

Pre-Trial Detention Rates and the Rule of Law in the European Union

Briefing to the European Commission

About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused. Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.



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In 2020, pre-trial detention rates rose across EU Member States, despite the serious health risks created by detaining people during the COVID-19 pandemic. In a number of Member States, including Poland and France, the number of people being held in prison while waiting for a trial has increased steadily over the past five years.

This increase in pre-trial detention is a sign that the rule of law continues to decline across the European Union.

As Europe faces the third wave of the COVID-19 pandemic, Fair Trials is calling for Member States to ensure pre-trial detention is only used when necessary and proportionate. We are also calling for the European Commission to include pre-trial detention in its current discussions with Member States in preparation for the [2021 Rule of Law monitoring report](#).

Pre-trial detention and the rule of law

The rule of law requires criminal justice systems to be fair and open. From an individual's perspective, this means that people who are accused of a crime are treated fairly. From a State's perspective, that criminal justice systems must ensure that law enforcement authorities operate within their legal remit and do not exceed their legal powers. Even though law enforcement authorities need to have legal powers to investigate and prosecute crimes, the legality and proportionality of their actions, which directly affect people's fundamental rights, must be subject to independent and impartial review.

Depriving someone of their liberty while they wait for the judgment on their guilt or innocence in a criminal case is among the harshest decisions a criminal justice system can take, and therefore, it is where the rule of law starts. Pre-trial detention should only be used as a measure of last resort when, after a thorough individual assessment, it is deemed necessary, proportionate and in compliance with the presumption of innocence and the right to liberty. If people are being unnecessarily placed in pre-trial detention, this indicates a failure of the mechanisms in place to uphold the rule of law and protect individuals from the excessive use of state power.

High pre-trial detention rates are a sign that these strict limitations are not being respected and that the rule of law is being undermined.

Call for urgent release on health grounds during pandemic

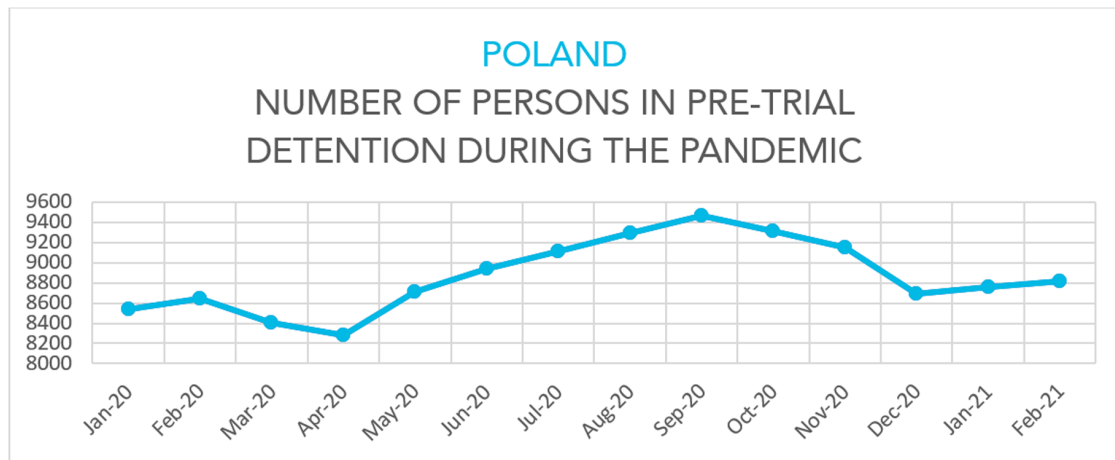
In March 2020, at the start of the COVID-19 pandemic, Fair Trials published a practical guide calling on judicial authorities and criminal justice actors to take urgent action on pre-trial detention as a matter of public health and safety. We urged for the number of people being held in pre-trial detention to be reduced and for arrested persons to only be placed in pre-trial detention as a measure of last resort.¹

The risk of contagion in places of detention is particularly high in overcrowded prisons, where the implementation of social distancing rules is impracticable.

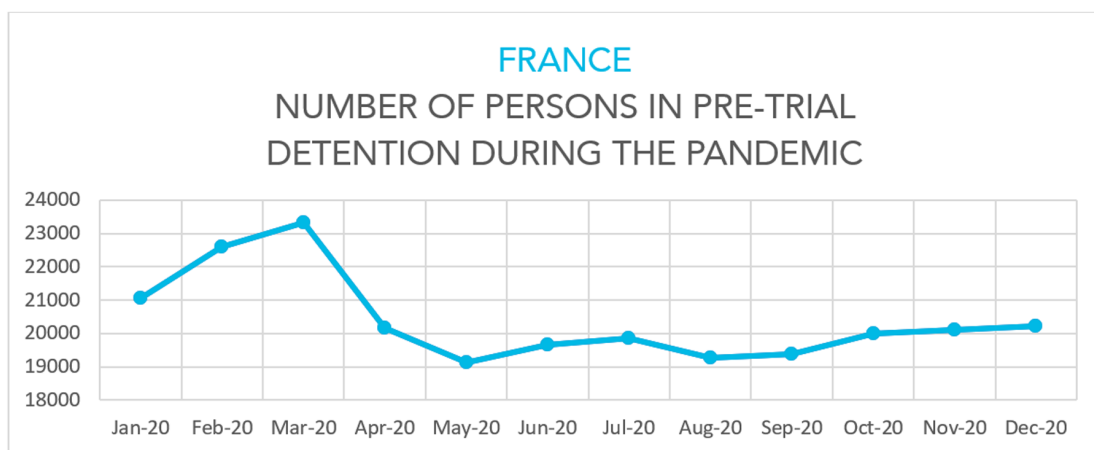
People in prison are very vulnerable to infectious disease due to poor access to sanitation and health facilities, unsanitary conditions and overcrowding, which can make physical distancing and isolation impossible.² The health risks increased greatly during the COVID-19 pandemic, yet pre-trial detention rates did not decrease in 2020.

For pre-trial detainees who, under normal circumstances, are already subject to a stricter regime than people serving their sentence, the pandemic brought even tighter restrictions. The ability to see their families, to engage in group activities and access basic services (such as showers) was further restricted, posing the risk of increased tensions and leading to further risk to the life and health of both residents and prison staff. People waiting for a trial have been restricted in how they access legal services in prison and attend court hearings, which has affected the preparation of their defence and ability to participate effectively in the court proceedings.

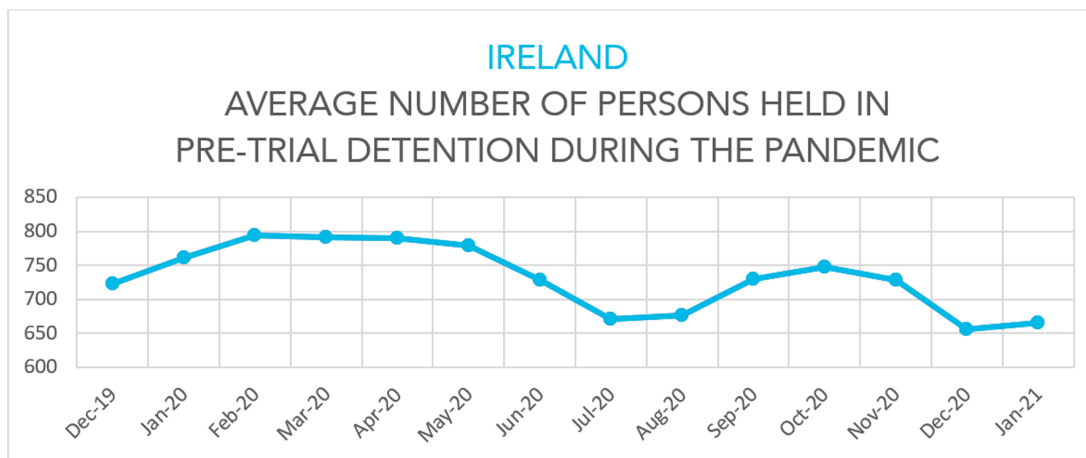
Although Member States have taken some measures to release prisoners, they have failed to take action to release those being held in pre-trial detention, or to reduce the number new pre-trial detention orders. Even where there were some reductions in the number of pre-trial detainees during the crisis, these rates increased again as the pandemic continued.³ These fluctuations reveal the existence of a structural issue on which ad hoc measures have only a limited impact.



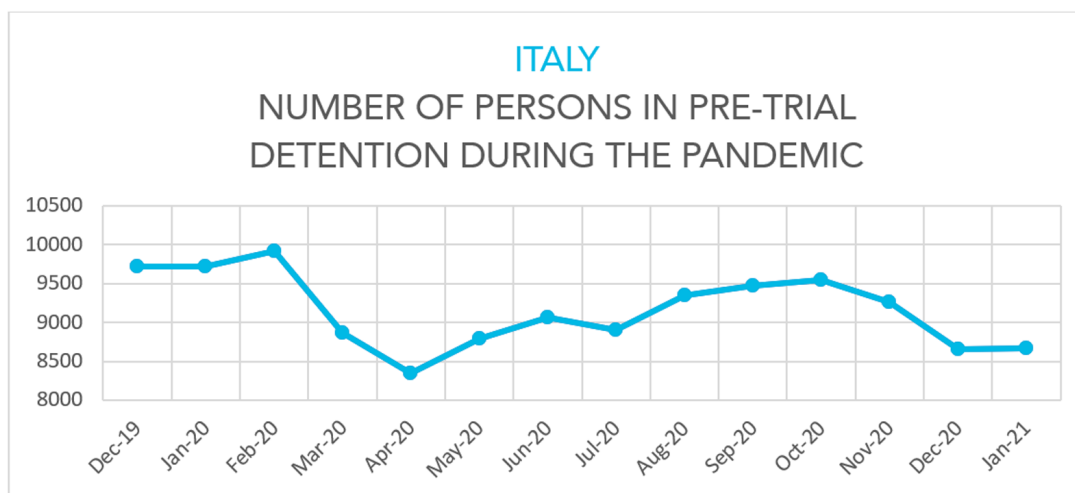
In Poland, the number of persons in pre-trial detention was at 8,640 at the end of February 2020. This slightly reduced to 8,285 in April, but then increased dramatically as of May 2020 with a rate of 8,710, reaching a peak of 9,466 at the end of September 2020. Courts even continued to order pre-trial detention for persons suspected of violations of the coronavirus isolation and home quarantine rules.⁴



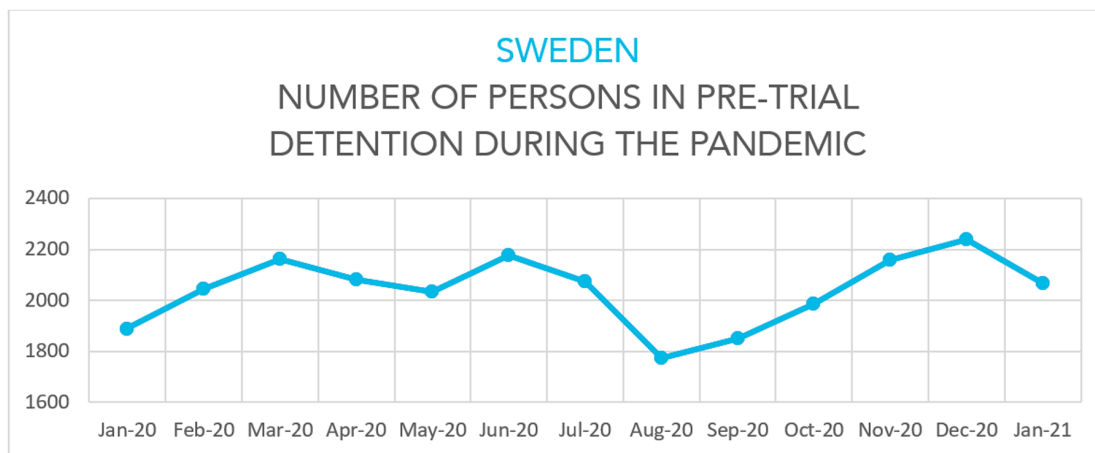
In France,⁵ the number of pre-trial detainees was at 22,611 at the beginning of February 2020 and reached a peak of 23,324 at the beginning of March. It then decreased to 19,138 in May only to increase again to 20,213 in December.



In Ireland,⁶ the average monthly number of persons in pre-trial detention raised from 761 in January 2020 to a peak of 794 in February. It decreased to 671 in July only to increase again to 747 in October.



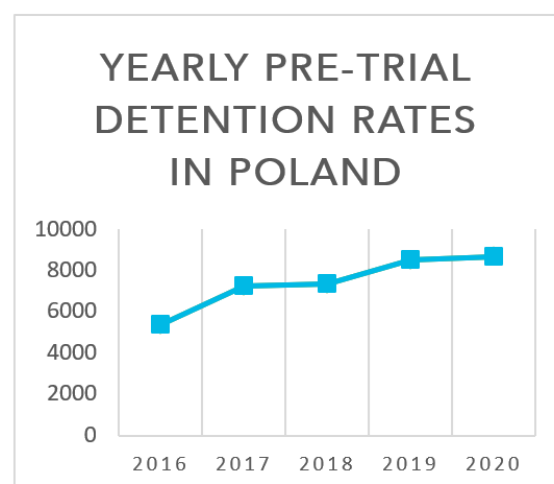
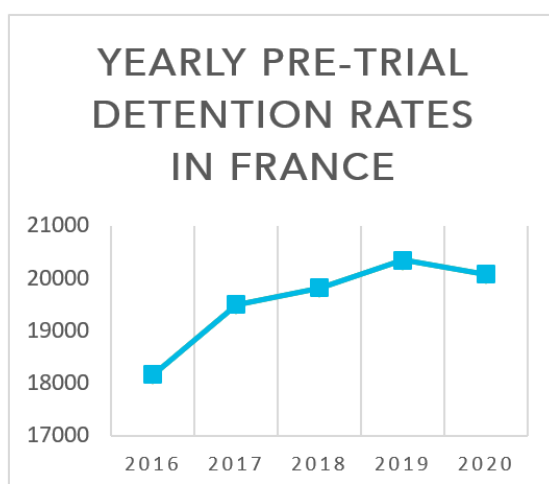
In Italy,⁷ the number of persons in pre-trial detention was at 9,920 in February 2020. It decreased to 8,340 in April, but only to increase again to a new peak of 9,549 in October.

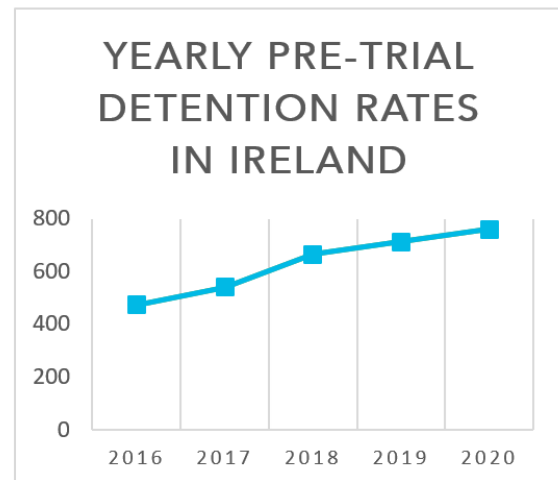
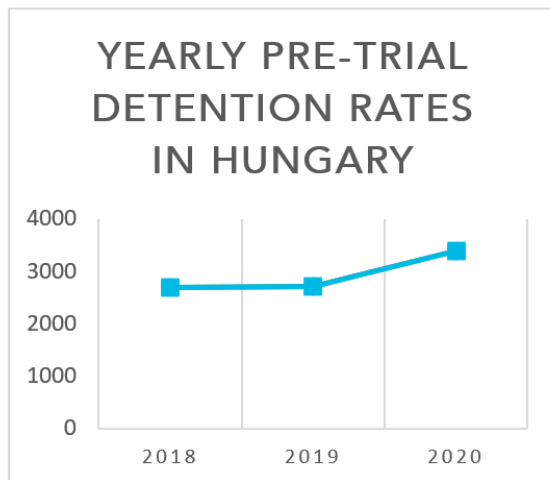


In Sweden,⁸ the average monthly number of persons in pre-trial detention raised from 1,889 in January 2020 to a peak of 2,178 in June. It decreased to 1,772 in August, only to increase again to 2,238 in December.

This increase in pre-trial detention rates has a serious impact on the rule of law

Since 2016, there has been a yearly increase in the number of persons held in pre-trial detention across the European Union, which can be seen in Member States including France, Poland and Ireland.⁹





The gradual increase of pre-trial detention rates in the last five years and the peaks reached over 2020, at a time where being in prison posed serious and immediate health risks, raises the question of whether the principle of pre-trial detention as a measure of last resort is adequately enforced¹⁰ and is a key indicator of the erosion to the rule of law in the European Union.

Over the last year, certain States even considered measures to restrict people's access to courts for the periodic review of holding them in pre-trial detention. For instance, in France, the government issued the order n°2020-303 of 25 March 2020 (later ruled unconstitutional by the Constitutional Council) to automatically and without judicial review extend the maximum pre-trial detention time limits for up to 6 months in certain situations. Extending pre-trial detention with no judicial reasoning goes against the very essence of rule of law and respect for fundamental rights.

Number of people held in pre-trial detention yearly, from 2016 to 2020				
	France ¹	Poland ²	Hungary ³	Ireland ⁴
2016	18,158	5,396	Not available	475
2017	19,498	7,239	Not available	541
2018	19,815	7,360	2,694	667
2019	20,343	8,520	2,709	714
2020	20,075	8,692	3,389	761

We call on Member States to review pre-trial detention procedures and implement measures to reduce its use. This is more urgent than ever in the light of the health risks related to the ongoing pandemic across Europe.

The European Union also has a role to play. The EU recognises access to independent courts and effective judicial review as a fundamental element of the rule of law.¹¹ Fair Trials urges the Commission to ensure, as part of its rule of law reporting mechanism, that applicable legal frameworks do not fall below the standards of the EU Charter of Fundamental Rights and guarantee access to impartial courts, meaningful judicial review, and the full and effective use of defence rights for all people in detention.

We call upon the Commission to include in dialogues with all Member States a thorough review of the reasons for increases in pre-trial detention rates throughout the health crisis and consider collecting the following information from Member States, and report back on findings as part of the upcoming 2021 Rule of Law monitoring report:

Over 2020:

- Were measures adopted/considered to reduce the number of persons in pre-trial detention in 2020 and if not, why?
- How many people have been held in pre-trial detention?
- How many people have been held in pre-trial detention:
 - For less than a month?
 - between 1 and 3 months?
 - between 3 and 6 months?
 - between 6 months and a year?
 - more than a year?
- What was the average length of pre-trial detention?
- What was the proportion of people in pre-trial detention among the total prison population?
- How regularly were people given access to court to challenge pre-trial detention?
- What measures (if any) were taken to ensure the effective use of defence rights (access to lawyer, right to interpretation, access to case file) for people in pre-trial detention despite the pandemic-related restrictions?
- Were pre-trial detention hearings (initial and review) conducted remotely or in person?
- Were prosecutors subject to any specific instructions regarding pre-trial detention motions?
- What alternative measures to detention were made available and to what extent have they been used?

Endnotes

- 1 - Fair Trials, The public health need to keep people out of detention – Practical Guidance, March 2020, available at <https://www.fairtrials.org/news/public-health-need-keep-people-out-detention-practical-guidance> (accessed on March 15, 2021).
- 2 - L. Baudrihay-Gérard, “The Covid-19 pandemic: the urgency to rethink the use of pre-trial detention”, in. *Antigone*, 1/2020, Have prisons learnt from Covid-19 ? How the world has reacted to the pandemic behind bars.
- 3 - L. Baudrihay-Gérard, “The Covid-19 pandemic: the urgency to rethink the use of pre-trial detention”, in. *Antigone*, 1/2020, Have prisons learnt from Covid-19 ? How the world has reacted to the pandemic behind bars.
- 4 - Polish Helsinki Foundation For Human Rights (HFHR), Impact of the coronavirus pandemic on the criminal justice system, available at https://www.hfhr.pl/wp-content/uploads/2021/02/02_Situation-of-persons-in-pretrial-detention_15022021.pdf (accessed on March 15, 2021).
- 5 - Statistiques des établissements des personnes écrouées en France, situation au 1er Décembre 2020, available at http://www.justice.gouv.fr/art_pix/stat_etab_decembre_2020.pdf (accessed on March 15, 2021).
- 6 - Monthly statistics of the Irish prisons service made available by ICCL, available at <https://www.irishprisons.ie/information-centre/statistics-information/monthly-information-note/> (accessed on March 15, 2021).
- 7 - Data made available by Antigone, published on the website of the Italian Ministry of Justice <https://www.giustizia.it>.
- 8 - Data made available to Civil Rights Defender by the Swedish Prison and Probation Service in response to a FOI.
- 9 - World Prison Brief & Institute for Crime and Justice Policy Research, World Pre-Trial/Remand Imprisonment List, fourth edition, February 2020, p.11-14.
- 10 - Fair Trials Report, “A measure of last resort – the practice of pre trial detention decision making in the EU”, p.24 available at https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf (accessed on March 15, 2021).
- 11 - European Commission, Communication from the Commission, The Rule of Law Situation in the European Union, COM(2020) 280 final, p.1; European Commission, Communication from the Commission, Further Strengthening the Rule of Law in the Union: State of Play and Possible Next Steps, COM(2019) 163, p.1 and Strengthening the Rule of Law within the Union: A Blueprint for Action, COM(2019) 343.