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NOTE

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| From: | General Secretariat of the Council |
| To: | Delegations |
| Subject: | Non-paper from the Commission services in the context of the adoption of the Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions |

Delegations will find attached the above-mentioned non-paper from the Commission services, which accompanies the forthcoming Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (expected date of publication: 8 December 2022).

**Non-paper from the Commission services in the context of the adoption of the
Recommendation on procedural rights of suspects and accused persons subject to pre-trial
detention and on material detention conditions**

Introduction

The purpose of this non-paper is to provide insight, by way of statistical data, into the substantial divergences, which exist among Member States in relation to important aspects of pre-trial detention and material detention conditions, and their impact on judicial cooperation in criminal matters.

1. Divergences across Member States as regards pre-trial detention

Although Member States should comply with Article 5 of the European Convention on Human Rights (ECHR), in practice significant divergences exist among Member States in relation to important aspects of pre-trial detention, such as the use of pre-trial detention as a last resort and the review of pre-trial decisions. For some Member States, it seems that pre-trial detention is treated less as an exceptional measure than as a normal part of the process of prosecuting suspected offenders.

The maximum time limit for pre-trial detention, the average length of pre-trial detention and the number of pre-trial detainees as a proportion of the total prison population also vary significantly from one Member State to another, which is demonstrated by the figures below.

A) Maximum time in pre-trial detention

The maximum time limit for pre-trial detention as laid down in the national laws of different Member States ranges from less than 1 year to more than 5 years. Six Member States do not provide for a maximum time-limit in their national law.

Table maximum time limit for pre-trial detention

| Period | Member State |
|----------------------------|----------------------------|
| Less than 1 year | AT, DE, DK, EE, LV, SE, SK |
| Between 1 year and 2 years | BG, GR, LT, MT, PL, PT |
| Between 2 and 5 years | CZ, FR, ES, HR, HU |
| More than 5 years | IT, RO |
| No time limit | BE, CY, FI, IE, LU, NL |

Source: *Rights of suspects and accused persons who are in pre-trial detention (exploratory study)*. Annex 2, Country fiches, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/184080>.

SI did not provide information on the maximum time limit.

B) Average length of pre-trial detention by Member State

According to the SPACE (Statistiques Pénales Annuelles du Conseil de l'Europe) I 2021 Final Report, the average length of imprisonment for detainees not serving a final sentence during 2020 was 4.5 months in all Council of Europe countries¹.

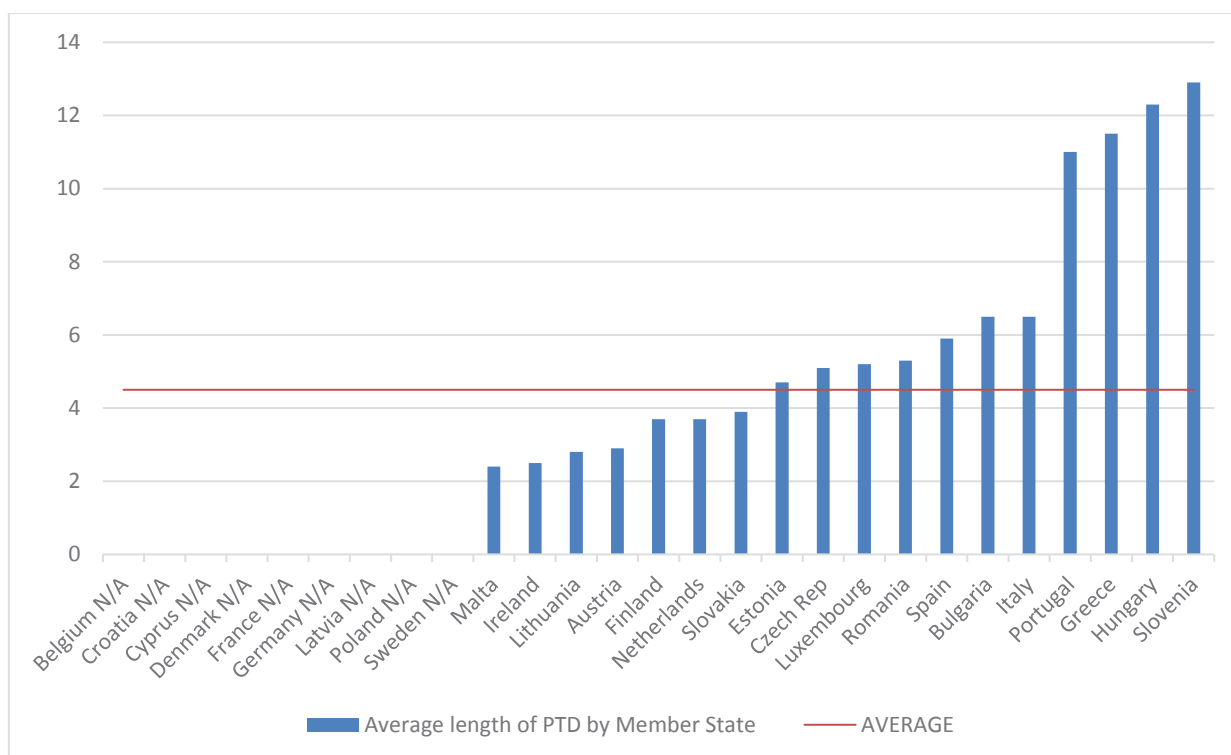
Concerning EU Member States, for which data is available, the highest indicators of the average length of pre-trial detention (in months), were to be found in Slovenia (12.9), Hungary (12.3), Greece (11.5), Portugal (11), Italy (6.5), Bulgaria (6.5), Spain (5.9), Romania (5.3), Luxembourg (5.2) and Czech Republic (5.1). It has to be noted, however, that not all EU Member States provided figures on the matter.

¹ [Aebi-Cocco-Molnar-Tiago 2022 Prisons-and-Prisoners-in-Europe-2021 Key-Findings-SPACE-I -220404.pdf \(unil.ch\)](#)

Table average length of pre-trial detention in 2020 (in months)

| Member State | Average length | Member State | Average length |
|--------------|----------------|--------------|----------------|
| Austria | 2.9 months | Italy | 6.5 months |
| Belgium | N/A | Latvia | N/A |
| Bulgaria | 6.5 months | Lithuania | 2.8 months |
| Croatia | N/A | Luxembourg | 5.2 months |
| Cyprus | N/A | Malta | 2.4 months |
| Czech Rep | 5.1 months | Netherlands | 3.7 months |
| Denmark | N/A | Poland | N/A |
| Estonia | 4.7 months | Portugal | 11.0 months |
| Finland | 3.7 months | Romania | 5.3 months |
| France | N/A | Slovakia | 3.9 months |
| Germany | N/A | Slovenia | 12.9 months |
| Greece | 11.5 months | Spain | 5.9 months |
| Hungary | 12.3 months | Sweden | N/A |
| Ireland | 2.5 months | | |

Source: *Rights of suspects and accused persons who are in pre-trial detention (exploratory study)*. Annex 2, Country fiches, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2838/184080>.



C) Percentage of pre-trial detainees out of the total prison population

According to the SPACE I 2021 Final Report, 22% of the detainees held in European penal institutions in Council of Europe countries are not serving a final sentence, meaning that they are in pre-trial detention².

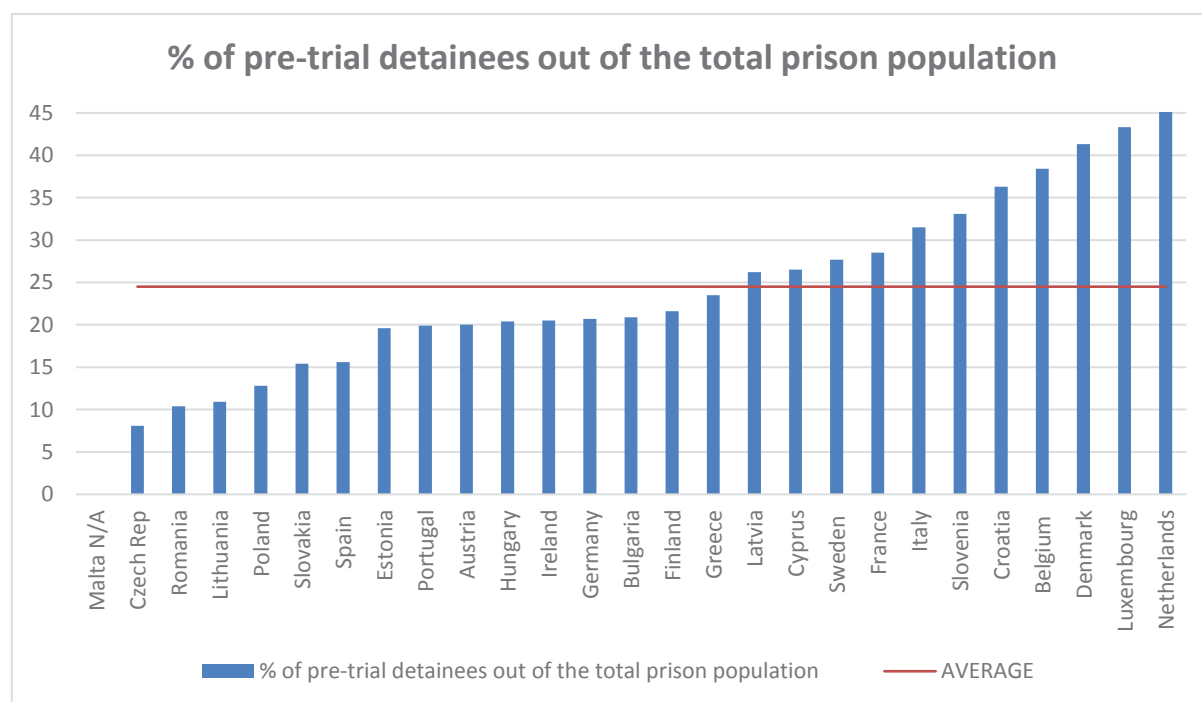
The percentage of detainees not serving a final sentence varies broadly across countries.

Among the EU Member States a very high rate can be found in 7 Member States: Belgium, Croatia, Denmark, Italy, Luxembourg, Netherlands and Slovenia. The percentages of detainees not serving a final sentence in these Member States vary from 45.7% to 31.5% of the prison population (from Netherlands with the highest rate of 45.7% to Italy with the still high rate of 31.5%). A generally high rate can be found in at least 4 Member States: Cyprus, France, Latvia and Sweden. For these Member States the percentages of detainees not serving a final sentence vary from 26.2% to 28.5% of the prison population.

² [Aebi-Cocco-Molnar-Tiago 2022 Prisons-and-Prisoners-in-Europe-2021 Key-Findings-SPACE-I -220404.pdf \(unil.ch\)](#)

Table % of pre-trial detainees out of the total prison population (Percentage of detainees not serving a final sentence in the prison population on 31st January 2021)

| Member State | Percentage (%) in 2021 | Member State | Percentage (%) in 2021 |
|--------------|------------------------|--------------|------------------------|
| Austria | 20 | Italy | 31.5 |
| Belgium | 38.4 | Latvia | 26.2 |
| Bulgaria | 20.9 | Lithuania | 10.9 |
| Croatia | 36.3 | Luxembourg | 43.3 |
| Cyprus | 26.5 | Malta | N/A |
| Czech Rep | 8.1 | Netherlands | 45.2 |
| Denmark | 41.3 | Poland | 12.8 |
| Estonia | 19.6 | Portugal | 19.9 |
| Finland | 21.6 | Romania | 10.4 |
| France | 28.5 | Slovakia | 15.4 |
| Germany | 20.7 | Slovenia | 33.1 |
| Greece | 23.5 | Spain | 15.6 |
| Hungary | 20.4 | Sweden | 27.7 |
| Ireland | 20.5 | | |



2. Divergences across Member States as regards prison density and material detention conditions

A) Prison density in the Member States

According to the SPACE I 2021 Final Report³, among the EU Member States, 8 have a prison density of more than 100 inmates per 100 places. Among these, 3 (France, Hungary, Sweden) had a density that was higher than 100 but inferior to 105, while the other 5 (Belgium, Cyprus, Greece, Italy, Romania) were experiencing overcrowding, with rates of more than 105 inmates per 100 places⁴ (Belgium (108.4) Cyprus (110.5) Greece (111.4), Italy (105.5) and Romania (119.3).

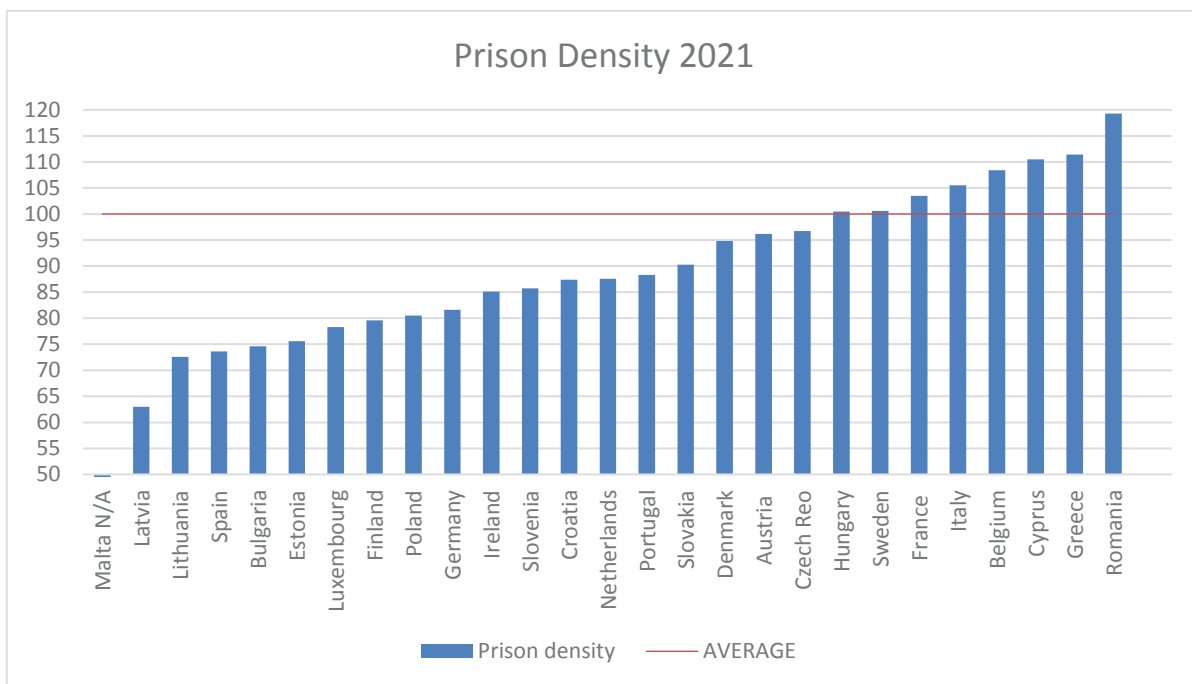
The estimated level of occupation of the cells differs considerably among the countries that provided the relevant data, ranging roughly from 1 (as in Finland and Spain) to 10 (as in the Slovak Republic) detainees per cell. At the European level, there are roughly 1.5 detainees per cell. This suggests that some penal institutions who are, at first glance, not experiencing overcrowding may have in practice overcrowded cells.

³ [Aebi-Cocco-Molnar-Tiago 2022 SPACE-I 2021 FinalReport 220404.pdf \(unil.ch\)](#).

⁴ Data on prison capacity is provided by the countries and therefore corresponds to their own estimation of it. By definition, there is overcrowding when there are more inmates than the number of places available in penal institutions. See [Aebi-Cocco-Molnar-Tiago 2022 Prisons-and-Prisoners-in-Europe-2021 Key-Findings-SPACE-I -220404.pdf \(unil.ch\)](#).

Table Prison overcrowding (Prison density (number of inmates per 100 detention places) on 31st January 2021

| Member State | Prison density 2021 | Member State | Prison density 2021 |
|------------------|---------------------|--------------------|---------------------|
| Austria | 96.2 | Italy | 105.5 |
| Belgium | 108.4 | Latvia | 63.0 |
| Bulgaria | 74.6 | Lithuania | 72.6 |
| Croatia | 87.4 | Luxembourg | 78.3 |
| Cyprus | 110.5 | Malta | N/A |
| Czech Rep | 96.7 | Netherlands | 87.6 |
| Denmark | 94.8 | Poland | 80.5 |
| Estonia | 75.6 | Portugal | 88.3 |
| Finland | 79.6 | Romania | 119.3 |
| France | 103.5 | Slovakia | 90.3 |
| Germany | 81.6 | Slovenia | 85.7 |
| Greece | 111.4 | Spain | 73.6 |
| Hungary | 100.5 | Sweden | 100.6 |
| Ireland | 85.1 | | |



B) Material detention conditions

As regards material detention conditions, the research undertaken by the European Union Agency for Fundamental Rights Agency (FRA) in this area also gives a diverse picture of the situation in the Member States.

The '[Criminal detention conditions in the European Union: rules and reality](#)' report⁵ outlines how selected minimum standards at international and European level are implemented into national laws and to what extent these national laws are complied with in practice.

FRA has also developed, at the request of the Commission, the Criminal Detention Database⁶ which was launched in December 2019. The Criminal Detention Database combines in one place information on detention conditions in all 27 Member States. It does not 'rank' Member States, but informs drawing on national, European and international standards, case law and monitoring reports about selected core aspects of detention conditions: including cell space, sanitary conditions, access to healthcare and protection against violence. The report and the database aim to assist judges and other legal practitioners involved in cross-border cases based on mutual recognition instruments, such as the European Arrest Warrant (EAW).

C) Cost of imprisonment

The costs of imprisonment vary from 6.50 Euros per day in Bulgaria to 332.63 Euro per day in Luxembourg. The highest expenses in penal institutions per day can be found in Luxembourg (332.63), Sweden (303.0), the Netherlands (284.00), Spain (234.50), Finland (208.30), Denmark (205.70), Ireland (200.27) and Germany (157.72).

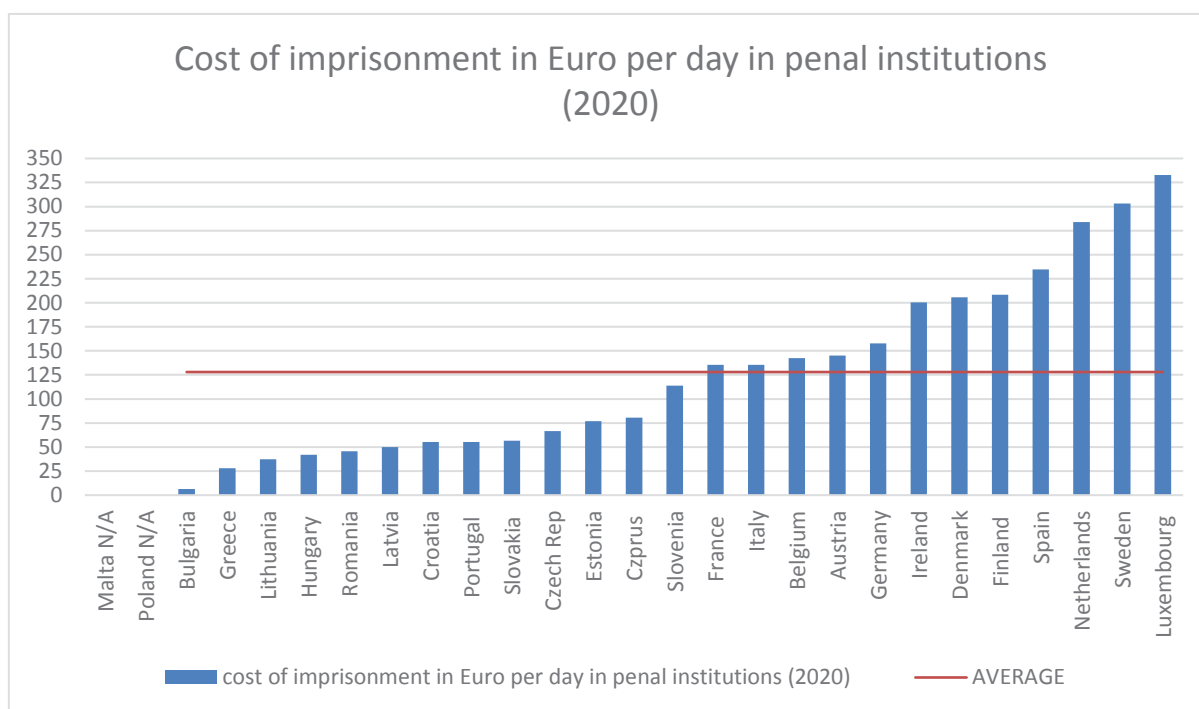
⁵ [Criminal detention conditions in the European Union: rules and reality | European Union Agency for Fundamental Rights \(europa.eu\).](#)

⁶ <https://fra.europa.eu/en/databases/criminal-detention/criminal-detention>

Table cost of imprisonment in Euro per day, expenses in penal institutions (2020).⁷ Average amount spent per day for the detention of one detainee

| Member State | Expenses during 2020 | Member State | Expenses during 2020 |
|--------------|----------------------|--------------|----------------------|
| Luxembourg | 332.63 | Estonia | 77.00 |
| Sweden | 303.00 | Czech Rep | 66.50 |
| Netherlands | 284.00 | Slovakia | 56.60 |
| Spain | 234.50 | Portugal | 55.42 |
| Finland | 208.30 | Croatia | 55.40 |
| Denmark | 205.70 | Latvia | 49.93 |
| Ireland | 200.27 | Romania | 45.50 |
| Germany | 157.72 | Hungary | 42.00 |
| Austria | 145.11 | Lithuania | 37.31 |
| Belgium | 142.41 | Greece | 28.00 |
| Italy | 135.51 | Bulgaria | 6.50 |
| France | 135.37 | Poland | N/A |
| Slovenia | 114.00 | Malta | N/A |
| Cyprus | 80.65 | | |

⁷ https://wp.unil.ch/space/files/2022/05/Aebi-Cocco-Molnar-Tiago_2022_SPACE-I_2021_FinalReport_220404.pdf



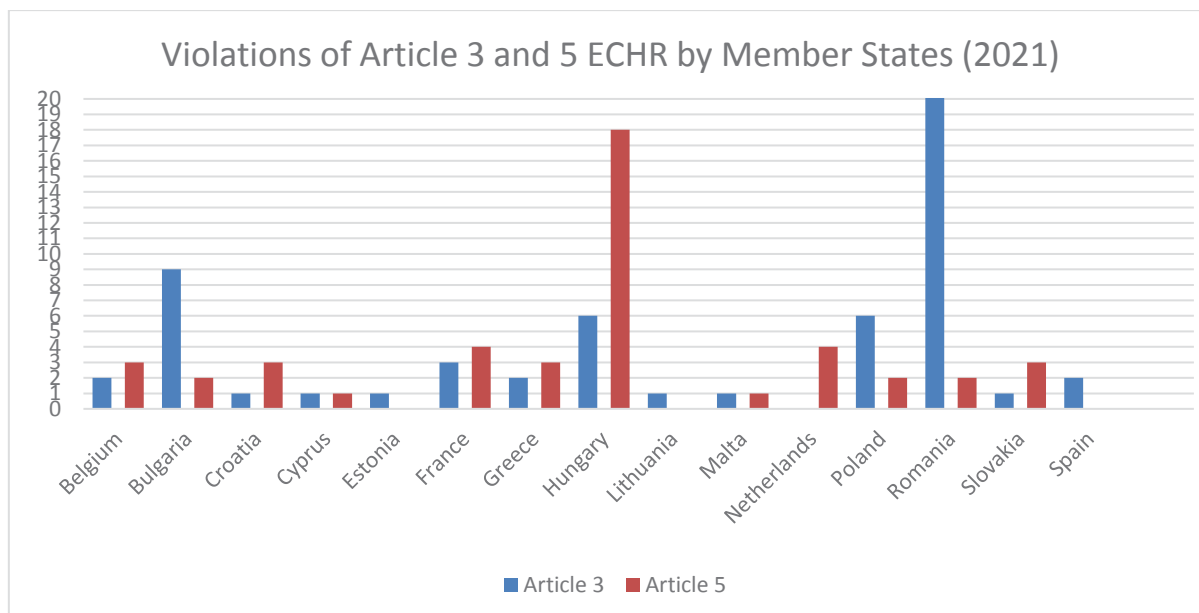
3. Violations of Articles 3 and 5 ECHR by Member States

In 2021, there were 81 cases of violations of Article 3 of the ECHR (inhuman and degrading treatment) concerning 14 EU Member States and 46 cases of violations of Article 5 of the ECHR (Right to liberty and security concerning 12 EU Member States⁸.

⁸ https://www.echr.coe.int/Documents/Stats_violation_2021_ENG.pdf

Table number of violations of Articles 3 and Article 5 of the ECHR in 2021

| Member State | Violations Article 3 | Violations Article 5 | Member State | Violations Article 3 | Violations Article 5 |
|--------------|----------------------|----------------------|--------------|----------------------|----------------------|
| Austria | 0 | 0 | Italy | 0 | 0 |
| Belgium | 2 | 3 | Latvia | 0 | 0 |
| Bulgaria | 9 | 2 | Lithuania | 1 | 0 |
| Croatia | 1 | 3 | Luxembourg | 0 | 0 |
| Cyprus | 1 | 1 | Malta | 1 | 1 |
| Czech Rep | 0 | 0 | Netherlands | 0 | 4 |
| Denmark | 0 | 0 | Poland | 6 | 2 |
| Estonia | 1 | 0 | Portugal | 0 | 0 |
| Finland | 0 | 0 | Romania | 46 | 2 |
| France | 3 | 4 | Slovakia | 1 | 3 |
| Germany | 0 | 0 | Slovenia | 0 | 0 |
| Greece | 2 | 3 | Spain | 2 | 0 |
| Hungary | 6 | 18 | Sweden | 0 | 0 |
| Ireland | 0 | 0 | | | |



4. Impact of these divergences on judicial cooperation in the EU

Divergences regarding important aspects of detention have adversely impacted the functioning of the EAW. Delays and suspensions of executions have become more common and a practice of seeking assurances from the requesting judicial authorities has arisen⁹.

Available statistics on the EAW demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk of breach of fundamental rights in close to 300 cases, in particular based on inadequate material conditions of detention¹⁰.

The judgments of the Court of Justice of the EU in cases *Aranyosi* and *Căldăraru*¹¹, *ML*¹² and *Dorobantu*¹³ have shown how material conditions can actually affect mutual trust in practice¹⁴. Following the *Aranyosi* and *Căldăraru* judgment, the number of EAWs that have been refused on fundamental right ground has increased from 21 (the year before the ruling) to 81 in 2019 (the latest year for which data is available).

⁹ Criminal Procedural Laws across the EU – study requested by the LIBE Committee, August 2018.

¹⁰ Period covered 2016-2019. See Commission Staff Working Documents Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant years 2014, 2015, 2016, 2017, 2018 and 2019 – reference SWD(2017)319 final, SWD(2017) 320 final, SWD(2019) 194 final SWD(2019) 318 final, SWD(2020) 127 final, SWD(2021) 227 final (https://ec.europa.eu/info/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en.)

¹¹ Judgment Court of Justice, 5.4.2016 *Aranyosi* and *Căldăraru*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

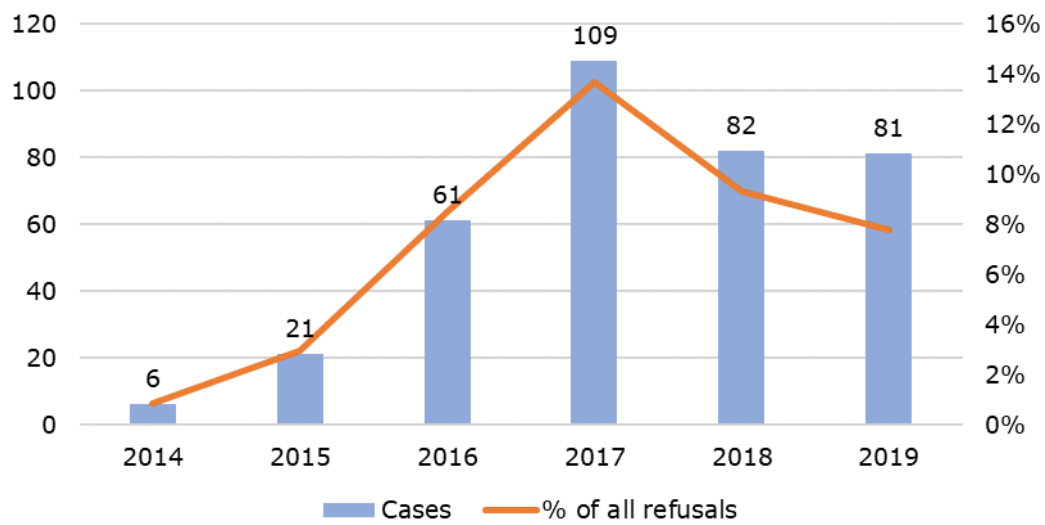
¹² Judgment Court of Justice, 25.7.2018 *Generalstaatsanwaltschaft*, C-220/18 PPU, ECLI:EU:C:2018:589.

¹³ Judgment Court of Justice, 15.10.2019 *Dumitru-Tudor Dorobantu*, C-128/18, ECLI:EU:C:2018:589.

¹⁴ For further guidance, see also Handbook on how to issue and execute a European arrest warrant, OJ C 335, 6.10.2017, p. 1:

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006\(02\)&from=DA](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=DA).

**Number of cases where an EAW was refused on fundamental rights grounds
(absolute number of cases and share of total refusals)**



Source: https://ec.europa.eu/info/publications/replies-questionnaire-quantitative-information-practical-operation-european-arrest-warrant_en.