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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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Date: 10/09/2019

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Meeting: 1355h meeting (September 2019) (DH)

Communication from a NGO (Helsinki Foundation for Human Rights) (21/08/2019) in the case of Burza v. Poland (Application No. 15333/16) (Trzaska group, 25792/94) and reply from the authorities (06/09/2019).

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1355e réunion (septembre 2019) (DH)

Communication d'une ONG (Helsinki Foundation for Human Rights) (21/08/2019) dans l'affaire Burza c. Pologne (requête n° 15333/16) (groupe Trzaska, 25792/94) et réponse des autorités (06/09/2019) **(*anglais uniquement*)**.

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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Warsaw, 21 August 2019

1237/2019/PSP/AK/KW

To:
The Secretary of the Committee of Ministers
Council of Europe
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COMMUNICATION FROM THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

CONCERNING

EXECUTION OF ECtHR JUDGMENT IN CASE *BURŻA AGAINST POLAND* (APPLICATION NO. 15333/16)

To the attention of:

1. Mr. Jan Sobczak
Plenipotentiary of the Minister of Foreign Affairs for cases and procedures before the European Court of Human Rights
Agent of Polish Government

2. Mr. Adam Bodnar
Commissioner for Human Rights

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EXECUTIVE SUMMARY

- In the judgment delivered on 18 October 2018 in the case *Burża v. Poland,* the European Court of Human Rights found that Poland had infringed Article 5 § 3 of the Convention by reason of the excessive length of pre-trial detention.

- On 11 June 2019, the Government of Poland presented an Action Report in which it expressed the hope that the general measures taken would be a sufficient basis for concluding that the judgment has been executed. In the Action Report, the Government referred to, among other things, the action report issued in the case of *Trzaska v. Poland*, which resulted in the adoption of a resolution to close the examination of the execution of a group of judgments on pre-trial detention.

- However, since the adoption of the *Trzaska* resolution (4 December 2014), there have been a number of legislative and practical developments that the Committee should take into account when assessing the execution of the most recent pre-trial detention judgments. Changes in statistics and legislation have also occurred since the adoption of the resolution related to *Porowski v. Poland*, on 18 April 2018.

- As a consequence, in the opinion of the Helsinki Foundation for Human Rights, the measures implemented by the Polish Government in relation to *Burża v. Poland* have not achieved the expected results. Therefore, they could not be sufficient to conclude that Poland has complied with its obligations under Article 46 § 1 of the Convention.

- The last recommendations of the UN Committee Against Torture published on 9 August 2019 also show that in Poland the application of the pre-trial detention remains a problematic issue.

- Moreover, the Ombudsman has been consistently pointing to concerns about the use of pre-trial detention.

- Our position has also a solid statistical basis. 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. Between 2009 and 2015, also 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.

- In view of the current trend in the use of pre-trial detention, concerns are raised by the most recent amendments to the Criminal Code and the Code of Criminal Procedure.

I. Introduction

The Helsinki Foundation for Human Rights (hereinafter "HFHR", "Foundation") would like to respectfully present to the Committee of Ministers of the Council of Europe its communication, under Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, regarding the execution by the Polish authorities of the European Court of Human Rights ("ECtHR") judgment in the case *Burża v. Poland* (application no. 15333/16). We wish to briefly outline a number of issues in relation to the General Measures established in relation to the cases *Burża v. Poland*. Our submissions pay special attention to the facts pointed out by the Government in its Action Report (hereinafter: AR).

The HFHR is a Polish non-governmental organization established in 1989 with a principal aim to promote human rights, the rule of law and the development of open society in Poland and other countries. The HFHR actively disseminates the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "Convention") and is dedicated to contributing to the proper execution of ECtHR judgments. In its activity, the HFHR pays particular attention to the execution of ECtHR judgments and monitors the implementation of ECtHR case-law standards by national authorities. For example, in 2018 the HFHR published a report on the implementation of judgements in Polish cases[1]. Moreover, ever since the HFHR started to operate, the Foundation has been undertaking monitoring, analytical, intervention and litigation activities in the area of criminal justice system[2].

In its communication, Foundation would like to present information based mainly on the findings included in our report "*The Trials of Pre-trial Detention. A review of the existing practice of application of pre-trial detention in Poland*"[3].

II. Judgment in the case *Burża v. Poland*[4]

The applicant complained that he had 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.

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[1] The report is available at:
http://www.hfhr.pl/wp-content/uploads/2018/11/Wykonywanie-wyrok%C3%B3w-ETPC-2018-EN.pdf (accessed on: 13-08-2019);

[2] *Pre-Trial Detention in Poland*, Warsaw 2015,
http://www.hfhr.pl/wp-content/uploads/2016/02/HFHR_PTD_2015_EN.pdf (accessed: on 13-08-2019);
Communication from the Helsinki Foundation for Human Rights Trzaska and Kauczor Group, 21 February 2014, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168063d192 (accessed on: 13-08-2019).

[3] Adam Klepczyński, Piotr Kładoczny, and Katarzyna Wiśniewska, *The Trials of Pre-trial Detention. A review of the existing practice of application of pre-trial detention in Poland*, Warsaw July 2019, http://www.hfhr.pl/wp-content/uploads/2019/07/HFPC_Raport_-Tymczasowe-aresztowanie-nietymczasowy-problem-EN.pdf (accessed on 13-08-2019), hereinafter: Report: "*The Trials of Pre-trial Detention*".

[4] The description of the judgment was taken from Report: "*The Trials of Pre-trial Detention*", p. 39-40.

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.

In its judgment the ECtHR ruled that:[5]

- "*(...) 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.

III. General measures

In the Action Report of 11 June 2019 (see page 2), the Polish government stressed that:

> "*General measures taken in order to address the issue of excessive length of detention on remand have been presented in the action reports concerning the execution of the judgments in the Trzaska v. Poland group of cases (application no. 25792/94, see*

[5] The ECtHR judgment from 18 October 2018 in the case *Burża v. Poland*, application no. 15333/16, §§ 41-43.

document DH-DD(2014)1312) and Porowski v. Poland (application no. 34458/03, judgment of 21/03/2017, final on 21/06/2017)."[6]

Moreover, in the Action Report it was stated that *„the Government is of the opinion (...) that measures of a general nature (...) will be sufficient to conclude that Poland has fulfilled its obligations under Article 46 § 1 of the Convention".*

The HFHR would like to submit clarifications and concerns regarding the Government's observations.

First and foremost, it must be noted that on 4 December 2014, the Committee of Ministers announced the resolution CM/ResDH(2014)268 on closing the examination of the execution of the Court's judgments in the *Trzaska* group of cases.

Importantly, since the adoption of the above resolution (4 December 2014), there have been a number of legislative and practical developments that the Committee should take into account when assessing the execution of the judgments from this group.

The basis for this resolution was the Action Report of 23 October 2014[7], in which the Government presented, inter alia, statistics on the practice of applying pre-trial detention in the period 2008-2013, which showed a systematic decrease in the number of requests for pre-trial detention and in the population of pre-trial detainees, including those held for more than two years. We respectfully draw the Committee of Ministers' attention to the fact that this state of affairs has changed significantly since 2015, which is clearly demonstrated in the statistics presented below. Changes in statistics and legislation should also be noted in relation to the *Porowski* resolution.

Moreover, in the 2014 Action Report, the Government referred to changes resulting from the amendment of September 2013, which entered into force in July 2015. The legislative changes so introduced – which were essentially aimed at incorporating into the Code of Criminal Procedure the fundamental lines of ECtHR case-law – have produced a certain effect, as can be seen from the statistics presented below. 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[8], which entered into force on 15 April of that year. The 2016 amendment did not completely roll 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, which show the direction of 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);

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[6] Communication of the Government of the Republic of Poland of 11 June 2018, p. 2, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168094ef04 (accessed date: 13-08-2019).

[7] https://hudoc.exec.coe.int/eng#{%22EXECIdentifier%22:[%22DH-DD(2014)1312E%22]} (accessed on: 13-08-2019).

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

b) Article 258 § 2 CCP was again redrafted in a way that suggests a 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).

These changes have been partially described in the Action Report submitted in *Porowski v. Poland*. However, as the changes have been in place for a considerable period of time, we can now better assess their impact.

Also, a note should be made of the Act of 13 June 2019 amending the Criminal Code's and certain other acts[9], which significantly increased the upper limits of criminal penalties for a significant 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.

Further concerns are raised by the most recent amendment to the Code of Criminal Procedure, which authorises prosecutors to file an objection to the court's decision to allow to replace pre-trial detention with a non-custodial preventive measure upon the provision of financial surety. This change was opposed by, among others, the Ombudsman, the Warsaw Bar Council and the JUSTICIA network[10].

It should also be noted that the Government's 2014 Action Report makes extensive references to the judgment of the Constitutional Tribunal of 20 November 2012 (case no. SK 3/12), in which the Tribunal held that *"Article 263 § 7 of* [the Code of Criminal Procedure], *insofar as it fails to clearly define the grounds for an extension of pre-trial detention after the first instance court has issued a judgment in the case, is inconsistent with Article 41(1) of the Constitution, read in connection with Article 31(3) of the Constitution and with Article 40 of the Constitution read in connection with Article 41(4) of the Constitution"*. Notably, despite the passage of nearly seven years, no legislation has been introduced to implement this judgment.

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[9] The President of Poland submitted the motion to the Constitutional Tribunal to conduct a constitutional review of the Act of 13 June 2019, http://trybunal.gov.pl/sprawy-w-trybunale/art/10715-nowelizacja-kodeksu-karnego-postepowanie-legislacyjne-dopuszczalny-zakres-poprawek-senackich/ (accessed on: 13-08-2019).

[10] Statement of the Ombudsman to the Chair of the Senate's Committee of Human Rights, Rule of Law and Petitions, 30 July 2019, https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20przewodnicz%C4%85cego%20senackiej%20Komisji%20Praw%20Cz%C5%82owieka%2C%20Praworz%C4%85dno%C5%9Bci%20i%20Petycji.pdf (accessed on: 13-08-2019); Statement of the Warsaw Bar Council of 6 August 2019 on the amendment to the Code of Criminal Procedure, https://www.ora-warszawa.com.pl/aktualnosci/wiadomosci/stanowisko-okregowej-rady-adwokackiej-z-dnia-6-sierpnia-2019-roku-w-sprawie-nowelizacji-kodeksu-postepowania-karnego/ (accessed on: 13-08-2019); Statement of the JUSTICIA network, http://www.hfhr.pl/en/justicia-pre-trial-statement-on-amendment-to-the-code-of-criminal-procedure/ (accessed on: 19-08-2019). The discussed change to the Code of Criminal Procedure was included in the Act of 19 July 2019 amending the Code of Criminal Procedure and other acts, which was signed by the President on 14 August 2019.

It is equally important to note the Polish Bar Council's observations to the Committee of Ministers of the Council of Europe made in March 2016, in which the Council invoked a comprehensive analysis of statistical data and case law to argue that the *Trzaska* resolution could be considered premature, a position that is fully endorsed by the HFHR.[11]

IV. The practice of the application of the pre-trial detention in Poland

Our concerns are further substantiated by the findings of other international bodies.

In its last recommendations the Committee Against Torture (hereinafter: CAT) [12] recommends that Poland should ensure that pretrial detention is used as an exception, a measure of the last resort and applied for a limited period of time. In particular, it recommends that Polish authorities should establish a maximum period prescribed by law. According to the CAT Poland should also take measures to put a stop to the practice of extending pretrial detention and in particular the six-month extensions of pre-trial detention after the first verdict of the court of first instance allowed by the Code of Criminal Procedure. Moreover, the State should ensure that it is not prolonged arbitrarily and that pretrial detainees are held separately from convicted prisoners. Polish authorities should also consider replacing pretrial detention with non-custodial measures, especially for sentences not exceeding two years and consider alternatives to detention, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules). The Committee further recommends that the State party ensure that redress and compensation are provided to persons who are victims of unjustified prolonged pretrial detention.

These recommendations are the consequences of the fact that the CAT was concerned:

- about the extent of application and the duration of pre-trial detention;
- the fact that the Polish Code of Criminal Procedure does not provide for a maximum time of pre-trial detention;
- that pre-trial detention can be extended without justification;
- that courts have difficulties justifying extensions and that the Code of Criminal Procedure allows for sixmonth extensions of pretiral detention after the first verdict of the court of first instance;
- that appeals against decisions on pre-trial detention have a low percentage of success.

The conclusions of the CAT proved that in Poland the issue of the application of the pre-trial detention is still problematic.

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[11] Observations of the Polish Bar Council on the execution of judgments of the European Court of Human Rights in the group of cases *Trzaska v. Poland* (application No 25792/94) by the Republic of Poland, http://www.adwokatura.pl/admin/wgrane_pliki/file-trzaska-v-poland-15060.pdf (accessed on: 13-08-2019).

[12] Concluding observations of Committee Against Torture adopted by the Committee at its sixty-seventh session (22 July-9 August 2019), available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/POL/CAT_C_POL_CO_7_35715_E.pdf (accessed date: 13-08-2019).

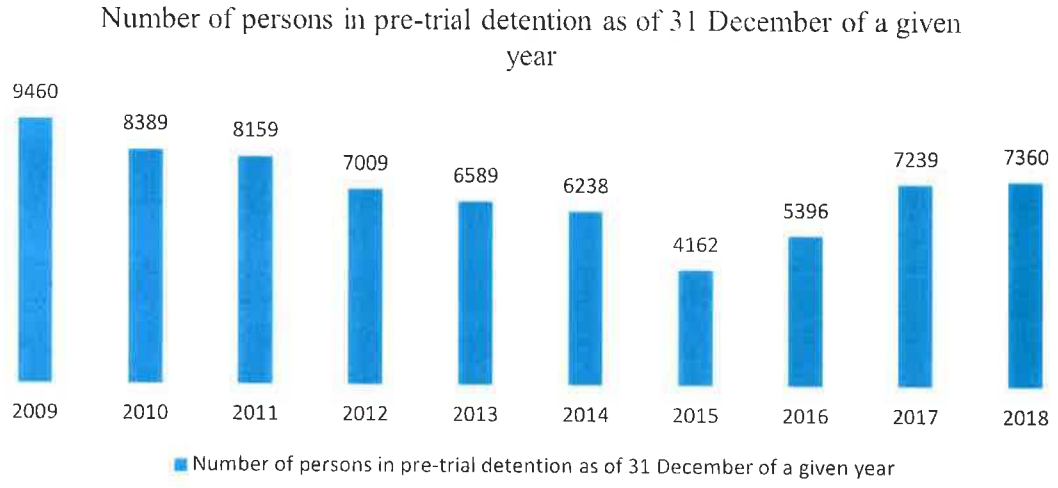
It is worth to underline that similar statements had been presented by the Polish Ombudsman in its *"Alternative report on the seventh periodic report of the Republic of Poland on its implementation of the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the period from 15 October 2011 to 15 September 2017".*[13]

V. Statistical data

In paragraph II.1 of the Action Report, the Government provided statistics on the practice of application of pre-trial detention. We respectfully submit that an analysis of these data alone should demonstrate to the Committee of Ministers that the measures taken by Poland are not sufficient to conclude that the problems of abuse of pre-trial detention and its excessive length have been resolved. The vast majority of these statistics show that the number of requests for applying pre-trial detention is on the rise and that a greater number of persons were put in pre-trial detention over the last two years. Moreover, the data presented by the Government show an increase in the number of persons held in pre-trial detention for a period of more than two years in the course of proceedings before regional and district courts.

In view of the above, we consider it reasonable to provide the Committee with additional statistical information that is capable of demonstrating both the current practice of applying pre-trial detention and the alarming trends that we have seen over the last few years.

a. Number of persons in pre-trial detention[14]



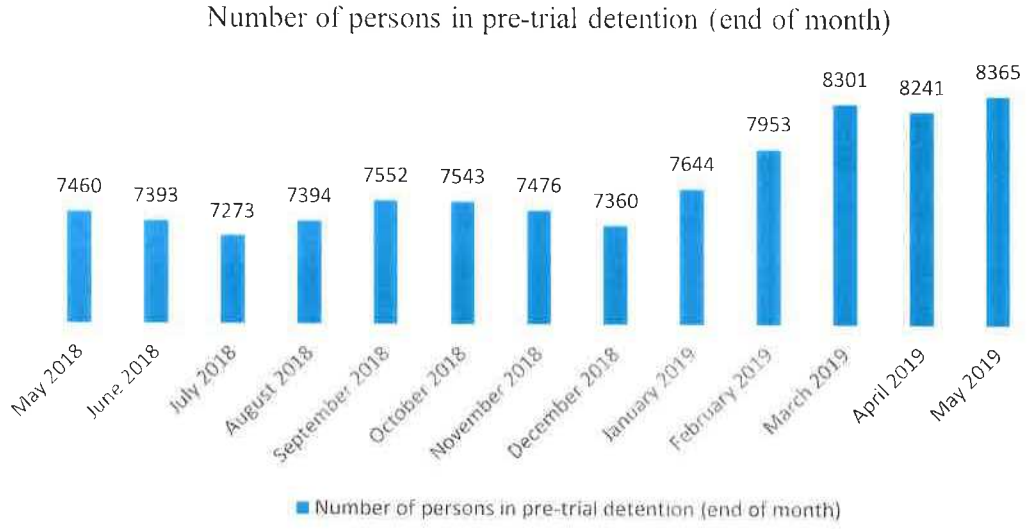
The last decade has been a period of many changes in the criminal policies and the practice of criminal justice authorities in Poland. They were a consequence of introduced legislative changes, but also of the judicial practice, being increasingly better aligned with the standards

[13] Alternative report of the Commissioner for Human Rights on the seventh periodic report of the Republic of Poland on its implementation of the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the period from 15 October 2011 to 15 September 2017, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCAT%2fNP%2fPOL%2f35300&Lang=en, p. 48-52. (accessed date: 13-08-2019).

[14] Report: "*The Trials of Pre-trial Detention*", p. 11-13.

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.



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%

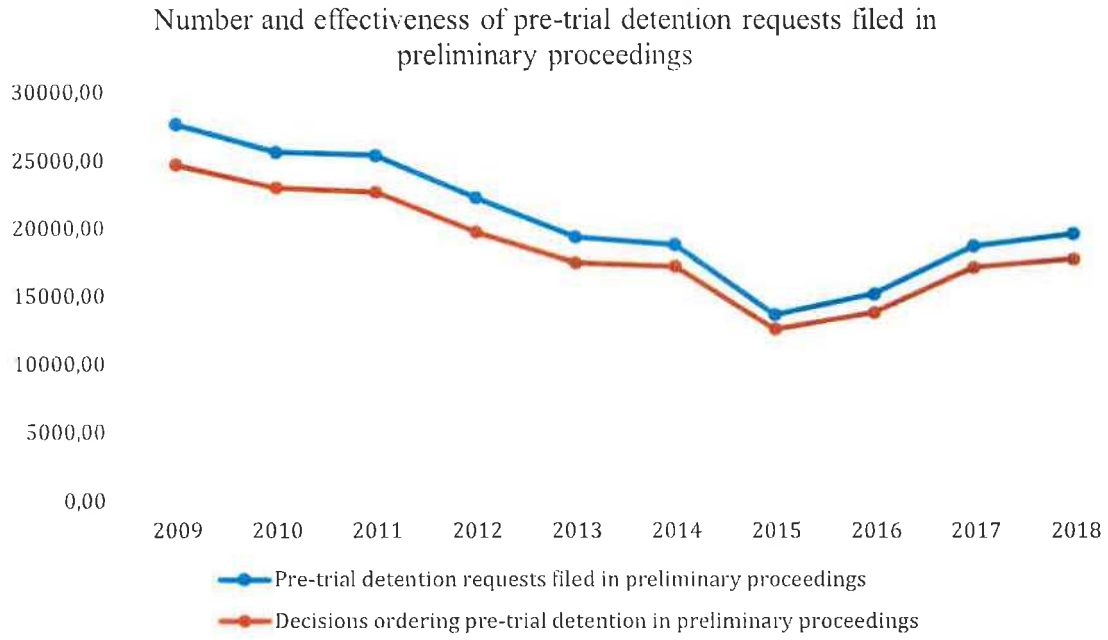
From 2009 to 2015, the percentage of pre-trial detainees in the general population of prisons and pre-trial detention centres was consistently falling, from 11.26% to 5.88%. However, since 2016, there has been an almost a 50% increase in the number of pre-trial detainees. On 31 December 2018, the figure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

b. The number and effectiveness of prosecutor's pre-trial detention requests filed in preliminary proceedings[15]

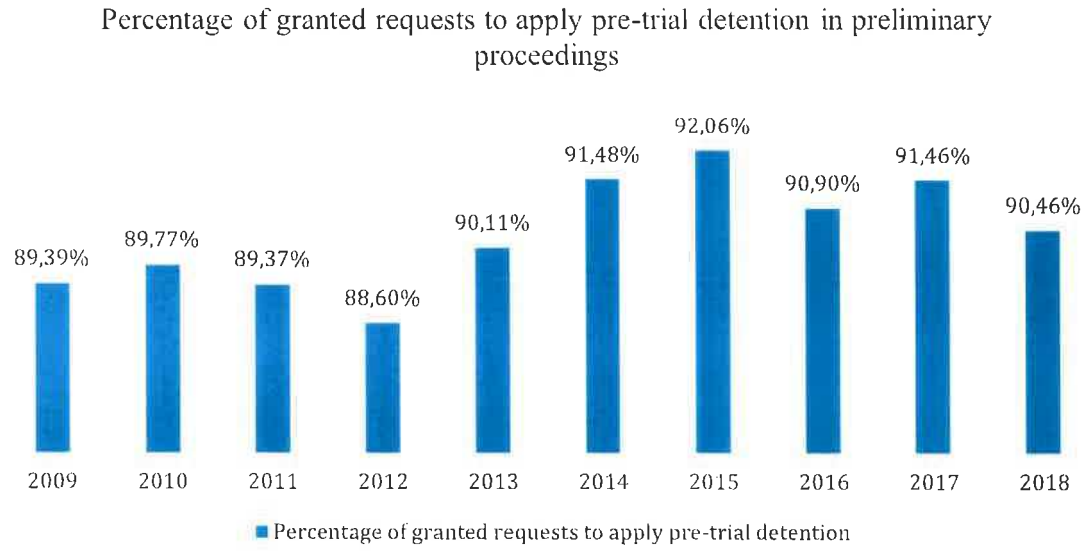
Year	Pre-trial detention requests filed in preliminary proceedings	Decisions ordering pre-trial detention in preliminary proceedings	Percentage of granted pre-trial detention requests
2009	27,693	24,755	89.39%
2010	25,688	23,060	89.77%
2011	25,452	22,748	89.37%
2012	22,330	19,786	88.60%
2013	19,410	17,490	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%

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.

[15] Report: "*The Trials of Pre-trial Detention*", p. 13-15.



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.



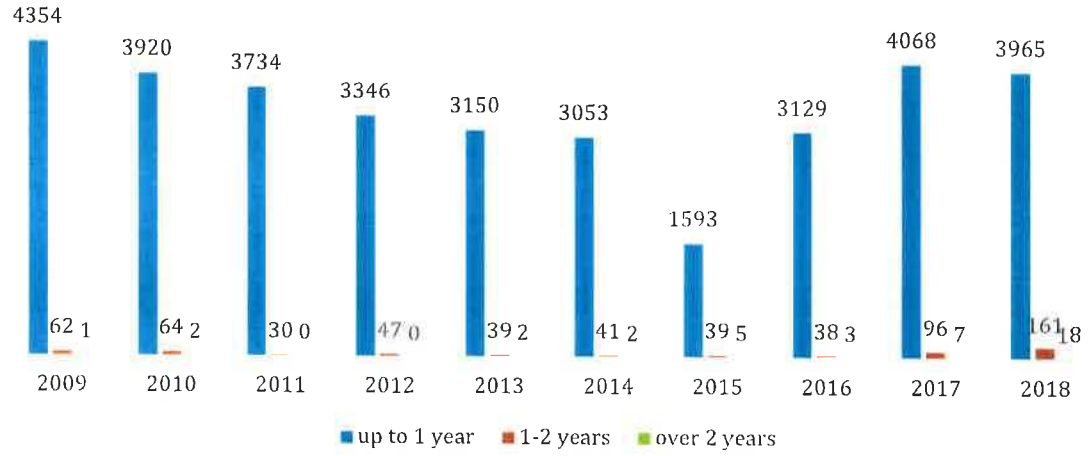
The above statistics lead to the conclusion that an increase in the number of applications does not always results in an increase of their effectiveness. The effectiveness of submitted applications was the highest in 2015. This can be explained, in particular, by the much lower number of submitted requests 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.

c. Duration of pre-trial detention[16]

In a judgment of *Burża v. Poland*, the ECtHR found a violation of art. 5 § 3 of the Convention precisely because of the length of pre-trial detention. According to the Court, three years, two months and nine days of pre-trial detention should have been found to violate the Convention. 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.

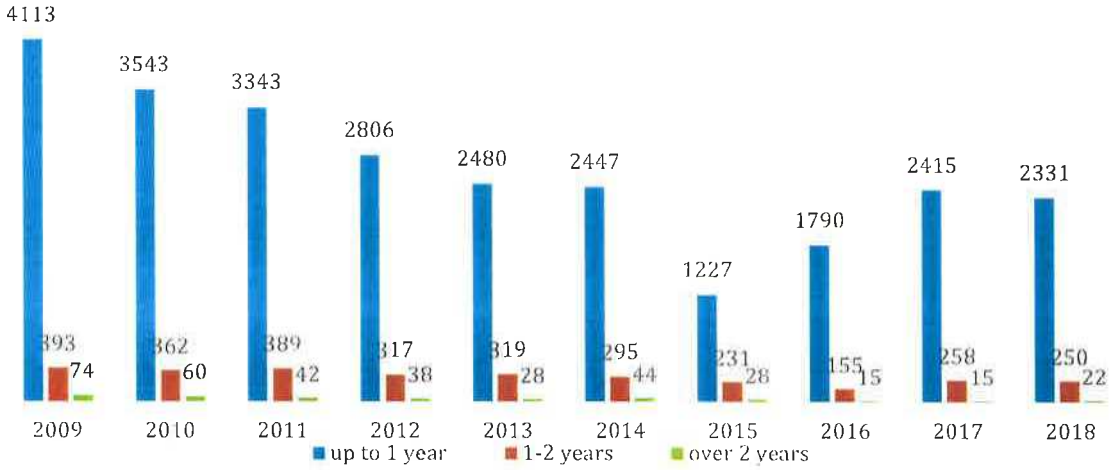
Number of persons in pre-trial detention broken down according to the duration of detention in preliminary proceedings



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).

[16] Report: "*The Trials of Pre-trial Detention*", p. 25-29.

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



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.

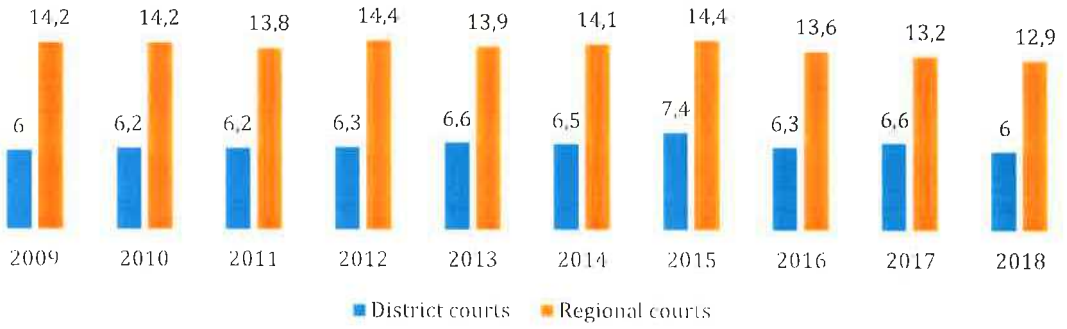
Number of persons in pre-trial detention broken down according to the duration of detention – regional courts

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.

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



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.

VI. Conclusions and recommendations

Having regard to the above-mentioned argumentation, the HFHR requests that the Committee of Ministers continues its supervision of the execution of the *Burża v. Poland* judgment. In our opinion the implemented measures have not achieved the expected results. As a consequence, the adopted measures could not be sufficient to conclude that Poland complied with its obligations under Article 46 § 1 of the Convention. Therefore we claim that examination of *Burża cases* should not be finished, as the systemic problem underlining the violation of human rights has still not been fully resolved. In addition, we would like to point out that the Polish authorities did not specifically address the problem of lengthy pre-trial detention.

For this reason, we recommend that:

a) the Committee request the Polish authorities to provide information on what legislative measures have been introduced to limit the use of pre-trial detention.

In the opinion of the HFHR, in order to fully implement the judgement in the *Burża v. Poland* case additional changes should be introduced by Polish authorities[17]:

a) 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;
b) An alternative option would be to introduce a maximum and non-extendable term of pre-trial detention.
c) The "*severe penalty that the accused may face upon conviction*" (Article 258 § 2 CCP) 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. 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;
d) The structure 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;
e) The list of preventive measure in the Code of Criminal Procedure should be expanded by the addition of house arrest and/or electronic monitoring.

HFHR would like to express its readiness to cooperate with the Committee of Ministers in matters related to the monitoring of the effective implementation of the ECtHR judgement.

On behalf of Helsinki Foundation for Human Rights,

Piotr Kładoczny, PhD
Secretary of the Board
Helsinki Foundation for Human Rights

Danuta Przywara
President of the Board
Helsinki Foundation for Human Rights

[17] The recommendations are based on the conclusions presented in the Report: "*The Trials of Pre-trial Detention*", p. 54-56.

Republic of Poland
Ministry
of Foreign Affairs
Plenipotentiary of the Minister
of Foreign Affairs for cases and procedures
before the European Court of Human Rights
Agent for the Polish Government

DPT.432.102.2019 / 9

Warsaw, 6 September 2019

Mr Fredrik Sundberg
Head of the Department
for the Execution of Judgments
of the European Court of Human Rights
Council of Europe
Strasbourg

Dear Sir,

With reference to the communication submitted to the Committee of Ministers of the Council of Europe on 21 August 2019 by the Helsinki Foundation for Human Rights concerning execution of the European Court of Human Rights' judgment in the case of *Burża v. Poland* (application no. 15333/16), transmitted to the Government on 26 August 2019, attached you will find the Government's comments in response to the said communication, prepared on the basis of information submitted by the Ministry of Justice.

Yours sincerely,

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Government Agent

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In reply to the communication of the Helsinki Foundation for Human Rights (hereinafter: HFHR) of 21 August 2019 in the case *Burża v. Poland* (application no. 15333/16, judgment of 18 October 2018), the Government of Poland would like to submit the following comments with regard to the statistical data and the recommendations to the State Party presented therein.

Statistical data

As regards the statistical data concerning the pre-trial detention it should be pointed out that in recent years (2016-2018) the increase of requests for applying a pre-trial detention has been noted: 15 172 in 2016, 18 750 in 2017 and 19 655 in 2018. The number of the requests admitted by the courts has also increased: from 13 791 in 2016, 17 140 in 2017 to 17 762 in 2018. However, it must be emphasized that at the same time the number of cases received by the Prosecutor's offices has also increased. In particular, in 2016 Prosecutor's offices received 901 882 cases, whereas this number increased to 992 196 cases in 2017 and 1 081 358 cases in 2018. Therefore, the increase in the number of prosecutors' requests for the application of the detention on remand and the number of requests admitted by the courts is more or less proportional to the increase in the number of cases received by the Prosecutor's office in the same period.

With regard to the number of persons detained on remand, at the end of 2018 there were 2 603, such persons in cases pending before district courts (including 22 accused detained for more than 2 years) and 2 062 in cases pending before regional courts (including 261 accused detained for more than 2 years). In comparison – in 2017 in cases pending before district courts 2 688 accused were detained on remand (including 15 persons detained for more than 2 years) and in cases pending before regional courts 1 768 accused were detained (including 221 persons for more than 2 years). In 2016, in turn, in cases pending before district courts 1 960 accused were detained on remand (including 15 persons detained for more than 2 years) and in cases pending before regional courts 1 448 accused were detained (including 243 persons for more than 2 years).

Having regard to the above-presented statistical data it should be noted that the tendency in the number of persons detained on remand pending trial does not indicate any significant changes in the years 2017-2018. The increase can only be noted when comparing years 2016 and 2017.

Lastly, it should be underlined that all cases in which pre-trial detention exceeded 2 years are under administrative supervision of the relevant presidents of the courts, as well as of the Department of the Administrative Supervision in the Ministry of Justice.

HFPR's recommendations

- **Legislative changes**

With regard to the possible legislative changes aimed at limiting the use of pre-trial detention, the Government is of the opinion that there is no justified need for introducing such changes. It should be emphasized that the provisions of the Code of Criminal Procedure (hereinafter: the

CCP) regulate the use of preventive measures, and particularly the pre-trial detention, in a very restrictive manner. According to Article 249 § 1 of the CCP, in order to apply any of the preventive measures it is necessary to establish with a high probability – bordering on certainty - that the accused could have committed the offence in question. The existence of such a high level of probability is indispensable due to the fact that the application of the preventive measures results in limiting of the civic freedoms of the person accused. What is also important, the assessment of such a probability by the domestic court does not interfere in any way with the principle of the presumption of innocence (enshrined in Article 5 § 1 of the CCP), as during the examination of the pre-trial detention request, the court does not assess whether the accused is guilty, but only the level of the probability of him or her committing the crime. Furthermore, aside from the evidentiary basis, it is necessary to give also the specific basis for ordering the detention on remand, justifying application of that measure (as required by Article 258 of the CCP), as well as the aim of applying that measure (see decision of the Court of Appeal in Katowice of 20 January 2010, ref. no. II AKz 17/10). Preventive measures may be ordered in order to ensure the correct course of proceedings and, exceptionally, in order to prevent the accused from committing a new serious offence (Article 249 § 1 of the CCP).

Lastly, the principle of the pre-trial detention as *ultima ratio*, expressed in Article 257 § 1 of the CCP, cannot be overlooked. It provides that detention on remand shall not be ordered if a different preventive measure is sufficient. Further, regulation of Article 257 § 2 of the CCP, allowing the court ordering detention on remand to rule that this measure will be changed at the moment of posting of the required bail within the specified time-limit, is also of importance here.

- **Transposition of Article 5 § 3 of the Convention into the Code of Criminal Procedure and introduction of an maximum and non-extendable time-limit for pre-trial detention**

Firstly, in reference to the HFHR's suggestion to transpose the wording of Article 5 § 3 of the European Convention on Human Rights ("Everyone arrested or detained (...) shall be brought promptly before a judge (...) and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial") into the Code of Criminal Procedure, it should be noted that all of the rights guaranteed by that provision are already properly covered in the existing provisions of the Polish law. In particular, regulations provided for in the CCP and in the Ordinance of the Minister of Justice of 18 June 2019 – Rules on the operation of common courts (*Regulamin urzędowania sądów powszechnych*) oblige the court to order trial and conduct it without undue delay (Article 348 of the CCP) and to make all efforts to resolve the case during the first main hearing (Article 366 § 2 of the CCP). What is more, cases concerning the application of pre-trial detention and cases, in which such detention was ordered, are classified as urgent and thus the domestic court is obliged to examine them in the first place, regardless of the order in which the cases were submitted (§ 2 point 5a, § 79 (1) and (2) of the above-mentioned Rules).

Secondly, regarding the HFHR's alternative suggestion of introducing a maximum and non-extendable period for which a pre-trial detention could be applied, it should be underlined that this issue has also been already properly regulated by the existing provisions of the Polish law. The provision of Article 263 of the CCP, read together with the provision concerning negative conditions for ordering detention on remand, constitute a sufficient safeguard against the

arbitrary extension of the pre-trial detention. It should be noted that the particularities of the criminal proceedings do not allow for a precise definition of a maximum and non-extendable duration of a detention on remand that could be objectively assessed as not exceeding "a reasonable time". The European Court also stressed in its case-law (see for example *Bąk v. Poland*, judgment of 16 January 2007, §§ 51-52) that "the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. (...) It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions dismissing the applications for release."

It should be emphasized that the extension of the duration of the detention on remand is allowed only in the event of specific circumstances of the case, understood as the inability to conclude the preparatory proceedings within the time limit set in Article 263 § 1 of the CCP due to the objectively existing obstacles of a factual, evidentiary or procedural nature, that are impeding the course of the preparatory proceedings (see decision of the Court of Appeal in Lublin of 6 October 1999, ref. no., II AKz 240/99).

- **Notion of the severity of possible penalty as a sole ground for imposition of pre-trial detention**

The premise of the severity of possible penalty, indicated in Article 258 § 2 of the CCP is an independent and sufficient ground for the use of pre-trial detention. It must be emphasized, however, that this premise includes a presumption that the accused person may attempt various unlawful activities aimed at destabilising the proper course of the proceedings, what in turn releases from the obligation to demonstrate specific behaviors that impede the proceedings.

Moreover, the severe penalty that the accused may face upon conviction as the ground for pre-trial detention is also applied in several other countries – Member States of the Council of Europe.

Furthermore, the suspicion of committing a crime or offense subject to severe punishment of imprisonment has not been questioned in the case law of the European Court of Human Rights as the ground for application of pre-trial detention (see for example *Jabłoński v. Poland*, judgment of 21 December 2000, § 82; *Kreps v. Poland*, judgment of 26 July 2001, § 43; *Iłowiecki v. Poland*, judgment of 4 October 2001, § 62).

Having regard to the above, and especially to the fact that similar legal regulations are functioning in other European countries, there is no justification for the amendments in the Code of Criminal Procedure and for the remodeling of the premise indicated in Article 258 § 2 of that Code.

- **Structure of chapter 28 of the Code of Criminal Procedure – structure and possible new preventive measures**

In the Government's opinion, the change of the layout of chapter 28 of the Code of Criminal Procedure would not affect the frequency of use of specific preventive measures. It would rather constitute an unnecessary editorial change that might cause unnecessary confusion.

The provisions of the CCP determine six kinds of preventive measures: pre-trial detention, bail, supervision, order to leave premises occupied jointly with the victim, suspension in the performance of official duties or profession and ban on leaving the country together with retention of passport or another document authorizing to cross the border. In the Government's opinion those preventive measures seem to be sufficient for a proper implementation of the criminal policy. Therefore, there are currently no grounds for introducing new preventive measures as there are no data or information indicating that introducing another preventive measure would in fact result in the decrease of the number of pre-trial detention orders.