibility of exercising this preventive power must, of course, be provided for by national law and there must be an enforceable right to compensation where the deprivation of liberty was actually unlawful.

216. The European Court will not consider that the a deprivation of liberty which is directed to preventing the commission of offences in general – as opposed to a specific offence - is compatible with Article 5(1) of the European Convention, except where there has been a derogation under Article 15 and this has been shown to be strictly required in response to an emergency threatening the life of the nation.[297]

2. **Comparative law and practice**

217. In the jurisdictions covered by the Study, the approach regarding the use of preventive detention varies from the general absence of any power to detain a person to prevent the possible commission of an offence – whether a specific one or in general - in circumstances where the object is not to institute criminal proceedings against the person concerned through provision for this possibility just in states of emergency to the existence of such a power or powers in certain, limited circumstances.

218. However, in some of the jurisdictions surveyed where there is no power to detain related to the prevention of the possible commission of a criminal offence (as well as in those where there is some such power), there are powers to detain persons whose mental state means that they pose a risk to themselves or others, which could lead to the commission of an offence.[298] In such cases, although the purpose is not to bring criminal proceedings against the person concerned, the exercise of the power can effectively be to prevent the commission of an offence through her or his detention.

219. Moreover, in one of the jurisdictions where there is normally no power of preventive detention, there is also an administrative power of a preventive nature that entails the imposition of restraints less exacting than a deprivation of liberty, even though no criminal proceedings against the person concerned are envisaged.[299]

220. Thus, in France and Spain there is no power given by the law to detain someone in order to prevent the commission of an offence where its object is not to institute criminal proceedings against her/him.[300]

221. Of course, where the deprivation of liberty is effected in these two countries – as well as in the other jurisdictions covered by the Study - in respect of an inchoate offence, i.e., one of attempting to commit, encouraging or assisting the commission of an offence and conspiring to commit an offence, this does, of course, prevent the commission of the substantive offence. However, in this case, the object is to bring criminal proceedings against the person concerned for the inchoate offence involved.

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[297] As was found in both *Lawless v. Ireland (No. 3)*, no. 332/57, 1 July 1961 and *Ireland v. United Kingdom* [P], no. 5310/71, 18 January 1978, which concerned the imposition of detention without trial in order to prevent the commission of terrorist offences.

[298] The relevant legislation is as follows: Denmark(section 5.2 of the Act on use of force in psychiatry); England and Wales (the Mental Health Act 1983); France (Article L. 3213-1 and *seq.* of the Public Health Code [Code de la santé publique]) ; Germany (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* (FamFG)); and Spain (Article 763 Ley de Enjuiciamiento Civil (Law 1/2000, of 7 January, on Civil Procedure): Non-voluntary hospitalisation due to mental disorders). In all cases, the detention of the person concerned must be based on a medical assessment and is subject to judicial supervision.

[299] See para. 236 below.

[300] In the case of England and Wales, Code G specifically states that "it can never be necessary to arrest a person unless there are reasonable grounds to suspect them of committing an offence" (para. 2.1).

222. Furthermore, France does permit administrative house arrest under the exceptional rules of a state of emergency[301] and Spain makes provisions for preventive detention in a certain type of state of emergency[302].

223. As has already been seen, the United Kingdom was able to successfully invoke Article 15 of the European Convention to justify its use of preventive detention where there was considered to be a risk of the commission of terrorist offences during a state of emergency.[303] There remains in effect a legal basis for applying any derogations that are made under Article 15 of the European Convention, which could again include measures entailing preventive detention.[304]

224. However, the United Kingdom was held by the European Court not to be able to rely upon a subsequent derogation under Article 15 where, in England and Wales, it had detained non-nationals for security reasons on the basis that their presence in the country was believed to constitute a risk to national security and it was suspected that they were or had been concerned in the commission, preparation or instigation of acts of international terrorism and were members of, belonged to or had links with an international terrorist group and it was not possible to remove or deport them from the country. In the European Court's view, the measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals and so it found a violation of Article 5(1) of the European Convention.[305]

225. There is no provision in Denmark or Germany that envisages the use of preventive detention in a state of emergency.

226. In Denmark, section 5(3) of the Police Act allows the police to detain a person in order to avert any risk of disturbance of public order or any danger to the safety of individuals or public security. Such a detention can as a general rule last no longer than six hours and will only be justified for as long as it was necessary to avert the risk or danger in question.

227. The exercise of this power was the subject of the proceedings in which, as seen above,[306] the European Court found that short-term detention, reasonably considered necessary to prevent a person committing an offence, is a distinct ground for deprivation of liberty under Article 5(1)(c) of the European Convention.

228. In that case, the European Court was satisfied that the facts established had sufficiently indicated that the "offence" – a hooligan brawl between football supporters - could be considered "specific and concrete" for the purposes of Article 5(1)(c) and that there was also applicants concerned would in all likelihood have been involved in that offence had its commission not been prevented by their detention. Furthermore, the European Court was satisfied that the applicants had been released as soon as the imminent risk had passed and that their detention – which was within the six-hour limit – had lasted for no longer than was necessary to prevent them from taking further steps towards instigating a hooligan brawl.

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301 Article 6 of Act no. 55-385 of 3 April 1955 on the state of emergency.

302 Thus, under an "estado de excepción", the governmental authority (police) may arrest any person if it considers it necessary for the preservation of public order, provided that, at the very least, there are well-founded suspicions that this person is going to provoke disturbances of public order. In these cases, the detention must be reported to the competent judge within 24 hours and may not exceed 10 days. Those detained enjoy the rights granted to them by Article 17.3 CE to be informed immediately of her/his rights, not to be compelled to make a statement and the assistance of a lawyer during police and judicial proceedings); Article 16 of Law 4/1981 on states of alarm, exception and siege. If an "estado de sitio" (state of siege as state of emergency) is declared, the 10-day period may also be relied upon. In addition, the legal guarantees of the detainee recognised in Article 17.3 CE may be suspended; Article 32, Law 4/1981 on states of alarm, exception and siege.

303 See para. 216 above.

304 Under section 14 of the Human Rights Act 1998, the Secretary of State can make an order incorporating any derogation made or planned to be made under Article 15 of the European Convention into the Act, so that it should have like affect domestically to any derogation notified to the Secretary General of the Council of Europe. Any such domestic derogation can only last a maximum of five years and then is automatically repealed unless extended again by a fresh order and further requires repeal if the derogation from the European Convention has itself been withdrawn; section 16.

305 *A. and Others v. United Kingdom* [GC], no. 3455/05, 19 February 2009.

306 See paras. 213-216.

229. Similarly, in Germany, the Police Acts of the 16 states provide for police detention ("Gewahrsam"), i.e., the possibility to deprive a person of her or his liberty, with the aim of preventing danger in various forms, including the harm that might be caused by possible criminal offences. There is no limit on the offences for which such detention can be imposed.

230. In practice, police detention is used infrequently and for short periods of a few hours or up to two days, mostly in connection with large sports events (to prevent for example football hooliganism) or large political events (to prevent violence from protesters, for example during summits of political leaders). The detention is usually enforced in police stations or sometimes in mobile police units. However, it is possible to transfer the detainee to a prison for longer periods.

231. The maximum length of this police detention varies between the states, with some Police Acts theoretically allowing for indefinite police detention as long as the danger is imminent (e.g., the Police Act in Bavaria allows for judicially authorised police detention for initially three months with the option to prolong it for further three months as long as the judge deems it necessary[307]).

232. Other Police Acts in Germany foresee time limits of 4-14 days, sometimes depending on the nature of the risk.[308] Such police detention is subject to appeal before an administrative court through a procedure to obtain an interim injunction to end it immediately.[309] Also, as the detention usually only lasts a short time, those affected will often seek redress after the event through seeking a ruling from the administrative court that it was illegal.[310]

233. Indeed, where the period is not short, the European Court may well find that there has been a violation of Article 5(1)(b) of the European Convention.[311]

234. In England and Wales, there is a common law power of arrest to prevent an imminent or actual breach of the peace.[312] There has, however, to be a sufficiently real and present threat to the peace to justify depriving of his liberty a citizen who was not at the time acting unlawfully.[313]

235. The Supreme Court has held that a pre-emptive arrest for imminent breach of the peace is compatible with Article 5 of the European Convention as it must not be interpreted so as to make it impracticable for the police to perform their duty to maintain public order and protect the lives and property of others. The qualification on the power of arrest or detention under Article 5(1)(c), that it is 'for the purpose of bringing him before the competent legal authority' is implicitly dependent on the cause for detention continuing long enough for the person to be brought before the court. Therefore, in the case of an early release from detention which was imposed for preventive purposes, it is enough to guarantee the rights inherent in Article 5 if the lawfulness of the detention can subsequently be challenged in court, such as by bringing judicial review proceedings.[314]

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307 Article 20, *Gesetz über die Aufgaben und Befugnisse der Bayerischen Staatlichen Polizei*.

308 E.g., the Police Act of North Rhine-Westphalia allows for 14 days of detention for the purpose of preventing a serious criminal offence - *Verbrechen* according to section 12 of the German Criminal Code, which includes all criminal offences that must be punished with a sentence of at least a year of imprisonment -. that can once be prolonged for another period of 14 days. If the purpose of detention is the prevention of any offence that poses a risk for life, health or liberty of another person, the maximum period is one week. Regarding other offences, the maximum is detention until the end of the day following apprehension (section 35, 38 *Polizeigesetz des Landes Nordrhein-Westfalen*). On the other hand, the Police Act of Berlin - section 33 *Allgemeines Sicherheits- und Ordnungsgesetz* (ASOG) Berlin - allows for police detention only until the end of the day following apprehension. This means that longer preventive detention in Berlin is only possible when a judge has ordered preventive detention on the basis of other preventive legislation, for example according to the Act for the Placement of Mentally Ill Persons.

309 Section 80(5) of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*).

310 Ibid, section 113(1). This occurred, e.g., in the *Ostendorf* case.

311 See, e.g., *Epple v. Germany*, no. 77909/01, 15 December 2006, in which detention lasting 19 hours detention was considered not to have struck a proper balance between the need to enforce the order made against the applicant and the applicant's right to liberty.

312 Preserved by section 40 of the Public Order Act 1986.

313 *Foulkes v. Chief Constable of Merseyside* [1998] 3 All E.R. 705.

314 *R. (on the application of Hicks) v Commissioner of Police for the Metropolis* [2017] UKSC 9. This ruling was taken into account by the European Court in its judgment in *S., V. and A. v. Denmark* [GC], no. 35553/12, 22 October 2018 discussed above.

236. Although preventive detention is not possible in France, the law does provide for a means of administrative control and surveillance of any person in respect of whom there are serious reasons to believe that their behaviour constitutes a particularly serious threat to public order and security linked to terrorist activities. Thus, for the sole purpose of preventing the commission of terrorist acts the Ministry of the Interior may, after having informed the national antiterrorism prosecutor, order a person to remain within a prescribed geographic perimeter, report periodically to a police station and state their place of residence and any change in it.[315]

F. COMPENSATION

1. The European Convention on Human Rights

237. Article 5(5) of the European Convention provides that:

> Everyone who has been a victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

238. This right applies to any deprivation of liberty that is contrary to the requirements of Article 5 regardless of whether it was authorised by national law.[316]

239. An enforceable right could be provided by any provision that is shown with sufficient certainty that Article 5(5) could be relied upon as the basis for a claim for compensation[317] but also by provisions in, e.g., the civil code[318] or the criminal procedure code[319] that have the effect of allowing compensation to be claimed in respect of a deprivation of liberty contrary to Article 5. Such a right will not, however, exist where the deprivation of liberty is authorised by national law.[320]

240. An award of compensation should cover not only financial damage or loss but also any moral damage suffered.[321]

241. Article 5(5) will not preclude a requirement that makes the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach.[322]

242. However, the mere fact of unlawful detention must be regarded as giving rise to non-pecuniary damage.[323] In particular, it should not be expected that such damage be outwardly perceptible and should be recognised that effects on a person's psychological condition could persist even after release.

243. This is seen by the European Court as especially important where an unlawful deprivation of liberty has lasted a short time and has not resulted in an objectively perceptible deterioration in the detainee's physical or psychological condition.[324]

244. Furthermore, it is important that any amount of compensation awarded should not be substantially lower than the European Court's awards in similar cases and that they are not disproportionate to the duration of their detention or negligible in absolute terms.[325]

315 Article L. 228-1 and *seq*. of the Internal Security Code; the terminology has been simplified for the purpose of exposition.
316 *Nolan and K. v. Russia*, no. 2512/04, 12 February 2009.
317 *Ciulla v. Italy* [P], no. 11152/84, 22 February 1989.
318 *Venskutė v. Lithuania*, no. 10645/08, 11 December 2012.
319 *Popovici v. Republic of Moldova* (dec.), no. 38178/08, 24 June 2014.
320 *Caballero v. United Kingdom* [GC], no. 32819/96, 8 February 2000.
321 *Khachatryan and Others v. Armenia*, no. 23978/06, 27 November 2012.
322 *Wassink v. Netherlands*, no. 12535/86, 27 September 1990.
323 *Dzhabarov and Others v. Poland*, no. 6095/11, 31 March 2016
324 *Danev v. Bulgaria*, no. 9411/05, 2 September 2010.
325 *Vasilevskiy and Bogdanov v. Russia*, no. 52241/14, 10 July 2018.

245. No award of compensation will be required where the deduction of a period of pre-trial detention from the sentence of imprisonment to be served that violated Article 5 of the European Convention leaves no outstanding damage to be compensated or none can be demonstrated.[326] This would undoubtedly apply also to the deduction of an unlawful period of detention prior to the imposition of pre-trial detention.

246. A failure to comply with an enforceable judgment awarding compensation for a deprivation of liberty contrary to Article 5 will amount to a violation of Article 6 of the European Convention and of Article 1 of Protocol No. 1.[327]

2. **Comparative law and practice**

247. In all five jurisdictions surveyed there are provisions that would enable someone to obtain some form of recompense where it is established that her/his deprivation of liberty – whether by an arrest, a period of custody following it or a period of pre-trial detention – was unlawful. In some of the jurisdictions, there is a possibility of obtaining recompense where the person who has been deprived of liberty is subsequently cleared or acquitted.

248. Thus, in Denmark such a possibility is provided for any deprivation of liberty which exceeded the legal limitation in regard to duration or proportionality so long as s/he is not found to have been partly responsible for it.[328]

249. Any deprivation of liberty by the police which is unlawful is regarded in both France[329] and Spain[330] as a malfunctioning of the administration of justice and the State is required to repair any damage caused by it. However, this will only be in the event of gross negligence being established, a test which would not be satisfied where the deprivation of liberty is merely unlawful .

250. On the other hand, in Germany, a right to recompense for an unlawful deprivation of liberty will be based on the fact that Article 5(5) of the European Convention is directly applicable before the German courts.[331]

251. However, in Spain there is only a possibility of seeking recompense for a deprivation of liberty which results from a judicial decision – including one imposing or continuing pre-trial detention – where the existence of a judicial error is shown to have occurred.[332] The procedure for seeking this remedy is complex .

252. Finally, in England and Wales, an unlawful deprivation of liberty by the police can give rise to a civil claim for the tort of false imprisonment.[333] A deprivation of liberty by an order of a court that was

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326 *A.R. v. Switzerland* (dec.), no. 31813/96, 20 May 1998 and *P.L. v. France*, no. 21503/93, 2 April 1997.

327 *Fedotov v. Russia*, no. 5140/02, 25 October 2005.

328 Section 1018a of the Administration of Justice Act. A person may be considered responsible where s/he was not cooperative, e.g., did not talk.

329 Article L.141-1 of the Code of Judicial Organisation.

330 Articles 292-293 of the Law on the Judiciary.

331 This may be considered in the sentencing process but compensation can also be sought for all unlawful procedural delays (*rechtsstaatswidrige Verzögerungen* or delays in contravention of the rule of law). The relevant norms are now incorporated in sections 198-201 of the Court Act (*Gerichtsverfassungsgesetz*).

332 Articles 292 and 293 of the Law of Judiciary. However, it is now being proposed to recognise the right of an acquitted person to claim compensation for the time spent in pre-trial detention in accordance with tort law. It would be specified that compensation will not payable if the damage was not actual or if it was mainly attributable to the conduct of the person concerned. The proposed rule considers this to be the case when the deprivation of liberty suffered has had as its immediate and principal cause the breach of imperative rules of conduct, in particular the breach of less burdensome preventive measures or the effective attempt to evade justice, to conceal or destroy sources of evidence or to attack the victim's legal assets. The High Court of Justice would generally have jurisdiction and a claim must be made within 30 days of notification of the decision that has put an end to the proceedings, which will be the final acquittal, the dismissal order or the decree to close the proceedings (decisions that has the effect of res judicata).

333 A remedy at common law.

found to breach the suspect's human rights, could in theory be subject to judicial remedies under sections.7 and 8 of the Human Rights Act 1998.

253. In addition, in France a person who has been discharged at the end of the investigation or acquitted has the right to request full compensation from the State suffered as a result of her or his deprivation of liberty even though it was not unlawful.[334] There are similar possibilities following an acquittal in both Germany[335] and Spain[336].

254. The recompense in all these cases is generally financial.

255. However, where a sentence of imprisonment is ultimately imposed on the person concerned, it is possible for some deduction from it to be made on account of an unlawful deprivation in liberty in both Germany[337] and Denmark.

256. Any compensation paid will cover both pecuniary and non-pecuniary loss in all the jurisdictions surveyed.

257. However, while there are no particular rules for the evaluation of the loss suffered in Denmark,[338] France[339] and Germany[340], guidelines have been developed by the Supreme Court in Spain[341] and there is also a framework governing awards in England and Wales[342] .

334 Article 149 CCrP.

335 Pursuant to section 2 of the Act on the Compensation for Law Enforcement Measures in Criminal Matters ("*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*".

336 Under Article 294 of the Law of Judiciary. The Constitutional Court declared in STC 85/2019 that a requirement in this provision that the absence of a conviction had to be the non-existence of the act charged was unconstitutional due to its contradiction with the right to equality and the right to the presumption of innocence. In doing so, it was influenced by the finding by the European Court in *Puig Panella v. Spain*, no. 25 April 2006, *Tendam v. Spain*, no. 25720/05, 13 July 2010 and *Vlieeland Boddy y Marcelo Lanni v. Spain*, no. 53465/11, 16 February 2016 that this requirement was contrary to the presumption of innocence in Article 6(2) of the European Convention.

337 Where the pre-trial-detention has been long, the sentence is first determined taking into account the long duration of the proceedings and the negative consequences for the person affected. This may already lead to a somewhat milder sentence. In a second step, the fact that the long duration has been caused by an *unlawful* delay is considered and must lead to an extra reduction that has to be spelled out in the judgement (for example: "As compensation for the inadequate duration of the proceedings, two months of the sentence imposed are considered to be served"). This approach has been developed in the jurisprudence of the high court and the constitutional court.

338 This is a matter to be determined by the public prosecutor, i.e., one at a level higher than those who put the charges in the district courts.

339 No scale is provided in the law, with each case being determined by its particular circumstances.

340 Awards for unlawful deprivation of liberty vary between 16 and 40 EUR per day (Meyer-Ladewig et al. 2017, marginal note 114) but, where a person is acquitted s/he can recover any financial losses established and 75 EUR per day for non-pecuniary losses (Act on the Compensation for Law Enforcement Measures in Criminal Matters (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*).

341 Notably in STS of 10 October 2019, FD 6; Firstly, the various damages of pre-trial detention have been identified: "the resulting social disrepute and break with one's environment that imprisonment entails, as well as the anguish, anxiety, insecurity, restlessness, frustration, annoyance, irritation or fear that it often entails, are a serious moral loss to everyone". In other judgments it has been stated that compensation should not only increase the longer the period of deprivation of liberty, but that it should do so at an increasing rate: compensation should be progressive, given that the prolongation of imprisonment gradually aggravates the damage. Other times, the opposite view is taken, that the first days of deprivation of liberty are more burdensome. The circumstances of age, health, civic conduct, the acts charged, criminal or prison records, rehabilitation of lost honour, greater or lesser probability of achieving social oblivion of the act, as well as the mark that prison may have left on the personality or conduct of the person who had suffered it, have also been considered relevant. In addition to these specific guidelines, the Supreme Court takes into account that the ECtHR states that other circumstances must be assessed, such as loss of earnings, i.e. the income that the person had and lost during that time; or, more generally, the serious economic effects that the stay in prison during that period has had on that person; or also the length of pre-trial detention in that case; whether the person has become physically or mentally ill on admission; what were the physical or mental conditions on admission that made the stay in prison even more burdensome; existence of dependants outside prison; minor children, etc. Notwithstanding these guidelines, court practice shows that the amount of compensation is usually calculated by setting a flat rate that is often not expressly justified according to the circumstances. Moreover, there is even a tendency to make a monetary valuation of the day of imprisonment, which is multiplied by the number of days in which the person was deprived of liberty as a precautionary measure, without specifying these particular conditions; see Manzanares Samaniego, J. L. "La indemnización por prisión provisional tras la STC 85/2019", *Diario La Ley*, Nº 9759, 2020; De Hoyos Sancho, M., *Efectos* ad extra *del derecho a la presunción de inocencia*, Valencia (Tirant lo Blanch), 202º, p. 79.

342 Thus, basic damages are awarded for the actual time spent unlawfully imprisoned, aggravated damages are awarded for any mental distress or injury to feelings caused by the unlawful arrest or detention and exemplary damages may be awarded – usually in exceptional circumstances - to punish the relevant authority for any particularly oppressive or insulting behaviour. These are only usually payable in exceptional circumstances. See, e.g., *Mohidin and Ors v Commissioner of Police of the Metropolis* [2015] EWHC 2740 (QB), which involved the unlawful arrest of three claimants. The first was awarded 200 GBP for five minutes detention and 2,300 GBP aggravated damages in respect of racist abuse for a few minutes. The second was assaulted, arrested and detained for 20 hours and was awarded 4,500 GBP for basic damages, 250 GBP for pain and suffering and 7,200 GBP aggravated damages partly due to the fact that false allegations made by a police officer meant that he was wrongly strip searched. The third was detained for 10 hours and was awarded 3000 GBP basic damages, 500 GBP for pain and suffering and 3,500 GBP aggravated damages.

258. Generally, claims for an unlawful deprivation of liberty can be brought at any stage in the proceedings. However, in Spain a claim for unlawful pre-trial detention must be made through the procedure for compensation for judicial error.[343] Moreover, in France, claims for damages can only be made once the relevant proceedings have ended.

259. Furthermore, any claim for recompense that is dependent upon an acquittal can, of course, only be given at that the conclusion of that stage of the proceedings.

260. The time limits for bringing claims vary significantly.

261. Thus, in Denmark there is a two-month time limit for appealing to the courts against a refusal by administrative authorities to award any compensation.[344] On the other hand, in France claims must be made within six months of the decision to terminate the proceedings or discharge or acquit the person concerned[345] and in Spain it is one year from the day on which the right to claim compensation could be exercised [346]. However, in England and Wales and Germany the general limitation periods are applicable.[347]

262. In all cases, the body ultimately determining any recompense will be a court[348] but in Denmark, Germany and Spain there must first be recourse to an administrative authority[349].

[343] Firstly, it must be declared by the Supreme Court that there has been a miscarriage of justice, which action must be brought within three months of the day on which it could be exercised (Article 293.1.a of the Law of Judiciary), after all appeals against the decision have been exhausted. Once the existence of the miscarriage of justice has been declared, the action before the administration to claim compensation for damages will be time-barred after one year, from the day on which it could be exercised; i.e., the moment when the error was declared (Article. 293.2 of the Law of Judiciary.

[344] Section 1018f of the Administration of Justice Act.

[345] Article 149-2 of the CCrP.

[346] i.e., the moment when there is a final acquittal; Article 294 of the Law of Judiciary.

[347] Three years in Germany, although there is some dispute regarding this as the matter is not properly regulated. In England and Wales it will be three years from the incident or diagnosis where a personal injury is involved but otherwise six years.

[348] In France, court decisions are open to appeal before the National Compensation Commission for Detentions, which is part of the Court of Cassation.

[349] In England and Wales, the police may make a payment without the need to take the case to court.

This study provides a comparative perspective on law and practices relating to the initial apprehension of a suspected offender, the subsequent deprivation of liberty based upon that act, and pre-trial detention in five jurisdictions in Council of Europe member States, namely: Denmark, England and Wales (one of the three jurisdictions within the United Kingdom), France, Germany and Spain.

Following an overview of each country's criminal justice system, this study examines the requirements of the European Convention on Human Rights, and the law and practice of the five jurisdictions relating to:

- arrest and custody;
- pre-trial detention;
- preventive detention; and
- compensation.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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