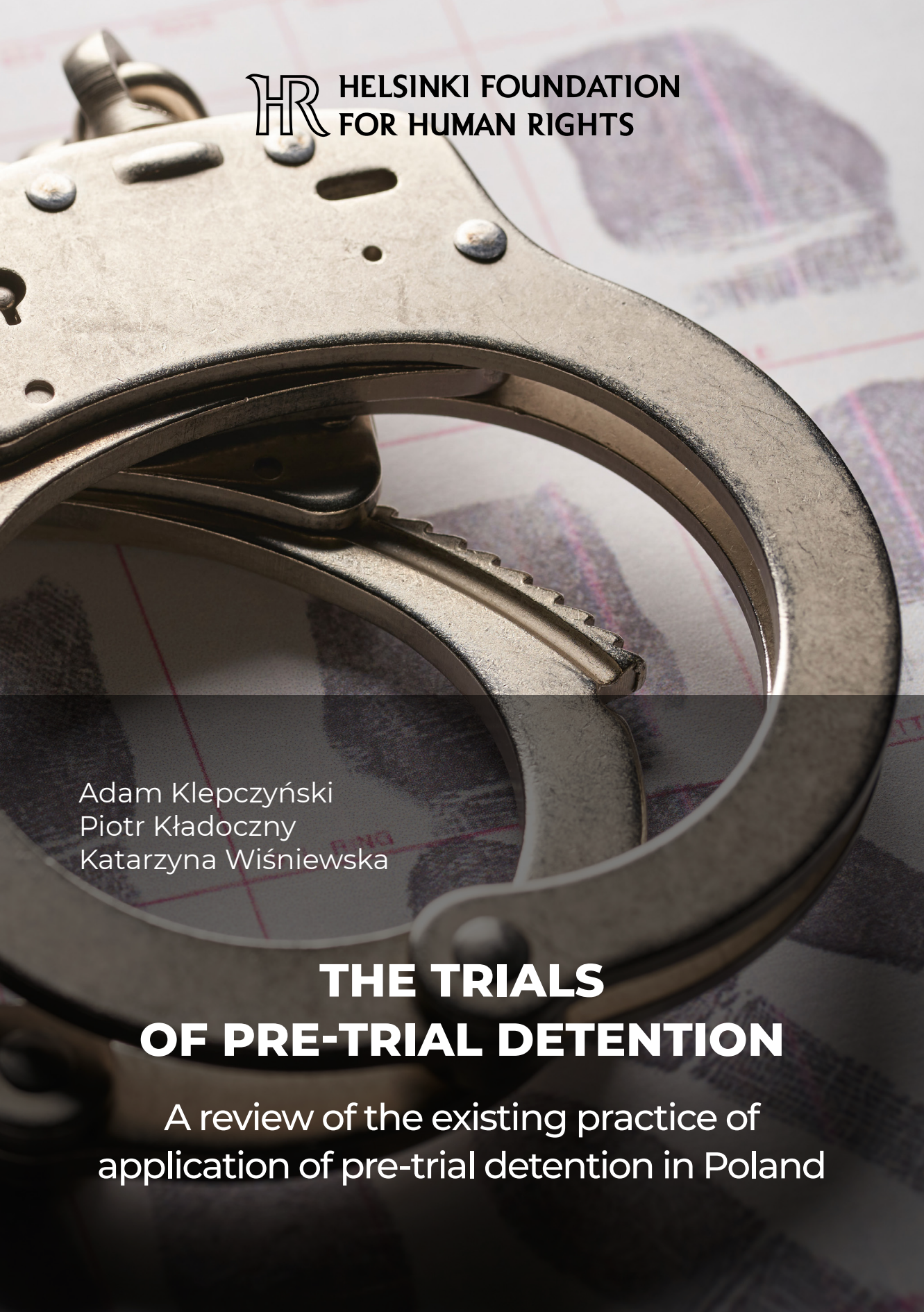

HELSINKI FOUNDATION FOR HUMAN RIGHTS

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THE TRIALS OF PRE-TRIAL DETENTION

A review of the existing practice of application of pre-trial detention in Poland

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Warsaw
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LIST OF ABBREVIATIONS

ECtHR, the Court	European Court of Human Rights
SC	Supreme Court (of Poland)
CT	Constitutional Tribunal
NPO	National Prosecutor's Office
CoA	Court of Appeal
RC	Regional Court
DC	District Court
CHR	Commissioner for Human Rights (Polish Ombudsman)
CCP	Act of 6 June 1997 – Code of Criminal Procedure (consolidated text: Polish Journal of Laws (J.L.) 2018, item 1987, as amended)
CC	Act of 6 June 1997 – Criminal Code (consolidated text J.L. 2018, item 1600, as amended)
ECHR, the Convention	Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, as amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (J.L. 1993, No. 61, item 284)
CoRP, the Constitution	Constitution of the Republic of Poland of 2 April 1997 (J.L. 1997 No. 78, item 483, as amended)
HFHR, the Foundation	The Helsinki Foundation for Human Rights

SUMMARY

- More than 10 years ago, the European Court of Human Rights issued a judgment in the case of *Kauczor v. Poland*, in which ECtHR for the first time held that the problem of abuse of pre-trial detention in Poland is of a structural nature.
- Since the *Kauczor* decision was delivered, a multitude of changes have been made to Polish criminal law, criminal policies, the structure of courts and organisation of the prosecution service, and the practices of criminal justice authorities. These changes have also had and still have an impact on the application of preventive measures, including the most severe of these measures, namely pre-trial detention.
- Due to the observed tendencies in case law, the reviewed decade can be divided into two distinct periods: the 2009-2015 period and the period from 2016 to the present.
- On the last day of 2009, 9460 individuals were held in pre-trial detention in various penitentiary institutions. This number was consistently decreasing: as of 31 December 2015, 4162 persons were held in pre-trial detention. However, this downward trend was not sustained, and in recent years we have seen a consistent and significant increase in the number of persons deprived of their liberty before the final sentence is handed down in their case. On 31 May 2019, as many as 8365 individuals were held in pre-trial detention.
- From 2009 to 2015, the percentage of persons in pre-trial detention in the general population of prisons and pre-trial detention centres was consistently falling, from 11.26% to 5.88%. However, since 2016, there has been an increase in the percentage of those under pre-trial detention. On 31 December 2018, the figure was 10.19%.
- Between 2009 and 2015, the number of prosecutor's requests for pre-trial detention fell by more than 14,000. However, a clear increase in the number of such requests is visible already for the period from 2016 to the end of 2018. In 2018, prosecutors filed 19,655 pre-trial detention requests.
- Currently, their effectiveness, or the percentage of the granted requests to apply pre-trial detention, is 90.46%. This is the lowest figure recorded since 2014. The effectiveness of the requests for an extension of pre-trial detention was 94.92% in 2018.
- In recent years, the number of persons held in pre-trial detention for more than one year has increased from 38 in 2016 to 161 in 2018.
- The percentage of foreigners in pre-trial detention in the total number of persons held in pre-trial detention in 2009-2014 remained stable at around 3.3%-3.6%. However, from 2014 onwards, the percentage of foreigners in pre-trial detention risen visibly, from 3.67% to 6.95% in 2018.

- In 2018, the number of foreigners in pre-trial detention (887) increased by more than 300 as compared to 2016.
- The reading of ECtHR judgments highlights a number of key problems associated with the application of pre-trial detention: the long duration of detention; the failure to give case-specific grounds for decisions on the application or extension of detention; disregard of non-custodial preventive measures; the recurrence of boilerplate arguments in extension decisions; citing the severity of the penalty or the nature of the alleged offence as a primary justification for the entire length of the requested pre-trial detention period.
- In view of the current trend in the use of pre-trial detention, concerns are raised by the most recent amendment to the Criminal Code (Act of 13 June 2019), which proposes a significant increase in the upper limits of criminal penalties for a large number of offences. Given the importance of "severe penalty which may be imposed on the accused" as grounds for applying pre-trial detention, it is difficult to not argue that a material increase in the upper limits of criminal penalties may lead to a surge in the number of pre-trial detention decisions.

BACKGROUND INFORMATION

Pre-trial detention is intrinsically linked to the fundamental rights and freedoms of the individual and, in particular, to personal freedom and the right to a fair trial and their inherent component, the principle of the presumption of innocence. These values are protected by both national and international law. Despite clear guidelines from international bodies, many countries are still experiencing issues relating to the abuse of pre-trial detention. This means that pre-trial detention has always been a focus of attention for human rights defenders. Indeed, ever since the HFHR started to operate, the Foundation has been undertaking monitoring, analytical, intervention and litigation activities in this area.[1]

It should also be noted that the practice of applying pre-trial detention is a litmus test capable of identifying key problems affecting the criminal justice system. Data on pre-trial detention must be taken into account in each analysis of such problems as:

- the excessive length of criminal proceedings;
- the overcrowding of penitentiary institutions;
- judicial miscarriages.

Currently, both in Europe and elsewhere in the world, there is a discussion on the use of custodial preventive measures and their feasible alternatives.[2] Such debate should also take place in Poland, especially given that the presently legislated legal acts – amendments to the Code of Criminal Procedure and the Criminal Code – will undoubtedly have an impact on the practice of criminal justice authorities in conducting preliminary proceedings, as well as in applying preventive measures.

1 P. Kładoczny, K. Wiśniewska, J. Smętek, A. Bodnar, *Praktyka tymczasowego aresztowania. Raport z badania*, Warsaw 2016, http://www.hfhr.pl/wp-content/uploads/2016/07/HFPC_raport_tymczasowe-aresztowanie_2016.pdf (accessed on 19-06-2019).

2 Cf. *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation*, Parlament Europejski, August 2018, http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf accessed on 19-06-2019); Update report: "*A Measure Of Last Resort? The practice of pretrial detention decision making in the EU*", Fair Trials, 2016, https://www.fairtrials.org/sites/default/files/publication_pdf/LEAP%20Update%20policy%20paper%20PTD.pdf (accessed on 19-06-2019), *Area of freedom, security and justice: Cost of non-Europe*, European Parliament, May 2019, http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/631730/EPRS_BRI(2019)631730_EN.pdf (accessed on 19-06-2019).

We prepared this publication guided by the conviction that it is necessary to hold an in-depth discussion on the practice of pre-trial detention and relevant legislative solutions. This report is primarily based on the analysis of statistical data provided or published by the Ministry of Justice, the National Public Prosecutor's Office and the Prison Service.

PRE-TRIAL DETENTION IN THE POLISH LEGAL SYSTEM

Pre-trial detention is the most severe preventive measure. The essence of this measure is to deprive the suspect/accused of their liberty for a predetermined period of time during which they remain in the custody of the prosecutor or the court. Pursuant to Article 249 § 1 CCP, preventive measures, including pre-trial detention, are applied for the purpose of securing the proper course (integrity) of the proceedings. In preliminary proceedings, as laid down in Article 249 § 2 CCP, pre-trial detention may be applied only against a person against whom a decision to present charges has been issued. The general rationale for applying pre-trial detention is to prevent the suspect/accused from committing a new and serious offence. Moreover, according to Article 249 § 2 CCP, the most severe preventive measure can only be applied if there is compelling evidence to suggest that the suspect/accused has committed the offence in question. At the same time, Article 258 §§ 1-2 CCP sets out the following specific grounds for the application of pre-trial detention: the existence of a justified concern that the suspect/accused will abscond or go into hiding, in particular where their identity cannot be established or when they have no permanent place of residence in the country; the existence of a justified concern that the suspect/accused will attempt to induce others to give false testimony or explanations or to obstruct the proper course of proceedings by any other unlawful means; the fact that the suspect/accused has been charged with a felony or a misdemeanour punishable with imprisonment with an upper limit of at least 8 years or sentenced by the first instance court to imprisonment for a minimum period of 3 years; the need to apply pre-trial detention in order to secure the proper course of proceedings can be justified by the severity of the penalty that the accused may face upon conviction. Furthermore, Article 258 § 3 CCP provides that pre-trial detention may be applied based on a reasonable expectation that the suspect/accused charged with a felony or an intentional misdemeanour may commit an offence against life, health or public safety, especially if the suspect/accused has threatened to commit such an offence.

Pursuant to Article 250 CCP, pre-trial detention may only be imposed by court decision. Pre-trial detention is ordered in pre-trial proceedings by the district court local to the proceedings, at the request of the prosecutor. If an indictment is filed with the court, pre-trial detention is ordered by the court that hears the case. Pursuant to Article 252 CCP, the suspect/accused have 7 days to lodge an interlocutory appeal against the detention decision. Such an appeal should be considered

not later than within 7 days from the date it was submitted to the court together with necessary case files.

Article 263 CCP defines the length of pre-trial detention. In accordance with Article 263 § 1 CCP, the period of pre-trial detention ordered in the course of preliminary proceedings may not exceed three months. However, pursuant to Article 263 § 2 CCP, if, due to the special circumstances of a case, preliminary proceedings cannot be concluded within three months, then, at the prosecutor's request, the first instance court competent to hear the case may, if a need arises, extend pre-trial detention to an aggregate period of a maximum twelve months. Article 263 § 3 CCP provides that the total duration of pre-trial detention, counted from the date of the first instance judgment may not exceed two years. Pursuant to Article 263 § 4 CCP, a court of appeal may order an extension of pre-trial detention for a fixed period that may be longer than the aforementioned time frames. An extension may be ordered at the request of the court that hears the case (in preliminary proceedings – at the request of a competent prosecutor, directly superior to the prosecutor conducting or supervising the investigation) – if such a necessity arises in connection with the suspension of the criminal proceedings, steps taken to establish or confirm the identity of the accused, the taking of evidentiary procedures in a particularly complex case or abroad, or the accused intentionally stalling the proceedings.

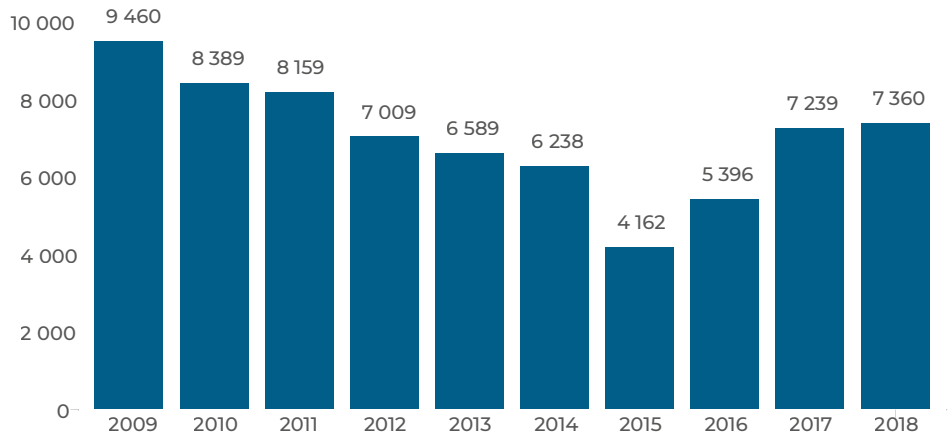
The frequency of use of pre-trial detention within the national legal system is the resultant of a number of factors, the key of which are:

- the level and structure of crime;
- population size;
- migration processes;
- the effectiveness of law enforcement bodies;
- the availability of non-custodial preventive measures;
- laws setting out grounds for the application of pre-trial detention;
- the speed of criminal proceedings.

PRE-TRIAL DETENTION IN NUMBERS

Number of persons in pre-trial detention

Number of persons in pre-trial detention as of 31 December of a given year[3]



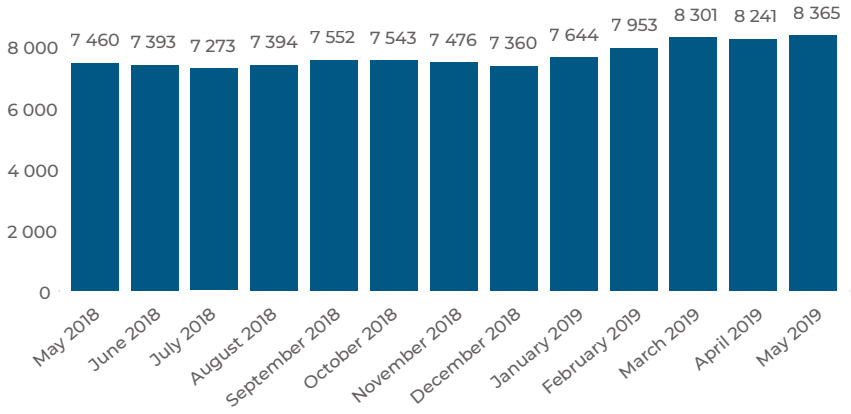
The last decade has been a period of many changes in the criminal policies and the practice of criminal justice authorities. They were a consequence of introduced legislative changes, but also of the judicial practice, being increasingly better aligned with the standards developed in the case law of the European Court of Human Rights and the Constitutional Tribunal.

It follows from the above that these factors have also affected the application of pre-trial detention. At the end of 2009, 9460 individuals were held in pre-trial detention in various penitentiary institutions. This number was consistently decreasing and reached the level of 4162 as of 31 December 2015. However, this downward trend was not sustained, and in recent years we have seen a consistent and significant increase in the number of persons deprived of their liberty before the final sentence is handed down in their case. On 31 May 2019, 8365 individuals were held in pre-trial detention.[4]

3 The chart is based on statistics published by the Prison Service at https://www.sw.gov.pl/dzial/statystyka (accessed on 19-06-2019).

4 The statistics on the number of persons remaining in pre-trial detention as of 31 May 2019 was published by the Prison Service at https://www.sw.gov.pl/dzial/statystyka (accessed on 19-06-2019).

Number of persons in pre-trial detention (end of month)[5]



It is also worth presenting the rate of growth in the number of people recently put in pre-trial detention. In order to show the extent of the changes, we decided to present data from the Prison Service reports for the last year. These data reveal an annual increase in the number of individuals put in pre-trial detention at the level of ca. 900, giving proof of clearly visible changes that must give rise to legitimate concerns.

Year	Number of persons in pre-trial detention as of 31 December	Population of inmates of prisons and detention centres as of 31 December	Percentage share of pre-trial detainees in the general population of penitentiary institutions
2009	9 460	84 003	11,26%
2010	8 389	80 728	10,76%
2011	8 159	81 382	10,02%
2012	7 009	84 156	8,33%
2013	6 589	78 994	8,34%
2014	6 238	77 371	8,06%
2015	4 162	70 836	5,88%
2016	5 396	71 528	7,54%
2017	7 239	73 822	9,8%
2018	7 360	72 204	10,19%

Number of persons in pre-trial detention as of 31 December[6]

5 The chart is based on statistics published by the Prison Service at https://www.sw.gov.pl/dzial/statystyka (accessed on 19-06-2019).

6 The table is based on statistics published by the Prison Service at: https://www.sw.gov.pl/strona/statystyka-roczna (accessed on 19-06-2019).

From 2009 to 2015, the percentage of pre-trial detainees in the general population of prisons and pre-trial detention centres was consistently falling, from 11.26% to 5.88%. However, since 2016, there has been an almost a 50% increase in the number of pre-trial detainees. On 31 December 2018, the figure was 10.19%.

The number and effectiveness of prosecutor's pre-trial detention requests filed in preliminary proceedings

Year	Pre-trial detention requests filed in preliminary proceedings	Decisions ordering pre-trial detention in preliminary proceedings	Percentage of granted pre-trial detention requests
2009	27 693	24 755	89,39%
2010	25 688	23 060	89,77%
2011	25 452	22 748	89,37%
2012	22 330	19 786	88,60%
2013	19 410	17 490	90,11%
2014	18 835	17 231	91,48%
2015	13 665	12 580	92,06%
2016	15 172	13 791	90,90%
2017	18 750	17 140	91,41%
2018	19 655	17 762	90,46%

Pre-trial detention in preliminary proceedings[7]

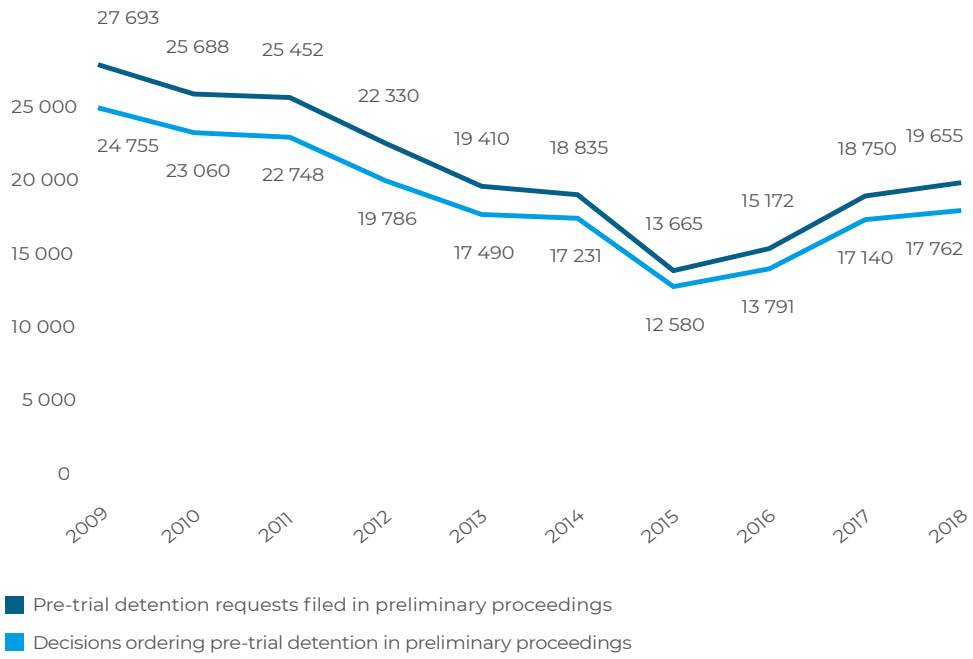
The above table shows that between 2009 and 2015 the number of prosecutor's requests for pre-trial detention fell by more than 14,000. However, the figure for the years 2016-2018 increased by 6,000. According to the data obtained from the Ministry of Justice[8], the largest number of requests for the application of custodial preventive measures is recorded by district courts in the appellate judicial circuits of Warsaw, Gdańsk, Poznań, Lublin, Łódź, Katowice and Wrocław. In 2018 alone, 823

7 The table was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

8 The HFHR obtained access to the above data from the Ministry of Justice based on a public information request submitted pursuant to the Act of 6 September 2001 on Access to Public Information ("Access to Information Act", consolidated text: J.L. 2018, item 1330, as amended). The data were provided by letter dated 12 April 2019, ref. DSF-II.082.75.2019.

requests for pre-trial detention were filed in district courts of the Warsaw circuit, 1129 in the Gdańsk circuit, 659 – in the Katowice circuit, 738 – in the Kraków circuit, 750 – in the Lublin circuit, 768 – in the Łódź circuit, 809 – in the Poznań circuit and 801 – in the Wrocław circuit. Country-wide, the lowest number of requests are filed in district courts of the Rzeszów circuit, where approximately 550 applications were registered annually in the period 2014-2018. This disproportionately low number of requests, as compared to other circuits, is likely to result from the differences in size between circuits.

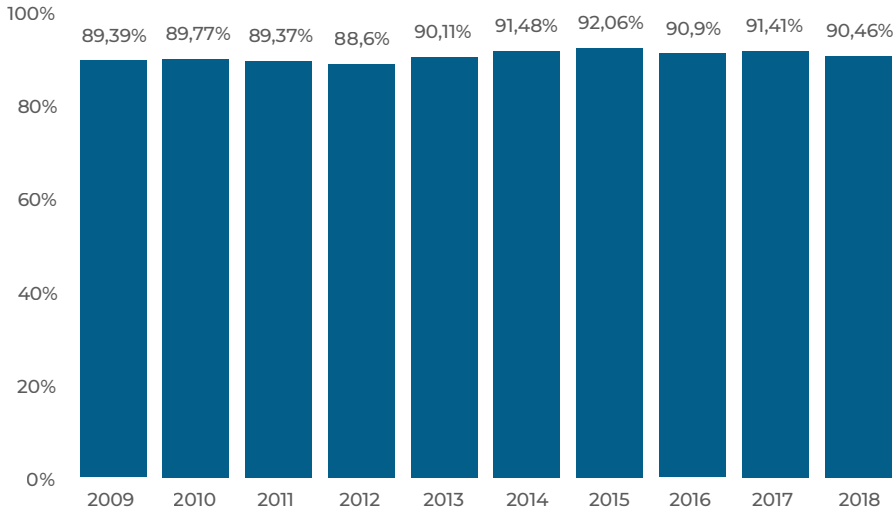
Number and effectiveness of pre-trial detention requests filed in preliminary proceedings[9]



The difference between the number of submitted pre-trial detention requests and the number of detention decisions ranges from approximately 1,000 to 3,000. What is more, the greatest differences had been observed until 2014, which was followed by a period of decreases that lasted until 2015. The difference then started to expand to reach the level of nearly 2,000 in 2018.

9 The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

Percentage of granted requests to apply pre-trial detention in preliminary proceedings[10]



The above statistics lead to the conclusion that an increase in the number of applications does not always results in an increase of their effectiveness. The effectiveness of submitted applications was the highest in 2015. This can be explained, in particular, by the much lower number of submitted requests for pre-trial detention, which, in turn may suggest that prosecutors filed such requests only in well-substantiated cases. The difference between the number of decisions issued and that of requests submitted at the time was just over 1000. However, in 2017, despite an increase in the number of requests for pre-trial detention, their effectiveness (91.41%) did not decrease significantly, which is the opposite trend to the one described above. On the other hand, 2018 saw another decrease in the effectiveness of prosecutorial requests, which was accompanied by an increase in the number of requests filed in relation to 2017. This may arguably suggest that prosecutors were too eager to request pre-trial detention and/or that the courts were stricter in examining the requests.

10 The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

The number and effectiveness of requests to extend pre-trial detention filed in preliminary proceedings

Year	Requests to extend pre-trial detention (filed in preliminary proceedings)	Granted requests to extend pre-trial detention	Effectiveness of extension requests (%)
2009	11 951	11 427	95,61%
2010	11 433	10 841	94,82%
2011	10 780	10 272	95,29%
2012	9 789	9 308	95,08%
2013	8 809	8 445	95,86%
2014	8 621	8 289	96,14%
2015	6 509	6 264	96,23%
2016	7 659	7 242	95,55%
2017	10 684	10 156	95,06%
2018	12 841	12 189	94,92%

Requests to extend pre-trial detention filed in preliminary proceedings and its efectiveness[11]

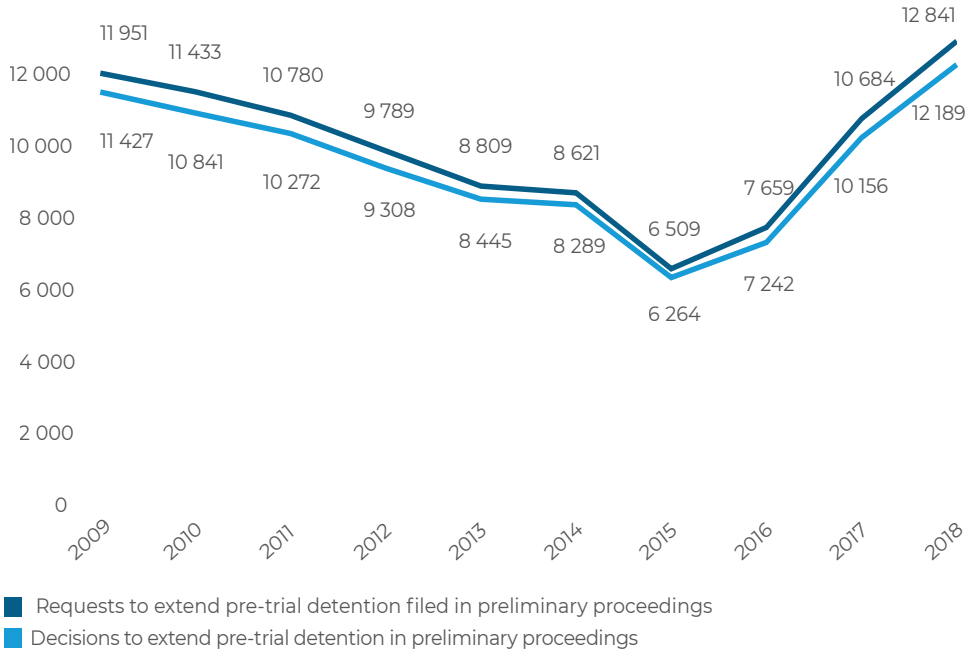
The number of requests to extend pre-trial detention also was decreasing until 2015, which correlates with the falling number of requests to apply pre-trial detention. At the same time, in 2016-2018, the number of applications to extend pre-trial detention increased by 50%. According to the data obtained from the Ministry of Justice[12], the largest number of applications for the extension of pre-trial detention in 2014-2016 (550 annually) were filed with district courts belonging to the appellate circuits of Warsaw, Łódź and Gdańsk. Later, in 2017-2018, the district courts of the above circuits were joined by the district courts of the Katowice, Kraków, Poznań, Szczecin and Wrocław appellate circuits. Country-wide, the lowest number of extension requests are filed in district courts of the Rzeszów appellate circuit. Similar observations can be made for regional courts. In the years 2014-2016, regional courts of the Warsaw, Łódź and Gdańsk appellate judicial circuits received the largest number of requests for the extension

11 The table was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

12 The HFHR obtained access to the above data from the Ministry of Justice based on a public information request submitted pursuant to the Access to Information Act. The data were provided by letter dated 12 April 2019, ref. DSF-II.082.75.2019.

of pre-trial detention. In 2017-2018, the regional courts of the Katowice, Kraków, Poznań, Szczecin and Wrocław circuits joined this group. Again, the lowest number of extension requests were submitted to regional courts of the Rzeszów appellate circuit.

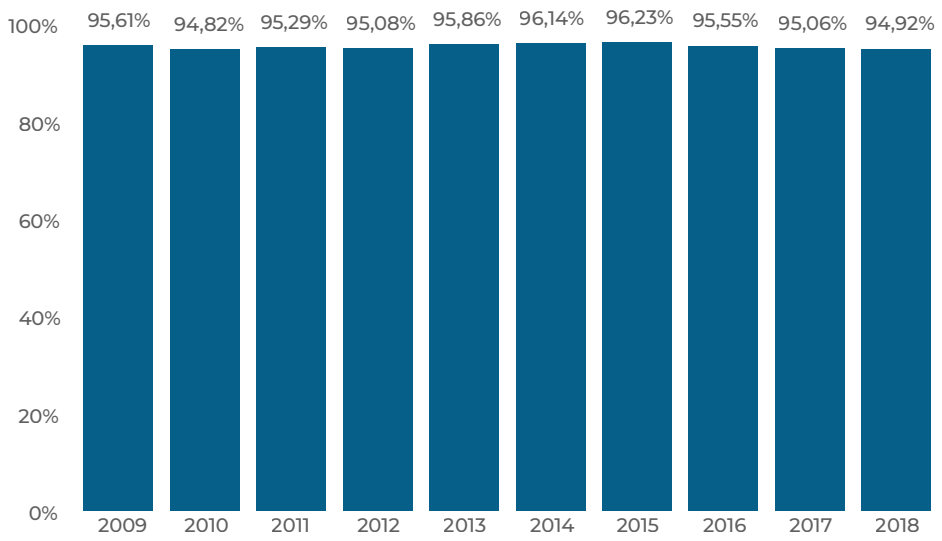
Number and effectiveness of requests to extend pre-trial detention filed in preliminary proceedings[13]



As compared to the number of requests to apply for pre-trial detention, the number of requests for the extension of pre-trial detention does not differ significantly from the number of issued extension decision. Therefore, the effectiveness of prosecutorial extension requests is high. Notably, the difference between the number of filed and granted extension requests was most virtually non-existent in 2015; also, the difference decreased when fewer extension requests were made.

13 The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

Percentage of granted requests to extend pre-trial detention[14]



Before 2012, the effectiveness of prosecutor's requests for the extension of pre-trial detention (filed during preliminary proceedings) was fluctuating. However, in 2013 the effectiveness of prosecutor's requests increased, probably due to a decrease in the number of requests for the extension of pre-trial detention. This was followed by a period of lowering effectiveness, starting from 2016. This trend is similar to that observed for the number of requests to apply pre-trial detention. It should also be noted that over the last decade, the percentage of granted prosecutorial requests for the extension of pre-trial detention tend to remain stable at the level between 94.5% and 96%. This means that only about 5% of extension requests are dismissed by courts, leading to the suspect's (or accused's) release.

14 The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

Interlocutory appeals against pre-trial detention

a) The inflow of interlocutory appeals to district courts

Year	Filed interlocutory appeals against pre-trial detention	Affirmed interlocutory appeals against pre-trial detention	Percentage of effective interlocutory appeals against pre-trial detention
2009	5 324	749	14,07 %
2010	5 630	485	8,61 %
2011	5 867	443	7,55 %
2012	6 698	462	6,90 %
2013	6 121	308	5,03 %
2014	3 733	663	17,76 %
2015	3 017	157	5,20 %
2016	2 352	99	4,20 %
2017	3 706	159	4,29 %
2018	4 505	168	3,73 %

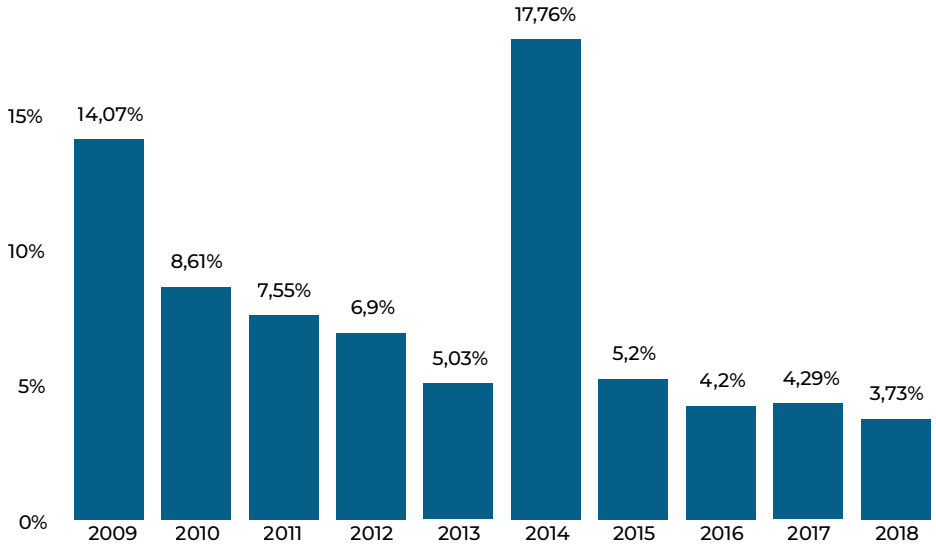
Effective interlocutory appeals against pre-trial detention[15]

As the above figures show, despite a decrease in the number of requests to apply or extend pre-trial detention in 2009-2013, the number of appeals against these requests increased in that period. It should be noted that in 2014 the number of appeals fell by almost 2,500. Importantly, in 2016-2018, a period of an increasing number of both types of pre-trial detention requests, we also observed a nearly 50% increase in the number of submitted interlocutory appeals. It should also be noted that, according to the data provided by the Ministry of Justice[16], district courts of the Warsaw, Gdańsk or Lublin appellate circuits received the largest number of interlocutory appeals in 2014-2018. It also correlates with the number of pre-trial detention decisions issued in those circuits. In 2014, the lowest number of interlocutory appeals were filed in district courts of the Rzeszów (159) and Szczecin (162) circuits; in 2015 – in the Rzeszów (119) and Białystok (137) circuits; in 2016 – in the Rzeszów (57) and Szczecin (57) circuits; in 2017 – in the Szczecin (64) circuit; and in 2018 – in the Rzeszów (149) circuit.

15 The table was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

16 The HFHR obtained access to the above data from the Ministry of Justice based on a public information request submitted pursuant to the Access to Information Act. The data were provided by letter dated 12 April 2019, ref. DSF-II.082.75.2019.

Percentage of affirmed interlocutory appeals against pre-trial detention[17]



The chart above shows that over the period from 2009 to 2013 the effectiveness of the appeals registered in district courts decreased. In 2014, there was a steep increase of their effectiveness in comparison to 2013 – by as much as 12%. According to the data provided by the Ministry of Justice, district courts in the Gdańsk judicial circuit affirmed as many as 109 out of 215 filed interlocutory appeals against pre-trial detention decisions. Also, 25 out of 55 interlocutory appeals filed with district courts of the Legnica circuit were affirmed. In the following years, there was again a 12% decrease in the effectiveness of appeals.

b) The inflow of interlocutory appeals to regional courts

Year	Filed interlocutory appeals against pre-trial detention	Affirmed interlocutory appeals against pre-trial detention	Percentage of effective interlocutory appeals against pre-trial detention
2009	2 144	137	6,39 %
2010	2 313	96	4,15 %
2011	1 762	180	10,22 %
2012	1 946	66	3,40 %
2013	1 959	102	5,21 %

17 The chart was prepared on the basis of the statistics entitled *Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018* (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

Year	Filed interlocutory appeals against pre-trial detention	Affirmed interlocutory appeals against pre-trial detention	Percentage of effective interlocutory appeals against pre-trial detention
2014	1 528	53	3,46 %
2015	1 457	33	2,26 %
2016	1 280	37	2,89 %
2017	1 463	44	3,01 %
2018	1 917	16	0,83 %

Effective interlocutory appeals against pre-trial detention[18]

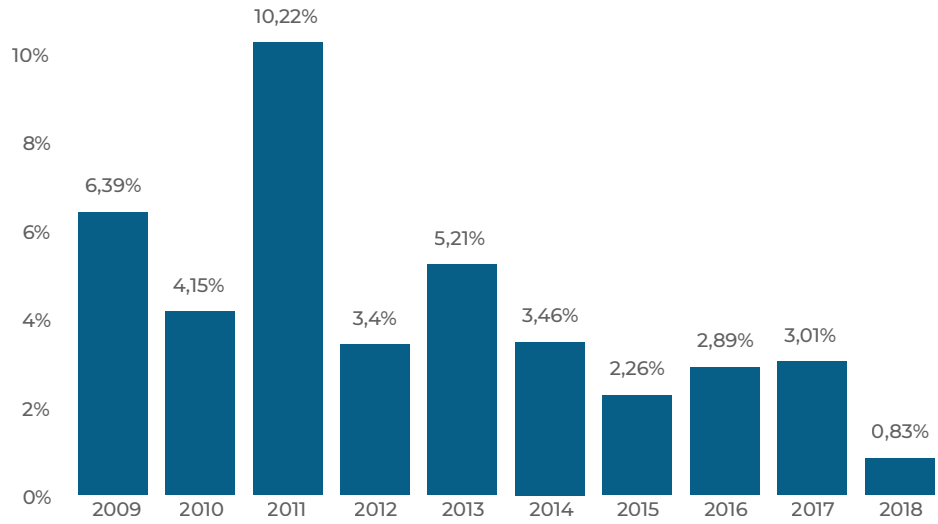
The above data provide no unambiguous indication, as it was in the case of district courts, that the number of interlocutory appeals against the application or extension of pre-trial detention correlates[19] with the decrease in the number of requests for the application or extension of pre-trial detention. Above all, no such connection can be detected in 2009-2013. It can only be seen in the years 2014-2018, the period marked by an initial decrease in the number of pre-trial detention requests followed by a constant increase in the number of such requests. Importantly, according to data released by the Ministry of Justice[20], the highest number of interlocutory appeals recorded in regional courts in 2014 were submitted in the Gdańsk and Lublin appellate judicial circuits, while in the period between 2015 and 2017, regional courts of the Warsaw, Gdańsk and Lublin circuits received the largest number of appeals against pre-trial detention decisions. In 2018, the regional courts of the Katowice appellate circuit joined the above mentioned regional courts. In 2014, the lowest number of interlocutory appeals were filed with regional courts of the Białystok (58), Poznań (55) and Rzeszów (14) appellate circuits; in 2015 – with the courts of the Rzeszów (29) and Poznań (2) circuits; in 2016 – with the courts of the Poznań (2), Rzeszów (35), Białystok (37) and Wrocław (23) circuits; in 2017 – with the courts of the Poznań (2) and Wrocław (50) circuits; and in 2018 – with the courts of the Poznań circuit (1).

18 The table was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019)

19 In this report, the notion of "correlation" is given the colloquial rather than statistical meaning.

20 The HFHR obtained access to the above data from the Ministry of Justice based on a public information request submitted pursuant to the Access to Information Act. The data were provided by letter dated 12 April 2019, ref. DSF-II.082.75.2019.

Percentage of affirmed interlocutory appeals against pre-trial detention[21]

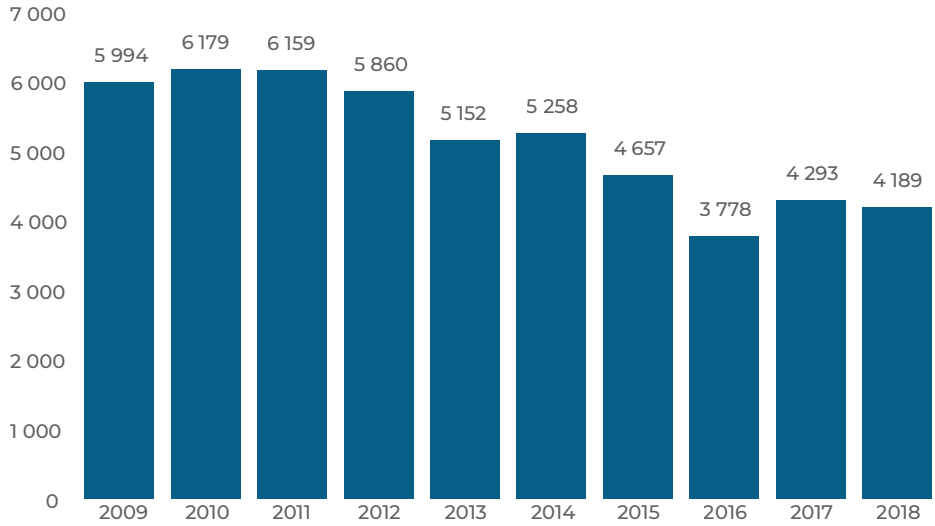


The chart above shows that there is no single trend related to the outcomes of interlocutory appeals against pre-trial detention. What can be observed is that the effectiveness of appeals against pre-trial detention declined in 2013-2015, the period during which we saw a decrease in the number of the appeals filed. In the next two years, 2016-2017, when the number of requests for the application or extension of pre-trial detention was growing, the effectiveness of appeals was also increasing. On the other hand, in 2018, the increasing number of requests was accompanied by a significant decrease in appeals' effectiveness.

21 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

Prosecutor's revocation of pre-trial detention at the stage of preliminary proceedings

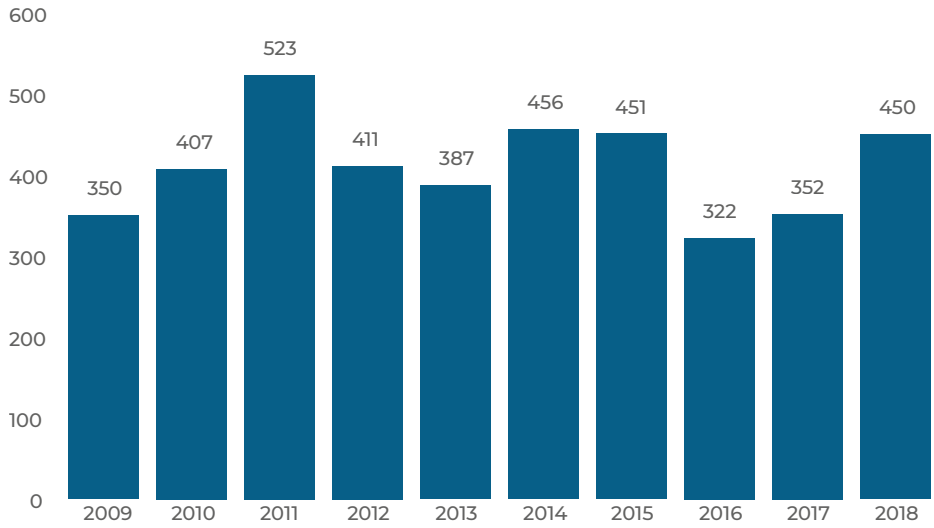
a) The revocation of pre-trial detention by the prosecutor pursuant to Article 253 § 1 CCP[22]



Under Article 253 § 1 CCP, pre-trial detention must be immediately revoked or changed if the reasons for its application cease to exist, or if any reasons justifying its revocation come into being. As shown in the chart above, the number of revocations of pre-trial detention based on the grounds mentioned is connected with a decrease in the number of persons put in pre-trial detention. This means that the 2010-2015 decrease in the number of persons held in pre-trial detention coincided with a decrease in the number of prosecutorial revocations of pre-trial detention. However, despite an increase in the number of persons held in pre-trial detention in 2016, the number of prosecutor's revocations continued to decrease. In 2017 the population of pre-trial detainees started to increase again, as well as we observe an increase in the number of revocations of pre-trial detention based on Article 253 § 1 CCP. In 2018 the number of revocations of pre-trial detention decrease.

22 The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

b) The revocation of pre-trial detention by the prosecutor pursuant to Article 254 CCP[23]



In accordance with Article 254 CCP, a person held in pre-trial detention may make a request to the prosecutor for the revocation of their detention. The above data do not reveal a single trend in relation to the effectiveness of requests for the revocation of pre-trial detention. However, it is worth noting that, in 2018, the effectiveness of revocation requests increased by almost 100 in comparison with 2017.

The court-requested extension of pre-trial detention by the court of appeal pursuant to Article 263 § 4 CCP

Pursuant to Article 263 § 4 CCP, a court of appeal may extend pre-trial detention, at the request of a district or regional court, beyond the time limit specified in Article 263 § 3 CCP, which provides that: *"The total period of pre-trial detention until the delivery of the first judgment by the first instance court shall not exceed two years."*

23 The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

	Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
District courts	Persons concerned	b/d	b/d	42	70	18	24	41	10	7	19
	Cases concerned	27	13	34	11	19	19	13	7	10	19
Regional courts	Persons concerned	b/d	b/d	583	536	355	313	252	173	173	203
	Cases concerned	413	412	192	164	125	159	119	88	84	110

The court-requested extension of pre-trial detention by the court of appeal pursuant to Article 263 § 4 CCP[24]

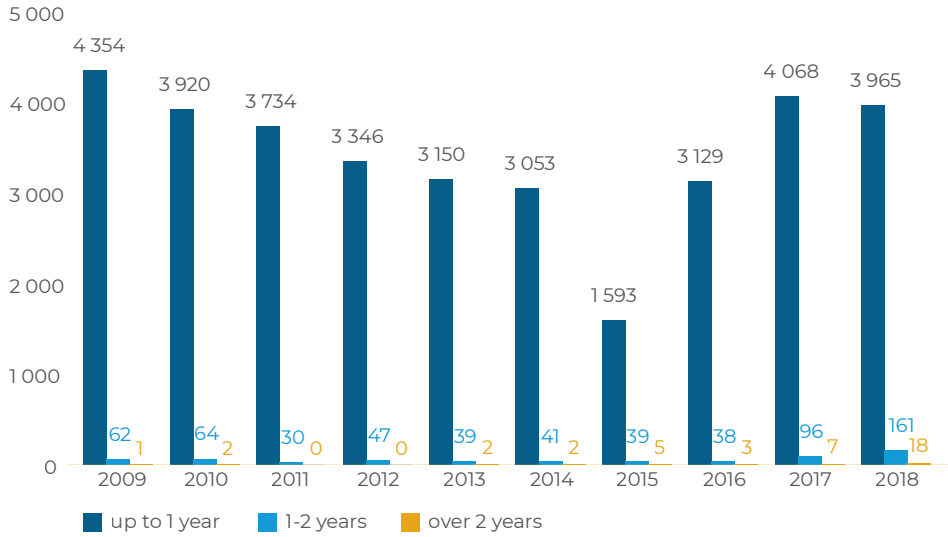
For district courts, no downward or upward trend can be identified based on the table above. For example, the number of persons held in pre-trial detention under Article 263 § 4 CCP was the highest in 2012, only to fall by 52 in the following year. It should only be noted that the years 2016-2018 saw a growing number of decisions authorising extensions of pre-trial detention upon the expiry of the time limit specified in Article 263 § 3 CCP. In 2011-2017 the number of persons whose pre-trial detention was extended under Article 263 § 4 CCP at the request of regional courts decreased. However, between 2017 and 2018, there was an increase in the number of persons whose pre-trial detention was extended under Article 263 § 4 CCP. It is also worth noting that in the years 2009-2013, and then in 2015-2017, there was a downward trend in the number of *cases* in which pre-trial detention was ordered under Article 263 § 4 CCP. However, between 2017 and 2018, the number of such cases increased.

Duration of pre-trial detention

One of the biggest problems observed by human rights defenders is the excessive duration of custodial preventive measures. Unreasonable length of pre-trial detention is also one of the most frequently raised allegations in Polish applications lodged with the European Court of Human Rights. As courts and prosecutor's offices compile their relevant statistics separately, it is not possible to indicate the average duration of pre-trial detention in Poland, which constitutes a great difficulty in the assessment of this issue.

24 The HFHR obtained access to the above data from the Ministry of Justice based on a public information request submitted pursuant to the Access to Information Act. The data were provided by letters, dated 12 April and 29 May 2019, ref. DSF-II.082.75.2019.

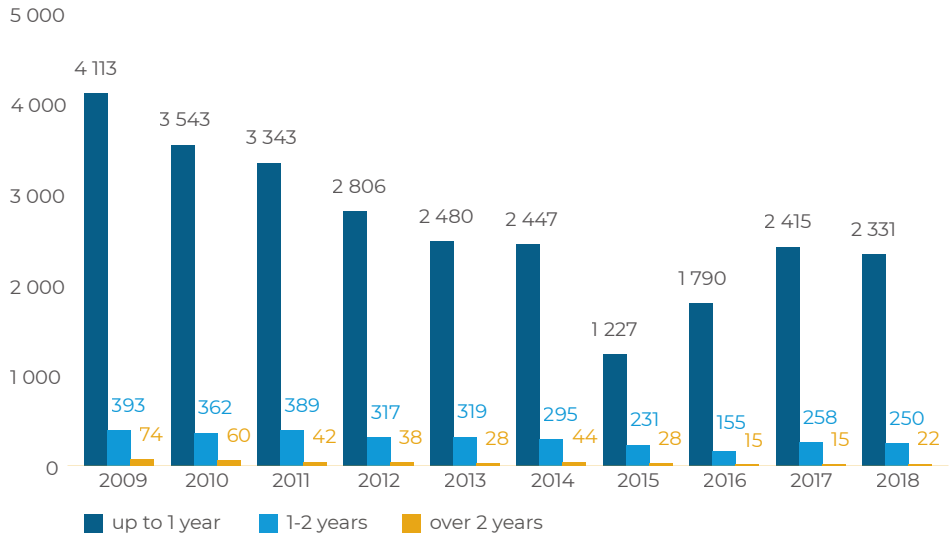
Number of persons in pre-trial detention broken down according to the duration of detention in preliminary proceedings[25]



The above data permit to determine that the number of persons held in pre--trial detention in the course of preliminary proceedings for a period longer than one year increased considerably in 2018 (in 2017 there were 103 such detainees, as compared to a notable 179 in 2018). 2018 saw also an increase in the number of persons held in pre-trial detention for more than two years (18, as compared to 7 in 2017). At the same time, it is worth noting that the percentage of pre-trial detainees held for a period from one to two years to the number of all pre-trial detainees increased, from 1.19% in 2016 to 3.88% in 2018 (against the general population of individuals in pre-trial detention during preliminary proceedings). In 2018, there was an observable increase in the number of persons held in pre-trial detention for more than two years to the number of all pre-trial detainees held during preliminary proceedings (0.43%, as compared to a mere 0.09% in 2016).

25 The chart was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2009-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 19-06-2019).

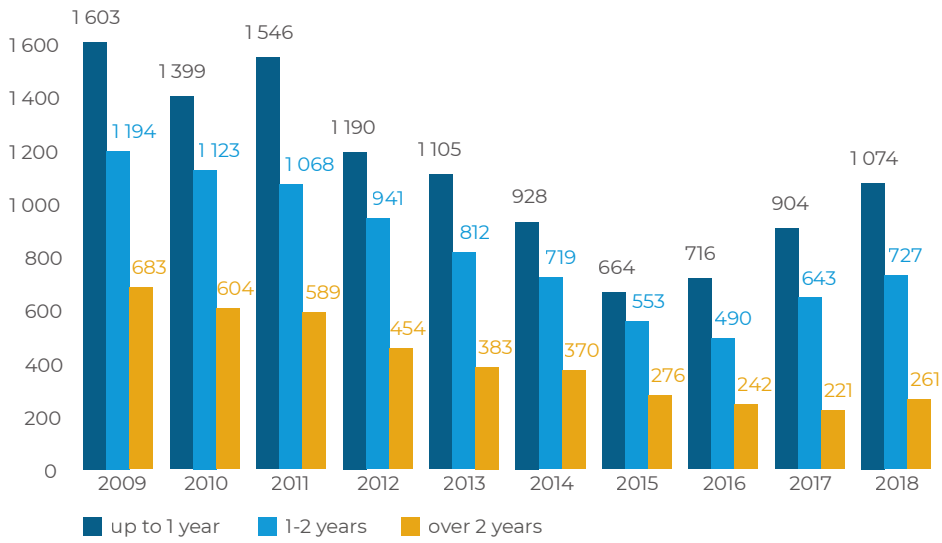
Number of persons in pre-trial detention broken down according to the duration of detention – district courts[26]



As shown in the chart above, the number of persons held in pre-trial detention for a period not exceeding one year in the course of proceedings before district courts was decreasing in the years 2009-2015. It is worth noting that a nearly 50% decrease was observed in 2014-2015. At the same time, since 2016, the number of persons detained for one year or less has been again increasing. It is also worth noting that the number of pre-trial detainees held for a period between one and two years has been increasing since 2016, and their percentage share in the general population of pre-trial detainees rose from 7.90% in 2016 to 9.60% in 2018.

26 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

Number of persons in pre-trial detention broken down according to the duration of detention – regional courts[27]

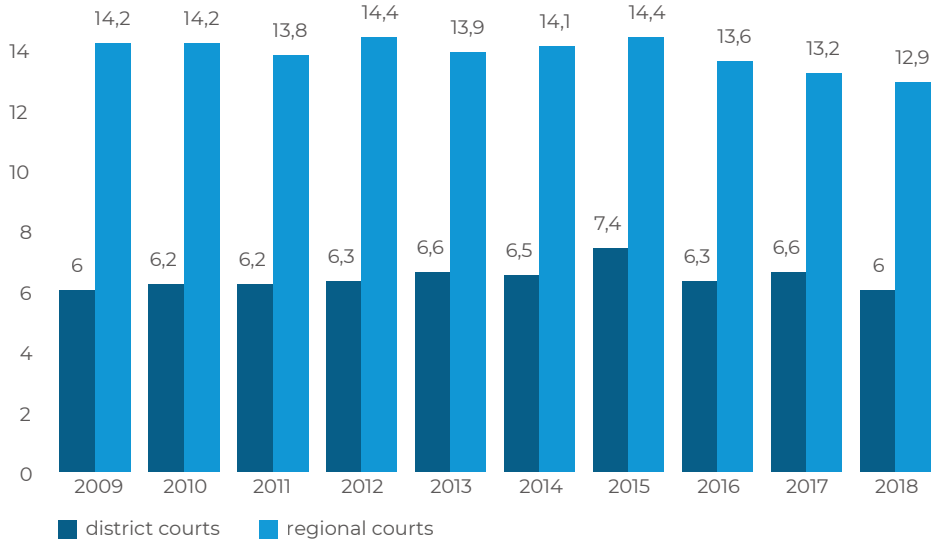


Between 2009 and 2015, there was a downward trend in the number of persons held in pre-trial detention for a period of between one and two years in the course of proceedings before regional courts. As for persons held in pre-trial detention for a period not exceeding one year, such a trend became visible from 2011. At the same time, the both groups increased in 2016-2018. Moreover, the period from 2009 to 2017 saw a decrease in the number of pre-trial detainees held for more than two years. However, in 2018, this figure started to increase again. It is certainly worth pointing out that the change in the size of the individual categories may be mainly attributable to a change in the general trend in the application of pre-trial detention.

On the other hand, the ratio of persons held in pre-trial detention for more than two years fell from 18.48% to 12.65% in comparison with the remaining two groups between 2015 and 2018.

27 The chart was prepared on the basis of the statistics entitled *Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018* (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

Average duration of pre-trial detention (months) ordered by district and regional courts in 2009-2018[28]



In 2018, the average duration of pre-trial detention ordered by district courts was 6 months. The chart above shows that, the average duration of pre-trial detention ordered by the district courts in 2009-2015 increased on an annual basis. Between 2014 and 2015 this duration grew by almost one month. In 2016, it fell by more than one month. The decrease continued in the years 2017-2018. However, it should be noted that the presented data are insufficient to determine the average duration of pre-trial detention pending the first instance ruling.

In 2018, the average duration of pre-trial detention ordered in the course of proceedings before regional courts was 12.9 months. It should be noted that in the case of the regional courts, there is no uniform trend as to the duration of pre-trial detention for the period 2009-2012. It is only from the period from 2013 to 2015 that an increase in the average duration of pre-trial detention can be observed. From 2016 to 2018 we observe a decrease in this regard.

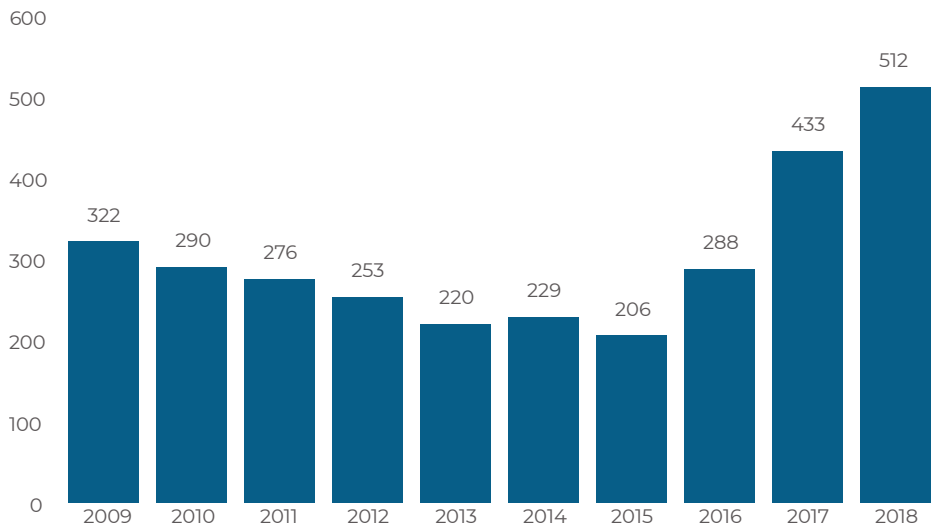
28 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

The application of pre-trial detention against foreign nationals

One of the most frequently aspect of pre-trial detention discussed internationally is the overuse of this measure against foreign nationals. As indicated in a report to the European Parliament, pre-trial detention is disproportionately often imposed on foreign suspects due to a presumed risk of flight[29]. In the wake of this phenomenon being defined as a pan-European problem, certain scholars and practitioners call for the creation of pan-European recommendations.

The above claims can also be confirmed through a review of the Polish practices in this area. The available statistical data can serve as the starting point for an analysis of this subject. However, the formulation of more categorical conclusions would require a thorough reading of the files of cases that involve foreign suspects or accused persons.

Number of foreign nationals in pre-trial detention as of 31 December[30]

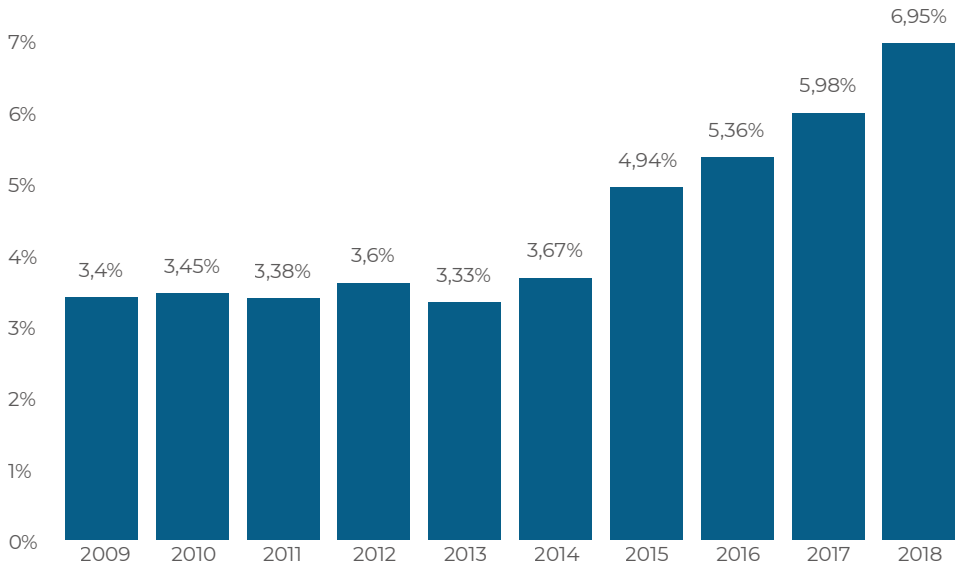


29 *Procedural Rights and Detention Conditions. Cost of Non-Europe Report*, European Parliament, December 2017, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf (accessed on 19-06-2019); see also M. F. Aebi, M. M. Tiago, *Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report*, Council of Europe, http://wp.unil.ch/space/files/2019/06/Key-Findings_190611.pdf (accessed on 19-06-2019).

30 The chart is based on statistics published by the Prison Service at https://www.sw.gov.pl/dzial/statystyka (accessed on 19-06-2019).

As the above data show, the number of foreigners held in pre-trial detention decreased year on year, from 2009 to 2015. It is clear, however, that the figure increased over the 2016-2018 period. A particularly steep increase was recorded between 31 December 2016 and 31 December 2018, when the number of foreign pre-trial detainees nearly doubled.

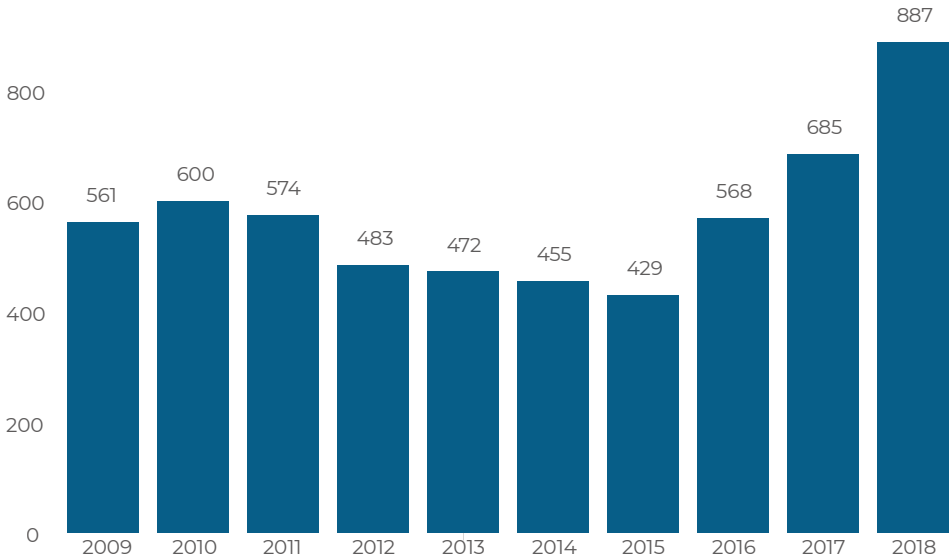
Percentage of foreign nationals held in pre-trial detention in the total population of pre-trial detainees[31]



The above chart clearly indicates that the percentage of foreigners in pre-trial detention in the total number of persons held in pre-trial detention in 2009-2014 remained stable, at the level of ca. 3.3%-3.6%. However, from 2014 onwards, the percentage of foreigners in pre-trial detention has risen visibly, from 3.67% to 6.95%.

31 The chart is based on statistics published by the Prison Service at https://www.sw.gov.pl/dzial/statystyka (accessed on 19-06-2019).

Application of pre-trial detention against foreign nationals in preliminary proceedings[32]



The above data show that the number of foreigners held in pre-trial detention during preliminary proceedings was decreasing year on year in 2010-2015. However, since 2016, there has been an increase in the number of detained foreigners. The figure for 2018 (887) represented an increase by more than 300 as compared to 2016.

32 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

CONDITIONAL PRE-TRIAL DETENTION IN THE COURSE OF PRELIMINARY PROCEEDINGS

Article 257 § 2 CCP provides that: *"When imposing pre-trial detention, the court may direct that this measure will be changed once financial surety has been given; at the reasoned request of the accused or their lawyer, made at the latest on the last day of the stipulated time limit, the court may extend the time limit for the provision of the surety."* As it is underlined by L. Paprzycki "The solution adopted in Article 257 § 2 CCP addresses the practical difficulties encountered where a relatively high financial surety could have been regarded as a sufficient preventive measure, but, at the same time, it was uncertain whether or not it would be possible to provide such a surety in the first place. In such a situation, conditional pre-trial detention is a solution that is both practical and favourable primarily for the suspect/accused. (...) The provision of financial surety within the time limit specified in the decision to apply or extend conditional pre-trial detention obliges the court to accept the surety (Articles 266-270 CCP), provided that all statutory requirements for the surety are met, and to immediately revoke pre-trial detention. From that moment on, the preventive measure of conditional pre-trial detention transforms into that of financial surety, governed exclusively by the provisions of financial surety (Articles 266-270 CCP)"[33].

Year	Decisions ordering pre-trial detention in preliminary proceedings	Decisions ordering conditional pre-trial detention in preliminary proceedings	Percentage share of conditional pre-trial detention decisions applied in all pre-trial detention decisions
2013	17.490	180	1,02%
2014	17.231	164	0,95%
2015	12.580	158	1,25%
2016	13.791	151	1,09%
2017	17.140	187	1,09%
2018	17.762	273	1,53%

Decisions ordering pre-trial detention in preliminary proceedings[34]

33 L. K. Paprzycki, *Komentarz do art. 257,* [in]: *Komentarz aktualizowany do art. 1-424 Kodeksu postępowania karnego*, System Informacji Prawnej LEX 2015.

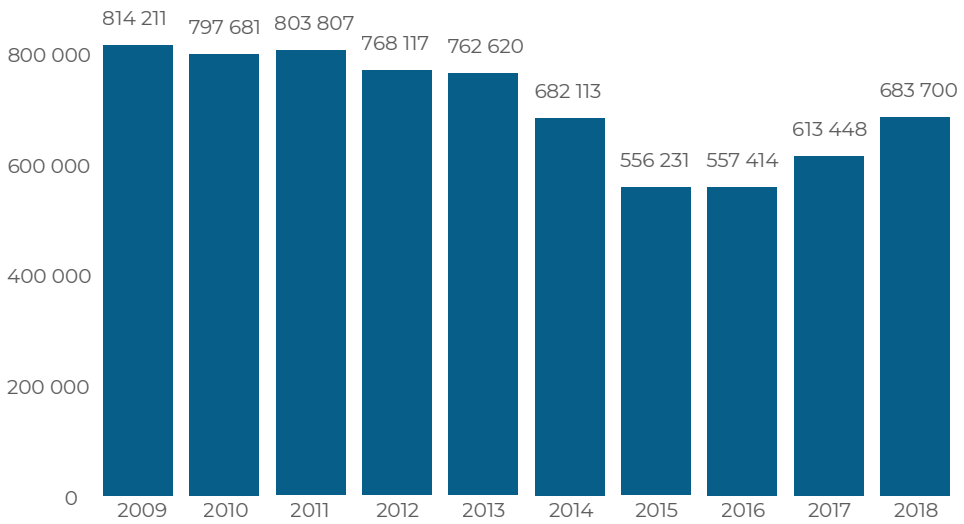
34 The table was prepared on the basis of reports on the activities of general organisational units of the prosecution service in criminal cases for the years 2013-2018 published by the National Prosecutor's Office at https://pk.gov.pl/dzialalnosc/sprawozdania-i-statystyki/ (accessed on 12-/06-2019). The table presents data on the use of conditional pre-trial detention only for the years

As the above table shows, the number of conditional pre-trial detention decisions was steadily decreasing in 2013-2016. However, between 2016 and 2018 the figure increased by almost 125. Importantly, no constant trends can be identified in relation to the percentage of conditional pre-trial detention decisions among all pre-trial detention decisions. It can only be pointed out that between 2017 and 2018, the number of conditional pre-trial detention decisions increased by nearly 0.5%.

The number of instituted preliminary proceedings

In order to come up with credible statistical conclusions on the practices related to pre-trial detention, any findings made in this respect must be accompanied by information on the number all instituted preliminary proceedings. These numbers are presented by the chart below:

Instituted preliminary proceedings[35]



2013-2018, because it is only from 2013 onwards that the General/National Prosecutor's Office has been including them in reports published on its website.

35 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

The chart above shows that from 2011 to 2015 the number of instituted preliminary proceedings decreased by nearly 250,000. However, since 2016, there has been an increase in the number of instituted preliminary proceedings. In 2018, the number of instituted preliminary proceedings exceeded the 2015 figure by over 100,000.

Non-custodial preventive measures

Apart from pre-trial detention, which is a custodial preventive measure, we distinguish non-custodial preventive measures, which are described in Articles 266-277 CCP. The non-custodial preventive measures include:

- financial surety,
- surety of a trustworthy person,
- communal bail,
- police supervision,
- travel ban,
- suspension in the performance of a person's official duties or a profession,
- disqualification from carrying out a specified business or activity;
- disqualification from operating certain types of vehicles,
- the obligation imposed on the suspect/accused to leave premises occupied together with an aggrieved person.

In this context, it should be stressed that a meaningful analysis of the practices of pre-trial detention would not be possible without comparing these practices with data on the use of alternative, non-custodial preventive measures.

a) preliminary proceedings

Year		2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Surety / bail	financial	15 867	13 940	14 358	12 414	10 880	10 031	6 850	5 994	7 521	8 336
	of a trustworthy person	99	79	74	86	46	32	21	45	17	14
	communal	7	8	5	8	3	0	1	6	1	0
Police supervision		34 741	33 028	34 918	31 190	30 294	31 858	25 350	25 716	28 675	28 838
Travel ban	all bans	8 800	8 362	8 508	7 855	7 889	7 769	5 710	5 511	6 967	7 976
	including the seizure of passport	2 299	1 930	1 832	1 580	1 474	1 332	1 147	1 010	1 374	1 712
	including the prohibition of issuing a passport	ND	ND	2 026	1 953	2 001	2 059	1 423	1 334	1 614	2 065
Suspension of the performance of official duties or a profession		306	254	165	222	216	226	154	183	234	265
Disqualification from carrying out a specified business or activity		481	484	319	258	88	100	157	137	229	294
Disqualification from operating certain types of vehicles		222	188	111	97	44	81	56	54	64	65
The obligation to leave premises occupied together with an aggrieved person		ND	ND	ND	1 241	1 500	2 359	2 474	3 060	3 761	4 121
Other preventive measures		ND	ND	ND	ND	31	1	0	17	3	2

Non-custodial preventive measures – preliminary proceedings[36]

As shown by the table above, the number of financial sureties provided in preliminary proceedings decreased by 9,000 from 2011 to 2016. This was followed by an increase of almost 1,500 between 2016 and 2018. Similar trends – initially, a downward one and later, an upward one – can be observed in the number of decisions ordering police supervision and travel ban. At the same time, it is worth noting that in

36 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

2012-2018 there was an increase (by nearly 3,000) in the number of issued decisions on the obligation to leave premises occupied together with an aggrieved person.

b) district courts

Year		2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Surety / bail	financial	7 881	7 174	6 679	5 059	4 389	4 075	4 650	3 429	4 502	5 010
	of a trustworthy person	51	66	60	77	24	20	53	41	13	108
	communal	6	2	6	24	19	4	36	5	6	10
Police supervision		14 131	15 138	14 624	13 271	12 259	12 908	15 060	15 889	17 298	17 515
Travel ban	all bans	3 278	3 177	3 018	2 435	2 555	2 449	2 564	2 671	3 273	3 313
	including the seizure of passport	822	734	646	365	461	520	561	454	600	638
Suspension of the performance of official duties or a profession		130	81	107	58	53	43	110	58	99	93
Disqualification from carrying out a specified business or activity		75	40	70	93	61	96	90	130	130	184
Disqualification from operating certain types of vehicles		1 722	1 995	1 637	2 537	1 381	1 388	1 086	800	752	1 123

Non-custodial preventive measures – district courts[37]

There was a downward trend in the number of financial surety decisions issued by district courts from 2009 to 2013. Between 2014 and 2015, a slight increase occurred (by 600). Thereafter, from 2016 to 2018, there was a visible increase in the number of issued financial surety decisions (by 1,500). As regards decisions on police supervision, it should be noted that their number decreased between 2009 and 2014. However, an increase in the number of issued police supervision decisions, by nearly 2,500, was observed in 2015-2018. For travel bans, a downward trend can be identified for the 2009-2012 period, which is followed by an upward trend for 2015-2018 (2015 – 2564, 2018 – 3313).

37 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

c) regional courts

Year		2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Surety / bail	financial	2 124	2 738	2 698	2 363	2 174	2 433	2 242	1 522	2 115	2 765
	of a trustworthy person	23	3	11	5	22	2	6	1	1	1
	communal	3	5	2	9	1	3	2	1	2	4
Police supervision		2 378	2 951	3 228	2 479	2 254	2 861	2 755	1 976	2 569	3 120
Travel ban	all bans	1 656	1 754	2 000	1 624	1 514	1 906	1 966	1 177	1 454	1 791
	including the seizure of passport	837	791	854	640	617	744	708	381	512	638
Suspension of the performance of official duties or a profession		48	55	21	28	47	16	11	33	9	17
Disqualification from carrying out a specified business or activity		46	58	37	31	11	22	61	25	31	47
Disqualification from operating certain types of vehicles		1	0	1	1	0	1	31	1	4	0

Non-custodial preventive measures – regional courts[38]

As shown by the above table, the annual number of issued financial surety decisions remained constant between 2010 and 2015. In 2016 the figure decreased, while ca. 1,200 more financial surety decisions were issued in 2018. There is no consistent trend related to the application of police supervision by regional courts. A strong downward trend was observed in the years 2011-2012 and 2015-2016. From 2016 to 2018, the number of issued police supervision decisions rose by over 1,000. Similar trends can be observed for decisions ordering travel ban.

38 The chart was prepared on the basis of the statistics entitled "*Środki zapobiegawcze orzeczone przez sądy rejonowe i okręgowe w latach 2005-2018*" (Preventive measures ordered by district and regional courts in 2005-2018), published by the Ministry of Justice at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,52.html (accessed on 19-06-2019).

POLISH PRACTICE OF APPLICATION OF PRE-TRIAL DETENTION FROM THE PERSPECTIVE OF STRASBOURG COURT

In an attempt to supplement the statistical analysis, below we present the most recent judgments of the European Court of Human Rights, in which the Court found that Poland has failed to fulfil its obligations under Article 5 of the Convention in connection with the application of pre-trial detention. It is important to note that these judgments, delivered in 2018, refer to violations occurring in an earlier period. However, all of the following cases relate to the practices of pre-trial detention applied over the last 10 years.

The rationale for presenting the following selection of cases is as follows:

- presenting the topics raised in pre-trial detention cases brought before ECtHR against Poland;
- providing guidelines from the Court on the application of preventive measures;
- showing the costs that Poland incurs as a result of violations of conventional standards caused the overuse of custodial measures.

As a side note, some of the proceedings launched in ECtHR cases brought against Poland, which are likely to result in finding violations, have not been concluded with a judgment – and therefore are not discussed in this publication. Some of these proceedings could have ended with a settlement between the parties or a unilateral declaration to confirm an infringement given by the Government of the Republic of Poland, which also ends the proceedings before the Strasbourg Court.

ECtHR judgment of 18 October 2018, *Burża v. Poland*, no. 15333/16

The applicant complained that he head been the subject of an excessively lengthy pre-trial detention, lasting from 26 November 2010, when he was arrested by the police, to 4 March 2016, when he was convicted by the first instance court. The period of his pre-trial detention, as the applicant claimed, was five years, three months and nine days. However, as the Court established, during the periods from 18 March to 12 April 2011, from 24 October 2011 to 24 October 2012 and from 24 October 2012 to 23 October 2013, the applicant served prison sentences. Therefore, these periods fall outside the scope of Article 5 § 3 ECHR. Accordingly, the period considered by the ECtHR was three years, two months and nine days.

In the proceedings before the Court, the Government argued that the criteria laid down in the ECtHR case-law concerning the application and extension of detention on remand had been met. In, particular, in the Government's view, *"the reasonable suspicion that the applicant had committed an offence"* had persisted throughout the whole period of application of the custodial measure. The Government noted other grounds that reportedly justified the applicant's pre-trial detention: the likelihood of a severe penalty being imposed on the applicant, the possibility of him going into hiding or interfering with the course of the criminal proceedings, the complexity of the case.

The ECtHR ruled that:[39]

- *"... the judicial authorities had presumed that there was a risk of the applicant's obstructing the proceedings, based on the serious nature of the offences and the fact that the applicant had been charged with being a member of an organised and armed criminal gang. The Court acknowledges that in view of the seriousness of the accusations against the applicant, the authorities could justifiably have considered that such a risk existed."*
- *"However, the Court notes that in all the decisions extending the applicant's detention, no other specific substantiation of the risk that the applicant would tamper with evidence, persuade other persons to testify in his favour, abscond or otherwise disrupt the proceedings, emerged. Moreover, the reasons for detention were very often identical with regard to all co-accused and did not include arguments pertaining specifically to the applicant... . Therefore, with the passage of time, the grounds relied on became less relevant and cannot justify the entire period of over three years and two months during which the most serious preventive measure against the applicant was imposed."*
- *"... even taking into account the fact that the courts were faced with the particularly difficult task of trying a case involving an organised and armed criminal group, the Court concludes that the grounds given by the domestic authorities could not justify the overall period of the applicant's detention. In these circumstances it is not necessary to examine whether the proceedings were conducted with special diligence."*

Given the above, the Court found a violation of Article 5 § 3 of the Convention and awarded the applicant EUR 3,500 in respect of non-pecuniary damage.

39 *Burża v. Poland*, no. 15333/16, 18 October 2018, §§ 41-43.

ECtHR judgment of 19 July 2018, *Zagalski v. Poland*, no. 52683/15

In his application lodged with the Court, the applicant argued that he was held in pre-trial detention from 29 November 2012 to 31 May 2016, when he was released after the payment of financial surety. He was detained for a total of three years and six months.

The Polish courts based their decisions to apply the custodial preventive measure on a reasonable suspicion that criminal offences had in fact been committed, the severity of the penalty faced by the applicant and the risk of obstruction of justice, in particular in the light of the allegation that the applicant acted as a member of an organised criminal group. The courts also assumed that the application of pre-trial detention was necessary to ensure the proper conduct of the criminal proceedings due to the complexity of the case and the presence of many co-defendants, multiple counts of charges and witnesses, including five state witnesses.

In the judgment, the ECtHR noted that:[40]

- *"... the reasonable suspicion that the applicant had committed the offences in question and the severity of the anticipated penalty might have justified his initial detention. Also, the need to secure the proper conduct of the proceedings, in particular the process of obtaining evidence from witnesses, constituted a valid ground for the applicant's initial detention. ... However, the Court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention on remand.[41]"*
- "*In addition, the judicial authorities had presumed the risk of obstruction of the proceedings, basing themselves on the fact that the applicant had been charged with offences committed in an organised criminal group. In this regard, the Court reiterates its case law according to which, in cases concerning organised crime, a relatively longer period of detention on remand could be justified given the particular difficulties in dealing with those cases in the trial courts... However, it does not give the authorities unlimited power to extend this preventive measure.*"
- *"... with the passage of time, the initial grounds for pre-trial detention become less and less relevant and the domestic courts should rely on other "relevant" and "sufficient" grounds to justify the continued deprivation of liberty (see, among many other authorities, I.A. v. France, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, p. 2979, § 102; and Labita v. Italy*

40 *Zagalski v. Poland*, no. 52683/15, 19 July 2018, §§ 29-30.

41 For the purposes of our discussion, the term "detention on remand" used by the ECtHR should be considered synonymous to that of "pre-trial detention".

[GC], no. 26772/95, § 153, ECHR 2000 IV). Secondly, even if, due to the particular circumstances of the case, detention on remand is extended beyond the period generally accepted under the Court's case-law, particularly strong reasons would be required to justify this (see Pasiński v. Poland, no. 6356/04, § 44, 20 June 2006)."

Having regard to the foregoing, the ECtHR found a violation of Article 5 § 3 of the Convention and considered it equitable to award the applicant EUR 2,500 under the head of non-pecuniary damage.

ECtHR judgment of 5 July 2018, *Zieliński v. Poland*, no. 43924/12

In the *Zieliński case*, the Court examined the application of pre-trial detention against the applicant in the following periods: from 2 January 2007 to 25 September 2008 (when the applicant was convicted by the first instance court); from 13 May 2009 (when the conviction was quashed) to 16 March 2010 (when he was again convicted by the first instance court) and; from 10 November 2010 (when the conviction was again quashed) to 12 July 2012 (when the applicant was again convicted by the first-instance court). The total period of pre-trial detention considered by the Court was 4 years and 3 months.

In their decisions to apply and extend the applicant's pre-trial detention, domestic courts relied on the following grounds: (1) the serious nature of the offence with which he had been charged, (2) the severity of the penalty to which he was liable and (3) the need to secure the proper course of the proceedings. The last ground was invoked based on, above all, the severity of the anticipated punishment which, as the domestic courts argued, created a risk that the applicant would attempt to pervert the course of justice if released.

In the judgment, the Court held as follows:[42]

- *"As regards the risk that the applicant would obstruct the proceedings, the Court is not persuaded that it constituted a valid ground for the entire length of his pre-trial detention. Firstly, it notes that the Gdynia District Court, when initially remanding the applicant in custody, made only a general reference to the fact that the offence had been committed by several perpetrators and the risk that the applicant would attempt to avoid a severe penalty. Secondly, the Court notes that the relevant decisions did not contain any argument capable*

42 *Zieliński v. Poland*, no. 43924/12, 5 July 2018, §§ 42-43, 45, 47.

of showing that these fears were well founded. Such a generally formulated risk, flowing from the nature of the offence with which the applicant had been charged, might possibly be accepted as the basis for his detention at the initial stages of the proceedings. Nevertheless, in the absence of any other factor capable of showing that the risk of his attempting to tamper with the proceedings actually existed, the Court cannot accept that ground as a justification for holding the applicant in custody for the entire period in question…".

- *"… the applicant's detention was supervised by the courts at regular intervals. However, in their decisions extending the applicant's detention, the domestic authorities repeatedly relied on the same grounds, namely a reasonable suspicion that the applicant had committed the offence in question, the severity of the likely penalty and the risk that the applicant would obstruct the proper conduct of the proceedings. No other grounds for detention were given in those decisions, notwithstanding the significant length of the applicant's detention on remand."*
- *"… under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures for ensuring his appearance at trial. Indeed, that provision proclaims not only the right to 'trial within a reasonable time or to release pending trial' but also lays down that 'release may be conditioned by guarantees to appear for trial' (see G.K. v. Poland, no. 38816/97, § 85, 20 January 2004). A range of other, less stringent, preventive measures could have been alternatively considered and imposed on the applicant to ensure his presence and participation in the proceedings."*
- *"The Court further observes that the applicant was detained on a charge of homicide committed together with two accomplices. The defendants had not been formally charged with acting as part of an organised criminal group. In these circumstances, the Court is not persuaded that the instant case presented particular difficulties for the investigation authorities or for the courts to determine the facts and mount a case against the perpetrators, as would undoubtedly have been the case had the proceedings concerned organised crime…".*

The Court established that the applicant had been finally sentenced to four years' imprisonment and that the period of detention within the meaning of Article 5 § 3 ECHR was three months longer than that the prison term imposed by the final judgment.

All those circumstances led judges of the Strasbourg Court of Justice to conclude that there had been a violation of Article 5 § 3 of the Convention and that it was equitable to award the applicant EUR 5,200 on account of his non-pecuniary damage.

The reading of the above cases highlights a number of key problems associated with the application of pre-trial detention presented in applications lodged with the Strasbourg Court:

- the excessive length of the application of pre-trial detention;
- the failure to give case-specific grounds for decisions on the application or extension of pre-trial detention;
- disregard of preventive measures that may serve as alternatives to detention;
- the recurrence of boilerplate arguments in extension decisions;
- citing the severity of the penalty or the nature of the alleged offence as a primary justification for the entire length of the requested pre-trial detention period.

It is worth noting that the above problems have been noticed for years by legal scholars and practitioners. However, despite the recognition of their existence, no sufficient legal and educational measures have yet been taken to address those issues.

RECENT DECISIONS OF POLISH COURTS ON THE APPLICATION OF PRE-TRIAL DETENTION

Decision of the Court of Appeal in Katowice of 9 November 2016, case no. II AKz 576/16, published in LEX no. 2242178:

- *"The very fact that the suspect is acquainted with witnesses or co-suspects does not give rise to any concern that he will try to persuade them to give false testimony or that he will otherwise obstruct criminal proceedings. The concern referred to in Article 258 § 1(2) CCP, as a rule, must be based on specific circumstances indicating that such a concern exists and, above all, result from the suspect's past actions undertaken precisely for that purpose, as well as the conduct of other persons; it cannot be merely inferred from a hypothetical presumption that the suspect has been engaged in such actions."*

Decision of the Regional Court in Częstochowa of 14 December 2017, case no. VII Kz 552/17, published in LEX no. 2441563:

- *"In a situation where already during the preliminary proceedings the victim gave testimony describing the event in a manner consistent with the suspect's statements, there can be no concern of* [the suspect'] *obstructing the course of justice."*

Decision of the Court of Appeal in Katowice of 2 March 2018, case no. II AKz 100/18, published in LEX no. 2574272:

- *"While ordering an extension of pre-trial detention, the court is not obliged to hear the accused or even notify them of the* [detention] *hearing; notification to their defence lawyer is sufficient (Article 249 § 5 CCP). The obligation to hear the accused exists when pre-trial detention is initially applied (Article 249 § 3 CCP). These are different procedural situations, governed by different rules."*
- *"Since the presence of the accused at the hearing concerning the extension of their detention is not mandatory (Article 374 §§ 1-2 CCP, the absence of the accused does not constitute an absolute ground for appeal under Article 439 § 1(11) CCP, nor does it violate the accused's right of a defence, as his defence lawyer may participate in the hearing (Article 249 § 5 CCP)."*

Decision of the Court of Appeal in Kraków of 6 March 2018, case no. II AKz 104/18, LEX no. 2574269:

- *"In any case, the wording of Article 258 § 2 CCP (as amended in 2013) does not give the right to invoke this provision as a stand-alone basis for pre-trial detention without demonstrating how the impending penalty affects the purposes of applying preventive measures. A different interpretation is in conflict with constitutional and Convention guarantees and that alone is sufficient to reject it as unacceptable."*

Decision of the Court of Appeal in Kraków of 6 March 2018, case no. II AKz 107/18, published in LEX no. 2574274:

- *"With the progress of the proceedings in the trial court, the risk that the course of justice will be perverted diminishes, which means that this ground for pre-trial detention is less likely to exist. The hearing of the accuseds and subsequent witnesses directly before the court before which the case is pending reduces the non-detained accused's ability to influence the remaining witnesses and their depositions. It is therefore impossible to agree with the very general argument set out in the statement of grounds of the challenged* [detention] *decision, according to which the concern that the course of justice may be perverted lasts until the final conclusion of the proceedings, or even until the commencement of the enforcement of the penalty."*

Decision of the Court of Appeal in Wrocław of 7 March 2018, case no. II AKz 142/18, OSAW 2018(1), item 374:

- *"The application of a preventive measure by the court requires holding a hearing at which the court should hear the accused, pursuant to Article 249 § 3 CCP. The hearing of the accused is a necessary condition for the application of a preventive measure. Thus, the law provides for the mandatory participation of the accused in the court hearing regarding the application of the preventive measure referred to in Article 249 § 3 CCP. The examination of the case concerning the application of a preventive measure in the absence of the accused, i.e. without the mandatory hearing of the accused, constitutes an absolute infringement* [a mandatory ground for an appeal] *referred to in Article 439 § 1(11) CCP."*
- *"The court hearing on the application of a preventive measure is a procedural step that involves "examination of the case" and making a ruling on the matter concerned. If the accused did not attend that hearing, their right to a defence*

has been violated. This infringement means that the proceedings were unfairly conducted.

Decision of the Court of Appeal in Kraków of 9 March 2018, case no. II AKz 105/18, LEX no. 2574275:

- *"'Going into hiding' is defined as the avoidance of contact with criminal justice bodies that results in the accused's failure to appear on summons and prevents these bodies from contacting the accused due to the accused consciously making criminal justice bodies unaware of his current whereabouts. 'Flight' is defined as the accused moving out of a place of residence known to the criminal justice body without providing an address and without any intention of immediate return."*

Decision of the Court of Appeal in Wrocław of 16 March 2018, case no. II AKz 307/18, OSAW 2018(1), item 375:

- *"Therefore, the prosecutor is charged with proving that there is compelling evidence in the case to suggest that the suspect has committed the alleged offence (Article 249 § 1 CCP) and that there is a justified concern that the suspect may unlawfully obstruct the proper course of the proceedings (Article 258 §§ 1-2 CCP)."*
- *"The burden of proving the general and specific grounds for pre-trial detention and further preventive measures exists not only when pre-trial detention is initially requested, but also in respect of each subsequent request for the measure's extension, as follows from the directive to adopt preventive measures to the procedural situation of the accused, which is referred to in Article 253 § 1 CCP."*
- *"... the concern of unlawful obstruction of the proper course of proceedings, constituting the only ground for the application of preventive measures that serve the protective purpose, must be justified (Article 258 § 1 CCP) and result from circumstances established in the course of the proceedings (Article 251 § 3 CCP). Accordingly, that ground cannot be inferred from illusive, empty or unconfirmed allegations. Articles 249 § 1 and 258 § 1 CCP require the showing of actual circumstances justifying the state of being concerned over a likely unlawful obstruction of the proper course of proceedings, while the prosecutor and the trial court failed to do so, merely presenting assumptions and hypotheses."*
- *"Both the prosecutor requesting the extension of pre-trial detention, and the trial court, lose sight of the fact that the Polish criminal process (and any*

process in a democratic country) is based on the rule that the accused should be released pending trial and that pre-trial detention and other preventive measures may be applied only exceptionally. This feature of preventive measures is evidenced by their purpose, functions and grounds for their application. The prosecutor also forgets that preventive measures, while performing a protective function, may not be used for the convenience of criminal justice bodies, namely in order to facilitate the establishment of certain facts, but only to secure the proper course of proceedings."

Decision of the Court of Appeal in Kraków of 23 August 2018, case no. II AKz 439/18, LEX no. 2633159:

- *"The Code of Criminal Procedure provides only for the possibility, not an obligation, of applying preventive measures, in particular pre-trial detention. This possibility is assessed on the facts of each case, taking into account how advanced the proceedings are and how realistic it is for the accuseds to influence the course of proceedings, including by unlawfully obstructing the proceedings."*
- *"Requesting detention on account of another pending case is clearly inappropriate. The application of preventive measures is case-specific: they are intended to ensure the correct course of the specific proceedings. As it is not possible to apply pre-trial detention based on charges that have not been presented, so much less would it be admissible to do so in order to ensure the proper course of another proceedings in which the persons targeted by the preventive measure are not even parties."*
- *"It follows from Article 249 § 2 CCP, which refers to the possibility of applying measures only to the person named in a decision to present charges, or from Article 251 § 1 CCP, which requires that the alleged offence must be described, that it is not possible to justify the application of pre-trial detention with the need to secure the proper course of another criminal proceedings."*
- *"The impact of the ground of the severity of penalty diminishes over time. This is due to the fact that the decreasing the length of the penalty by the time spent in pre-trial detention makes it not worthwhile to obstruct the proceedings, including the enforcement proceedings: potential benefits associated with such obstruction do not offset potential losses. The passage of time during proceedings, including reaching their subsequent stages, limit the possibilities of obstructing the proceedings, especially in the context of the concern over the perversion of the course of justice. This is a reasoning presented in the case law of the ECtHR, which excludes invoking severity as a basis for temporary confinement."*

LEGISLATIVE CHANGES AND THE EXISTING PRACTICE OF APPLICATION OF PRE-TRIAL DETENTION

As mentioned above, problems with the use of pre-trial detention in Poland in accordance with the Strasbourg standard have existed since Poland joined the European Convention on Human Rights. The persistence of this phenomenon caused the ECtHR to respond by communicating the existence of a structural problem in this respect to Poland already 10 years ago (*Kauczor v. Poland*[43]). In addition, the failings of the Polish justice system related to the use of pre-trial detention was exposed by the case of *Choumakov v. Poland (2)*[44], in which, following a judgment of the ECtHR finding that the period of pre-trial detention of the applicant had been unreasonable, the applicant continued to be detained for more than 30 months. The increasing number of ECtHR rulings, which are increasingly embarrassing for Poland, and in particular the necessity to execute those rulings, not only financially, but above all structurally, resulted in a significant amendment to the Code of Criminal Procedure, which came into force on 1 July 2015[45], considerably expanding the provisions on the application of pre-trial detention. This happened in spite of the frequently (and correctly) expressed scholarly opinion that the Code rules are not contrary to the ECtHR case-law, but rather should be applied properly.[46] The changes to the pre-trial detention provisions of the Code of Criminal Procedure introduced in this amendment have essentially gone in two key directions: they have strengthened detained persons' right of a defence and clarified the grounds and rules for the application of pre-trial detention, which, according to lawmakers intention, was to limit the use of this most severe preventive measure.

In order to achieve the first of the above objectives, the lawmakers extended suspects' access to a defence lawyer (traditionally termed "procedural defence" in Polish criminal law) at the stage of lodging and review of interlocutory appeals

43 *Kauczor v. Poland, no.* 45219/06, 3 February 2009.

44 *Choumakov v. Poland (2), no.* 55777/08, 1 February 2011.

45 The Act of 27 September 2013 amending the Code of Criminal Procedure and certain other acts (J.L. 2013, item 1247).

46 This argument is confirmed by a gradual decrease in the number of persons held in pre-trial detention in years preceding the amendment, which, among other things, resulted in the resolution of the Committee of Ministers of the Council of Europe of 4 December 2014 to close the examination of the execution of the ECtHR judgments in the *Trzaska* group of cases (CM/ResDH(2014)268), in which the applicants complained about the excessive length of pre-trial detention and deficiencies in the appellate review over decisions to apply or extend pre-trial detention.

against decisions on the application and extension of pre-trial detention. The accused's access to evidence on which pre-trial detention is based has also been expanded.

The lawmakers made the following changes in an attempt to define in a greater detail the grounds and rules of pre-trial detention:

- Article 258 § 2 CCP was redrafted in such a way as to make it less likely to be construed as justifying the use pre-trial detention based on the "severe penalty that the accused may face upon conviction" as an independent ground for detention. Unfortunately, the existing upper limit of the penalty for a given offence (a prison term of "at least 8 years") that warrants pre-trial detention was maintained, despite considering the possibility of raising this limit to 10 years;
- The prohibition to apply pre-trial detention was extended to include the perpetrators of "petty" crime. Pursuant to the amended Article 259 § 3 CCP, pre-trial detention could not be applied if the offence was punishable by a term of imprisonment not exceeding 2 years. Before the amendment, the law prevented the application of pre-trial detention if the offence carried a prison term not exceeding one year;
- A new ground excluding an extension of the pre-trial detention was introduced. According to a new section added to Article 263 CCP (§ 4b), it was (and still is) not permissible to extend the duration of pre-trial detention in preliminary proceedings for a period longer than one year in a situation where the penalty that the accused may realistically face does not exceed 3 years of imprisonment. The maximum allowed duration of pre-trial detention ordered at the stage of court proceedings is 2 years in a situation where the penalty that the accused may realistically face is a prison time of 5 years or less;
- The law was changed in line of the ECtHR's jurisprudence, which repeatedly indicated that circumstances that may provide a legitimate reason for pre-trial detention at the initial stage of proceedings become less and less relevant with time. Accordingly, the amended wording of Article 258 § 4 CCP stipulated that the selection of a specific preventive measure should be guided by the type and nature of the concerns referred to in Article 258 §§ 1-3 CCP that serve as a basis for the measure, as well as by the "intensity" of anticipated risks to the proper conduct of the proceedings "at their given stage";
- Pursuant to a new provision (Article 250 § 2a CCP), in the request for the application of pre-trial detention, the prosecutor was required to describe evidence indicating the high probability that the defendant has committed an offence, facts supporting the existence of risks to the proper course of the proceedings or the possibility that the defendant will commit another serious criminal offence, as well as the specific basis for application of this preventive measure and the necessity of its application;

- In accordance with the amended Article 251 § 3 CCP, the court ordering pre-trial detention was required to indicate in the detention decision the evidence mentioned in the foregoing bullet point.

The legislative changes introduced by the 2013 amendment – which were essentially aimed at incorporating into the Code of Criminal Procedure the fundamental lines of ECtHR case-law – have had a certain effect, as can be seen from the statistics presented above. It is impossible to say how constant this trend would be, as the amended provisions, in force since 1 July 2015, have been once more amended by a law enacted on 11 March 2016[47], which entered into force on 15 April of that year. The 2016 amendment did not completely rolled back the rules on pre-trial detention changed in 2013, but the nature of this latest legislative intervention indicated, in at least a symbolic way, a significant change in penal policies and the relevant expectations of the policymakers. These factors, in turn, influenced the number of prosecutor's requests for the application and extension of pre-trial detention.

The following are examples of the key changes introduced by the 2016 amendment that show the direction revamped criminal policies:

a. Restricted access to evidence providing the basis for the application of pre-trial detention (Article 249a § 1 CCP read in conjunction with Article 250 § 2b CCP);
b. Article 258 § 2 CCP was again redrafted in a way that suggests return to the model of the "severe penalty that the accused may face upon conviction" constituting an independent ground for detention;
c. The language of Article 259 § 3 CCP was reinstated to its pre-amendment form, which prevented the use of pre-trial detention in cases involving offences punishable by a term of imprisonment of one year or less (the 2013 amendment increased this threshold to two years).

From the perspective of legal doctrine, the impact of the recently (re-)amended provisions is minor. However, it should be stressed that it is the tone of these changes, rather than their procedural dimension, that has considerably driven the increase in the number of pre-trial detention decisions.

It must be noted at this point that the amendments to procedural and substantive provisions included in the Codes were accompanied by the redrafting of other legal acts which are relevant to entities influencing the practice of applying pre-trial detention. Most notably, the Prosecution Service Act of 28 January 2016[48] came into force on 4 March 2016, strictly subordinating prosecutors to the Prosecutor General who by law is also the Minister of Justice, an active politician of the ruling coalition.

47 The Act of 11 March 2016 amending the Code of Criminal Procedure and certain other acts (J.L. 2016, item 437).

48 J.L. 2016, item 177.

Using his powers, the Prosecutor General has re-shuffled the cadres, effectively obtaining an unquestionable influence on decisions taken by prosecutors in the areas he considers important. Pre-trial detention is clearly one of such areas, as it is the second most visible symbol of swift and decisive action by state law enforcement authorities, surpassed only by the arrest (apprehension) of the suspect. The public is very sensitive to this type of activity and generally expresses a positive attitude towards detention. In any case, this attitude is combined with the popular conviction that the detained person is guilty, and that proving the guilt is only a matter of time. Therefore, a sizeable segment of the public opinion thinks that a rising frequency of applying pre-trial detention demonstrates that the state is more efficient in prosecuting criminals. Admittedly, it is not the prosecutors, but the courts, who apply pre-trial detention, but, as this report's charts clearly show, the number of detention requests is directly proportional to the number of detention decisions. Thus, it is the activity of prosecutors that determines the number of detained individuals and, consequently, the collective assessment of the state's efficiency in the field of justice.

It should also be noted that the Minister of Justice/Prosecutor General has received certain instruments that may be used to influence judges. The ability to replace presidents of courts, the influence on the nominations of Supreme Court and the National Judiciary Council candidates, and – in particular – the authority to initiate disciplinary proceedings against judges who are ultimately accountable to the newly established Disciplinary Chamber of the Supreme Court, are measures that allow for achieving certain jurisprudential results. Any doubts about whether the powers acquired by the Prosecutor General would be used against judges who refuse to apply pre-trial detention were dispelled after a judge was targeted by disciplinary proceedings (case no. II DSS 2/18) for revoking the pre-trial detention of a person with an intellectual disability. Irrespective of the outcome of the matter pending before the Supreme Court's Disciplinary Chamber, this was a warning to other judges not to hastily lift pre-trial detention, but rather to be willing to apply this measure as the current penal policies dictate.[49]

The data quoted in this report and the presented overview of amendments to the pre-trial detention provisions of the Code of Criminal Procedure lead to the conclusion that it is not the law that has a decisive influence on the judicial practice

49 *Sędziowie mogą wypowiadać się w sprawach ważnych dla sądownictwa. RPO o działaniach Piotra Schaba* [Judges can speak on matters that are important to the judiciary. Ombudsman comments on the activities of Piotr Schab], Commissioner for Human Rights, https://www.rpo.gov.pl/pl/content/rpo-sedziowie-moga-wypowiadac-sie-w-waznych-sprawach-dla-niezaleznosci-sadownictwa (accessed on 19-06-2019).

in this area.[50] Rather, this practice depends on the expectations of the makers of criminal policies, pursued through the use of specific instruments of influence. Regardless of this observation, the CCP provisions cannot be completely ignored as they form the normative basis for judicial decision-making and may either facilitate or hinder the implementation of criminal policies. In this context, concerns are raised by the most recent amendment to the Criminal Code (Act of 13 June 2019), which includes a significant increase in the upper limits of criminal penalties for a large number of offences. Given the importance of "severe penalty which may be imposed on the accused" as grounds for applying pre-trial detention, it is difficult to not argue that a material increase in the upper limits of criminal penalties may lead to a surge in the number of pre-trial detention decisions. The above concerns are all the more legitimate because in some cases the planned increase of the upper limit of the penalty will result in reaching the limit of eight years of imprisonment (involuntary manslaughter – Article 155 of the Criminal Code ("CC"), aggravated theft – Article 278a CC, obstruction of a tender procedure – Article 305 § 3 CC).

50 Assuming the general compliance of the applicable provisions of the Code of Criminal Procedure with the Strasbourg standard.

RECOMMENDATIONS

Liberty is one of the most precious human treasures. Article 5 ECHR, which upholds this value, should therefore be strictly respected by Poland. Unfortunately, the practice of depriving persons of their liberty in the context of pre-trial detention quite often leaves much to be desired. The data presented in this report clearly show that the number of detention decisions has been increasing in recent years. It is therefore essential to bring this trend to a halt. It seems that compliance with relevant Strasbourg standards could bring about such a desired effect. Perhaps some systemic and legislative measures could help to achieve this. However, accepting that it is not legislative changes that have a major impact on the jurisprudential practice significantly diminishes the importance of any such measures that may be proposed. It would be advisable to start by changing the "vibe" of criminal policies and taking away from the executive policymakers instruments that allow them to influence specific judicial outcomes. Otherwise, any legislative changes, however appropriate, may have no effect.

Let us now propose several key measures, which, if implemented in a favourable political environment, could help to bring about full compliance of the judicial practices in Poland with the Strasbourg standards regarding the use of pre-trial detention:

- The "severe penalty that the accused may face upon conviction" (Article 258 § 2 CCP)[51] should no longer serve as a ground for pre-trial detention. This is the ground invoked by courts in the vast majority of the pre-trial detention decisions, as it is the easiest one to show. In order to effectively rely on other grounds, the prosecution must prove certain facts that make the existence of these grounds reasonably plausible. The reading of Article 258 CCP brings an irresistible impression that § 2 of that Article constitutes a general clause that facilitates proving the obstruction of proceedings described in § 1. This clause was added by the legislator to mitigate the risk that the accused

51 Notably, this ground was discussed at lenght in a resolution of the Supreme Court (Resolution of 19 January 2012, case no. I KZP 18/11). One should agree with an argument presented by Warchoł, who stated with regret that *"while ruling on ... a legal question brought by the Ombudsman, which included a review of the [relevant] jurisprudence of common courts, the Supreme Court, being aware of the frequent problems concerning the detention policy that affect, among others, the judicial practice, the public, and the media, limited itself to holding that ,this is not a matter of interpretation, but of that of correct application of the law'."* Quoted from M. Warchoł, *Zagrożenie surową karą pozbawienia wolności jako szczególna przesłanka stosowania tymczasowego aresztowania*, [in:] *Piotr Turek (Ed.), Przewlekłość tymczasowego aresztowania w Polsce w świetle europejskich standardów ochrony praw człowieka*, Warsaw 2013, p. 134.

may take action that impede the proceedings but such an action cannot be proved by any direct or circumstantial evidence required under § 1. Therefore, the legislator introduced the presumption that the mere fact of the accused likely facing a severe penalty makes it highly probable that the accused will try to evade it.[52] This presumption should certainly be dropped;

- The final part of Article 258 § 1 (1) should be deleted. That provision reads as follows: *"pre-trial detention and other preventive measures may be applied where: 1) there is a justified concern that the accused will abscond or go into hiding, in particular where their identity cannot be established or when they have no permanent place of residence in Poland";* The condition of having no permanent residence in Poland is particularly important as it facilitates the application of pre-trial detention. As soon as this condition is proved, the court is virtually relieved of the burden of determining whether the accused/suspect actually intends to obstruct the proceedings by fleeing or hiding. However, the absence of permanent domestic residence is only an exemplification and certainly does not predetermine the existence of the accused's or suspect's intention to obstruct the proceedings. It seems that repealing this part of Article 258 § 1(1) CCP would not change the substance of this provision but would, at the same time, equalise the legal position of Polish citizens and foreign nationals. This is not without significance given the aforementioned concerns, expressed at the EU level, over the excessive use of detention against foreigners;
- The wording of Article 5 § 3 ECHR should be transposed directly into the Code of Criminal Procedure so that to ensure that outcomes of the application of the Code are not in conflict with the ECHR and so that it would be clear to any national judge that *"Everyone arrested or detained … has the right to be tried within a reasonable time or be released pending trial. A person's release from detention may require this person to provide guarantees that they will appear for trial."* There are somewhat similar laws currently in force in Poland, but they do not use such clear language[53];
- An alternative (but arguably less appropriate) option would be to introduce a maximum and non-extendable term of pre-trial detention.[54] While the

52 Cf. *Nowe kodeksy karne z 1997 r. z uzasadnieniami*, Warsaw 1997, pp. 420-421.

53 Cf. Article 253 § 1 CCP: *"A preventive measure shall be immediately revoked or changed if the reasons for its application cease to exist, or if any reasons justifying its revocation or change come into being."* Or Article 257 CCP: *„§ 1 Pre-trial detention shall not be applied if another preventive measure is sufficient.§ 2 When imposing pre-trial detention, the court may direct that this measure will be changed once financial surety has been given within the designated time-limit; at the reasoned request of the accused or their lawyer, made at the latest on the last day of the stipulated time limit, the court may extend the time limit for the provision of the surety."*

54 Such arrangements are in place in, e.g. Spain, France, Romania, Italy – see *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the*

determination of a fixed and absolutely non-extendable duration of detention has a value as a safeguard measure, the specific determination of such duration may give rise to serious controversy. It could also lead to criminal justice authorities making maximum use of that time, despite the fact that the actual grounds for pre-trial detention have already ceased to exist[55];

- The wording of chapter 28 of the Code of Criminal Procedure should be edited so as to change the order in which preventive measures are described: the least intrusive measures should be presented first, and pre-trial detention, as the *ultima ratio* measure, should be described last;
- The list of preventive measure in the Code of Criminal Procedure should be expanded by the addition of house arrest and/or electronic monitoring[56]. Also, the consecutive application of several non-custodial measures should be allowed. Such legislative action could encourage judges to more frequently impose measures less intrusive than pre-trial detention, especially in cases where the length of pre-trial detention would become "unreasonable" and, according to Article 5 § 3 ECHR, the accused/suspect would have to be released;
- The law should provide for higher awards of compensation for moral and financial losses resulting from unlawful detention. Judges who ordered detention that has been later found unlawful should be informed of the financial consequences of their actions. The misuse or abuse of pre-trial detention should be taken into consideration in reviews of judicial professionalism.

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impact they have over the development of EU legislation, European Parliament, August 2018, http://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf accessed on 19-06-2019).

55 On 8 January 2016, the Ombudsman submitted an application to the Constitutional Tribunal for declaring Article 258 § 2 CCP incompatible with Article 41 paragraph 1, Article 42 paragraph 3 read in connection with Article 42 paragraph 1, Article 45 paragraph 1, Article 31 paragraph 3 of the Constitution of the Republic of Poland and with Article 30 of the Constitution of the Republic of Poland, and for declaring Article 263 § 7 CCP, in so far as it does not imply a maximum duration of pre-trial detention and allows pre-trial detention to be extended without the need to show grounds justifying such a decision, incompatible with Article 2, Article 30, Article 41 paragraph 1 read in connection with Article 45 paragraph 1, Article 42 paragraph 3 read in connection with Article 42 paragraph 1 of the Constitution of the Republic of Poland and in connection with Article 6 paragraph 2 of the ECHR, and with Article 31 paragraph 3 of the Constitution of the Republic of Poland (https://ipo.trybunal.gov.pl/ipo/dok?dok=F1750913487%2FK_3_16_wns_2016_01_08_ADO.pdf, accessed on 19-06-2019).

56 Such solutions are used in many jurisdictions, e.g. in Bulgaria, Romania, France, Greece, Hungary, Lithuania – see *Country studies for the project on Rehabilitation and mutual recognition – practice concerning EU law on transfer of persons sentenced or awaiting trial*, FRA, November 2016, https://fra.europa.eu/en/country-data/2016/country-studies-project-rehabilitation-and-mutual-recognition-practice-concerning (accessed on 19-06-2019).

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