



# **DRUG USERS IN PRE-TRIAL DETENTION: A HUMAN RIGHTS ISSUE**

**REPORT**

**2012**



romanian  
harm  
reduction  
network

# DRUG USERS IN PRE-TRIAL DETENTION: A HUMAN RIGHTS ISSUE

## REPORT 2012

Authors:

Dan Mihai (lawyer)  
Maria-Nicoleta Andreescu (sociologist)  
Anamaria Szabo (social worker, PhD)  
Marian Badea (sociologist)  
Valentin Simionov (social worker)

Translation:

Mihaela Istrati  
Andreea Davidiou

**The Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR-CH)** is a non-governmental not-for-profit organization, established in 1990. APADOR-CH wants to be an influential and principled factor of reference, in dialogue with the state authorities and in cooperation with the civil society, an active participant in changing the society and its institutions towards a democratic culture, based on the respect of human rights. The mission of APADOR-CH is to raise the level of awareness on and respect of human rights and rule of law.

**The Romanian Harm Reduction Network (RHRN)** gathers organizations and individuals supporting the development of harm reduction services by cooperation between public institutions and civil society, by improving harm reduction services quality and by facilitating the implementation of effective policies and programs targeting drug users and other vulnerable groups. RHRN is a member of the Eurasian Harm Reduction Network and the International Drug Policy Consortium and supports the idea that drug policies must be based on human rights and public health principles.

Authors contribution:

Dan Mihai (sections 1.2, 4.1)

Maria-Nicoleta Andreescu (sections 2.1, 4.2)

Anamaria Szabo (sections 3.1.1-3.1.4, 3.2.1-3.2.3)

Marian Badea (sections 3.1.2, 3.2.4)

Valentin Simionov (sections 1.1, 2.2)

# CONTENTS

<i>Abbreviations and acronyms</i>	4
<i>Executive summary</i>	5
<i>Report conclusions and recommendations</i>	7
<b>1. Background information and legal framework analysis</b>	<b>9</b>
1.1. Statistical data	9
1.2. Cases and procedures related to remand custody in drug use offences	12
<b>2. Comments on statistical data and expert opinions on the use of pre-trial detention in criminal cases concerning drug users</b>	<b>27</b>
2.1. Comments on figures and statistical data	27
2.2. Expert opinion on the consequences of PTD — lawyers, prosecutors, judges, doctors	32
<b>3. Research experiences of drug users on pre-trial detention in Romania</b>	<b>51</b>
3.1. Research methodology	51
3.1.1. Aim and premise	51
3.1.2. Research design and sampling	51
3.1.3. Research ethics	54
3.1.4. Limits of the research	54
3.2. Research results	55
3.2.1. Typologies of drug use	55
3.2.2. The connection between drug use and crime	56
3.2.3. The double marginalization	57
3.2.4. Article 16 as a prisoner’s dilemma	65
<i>Research conclusions</i>	69
<i>Research recommendations</i>	70
<b>4. ECHR cases and procedures and a case study</b>	<b>71</b>
4.1. Cases and procedures related to custody on remand in drug use offences	71
4.2. A case study: report on the visit to Centre no. 1 for Preventive Detention and Arrest Attached to the Bucharest Municipality General Police Direction	87
4.3. Conclusions and recommendations	91
<i>References</i>	92
<i>Annexes</i>	93

## ABBREVIATIONS AND ACRONYMS

APADOR-CH	Association for the Defence of Human Rights in Romania – the Helsinki Committee
ANA	National Anti-drug Agency
ANP	National Administration of Penitentiaries
ATS	Amphetamine-type Stimulants
CAIA	Centre for Integrated Assistance of Addictions
CC	Criminal Code
CPC	Criminal Procedure Code
CSM	Superior Council of the Magistracy
DCCO	Direction for Combating Organized Crime
DGPMB	General Police Directorate of Bucharest Municipal Police
DIICOT	Directorate for Investigation Organized Crime and Terrorism
DU	Drug User
EC	European Commission
ECHR	European Court for Human Rights
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EO	Emergency Ordinance
ER	Emergency Room
IDU	Injecting Drug User
IGPR	General Inspectorate of Romanian Police
MoH	Ministry of Health
NCC	New Criminal Code
NCPC	New Criminal Procedure Code
NPD	New Psychoactive Drugs
ODU	Offenders that are Drug Users
OST	Opiate Substitution Treatment
PTD	Pre-trial Detention
RHRN	Romanian Harm Reduction Network
UNODC	United Nations Office for Drugs and Crime
WHO	World Health Organisation

## EXECUTIVE SUMMARY

This report is the result of documentation and analysis of information and opinions available on applying pre-trial detention in the case of drug users. The research was conducted within the project “Drug users in pre-trial detention – a human rights issue”, funded by Open Society Institute and implemented by the Romanian Harm Reduction Network, together with the Association for the Defence of Human Rights – Helsinki Committee as main partner, along with the General Inspectorate of Romanian Police and the National Administration of Penitentiaries, as institutional partners.

The project goal is to raise decision makers awareness on the benefits of reducing the use of pre-trial detention for drug users in Romania based on the assumption that, at least some cases, therapeutic measures are more useful than incarceration and on the finding that the alternative to imprisonment are rarely applied in cases of drug users.

The report includes a review of the main provisions concerning the application of preventive arrest measure to drug users, drug users’ views and expert opinions on procedures and the effects of judicial provisions concerning drug users in pre-trial detention. Based on data analysed, a set of conclusions and recommendations was developed, representing proposals to improve the current legislation, procedures and practices related to the application of pre-trial detention to drug users.

The report is structured in five chapters, each describing one of the elements that we consider to be important in describing the context of application and effective functioning of preventive arrest measure for drug users.

The first chapter contains background information and a legal framework analysis of the provisions regulating PTD and on the application of criminal sentences for drug offences.

The second chapter includes comments on statistical data and on the benefits and costs of applying PTD to drug users, the Romanian anti-drug legislation and related topics. In rendering expert opinions we aimed to cover all institutions or functions that occur around a person remanded in custody referring to drug users. Thus, using unstructured interviews, we documented opinions of judges, prosecutors, police, lawyers and doctors with regards to pre-trial detention.

The third chapter presents drug users’ perspective on pre-trial detention from a very personal point of view: their direct experience. This section contains information about detention conditions, the relationship between investigators and investigations, possible abuses and violations of procedures alleged by the interviewees. Thus, in several interviews, discussions focused on abuses from police and prosecutors, mainly residing in psychological pressure using article 16 of law 143/2000, threatening and insults, treatment deprivation, blocking access to evidence, using withdrawal as a tool in order to get a declaration. We are aware that these allegations coming from the people we interviewed concerning their own experience in pre-trial detention are hard to prove and some of them might be pure fiction. However, given the frequency of such remarks during the interviews but also in separate discussions with drug users

accessing harm reduction services, we decided to take this opportunity to draw public attention on these potential abuses against people who use drugs. Our goal is not to make justice to people, who pretend having been victims of institutional abuse during pre-trial detention, but to draw attention on the existence of such practices and to contribute to diminishing them.

The fourth chapter contains an analysis of ECHR jurisprudence on violations of Article 5 (the right to liberty and security) of the European Convention on Human Rights. This chapter is intended to provide examples of European jurisprudence on the application of pre-trial detention and the reasons behind decisions and solutions offered by the ECHR.

The last section contains conclusions and recommendations developed based on the analysis of the entire volume of information collected and it ends with proposals to be submitted to decision makers attention in order to improve the current legislation and practices regarding the application of preventive arrest measures.

As representatives of civil society, we believe that our mandate is to draw the attention of state authorities and public opinion over some facts or circumstances which, in our opinion, represent voluntary or involuntary human rights violations and to require the authorities to analyze the information submitted and take appropriate measures in order to improve the current procedures and practices in applying pre-trial detention to drug users.

## REPORT CONCLUSIONS AND RECOMMENDATIONS

### Recommendation 1

In order to ease drug users' access to life saving medication to treat HIV, hepatitis and other transmittable infections, possession for personal use should be decriminalized. This measure would also allow law enforcement to make a clear distinction between drug users and drug traffickers and it would help them concentrate on real criminals (drug traffickers who are selling drugs for profit) and stop chasing petty sellers who are selling drugs to support their personal use.

### Recommendation 2

The continuity of care needs to be guaranteed within the criminal justice system. In the last years the issue of access to medical services in PTD and the need to insure the continuity of care between community services and prisons has an increased international focus and visibility. More specifically, there is a need for a working protocol that would reduce the personal impact of system employees in relating with sick people in PTD by describing clear procedures in such cases. In terms of process, this goal could be achieved by organizing an inter-ministry/agency working group, including representatives from the Ministry of Health, Ministry of Justice, Ministry of the Interior, NGOs and other concerned institutions/structures.

### Recommendation 3

Training on human rights and experience exchange programs should be initiated for professional categories, such as judges, prosecutors, police officers, lawyers in order to increase professional's awareness on the effects of pre-trial detention and the benefits of therapeutic justice. The trainings should be held by peers in collaboration with human rights and harm reduction experts.





# CHAPTER 1

## BACKGROUND INFORMATION AND LEGAL FRAMEWORK ANALYSIS

### 1.1. Statistical data

According to the Romanian General Police Inspectorate, 3,419 drug offences were registered in 2010 (*Law 143/2000 on the prevention and control of illicit drug traffic and use*).

According to DIICOT, 3,360 criminal cases related to drug and precursor laws were solved in 2010.

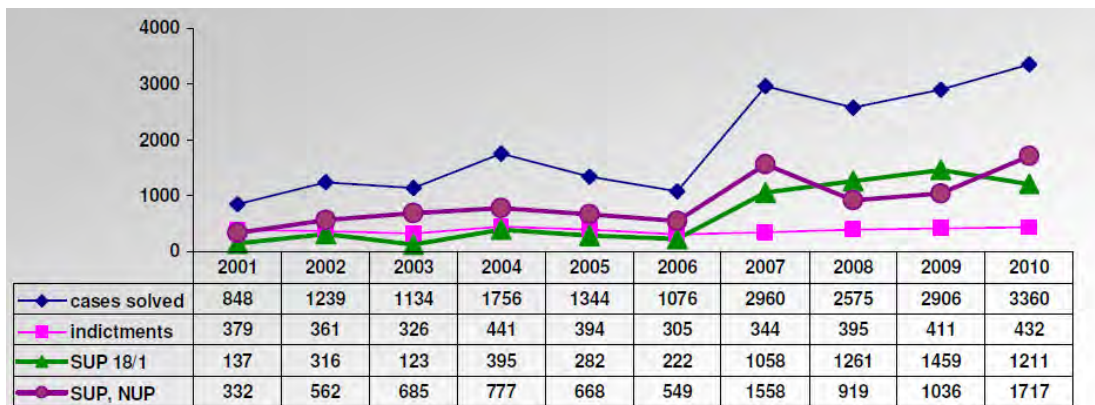


Figure 1.1. Dynamics of criminal cases settled by prosecution offices from 2001

Source: Prosecutor's Office with the High Court of Cassation and Justice, DIICOT

87% of the total solved cases were closed with the decision to stop the criminal investigation based on Article 18(1) Criminal Code (36%) or the decision to do not initiate or stop the criminal investigation (51%).

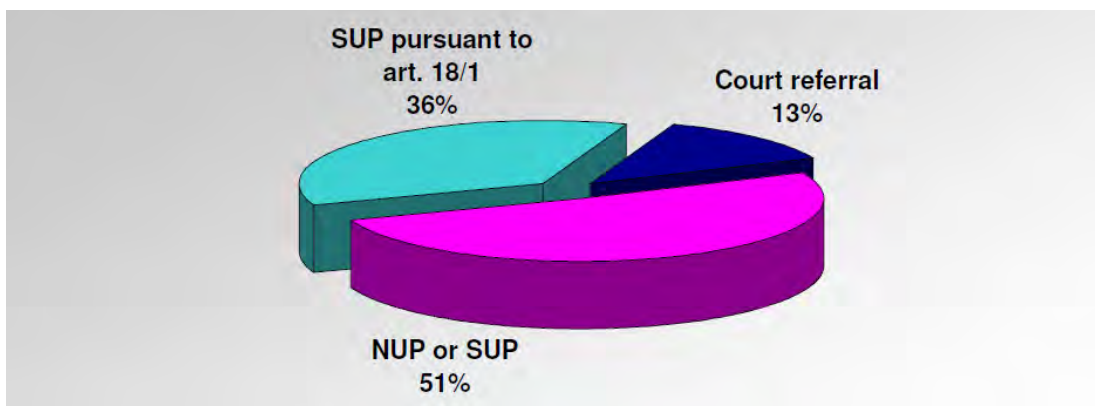


Figure 1.2. Distribution of criminal cases settled in 2010, by type of decision (%)

Source: Prosecutor's Office with the High Court of Cassation and Justice, DIICOT

In 2010, 6,436 persons were investigated by DIICOT for drug offences and 1,099 persons were sent to trial. In 2010, the courts of law have passed conviction decisions for 718 drug law offenders (663 men and 55 women), of which 701 offenders aged 18 and over (650 men and 51 women) and 17 underage offenders (13 men and 4 women), which represents a 6.3% increase as compared to 2009.

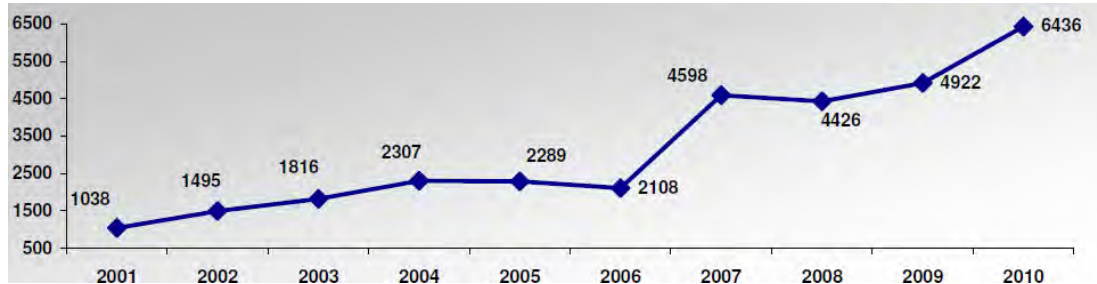


Figure 1.3. Trend in the offenders charged/prosecuted by the prosecutor's offices for drug and precursor law offences from 2001 to 2010

Source: Prosecutor's Office with the High Court of Cassation and Justice, DIICOT

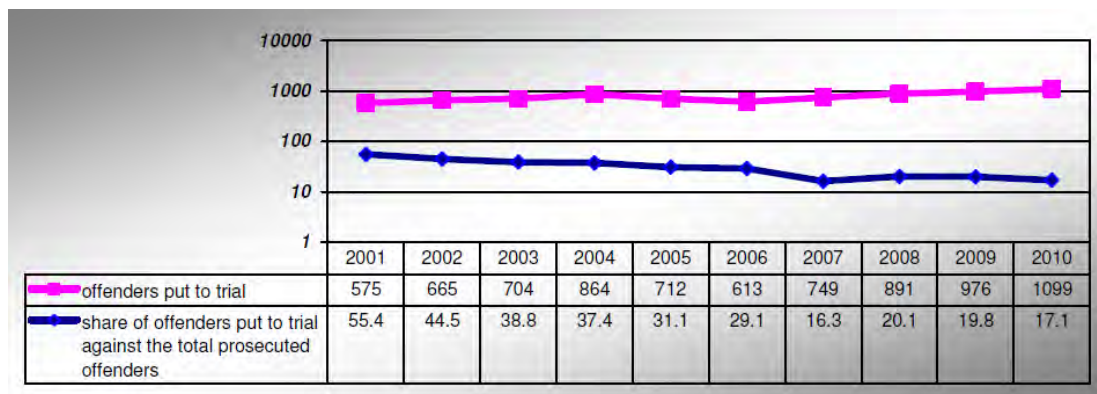


Figure 1.4. Trend in the offenders put to trial for drug law offences and their proportion against the total prosecuted offenders from 2001 to 2010

Source: Prosecutor's Office with the High Court of Cassation and Justice, DIICOT

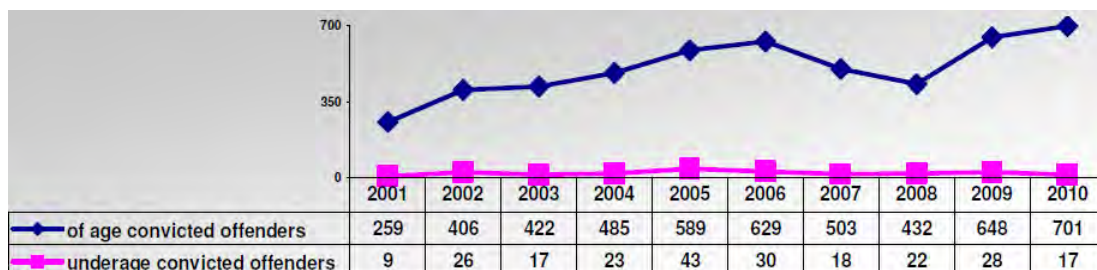


Figure 1.5. Evolution of the number of offenders convicted for drug law offences, by age, 2001 to 2010

Source: High Council of Magistracy

## Prison brief for Romania

	2009-2010	2012
Prison population total	<b>26,782</b> by 26.01.2010 (source: National Prison Administration)	<b>31,771</b> by 11.10.2012 (source: National Prison Administration)
Prison population rate (per 100,000 of national population)	<b>125</b> based on an estimated national population of 21.47 million at January 2010 (from Eurostat figures)	<b>166</b> based on an estimated national population of 19,043,000 in 2011 (provisional results of the 2011 national census)
Juveniles/minors/young prisoners under 18 years old incl. definition (percentage of prison population)	<b>1.7%</b> (26.01.2010 – under 18)	<b>0.24%</b> (11.10.2012)
Number of establishments/institutions	<b>45</b> (2010)	<b>45</b>
Official capacity of prison system	<b>34,187</b> (26.01.2010)	<b>28,780</b> (11.10.2012)
Occupancy level (based on official capacity)	<b>78.3%</b> (26.01.2010)	<b>121.24%</b> (11.10.2012)
Recent prison population trend (year, prison population total, prison population rate)	1992 <b>44,011 (193)</b> 1995 <b>45,309 (200)</b> 1998 <b>52,149 (232)</b> 2001 <b>49,840 (228)</b> 2004 <b>39,031 (180)</b> 2007 <b>29,390 (137)</b> 2008 <b>26,630</b> 2010 <b>26,721</b>	

Source: ICPS (<http://www.prisonstudies.org>) for data during 2009-2010 and ANP for data in 2012

## 1.2. Cases and procedures related to remand custody in drug use offences

### Remand custody – National provisions

#### Regulation of remand custody in the current Criminal Procedure Code

*Remand custody* is a measure taken during the criminal trial (set off by the initiation of criminal investigation) and which consists of deprivation of liberty of a person in the cases and according to the procedure set forth by law, until the final judgement of a criminal case, in order to ensure the successful unfolding of the criminal trial or to prevent elusion of the suspect/defendant from criminal investigation, trial or execution of sentence.

The cases and procedure for taking the measure of remand custody are provided both in the Criminal Procedure Code and the Constitution, as well as in the European Convention on Human Rights (in particular, Article 5), which also represents domestic law.

Since the measure of remand custody may be ordered solely by a person in a certain quality (judge) and only in limited cases set forth by law, this means that the deprivation of liberty has an exceptional nature.

Remand custody is only one of the preventive measures that may be taken. In this regard, Article 136 of the Criminal Procedure Code (CPC) stipulates that in cases concerning offences which are punishable by life incarceration or imprisonment, in order to ensure the successful unfolding of the criminal trial or to prevent elusion of the suspect/defendant from criminal investigation, trial or execution of sentence, one of the following preventive measures can be taken:

- a) Detention;
- b) The obligation not to leave town;
- c) The obligation not to leave the country;
- d) Remand custody.

According to the same Article 136 of the CPC, the purpose of preventive measures can be also achieved through provisional release under judicial control or bail, thus without placing the person in custody.

In addition, the list of preventive measures set forth in Article 136 of the CPC indicates an order of preference and a certain graduality regarding the assessment of preventive measures which can be ordered in a case. Remand custody is the most serious preventive measure, being the last one on the legal list.

#### Conditions and cases where remand custody is ordered

According to Article 146 and 148 of the CPC, the measure of remand custody may be taken solely against the suspect or the defendant

– only after hearing them in the presence of a lawyer, and only if:

– there is evidence or solid reasons that they committed an offence under criminal law

and

– any of the following cases has been observed:

- a) the suspect/defendant fled or hid away in order to elude criminal investigation or trial, or there is information that they will try to flee or escape in any way from criminal investigation, trial or execution of sentence, if the punishment provided by law for the offence for which they will be arrested is life incarceration or imprisonment exceeding four years;
- a/1) the suspect/defendant has violated, in bad faith, the measure obliging them not to leave town or the country or any other obligations during such measures, if the punishment provided by law for the offence for which they will be arrested is life incarceration or imprisonment exceeding four years;
- b) there is information that the suspect/defendant is trying to hinder the disclosure of truth, in a direct or indirect manner, by influencing a party, a witness or an expert or by destruction, alteration or abstraction of material means of evidence, if the punishment provided by law for the offence for which they will be arrested is life incarceration or imprisonment exceeding four years;
- c) there is information that the suspect/defendant is preparing to commit a new offence, if the punishment provided by law for the offence for which they will be arrested is life incarceration or imprisonment exceeding four years;
- d) the suspect/defendant intentionally committed a new offence, if the punishment provided by law for the offence for which they will be arrested is life incarceration or imprisonment exceeding four years;
- e) there is information that the suspect/defendant is putting pressure on the aggrieved party or that they are trying to reach a fraudulent settlement with the party, if the punishment provided by law for the offence for which they will be arrested is life incarceration or imprisonment exceeding four years;
- f) the suspect/defendant committed an offence for which the law provides life incarceration or imprisonment exceeding four years and there is evidence that letting them free represents a real danger to public order.

From this list it appears that, regardless of the specific case of arrest, the measure of **remand custody may be ordered only** for an offence for which **the punishment provided by law** is life incarceration or **imprisonment exceeding four years**.

Also, an important provision regarding the conditions for ordering remand custody is found in Article 136(3) of the CPC. According to this article, **the measure of remand custody may not be ordered in the case of those offences where the law alternatively provides a fine penalty**. For example, there is a drug offence for which remand custody cannot be ordered, precisely because it is punished by imprisonment and alternatively by fine. Thus, **according to Article 4(1) of Law no. 143/2000** on the

prevention and control of illicit drug trafficking and use, illegally growing, producing, manufacturing, experimenting, extracting, preparing, processing, buying or possessing **risk drugs** for personal use, without any right to do so, is punishable by **imprisonment from 6 months to 2 years or fine**. Since this offence is also punishable by fine, its author shall not be taken into custody (of course, if they committed other offences, the conditions for remand custody are analysed in relation to each of the offences). Another reason for which the offence set forth in Article 4(1) of Law no. 143/2000 cannot justify remand custody is that the maximum punishment provided by law does not exceed 4 years.

According to Article 146 CPC, remand custody of a **suspect** may last for maximum **10 days** and, according to Article 149 CPC, remand custody of a **defendant** during criminal investigation may not exceed **30 days**, unless it is legally prolonged. The period begins on the date when the arrest warrant was issued, if the arrest was ordered after hearing the defendant, or it runs from the enforcement date of the arrest warrant, if the arrest was ordered in the absence of the defendant.

### The procedure concerning remand custody

#### A) Remand custody during criminal investigation (in other words, during the investigation conducted by the prosecutor/police).

The prosecutor who supervises or conducts the criminal proceedings, *ex officio* or upon notification by the criminal investigation body, provided that the conditions and legal cases are met, may elaborate a motivated request for a remand custody order. They may do so when they believes that it is in the interest of the criminal investigation to arrest the suspect/defendant, **but only after** hearing them in the presence of their lawyer.

The file, together with the request for a remand custody order, shall be submitted to the presiding judge or to a judge delegated by the latter and pertaining to:

- the court which would have **jurisdiction over the merits of the case**
- or
- an equivalent court which has jurisdiction over:
    - o **the place of detention**, the place where the criminal offence was committed or
    - o **the public prosecutor's office** where the prosecutor undertaking or supervising the criminal investigation activates.

After receiving the file, the court settles the date and time for deciding upon the request for remand custody. The date must be settled before the expiry of the warrant for remand custody of the suspect turned into defendant or, if they are not arrested, but detained, within the 24 hours of detention. The date and time of the decision shall be communicated both to the defence lawyer (elected or appointed *ex officio*) and to the prosecutor, the latter being obliged to ensure the presence of the detained suspect or of the arrested or detained defendant before the judge.

Regardless of the nature of the offence, the request for remand custody shall be decided upon in the council chamber by one judge only. The participation of the

prosecutor is mandatory. The judge admits or denies the request for remand custody by issuing a motivated decision.

The suspect/defendant must be brought before a judge and assisted by a defence lawyer. If the defendant is detained or arrested, and, because of their health condition, force majeure or a state of emergency, they cannot be brought before the judge, the request for remand custody shall be examined in the absence of the suspect/defendant, but in the presence of their defence lawyer (elected or *ex officio*), who has the possibility to address the judge and draw conclusions.

The measure of arresting the suspect/defendant may be taken **only after they are heard by the prosecutor and the judge**, except for the situations when the defendant is missing, is abroad or is eluding criminal investigation or trial, or is in one of the situations provided by law (health condition, a case of force majeure or a state of emergency), in which case bringing him before the judge is not required.

If the conditions provided by law concerning the arrest are fulfilled, the judge issues a motivated decision and orders the arrest of the suspect/defendant for a period that **cannot exceed 10 days** (for the suspect) **or 30 days** (for the defendant). The judge who issued the arrest warrant hands a copy of the warrant to the person in custody, and sends another copy to the police authority in order to be submitted to the place of detention, together with the person in custody.

The arrest of the suspect/defendant may be ordered only for the days remaining after the **deduction of the period** during which they were previously detained or arrested as suspects, as the case may be, **out of the 10 and 30 days respectively**. We recall that according to Article 144. 1 CPC, out of the duration of the detention measure one must deduct the time during which the person was deprived of liberty following the administrative measure of being taken to the police headquarters, referred to in Article 31(1)(b) of Law no. 218/2002 on the organization and functioning of the Romanian Police.

**In case of denying the request for remand custody, the judge may order the measure imposing an obligation not to leave town or the country.**

The decision of admitting or denying the request for remand custody **may be appealed within 24 hours** of issue, concerning those who were present, or within 24 hours of being communicated to those who were absent.

The law (Article 149/1 of CPC) expressly stipulates that remand custody of the defendant has to be ordered before the expiry of the arrest of the suspect. The arrest warrant of the suspect ceases upon the issue of the arrest warrant of the defendant. These provisions are aimed at eliminating any “intermediate” periods, which may exist in practice, between the expiry of the arrest of the suspect and the beginning of the arrest of the same person as defendant, which would result in depriving a person of liberty without “legal proceedings”, in a “grey” area, between the warrant of the suspect and of the defendant. Therefore, it is better for the law to stipulate that there may not be free intervals between the two categories of arrests (as a suspect and as a defendant).



## B) Remand custody during trial

The defendant may also be taken into custody during trial, by the court, the conditions and the cases being the same as during criminal investigation. The court orders remand custody through a motivated decision that can be separately appealed to. The deadline for appeal is 24 hours and runs from the issue of the decision, for those who were present, or after being communicated to those who were absent.

It should be noted that regarding the defendant who was previously arrested in the same case, this measure may be ordered again during criminal investigation or trial, if there are new elements (non-existent at the time of the previous arrest) that require depriving them of liberty.

### Prolonging the measure of remand custody

**Prolonging the custody of the suspect** – The law does not provide the possibility to prolong the custody of the suspect, but only of the defendant. Therefore, after a custody of **maximum 10 days**, the suspect cannot be arrested in the same quality. They will be “turned” into defendants, by setting off the criminal action against them (and arrested in this new quality), or, if they do not become defendants, they will be under non-custodial interrogation.

### Prolonging the custody of the defendant

A) *During criminal investigation*, according to Article 155 CPC, the custody of the defendant ordered by the court may be prolonged, upon justification, by no more than 30 days, if the grounds which led to the initial arrest require further deprivation of liberty, or new grounds exist to justify the deprivation of liberty.

The prolongation of custody of the defendant may be ordered by the court which would have jurisdiction over the merits of the case, or by an equivalent court which has jurisdiction over the place of detention, the place where the criminal offence was committed or the public prosecutor’s office where the prosecutor undertaking or supervising the criminal investigation activates.

The prolongation of custody is ordered upon the motivated request of the prosecutor who undertakes or supervises the criminal investigation, as the case may be.

The request for prolonging remand custody shall be decided upon in the council chamber by one judge only, regardless of the nature of the offence.

The defendant is brought before a judge and assisted by the defence lawyer. If the arrested defendant is hospitalized and because of their health condition, they cannot be brought before a judge or when, because of force majeure or a state of emergency, it is not possible to move them, the request will be examined in the absence of the defendant, but only in the presence of the defence lawyer, who has the possibility to address the judge and draw conclusions.

According to Article 23(5) of the Constitution, **during criminal investigation**, the total duration of remand custody cannot exceed a reasonable term and, regardless, **cannot be longer than 180 days** (roughly **6 months**). These provisions have also been reiterated in Article 159(13) CPC.

B) *During trial*, hence after the defendant is charged, the prolongation of custody is practically realized by maintaining custody as a result of periodical verifications (every 60 days) of the lawfulness and grounds of the remand.

This means that after the defendant is charged, the prolongation of custody is no longer ordered by a formal prolongation act. During trial, remand custody runs continuously until revocation, which can occur as a result of periodical verifications of the lawfulness and grounds of the preventive measure.

## Maintaining remand custody

### A) Initial maintenance of remand custody

When the prosecutor orders, by indictment, the charge of the defendant who is in custody, the file shall be submitted to the competent court at least 5 days before the expiry of the arrest warrant or, as the case may be, of the duration for which the prolongation of the custody was ordered during criminal investigation.

Upon notification by indictment, the court shall verify the lawfulness and grounds of remand custody, before its expiry, in the council chamber. In this case as well, **the defendant must be brought before the judge** (except for the cases when this is not possible because of the defendant's health condition, force majeure or a state of emergency) and **must be assisted by a defence lawyer** (elected or *ex officio*).

However, if the judge finds that the grounds for remand custody have ceased or that there are no new grounds to justify the deprivation of liberty, they will order, by motivated decision, **the revocation of remand custody** and the immediate release of the defendant.

However, if the judge finds that the grounds for remand custody further impose deprivation of liberty or that there are new grounds to justify deprivation of liberty, they will order, by motivated decision, **the maintenance of remand custody**.

### B) Maintaining remand custody following periodical verifications

During trial, in the causes where the defendant is arrested, the court is required to periodically verify, but no later than **60 days**, the lawfulness and grounds of remand custody. In relation to the situations described above, it may order **to maintain** remand custody, or **to revoke** custody and release the defendant.

Unlike the total duration of remand custody during criminal investigation (which may not exceed 180 days), **during trial, remand custody may last longer, i.e. up to half the maximum punishment laid down by the law for the offence which is the object of the charge**. Even so, the latter term is considered only if half the maximum punishment laid down by the law has been reached without a conviction in first instance. **After conviction in the first instance, there is no formal time limit for the duration of custody**. Revocation of custody and release may still be ordered, but solely because the measure of remand custody is no longer justified (and not because the detention would exceed a fixed time limit).

### Detention and remand custody of a minor

According to Article 99 of the Criminal Code, the minor under the age of 14 years are not criminally responsible, the minors aged between 14 and 16 years are criminally responsible only if proven that they have committed the act with discernment, and the minors over the age of 16 years are criminally responsible.

The Criminal Procedure Code contains derogations on the detention and remand custody of minors.

In very exceptional cases, the minors aged between 14 and 16 years, who are criminally responsible, may be detained at the request of the prosecutor or the criminal investigation body, upon notification and control of the prosecutor, for a period not exceeding 10 hours, if there is conclusive evidence that the minor committed an offence punishable by law by life incarceration or imprisonment for 10 years or more. The detention can be prolonged for another maximum 10 hours, only by the prosecutor, by motivated order.

The minors between 14 and 16 years may be taken into custody if the punishment provided by law for the offence with which they are charged is life incarceration or imprisonment for 10 years or more and only if no other preventive measure is sufficient.

The duration of custody of the **minor suspect** is of maximum 3 days.

During criminal investigation, the duration of custody of the **minor defendant between 14 and 16** is, of maximum 15 days and may not exceed, in total, a reasonable term, and no longer than 60 days. Prolonging this measure can be ordered only in exceptional circumstances, each prolongation not exceeding 15 days. Exceptionally, when the punishment prescribed by law is life incarceration or imprisonment for 20 years or more, remand custody of the minor defendant between 14 and 16, during criminal investigation, may be prolonged up to 180 days.

During trial, verifying the lawfulness and grounds of remand custody of the minor defendant aged between 14 and 16 is undertaken periodically, but no later than 30 days.

**The minor defendant over 16 years** can be taken into custody during criminal investigation for a period no longer than 20 days. The duration of the preventive measure may be prolonged during criminal investigation, with 20 days each time. Remand custody of the minor defendant during criminal investigation may not exceed, in total, a reasonable term and no longer than 90 days. Exceptionally, when the punishment provided by law is life incarceration or imprisonment for 10 years or more, remand custody of the minor defendant over than 16 years, during criminal investigation, can be prolonged to 180 days. During trial, verifying the the lawfulness and grounds of remand custody of the minor defendant over 16 years is undertaken periodically, but no later than 40 days.

### Remand custody and drug offences

Drug offences are defined in **Law no. 143/2000** on the prevention and control of illicit drug trafficking and use.

Also, offences related to those concerning drug use are referred to in the **Emergency Ordinance no. 121/2006** on the legal status of drug precursors, approved with amendments by Law no. 186/2007.

#### Law no. 143/2000 defines the following offences

**According to Article 2**, growing, producing, manufacturing, experimenting, extracting, preparing, processing, offering, putting up for sale, sale, distribution, delivery free of charge or for a consideration, dispatch, transportation, procurement, purchase, possession or other operations related to the circulation of **risk drugs** (listed in Table no. III, attached to the Law), without any legal right (Article 2(1)), shall be punished by imprisonment from 3 to 15 years and the prohibition of certain rights. If the same actions involve **high-risk drugs** (listed in Tables no. I and II, attached to the Law), the punishment shall be imprisonment from 10 to 20 years and prohibition of certain rights (Article 2(1)).

**According to Article 3**, bringing risk drugs into the country or taking them out of the country, as well as their import or export, without any legal right, shall be punished by imprisonment from 10 to 20 years and the prohibition of certain rights (Article 3(1)). If the same actions involve **high-risk drugs**, the punishment shall be imprisonment from 15 to 25 years and the prohibition of certain rights (Article 3(2)).

**According to Article 4**, growing, producing, manufacturing, experimenting, extracting, preparing, processing, purchasing or possessing **risk drugs** for **personal use**, without any legal right, shall be punished by prison between 6 months and 2 years, or a fine (Article 4(1) – it was previously argued that this situation cannot constitute grounds for remand custody). If the actions involve **high-risk drugs**, the punishment shall imprisonment from 2 to 5 years.

**According to Article 5**, knowingly making available, either free of charge or for a consideration, a precinct, dwelling or any other arranged place of public access, for illegal drug use, or tolerating illegal drug use in such spaces shall be punished by imprisonment from 3 to 10 years and the prohibition of certain rights.

**According to Article 6**, intentional prescription of **high-risk drugs** by a physician, without this being medically necessary, shall be punished by imprisonment from 1 to 5 years (Article 6(1)). The same punishment shall be given for intentional release or obtaining of **high-risk drugs**, based on a medical prescription issued without it being medically necessary or on a forged medical prescription.

**According to Article 7**, administering **high-risk drugs** to a person, outside legal terms, shall be punished by imprisonment from 1 to 5 years.

**According to Article 8**, supplying toxic chemical inhalants to a minor in view of use shall be punished by imprisonment from 6 months to 3 years (also known as “*the aurolac offence*”, after the name of the chemical solvent with hallucinogenic effects that was inhaled by a large number of minors, before it being incriminated).

**According to Article 10**, organisation, management or funding of the actions stipulated under the previous articles shall be punished by the penalties provided by

the Law for such actions. The maximum limits of such penalties shall be increased by 3 years.

**According to Article 11**, the **urge** to illicit use of drugs, by any means, if followed by such action, shall be punished by imprisonment from 6 months to 5 years (Article 11(1)) and if the urge is not followed by such action, the punishment shall be imprisonment from 6 months to 2 years, or a fine (Article 11(2)).

**According to Article 12**, if the actions stipulated under Article 2, 6-8 and 11 have resulted in the victim's death, the punishment shall be imprisonment from 10 to 20 years and the prohibition of certain rights. Article 12 stipulates, in fact, aggravated versions (the victim's death) for each of the offences provided in Article 2, 6, 7, 8, 11 of the Law.

**In Article 13**, the **attempt** to certain offences referred to in Articles 2-7 and 10 is incriminated, resulting in the attempt to commit those offences being punishable as well (Article 13(1); We recall that, according to Article 21 of the Criminal Code, the attempt is punishable by a penalty between half of the minimum and half of the maximum provided by the law for the committed offence).

Moreover, Article 13(2) expressly indicates that producing or purchasing any means or instruments, as well as taking any measures aimed at committing the offences under(1 shall also be deemed an attempted crime.

The Law also stipulates **a case of impunity** (the criminal trial stops, the defendant is not convicted), as well as **a case of reduction of the punishment** (the defendant is convicted, but the limits of the punishment are compulsorily reduced).

**Article 15** indicates that the person who, before the beginning of criminal investigation, denounces to the competent authorities their participation in an association or agreement aimed at committing one of the offences under this Law, thus allowing the identification and criminal liability of other participants, **shall not be punished**.

**Article 16** stipulates that the person who has committed one of the offences under this Law and who, during criminal investigation, denounces and facilitates the identification and criminal liability of other persons who have committed drug-related offences shall benefit from a **reduction by half of the limits of the punishment** stipulated by the Law.

The law contains **special procedural provisions** if the committed offence concerns **drugs for personal use** (offence referred to in Article 4 of the Law). These provisions allow for the drug consumer – author of the offence indicated in Article 4 of the Law – to be included in an integrated assistance program for drug consumers. Moreover, if the offender has been taken into custody (only in the situation of high-risk drugs, since the punishment provided by the Law for other drugs is imprisonment for less than 4 years and alternatively a fine), these provisions offer the possibility to revoke or replace remand custody by another preventive measure.

The Law also stipulates that, if until the sentence is formulated, the offender under Article 4 respects the integrated assistance program for drug consumers, then the Court may not apply any punishment or may delay applying the punishment.

When delaying the application of the punishment, the Court shall set in its decision the date to decide on the punishment (probationary period for the offender), within a period no longer than 2 years, correlated to the duration of the integrated assistance program for drug consumers. If during the probationary period the offender has complied with the integrated assistance program, the Court may not apply any punishment.

If the offender fails to comply with the integrated assistance program, then the Court may give him a chance and once again postpone applying the punishment, for the same period, together with the re-inclusion in the integrated assistance program for drug consumers. But the Court may as well choose to no longer delay applying the punishment and, consequently, to apply the punishment provided by law.

### **Government Emergency Ordinance (GEO) no. 121/2006 on the judicial regime of drug precursors stipulates the following offences**

**According to Article 22(1)**, marketing of classified substances, import, export and intermediary activities, as well as possession of classified substances without a permit issued by the National Anti-Drug Agency or, as the case may be, without registration with the National Anti-Drug Agency, before starting the activity, constitute offences and shall be punished with imprisonment from 1 to 5 years.

**According to Article 22(2)**, possession of equipments or materials with the aim of illegally producing or manufacturing drugs shall be punished with imprisonment from 1 to 5 years.

**According to Article 22(3)**, classified substances marketing towards economic operators or natural persons who are unauthorized or unregistered with the National Anti-Drug Agency, as the case may be, shall be punished with imprisonment from 1 to 5 years.

**According to Article 22(4)**, committing the actions indicated in paragraphs 1 and 3 with the aim of using them at illegally cultivating, producing or manufacturing drugs shall be punished with imprisonment from 3 to 10 years and with the prohibition of certain rights.

**Article 23** stipulates that border crossing of classified substances, without possessing the documents indicated in GEO 121/2006, constitutes the offence of qualified smuggling, indicated in and punished by Article 271 of Law no. 86/2006 regarding the Romanian Customs Code.

To be noted that the “specific” offences are contained in a single article of the Ordinance, respectively in Article 22. Article 23 is a reference text to the Customs Code.

It is worth mentioning that according to Article 1(2) of the GEO 121/2006, the list of **classified substances** which are frequently used in the illicit manufacture of drugs is the one provided in the appendix no. I of the Regulation (EC) no. 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors, published in the Official Journal of the European Union no. L 47 of 18 February 2004, pp. 1-10, as well as in the appendix to Council Regulation no. 111/2005 of 22 December 2004, for monitoring trade of drug precursors between the Community and

third countries, published in the Official Journal of the European Union no. L 22 of January 26<sup>th</sup>, 2005, pp. 1-10.

In addition, Article 1(e) of Law no. 143/2000 contains a definition of precursors as substances frequently used in the manufacture of drugs, listed in Table IV, attached to the Law.

### Regulation of remand custody in the New Criminal Procedure Code

The New Criminal Procedure Code (NCPC) was adopted by Law no. 135/2010, published in the Official Gazette, Part I no. 486 on 15 July 2010.

As a general appreciation, NCPC has a higher degree of flexibility regarding preventive measures, both by introducing house arrest and by stipulating the possibility of directly ordering the measure of judicial control (currently, judicial control cannot be directly ordered, but only after the defendant is arrested. Only after arrest, they can be released under judicial control).

According to Article 202 of the NCPC, **preventive measures** can be ordered if there is evidence or grounds resulting in reasonable suspicion that a person has committed an offence and only if they are necessary to ensure the successful unfolding of the criminal trial, to prevent the elusion of the suspect/defendant from criminal investigation or trial or to prevent the latter from committing another offence. The same text also stipulates that any preventive measure shall be proportionate to the gravity of the charge brought against the person being subject to the measure and necessary for the purpose for which it was ordered.

Therefore, this means that the legislator has explicitly introduced the proportionality and necessity requirements for the first time in the Code, which must be met before ordering a preventive measure. This provision represents the application in the internal legislation of a principle frequently reiterated by the ECHR (European Court of Human Rights).

The preventive measures stipulated in the NCPC are:

- detention;
- judicial control;
- judicial control on bail;
- house arrest;
- remand custody.

Detention and the judicial control, simple or on bail, do not show great differences in comparison to the current regulations. We have previously mentioned that the new Code allows for the direct ordering of judicial control without the necessity of the defendant being already taken into custody as to be released under judicial control only afterwards (according to the system in the current Code).

**House arrest** is truly a new preventive measure. House arrest is ordered – depending on the trial phase of the file – by the rights and freedoms judge (during criminal investigation), by the pre-trial chamber judge (during pre-trial chamber phase) or by the Court (trial phase), if this measure is necessary and sufficient for achieving any of the purposes specific to the safety measures (ensuring the successful unfolding of

the trial, preventing the elusion of the defendant from criminal investigation or trial or preventing them from committing another offence).

The necessary and especially sufficient character of the measure is estimated by taking into account the risk degree of the offence, the purpose of the measure, health, age, family situation and other circumstances regarding the person against whom the measured is ordered.

It is not possible to take this measure with regard to the defendant:

- against whom there is reasonable suspicion that they committed an offence against a family member, or
- who was previously and irrevocably sentenced for the offence of escape.

The measure of **house arrest** refers to the obligation imposed on the defendant, for maximum 30 days (which can be prolonged by other maximum 30 days), **not to leave the building where they live** without the permission of the court that ordered the measure or that deals with the cause, as well as **to obey certain restrictions** established by the court.

The restrictions that may be imposed during house arrest consist of the following obligations:

- a) to appear before the criminal investigation body, the rights and freedoms judge, the pre-trial chamber judge or the court whenever they are summoned;
- b) not to communicate with the aggrieved party or family members of the party, with other participants in the offence, with witnesses or experts, nor any other persons who do not normally live with them or are not under their care;
- c) to permanently wear an electronic monitoring system.

At the written and motivated request of the defendant, the judicial body may allow them to leave the building for going to work, to education courses or professional training or other similar activities aimed at securing essential livelihoods.

In urgent cases, for serious reasons, the defendant may leave the building without the consent of the judicial body, provided the latter is immediately informed with regard to the reasons for leaving the building.

If the defendant violates in bad faith the house arrest measure or their obligations for that matter or there is the reasonable suspicion that they intentionally committed a new offence (for which a criminal investigation was ordered), the judicial body, upon motivated request of the prosecutor or *ex officio*, may order the substitution of house arrest for remand custody.

**The maximum duration of house arrest**, during criminal investigation, is of **180 days**, with the specification that the duration of the deprivation of liberty ordered by the measure of house arrest is not taken into consideration when calculating the maximum duration of the measure of remand custody of the defendant during criminal investigation.

### Remand custody of the defendant

According to **Article 223 of NCPC**, the measure of remand custody may be taken by:



- the rights and freedoms judge, during criminal investigation;
- the pre-trial chamber judge, during the pre-trial chamber procedure;
- the court judging the cause, during trial.

Remand custody may only be taken against the **defendant**.

Remand custody may be ordered only **if, after analysing the evidence, there is reasonable suspicion that the defendant has committed an offence** and one of the following situations has been observed:

- a) the defendant fled or hid away in order to **elude** criminal investigation or trial, or has undertaken preparations of any kind aimed at such actions;
  - b) the defendant is trying **to influence** another participant in the offence, a witness or an expert or **to destroy**, alter, hide or abstract material means of evidence or to determine another person to adopt such behaviour;
  - c) the defendant **is putting pressure** on the aggrieved party or they are trying to reach a fraudulent settlement with the party;
  - d) there is reasonable suspicion that, after the beginning of criminal investigation against the defendant, the latter intentionally **committed** another offence **or is preparing to commit** a new offence.
- d/1) In addition, remand custody may be ordered in order to avoid **endangering public order**, in the case of **certain offences** (expressly mentioned) or in the case of offences punishable by law with imprisonment of **5 years** or more.

This time, the legislator has been more restrictive and more precise than in the current CPC when regulating remand custody for the purposes of avoiding endangering public order. It has defined certain categories of offences and a limit of 5 years for the punishment established by law, while indicating several criteria that must be taken into consideration when appreciating the degree of danger for public order. Thus, according to Article 223(2) of NCCP, the measure of taking the defendant into remand custody may also be ordered if evidence indicates there is reasonable suspicion that they committed an intentional crime against life, a crime that resulted in physical injury or death of a person, an offence against national safety, a **drug trafficking** offence, arms trafficking, human trafficking, terrorism acts, money laundering, counterfeiting or other values forgery, blackmail, rape, deprivation of liberty, tax evasion, outrage, judicial outrage, corruption, an offence committed by electronic means of communication or another offence punishable by law with imprisonment of 5 years or more. In addition, based on the evaluation of the gravity of the offence, method and circumstances in which it was committed, entourage and background of the defendant, criminal record and other related circumstances, the deprivation of liberty of the defendant results as necessary to avoid endangering public order.

It is noteworthy that the NCPC does not contain the provision present in the current CPC, according to which the measure of remand custody may not be ordered regarding offences for which the law alternatively provides a punishment by fine. In this context, it must be mentioned that the European Convention of Human Rights (Article 5) does not define any condition concerning the nature or length of the punishment in relation to remand custody.

During criminal investigation, **the request for remand custody** is formulated by the prosecutor. Together with the case file, the request is submitted to the rights and freedoms judge pertaining to the court which has jurisdiction over the case in first instance or to an equivalent court which has jurisdiction over the place of detention, the place where the offence was committed or the public prosecutor's office where the prosecutor who submitted the request activates.

The rights and freedoms judge, notified by the prosecutor, settles the term for deciding upon the request for remand custody.

The decision on the request for remand custody is taken **solely in the presence of the defendant**, except for the case in which they are unjustifiably absent, are missing, elude themselves or when because of their health status, force majeure or a state of emergency, they cannot be brought before the judge.

In all situations, the legal assistance of the defendant by a lawyer, elected or appointed *ex officio*, is mandatory.

The participation of the prosecutor is mandatory.

The rights and freedoms judge hears the defendant regarding the act with which they have been charged and the reasons supporting the request for remand custody, as formulated by the prosecutor.

**But, before proceeding to hearing the defendant, the rights and freedoms judge is obliged to inform the defendant about the offence with which they have been charged and the fact that they have the right to remain silent, pointing out that anything they say can be used against them.**

If the request is admitted, the judge orders remand custody by motivated decision. Custody of the defendant can be ordered **for maximum 30 days**. The new Code expressly stipulates that **the duration of the detention shall not be deducted from the duration of the remand custody**.

If the request is denied, the judge may order another preventive measure, less severe (judicial control or house arrest).

During criminal investigation, the duration of remand custody of the defendant **cannot exceed 30 days**, except if it is prolonged. **The prolongation** can be ordered for a period of maximum 30 days as well. **The total duration of remand custody of the defendant during criminal investigation** cannot exceed a reasonable term **and cannot be longer than 180 days**.

**Prolongation** may be ordered **if the grounds which led to the initial arrest require further deprivation of liberty of the defendant, or there are new grounds justifying the prolongation of remand custody**. The defendant is heard by the rights and freedoms judge with regard to all the grounds upon which the request to prolong the custody is based, in the presence of a lawyer, elected or appointed *ex officio*. If the defendant that has been taken into custody is hospitalized and because of their health condition, they cannot be brought before the rights and freedoms judge, or when because of force majeure or a state of emergency, it is not possible to move them, the request shall be examined in the absence of the defendant, but only in the presence of his lawyer, who has the possibility to address the judge and draw conclusions.

**During the pre-trial chamber procedure** (intermediate phase between criminal investigation and trial) **and trial**, remand custody of the defendant may be ordered, as the case may be, by the pre-trial chamber judge or by the court dealing with the cause, *ex officio* or upon the motivated request of the prosecutor, for a period of maximum 30 days.

The grounds and conditions for ordering remand custody are the same as during criminal investigation, when remand custody is ordered by the rights and freedoms judge.

If the defendant has previously been taken into custody in the same cause, during criminal investigation, pre-trial chamber procedure or trial, their arrest may be ordered again only if new grounds have emerged, requiring their deprivation of liberty.

Throughout trial, the court, *ex officio* and by decision, **shall undertake periodical verifications, but no later than 60 days**, on whether the grounds that determined the maintenance of remand custody and house arrest against the defendant subsist. As the case may be, remand custody may be maintained (equivalent to prolonging custody during criminal investigation) or may be revoked.

**During first instance trial, the total duration of remand custody** of the defendant may not exceed a reasonable term and no longer than **half the special maximum** provided by law for the offence on trial. But **regardless of the special maximum, in all cases, the duration of remand custody in first instance may not exceed 5 years**, as indicated by Article 239(1) of the NCPC.

Upon the expiry of the total duration of remand custody, the court may order another preventive measure (judicial control or house arrest).

The new Code provides for special implementing conditions for preventive measures taken against **minors**. Thus, Article 243 of the NCPC stipulates that detention and remand custody may be ordered against a minor defendant as well, in exceptional cases, only if the effects that the deprivation of liberty would have on their personality and development are not disproportionate in relation to the aim pursued by such measure.

## CHAPTER 2

### COMMENTS ON STATISTICAL DATA AND EXPERT OPINIONS ON THE USE OF PRE-TRIAL DETENTION IN CRIMINAL CASES CONCERNING DRUG USERS

#### 2.1. Comments on figures and statistical data

Halfway through 2011, the **Public Prosecutor's Office attached to the High Court of Cassation and Justice** was solicited upon public interest information request to communicate data concerning the number of persons under criminal investigation, either in custody on remand or while free, for drug related crimes (both trafficking and use), as well as information concerning the measures taken by prosecutors through indictments elaborated in such cases. The Public Prosecutor's Office responded through the Directorate for Investigating Organized Crime and Terrorism (DIICOT) by providing cumulated data on both crimes regulated by Law no. 143/2000 and Law no 300/2000 on the judicial regime of precursors used at manufacturing illicit drugs. DIICOT did not provide dissociated information on trafficking or use, thus conclusions on the nature of the investigated crimes could not be drawn. According to the response from DIICOT, at the beginning of 2011, there were 2,340 cases registered with the institution. During the first half of 2011, 2,248 more new cases were registered and by the end of June, 2,520 cases were in progress.

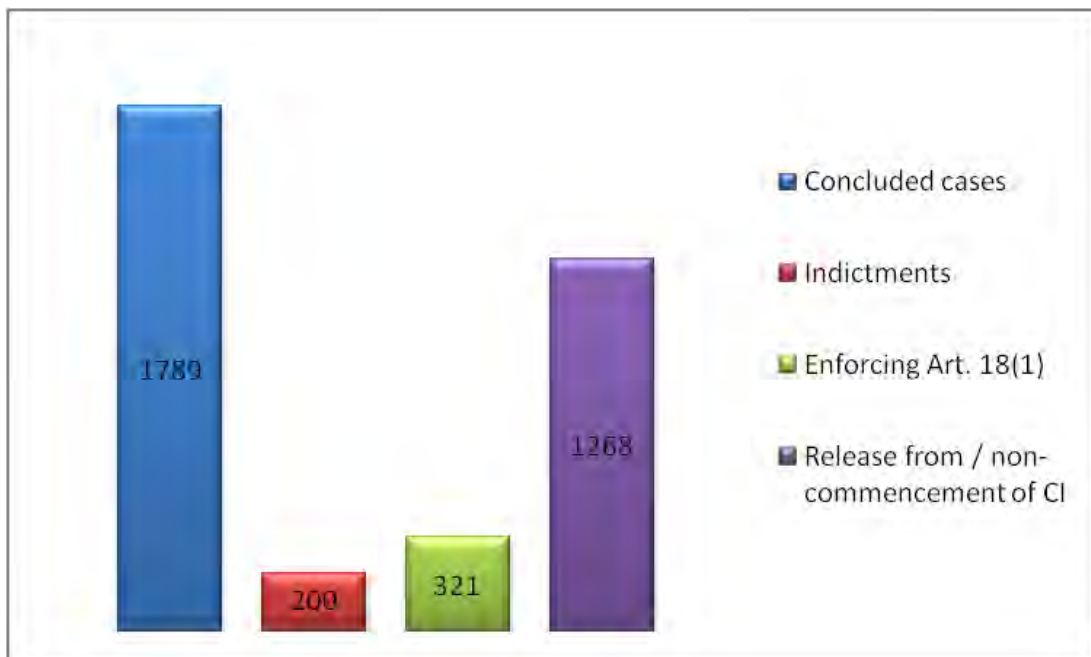


Figure 2.1. Outcomes in DIICOT cases

Between January and June, 1,789 cases were concluded, out of which 200 received indictments, while in other 1,268 cases the solution was either release from criminal investigation or non-commencement of criminal investigation. As for the rest of 321 concluded cases, an administrative sanction was enforced according to Article 18(1) of the Criminal Code<sup>1</sup>.

During the first half of 2011, 3,438 persons were investigated in cases concluded by DIICOT. Out of them, 468 were sent to trial and 215 were held in custody on remand.

\*

**The Superior Council of the Magistracy (CSM)** was solicited upon information request to communicate data concerning definitive sentences in cases of drug related crimes (both trafficking and use). The response of CSM referred to crimes regulated by Law no 143/2000 and consisted of the following information for the first half of 2011: 490 persons were definitively sentenced: 293 under Article 2 (trafficking) and 37 under Article 4 (use). Out of the 490 sentenced persons, 1 was sentenced to criminal fine (according to Article 18(1) of the Criminal Code), 234 were sentenced to prison, 98 benefited from conditional suspension of execution of punishment, and 158 benefited from suspension under judicial control. Out of the 293 persons sentenced under Article 2, 154 were sentenced to prison, 42 benefited from conditional suspension of punishment and 97 benefited from suspension under judicial control. **Out of the 37 sentenced persons for violating Article 4 (use) of Law no 143/2000, 23 were sentenced to prison**, 13 received conditional suspension of execution and 1 person received suspension under judicial control.

\*

In July 2011, both the National Administration of Penitentiaries (ANP) and the General Inspectorate of Romanian Police (IGPR) were requested to release information on the number of persons subject to custody on remand (AP=PTD). According to the law, IGPR, through its Remand Centres, detains only persons that have not been convicted by any court (held on an arrest warrant), while the remand sections under the control of ANP detain both persons that have not been convicted by any court and persons that have been convicted but have still to receive a definitive sentence.

---

<sup>1</sup> **Article 18(1) of the Criminal Code** states that “According to criminal law, an offence does not amount to crime if by minimally prejudicing one of the values defended by law and through its concrete content, evidently lacking importance, the offence does not reach the social danger degree of a crime” and indicates that in such cases the prosecutor or the court can enforce an administrative sanction, respectively reprimand, reprimand with warning or fine.

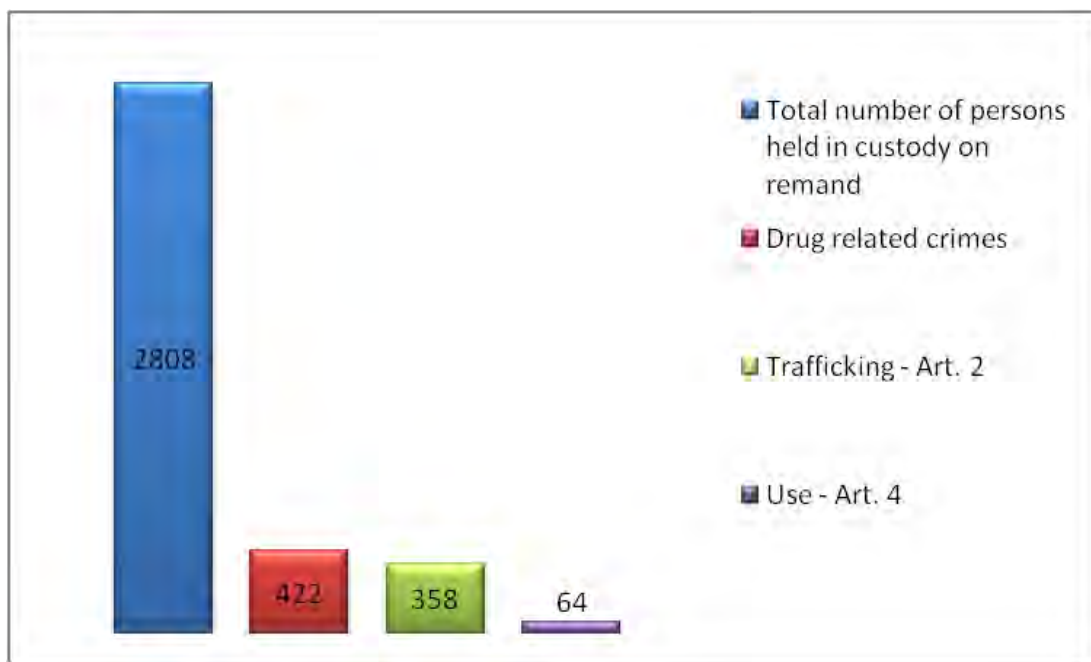


Figure 2.2. Persons in custody on remand

Halfway through 2011, 2,808 persons were held in custody on remand nationwide, out of which 422 were under investigation for crimes regulated by Law no 143/2000. **Out of them, 64 were charged exclusively with crimes under Article 4 of the law (use).** The remaining 358 were investigated for violating Article 2 or for multiple crimes (Article 2 and 3, Article 2. and 4, respectively Article 2, 3 and 4). Most likely, the persons investigated for violating Article 2 and 4 are actually users that are involved in trafficking activities for personal use only.

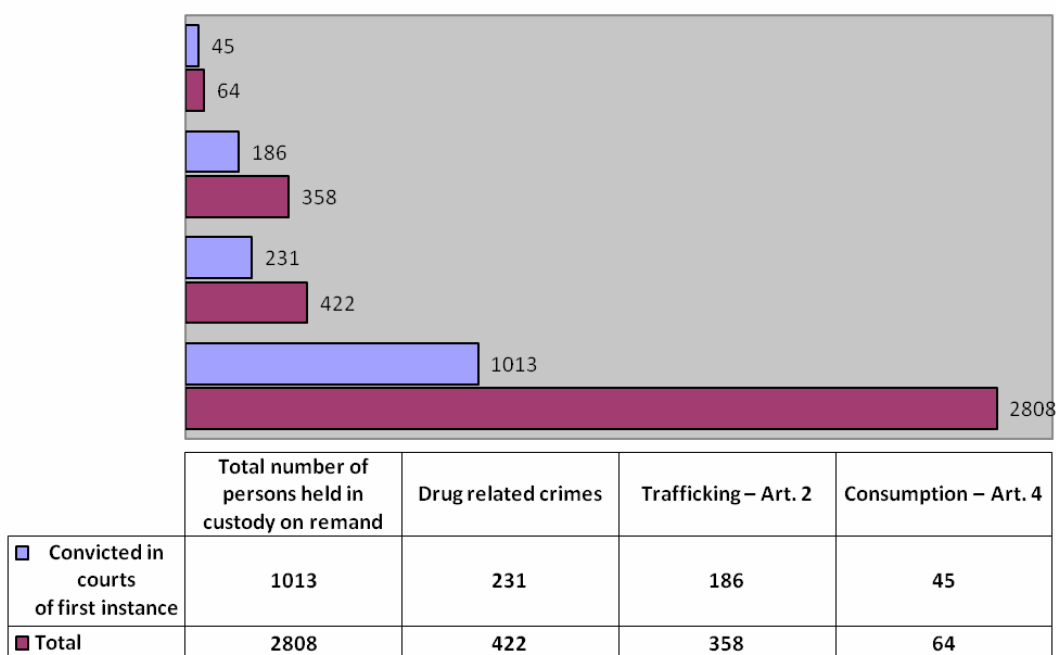


Figure 2.3. Prevalence of persons convicted in courts of first instance out of the total number of persons in custody on remand

\*

In July 2001, the remand sections under the control of ANP held 1,701 persons out of which 310 were detained for crimes regulated by Law no 143/200. **Out of them, 61 were investigated/convicted in courts of first instance exclusively for use (Article 4).**

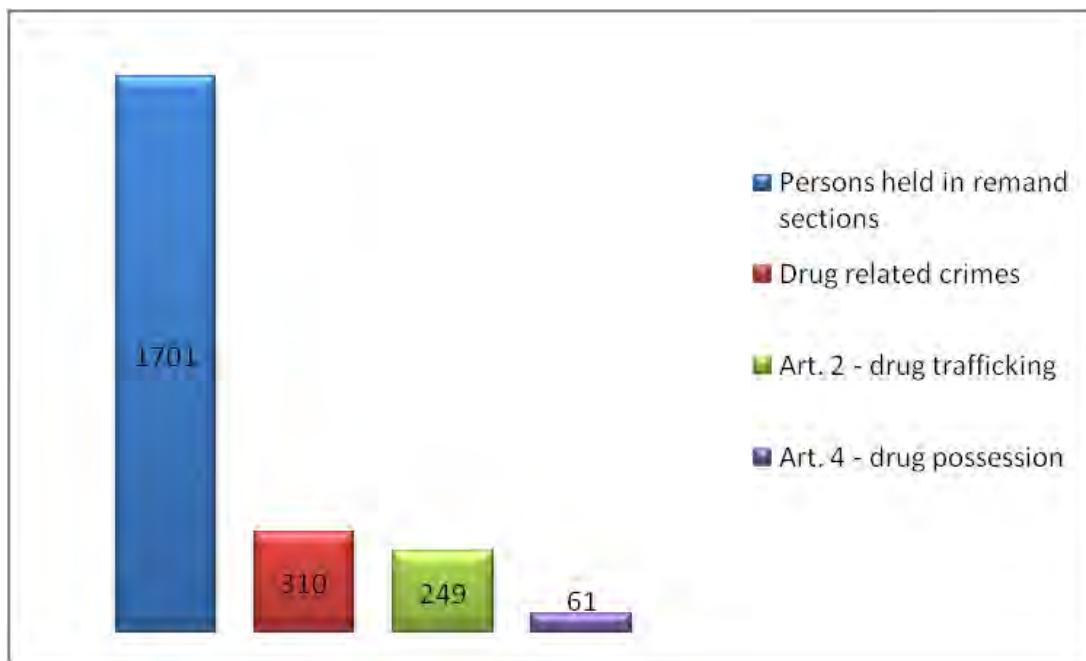


Figure 2.4. Persons held in remand sections under the control of ANP

In July 2011, the situation concerning the persons held in the remand sections under the control of ANP was as follows:

- 1,701 persons were detained, out of which 1,013 had been convicted by courts of first instance and 688 had been detained on arrest warrant;
- out of the 310 persons detained in remand sections for drug related crimes, 231 had been convicted by courts of first instance, while 79 had been detained on arrest warrant;
- more than half (138) from the detainees convicted by courts of first instance had been subject to custody on remand for more than 180 days;
- almost half (45%) of the persons held in remand sections for crimes regulated by Law no 143/2000 needed medical assistance, one third of those in need of medical assistance being held in the Penitentiary București-Rahova (the response of ANP does not indicate the nature of their health problems).

\*

In July 2011, **IGPR** was requested to provide dissociated information on the number of persons held in custody on remand that were registered with the institution, depending on types of crimes regulated by Article 2 and 4 of Law no 143/2000, custody period, medical assistance provided to drug users and the regulations on this topic.

According to the response of IGPR from July 2011, the Remand Centres nationwide held 1,107 persons out of which 112 were under investigation for crimes regulated by Law no 143/2000. **Out of them, 3 were charged exclusively with crimes**

**under Article 4 of the law (use), all 3 in centres outside Bucharest.** The remaining 109 were investigated for violating Article 2 or for multiple crimes (Article 2 and 3, Article 2 and 4, respectively Article 2, 3 and 4).

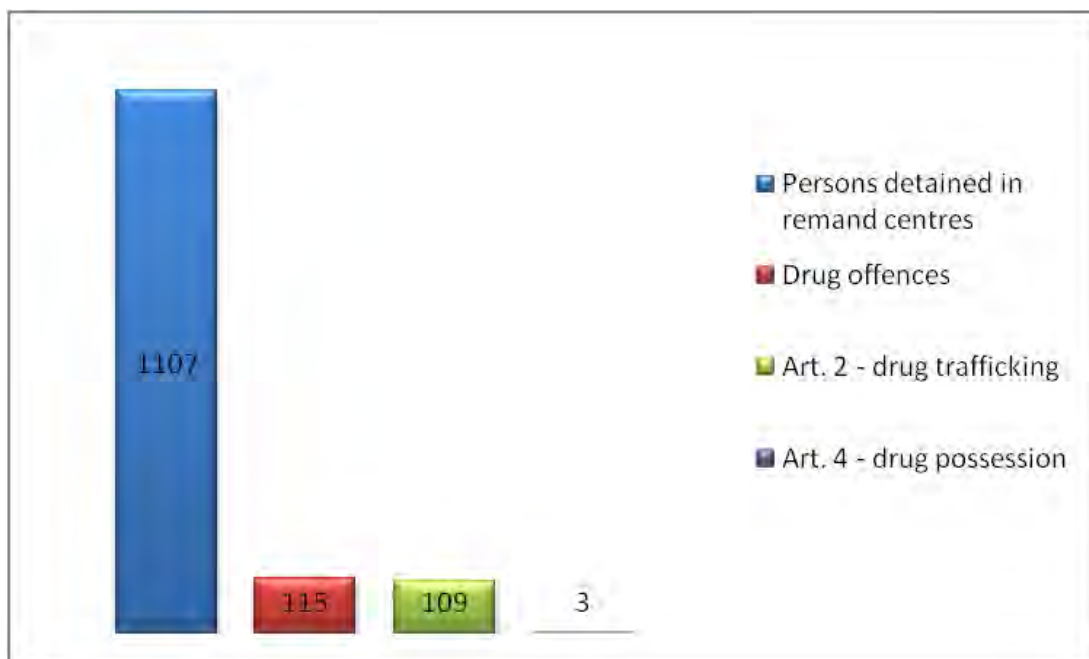


Figure 2.5. *Persons detained in remand centres*

In July 2011, the situation concerning the detainees in the remand centres under the control of county police inspectorates was as follows:

- 793 persons were detained out of which 67 for crimes regulated by Law no 143/2000.
- 53 of them had been arrested for committing crimes under Article 2 of Law 143/2000 (25 persons detained for less than 30 days, 28 persons for a time period between 30 and 180 days);
- 12 persons for committing multiple crimes under Article 2 and 4 (7 of them detained for less than 30 days, 5 for a time period between 30 and 180 days);
- 2 persons for committing multiple crimes under Article 2 and 3 (detained for less than 30 days);
- one person for committing multiple crimes under Article 2, 3 and 4 (detained for less than 30 days);
- 3 persons for committing crimes under Article 4 (2 persons detained for less than 30 days, the other for a time period between 30 and 180 days).

\*

In the General Directorate of Bucharest City Police (GDBCP) 314 persons were held in custody on remand, 45 of them for violating Article 2 of Law no 143 (12 persons detained for less than 30 days, 30 persons for a time period between 30 and 180 days and 3 persons for more than 180 days), one person for violating Article 4 (detained for less than 30 days).

Out of the 46 persons arrested by GDBCP for drug related crimes, 20 declared to be users, 15 of them needing medical assistance.



Out of the 73 persons arrested by county police inspectorates for single or multiple crimes under Article 2, 3 and 4, 30 persons declared to be users and out of these, 2 needed medical assistance.

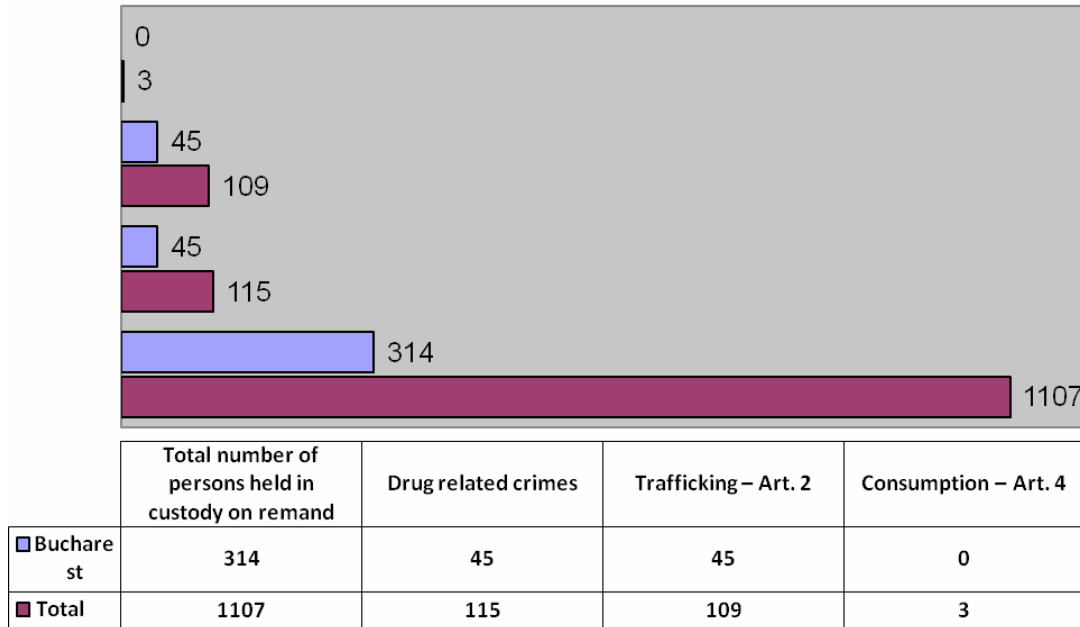


Figure 2.6. Prevalence of persons in custody in Bucharest of the total number of persons in custody on remand

## 2.2. Expert opinion on the consequences of PTD — lawyers, prosecutors, judges, doctors

This section brings together perspectives coming from different and often divergent points of view, coming from professionals working within the system. In order to document their opinions, the research team used non-structured interviews and adapted the questions according to the discussion. The research team contacted judges, prosecutors, police officers, lawyers, probation officers and medical doctors who were asked to describe the application of PTD on drug users from their profession’s perspective and also to state their opinions on the effectiveness of this measure and available alternatives. Thus, 17 interviews were conducted, as follows:

Profession	# of interviewed professionals
Judge	4
Prosecutor	2
Police officer	4
Probation service	1
Lawyer	2
Medical doctor	5

Given the diversity of backgrounds, the sensitivity of the topic and the differences between interviewees with regards to various points of discussion, we decided to keep all personal information of the interviewees confidential.

The main questions in the interview were focused on professional's perceptions on a series of topics, as following:

- In the case of drug offenders, is PTD an exceptional measure or more a regular practice?
- Are there any differences between drug offenders and the other offenders from the perspective of social danger?
- How do you determine the difference between possession for personal use and possession for drug trafficking considering the absence of clear regulations on this matter?
- How effective in solving cases is Article 16 of law 143/2000? What is your opinion about this article?
- What is your experience in working with drug offenders?
- Describe the procedure in working with a drug user in your institution. What is your opinion on the effectiveness of this procedure? How does the application of PTD influence the future actions of a drug offender?
- Can you identify any trend in applying law 143/2000 in the last two years?
- Can you describe the living conditions in pre-trial detention units considering the medical needs of problem drug users?
- Can you provide examples to support your statements?

In the analysis phase, the professional's answers were structured on a topic list:

- PTD application and procedures;
- law 143/2000 – articles 2, 4 and 16;
- administrative fines for drug possession;
- flagrant;
- trial;
- PTD conditions;
- trends.

### PTD application and procedures

#### Prosecution

DIICOT is in charge with enforcing law 143/2000, more specifically, to fight illicit drug trafficking. DIICOT is concerned with illicit drug traffickers, not with drug users. DIICOT is working in cooperation with the Direction to Combat Organized Crime (DCCO) and its subordinated units, under the General Inspectorate of the Romanian Police. With regards to law 143/2000, DCCO is the closest police structure to cooperate with DIICOT. In this partnership, DIICOT provides the coordination of operation and leads the investigation and DCCO provides the operation officers, undercover agents and collaborators (part of them are drug users who agreed to work for the police).

The lawyer cannot influence the judge decision in PTD phase. The decision is based exclusively on the evidence: drugs, witnesses, recordings etc. The exceptional

character of PTD is recognized. A drug related offence implies actions, conditions or possibilities that allow this decision:

- a) the drug traffickers are involved in regular criminal activity and they repeat crimes;
- b) the action of selling illicit drugs is a danger for the society in itself (example of a dealers network selling heroin in Gara de Nord, main Bucharest train station – their neutralization resulted in a temporary break in drug supply, which represents a success: the illicit drug market was de-stabilized on short term);
- c) drug traffickers can influence the course of the investigation.

There are drug traffickers who are released from police custody in exchange for their cooperation and information.

Even though a drug trafficking network is deconstructed, law enforcement has limits on long term: one seller is arrested, 10 more are willing to take his position; networks reconstruct after a while and learn from past experiences in order to avoid new encounters with law enforcement.

### Judges

PTD duration in drug related cases is estimated between 1 to 5 years.

In the phase of sentence individualization, it is up to the judge to decide the exact sentence. The prosecutor is not allowed to ask specifically the years of imprisonment, but only to ask for a sentence based on the evidence in the criminal file and the law.

Another view on PTD, coming from a judge is that PTD is a deterrence measure, aimed to make the drug users “feel” what happens if they commit a crime and to determine them to reconsider future actions.

If the investigators did not find a lead to a trafficking network, they arrest the suspect on spot.

Judges know that, in practice, a lot of users provide information about other users pretending they are drug traffickers but this is not sufficiently documented.

### Police officers

The authority has the legal base to individualize the sentence. The individualizing of the sentence is based on the specificities of the case and by corroborating all evidence and circumstances. For this reason, the possibility of committing sentence errors is limited. The sentence is adapted to the specific circumstances (both objective and subjective) of the offence and takes into account the proportionality to the damage.

PTD is not applied for drug possession or use alone. If the person is put in custody, usually there is another accusation, most probably drug trafficking or attack on property (theft, robbery). Drug users usually declare their use and they receive medical attention. They are seen as criminals, but their medical needs are treated accordingly.

PTD is applied in most drug related cases. A police officer mentioned the case of a carrier who accepted to carry a drug package because he needed money for a medical intervention for his mother. He was put in PTD even though he cooperated and he did not represent an obvious social danger.

The public opinion does not make a difference between PTD and imprisonment. For the public opinion, a person brought at the police section did not get there by accident; she/he must have done something, because law abiding citizens do not have such problems. The police/prosecution must send a signal that they are in control and they apply legal provisions, and thus PTD is applied.

Practice: the police have the power to keep a person for investigations for 24 hours. The suspect might be released by the end of the legal term, even though the investigation can be finalized in several hours. The same practice is encountered in PTD. This seems to be an example of mentality influencing the application of the procedures.

Example: the policeman finished the investigation after 16 hours and wanted to release the suspect, but his colleagues disagreed, so the person was kept in the police lock-up until the end of the legal term. The peer pressure is an important factor in this, one who would step outside the line might offend his colleagues.

In the law enforcer's mentality, the suspect must "feel" the seriousness of the situation and change his deviant behaviour. The measure is aimed to deter future crimes, to determine the person to wish not to return in the police lock-up.

PTD is not applied based on guilt (which is examined during the trial), but on clues which allow an accusation.

When drug users are arrested, if there are no clues on involvement in drug trafficking, they are released based on article 18(1) of the Criminal Code (the absence of social danger).

Cannabis users are not "eligible" for PTD because the sentence for cannabis possession is less than 4 years.

More information on conditions for applying PTD in Chapter II.1.

More information on Article 18(1) and statistics in section 1.3 of the report.

### Lawyers

PTD is the rule, not the exception in drug cases, without discriminating between users and traffickers.

Ref: Press article stating that the judge has dared not approve prosecutor's request for PTD in the case of two cannabis growers, because the offence did not imply any social danger.

[http://www.puterea.ro/articol/o\\_judecatoare\\_promoveaza\\_printr\\_o\\_decizie\\_cultivarea\\_canabisului\\_din\\_cele\\_m](http://www.puterea.ro/articol/o_judecatoare_promoveaza_printr_o_decizie_cultivarea_canabisului_din_cele_m)

The author of the article is outraged with regards to the judge decision to deny the prosecutor's request for PTD in the case of two cannabis growers who recognized their offence and cooperated with the law enforcement.

"A judge of the Bucharest Court ruled the investigation without custody of two students caught by DIICOT with growing cannabis at home. The reason given by the magistrate is as hilarious as it is stupefying.

The two students arrested on December 9 by DIICOT prosecutors are Andrei Cristescu, 21 years old, and Andreea Ioana Tudorache, 26 years old. They have recognized in front of prosecutors they have grown cannabis in their own home, stating that they are drug users and used "to serve friends"; but they never cultivated cannabis for commercial purpose. On December 9, DIICOT prosecutors raided the suspects' home, where they found cannabis plants, and they confiscated 17 plants, seeds, a device for shredding plant fragments of cannabis and precision scales.

"There is no social danger"

Students were presented the next day to the Bucharest Court with proposal for remand. Stupor, however. The judge ruled that Andrei Cristescu and Ioana Andrei Tudorache can be investigated at large, given that it "the cumulative condition of Article 148 Criminal Code referring to the concrete social danger represented by the release of the suspects during the investigation phase is not met and there is no reason for putting the suspects in custody", as shown in the conclusion of the hearing of December 10. Moreover, the judge supports the decision to release the two cannabis growers with the argument that "the concrete social danger that would present leaving the defendants in freedom must be supported by evidence which, in the present case, do not exist. In this context it is worth mentioning that the defendants are at the first conflict with criminal law, both are students that have been sincere in the prosecutor's conduct, elements likely to lead to the conclusion that these people do not present danger to public order".

The base of the incrimination is made by the police officer, than followed by the prosecutor and judge. If the suspect cannot afford a good lawyer, they are processed by the system: PTD for 29 days, than 180 days, Article 16 used as a tool for pressuring the suspect to provide information on his dealer. In case they do not agree to cooperate, the prosecutor asks for imprisonment.

In many cases the court does not read the file. Drug users are treated as objects. The procedure follows automatically, sometimes by copy/paste.

One lawyer provided the following example: the note of termination is recopied by the prosecution from the indictment, the entire file was copied/pasted from the police – the example is not referring to a drug file, but on some prosecutors practice in general.

The law stipulates that the social danger represented by a suspect has to be proven. In practice, the social danger is alleged and the measure aims to avoiding this possibility, even though the possibility is just a supposition.

Even though this is not the rule, PTD is often the first sign of a sentence to imprisonment. The judge supports the prosecutor and they would not contradict a colleague's opinion – this is a custom in the judicial practice.

In cases of poor drug users charged with drug-related offences, usually there is a public defender who does not represent the defendant properly. Such a case is routine for all parties. Only rich people can afford a good lawyer. A lot of successful lawyers working in drug related cases are former law enforcement people; they know how the system works and they solve a lot of cases in the favour of their clients.

The “artistic” performance of the accused is sometimes crucial in determining the judge decision (confirmed in Selena interview – the judge sentenced her to suspended prison after discussing about her family – she has two kids – and the future attempts to get clean – she has been really trying since then).

### Probation

During PTD, due to restraining conditions, a drug user is more likely to promise and commit to a positive change (e.g. stop committing crimes and stop using drugs).

A chronic user involves in criminal activity every day, when he is procuring drugs; therefore, according to the current legislation, PTD is justified in his case.

The probation officer explained the negative attitudes of police officers towards drug users as a problem of mentality and lack of information about the medical aspects of addiction. Law enforcement people perceive drug addiction as a matter of choice and believe drug users commit crimes with intention, not because they need money for the next shot, which makes them natural enemies.

### Forensic doctor

There are two types of forensic examination: the official expertise/examination (requested by the prosecutor) and the extra-judicial expertise (requested by the lawyer or by one of the parties in a civil case; the judge is not coerced to take this expertise into account).

The forensic evaluation aim is to determine a) the subject's discernment (full, absent, low); b) the legal framing; c) the social danger (yes/no); d) the danger to self.

The medical examination file includes all relevant documents available, which increases the file volume and makes it difficult to operate. The relevant information for

the case is added at the end of the file, usually in several lines and includes the conclusion and the expert recommendation.

Usually, the file received by the forensic doctor does not include the criminal case description or other background information, which would be useful for the examiner in order to understand the circumstances of the case.

Discernment: a person's ability to critically assess the content and consequences of his act.

The forensic examination can result in three assessments: absent, present or limited discernment. The forensic doctor can identify a critical moment in the action when the suspect had limited discernment. Example from a medical examination report: "the suspect presents a polymorphic personality disorder. Discernment is low in relation to the offense for which he is examined. We recommend medical measures according to Article 113 Criminal Code"\*.

\* Mandatory treatment: If the perpetrator, because of illness or chronic intoxication by alcohol, drugs or other similar substances is dangerous to society, they may be required to report regularly to medical treatment until they recovers. If they do not respect this condition, they can be hospitalized forcefully. If the person ordered to treatment is sentenced for life or punished by imprisonment, and treatment is performed during the sentence, the measure of compulsory treatment may be taken provisionally during the prosecution or judgment phase.

Drug users are brought to the Forensic Institute on several occasions:

1) at the ER – the case of people who declare they are drug users or they are suspected of using drugs by the time they got into contact with the police (as drivers, workers or suspects); they are brought by the police for examination; the doctor performs an examination which includes personal history, checking signs of use, eventually blood testing (this is applied only if the cost is covered). The doctor performs the examination, diagnosis and treatment recommendation. Most of drug users brought to the unit are under the influence or withdrawing.

2) psychiatric expertise – requested by the prosecutor. About 40% of all drug users examined have a double diagnosis (most frequently depression, anxiety, attachment disorders). Those people need medical attention.

The forensic examination allows prescribing a treatment and the confirmation of drug abuse can serve the defence in arguing limited discernment. In the Romanian praxis, the judge does not take into consideration the altered state induced by substance misuse as a circumstance in the favour of the offender.

### Law 143/2000 – Article 2

#### Judges

The judge does not sentence drug users to imprisonment only for possession or for trafficking, if they are at the first offence. Usually, the first sentence in these cases is suspended prison. The second offence is punished with imprisonment.

Sentences cannot be compared, every sentence depends on the context of the offence, the elements in the file, the cooperation of the suspect – all these are taken into consideration in the individualization of the sentence.

#### Prosecution

Currently the law does not include differences based on quantities, so the prosecution has no bases to discriminate between small traffickers and big traffickers.

On the question on the distinction between drug users and drug traffickers based on quantities, the prosecutor answered by noticing that this is not the responsibility of prosecutors, it should be referred to law makers.

#### Lawyers

There should be a distinction between the action of selling drugs for supplying personal use and selling drugs for profit.

### Law 143/2000 – Article 4

#### Judges

As long as drug possession is prohibited, there will always be problems with it. Problematic drug users become addicted due to social and economical conditions and lack of information. Something must be done in order to get them out from this black area.

There are no cases on simple drug use (Article 27(1), law no. 143/2000 – drug use is forbidden in Romania).

Drug users can be put into custody for other crimes than drug possession, such as violence, crimes against property motivated by the need to obtain money; these are criminogenic factors and PTD is therefore justified. Drug use or possession is not sufficient in order to apply PTD.

There were cases with possession of big amounts of drugs declared for personal use – it could not be proved the drugs were meant for selling.

#### Prosecution

Concerning PTD applied to drug users, according to the prosecutors, in practice PTD is not applied to drug users based on article 4 alone. A drug user is put in custody only on multiple charges, for example Article 2 + Article 4, driving under the influence, assault, robbery, theft, etc. In all cases, PTD is decided by the judge based on the evidence in the file.



Two cases of sentencing for possession were mentioned: at first, the case of a drug user sentenced for possessing 4 grams of cocaine. The offender was a recidivist and he was sentenced to 4 years imprisonment. The other case involved possession of 4 kg of cannabis and the defendant was sentenced to suspended prison.

### Police officers

When identified (by a policeman or a gendarme) the user is led to the closest police section. Usually, a drug user caught with drugs in his possession follows the next pattern:

- first offence = administrative fine
- second offence = criminal fine
- third offence = suspended prison
- fourth offence = imprisonment

Drug users are arrested if they are part of a bigger picture which involves trafficking networks. Some users can be key witnesses and PTD is applied in order to obtain the information from them or to prevent information leakage – the person cannot communicate with the rest of the group and law enforcement can save precious time in solving the case.

Due to the lack of provisions on drug quantities, in theory a person caught with 8 grams of heroin can receive the same sentence as another person caught with 1 kg.

### Administrative fines for possession for personal use

#### Prosecution

Simple drug possession for personal use is punished by administrative fine, in case the suspect is not connected to a drug trafficking case. There is no specification on the maximum amount of drugs possessed eligible for this measure – in practice, probably, this decision belongs to the case prosecutor and differs from case to case.

The aim of this measure is to deter the insertion of drugs into prisons. The prosecutor mentioned more cases with sentenced users' relatives (wives) who were caught while trying to introduce drugs in prison during their visit. Sentenced users were deterred to continue this practice, as the risk was to put their wives in prison.

#### Lawyers

What is the benefit of an administrative fine for a problematic drug user who still needs to obtain the money for the daily dose?

### Law 143/2000 – Article 16

#### Prosecution

The witness protection is not applicable for everybody who provides information, and it is very expensive. Only those who provide valuable information on important drug trafficking networks are included in the program. After the closure of the operation, the informant is relocated; they can even choose another country of residence.

Currently, Article 16 is not used as frequently as several years ago, there were cases when prosecutors could spend a couple of days at work chasing the drug trafficking network from contact to contact: faced with Article 16, suspects were cooperative and arrests followed in chain.

In recent years, the organized crime has developed new ways to trade drugs: they use carriers (carriers do not usually know what the content of the bag is), they change marked money in public shops (police must track the money and recover them), and deliveries are made indirectly. The dealer is late at the appointment or changes the place in the last minute if they sense anything un-usual.

Currently, the prosecution is working with article 19, law 682/2002 on witness protection<sup>1</sup>, which is more adapted big dealers who might agree to cooperate.

*Diversion of Article 16 by drug traffickers:* there are traffickers who provide information about other traffickers with the aim to eliminate competition. There are traffickers who provide information about drug users and pretend they are drug traffickers.

Drug users themselves are not a reliable source of information. Some of them exaggerate or distort the info, consume the drugs which were supposed to be the evidence or provide false information. There are prosecutors who prefer to avoid working with drug users for these reasons.

### Judges

Article 16 is useful because it keeps drug trafficking and use low.

Question: Do you remember the biggest quantity seized based on info retrieved with Article 16?

Answer: Usually we're talking about micro-trafficking.

Question: If there were more services for drug users, would you decide PTD that often?

Judge: My priority is to make sure the suspect is not endangering the others. Currently there are only few alternative measures.

Sometimes PTD is decided in order to provide time for the prosecutor to obtain information based on Article 16.

The purpose of prosecutors is to get the big traffickers through petty sellers – this is the goal of Article 16.

---

<sup>1</sup> Article 19. The person who is a witness within the meaning of Article 2(a)(1,2), and has committed a serious offence, and before or during the trial or criminal investigation denounces or facilitates the identification and criminal liability of other persons who have committed such crimes, benefit of halving the limits the penalty provided by law.

Article 2. In this Law, the terms and expressions have the following meanings:

a) a witness is a person who is in one of the following situations:

1. as a witness, according to the Code of Criminal Procedure, and by his statements provides crucial information and data for finding the truth about serious crimes or to help prevent or recover major damage could be caused by committing such crimes;

2. without being a suspect in that case, they provide crucial information and data in establishing the truth in cases of serious crimes or to prevent major damage that could be caused by committing such crime or the recovery; this category includes a person who is a defendant in another case.

### Police officers

Article 16 aims to provide law enforcement with a tool to get to the drug dealers. No one forces drug users to provide information on their peers, it is their choice.

### Lawyers

Article 16 is doing the job of police investigators, it allows them to get information by threatening suspects.

Article 16 is used and overused during all phases of the investigation and trial, until the court final sentence.

### Flagrant

#### Prosecution

The flagrant operations are difficult, as they require coordination and synchronizing between prosecutor, investigators, undercover agents and informants. The prosecutor must take into consideration the safety of all people involved and avoid accidents at all cost. In many cases, the situation in the field does not correspond to the initial plan and rapid adaptation is needed.

#### Judges

In cases of flagrant there might appear suspicions referring to Article 6 of the European Convention on Human Rights (causing the offence). That is why evidence is corroborated: there are video shootings, material evidence, declarations etc.

According to another judge, there are cases built exclusively by undercover investigators, who get involved with drug users and petty sellers and arrest them when they commit the crime of selling drugs or offering drugs to others.

**A) Răzvan Bulfinschi case\***

Bulfinschi – note from a press article: “A young man living in Bucharest aged 32 years old, who has spent the last eight years of his life locked up in prison Rahova, was released on Monday evening after he found justice in the European Court of Human Rights (ECHR). Razvan Bulfinski, 32, was a student at marketing in April 2002, when he was arrested along with two colleagues for drug trafficking. The youngsters defended themselves saying that they were supposed to buy watches but instead they were involved in a scam with drugs planted as proofs of trafficking. During the trial, however, their testimonies were not taken into account, and his conviction was based on testimony of agents.

ECHR magistrates decided in his favour in May 2010 and asked for re-trial, the damage was set at \$ 10,000.

“I cannot forget I told them all that is staged and not to forget my father died during my detention and we were together,” said Bulfinski.” (<http://www.libertatea.ro/detalii/articol/a-stat-8-ani-la-puscarie-pe-nedrept-319732.html> )

**B) The statements of the applicant, D.C. and P.T. during the proceedings**

1. On her arrest D.C. confessed to the prosecutor that she and P.T. had taken part in drug trafficking. However, she withdrew her confessions before the first-instance court, claiming that she had been coerced into making them by the police with the promise that if she wrote down what she was told to write, she would be released after ten minutes.

2. The applicant and his friends claimed that they had been contacted by Gotti, whose real name was Bogdan, and who was a friend of D.C. They gave the authorities his full name and address for further investigation. Gotti had told them that Alex had various objects (clothes and watches) for sale at reasonable prices. They finally agreed to meet Alex and at 4.30 p.m. on 29 April they, together with Bogdan, went to restaurant E. They sat down with Alex, who did not have the merchandise with him. Later that day the three friends were at bar N. when Bogdan told them that Alex was at restaurant M and could meet them again. The applicant and Bogdan left in Bogdan’s car. After a while, they called D.C. and P.T., who had stayed behind, and told them that Bogdan had forgotten a yellow plastic bag under their table at the bar and asked them if they could bring it to restaurant M as it contained food for Bogdan’s wife, who was ill.

3. At 9.15 p.m. the applicant and Bogdan arrived at restaurant M and sat at Alex’s table. Ten minutes later P.T., who was carrying Bogdan’s plastic bag, and D.C., joined them. P.T. sat at Alex’s table while D.C. sat at the next table with some acquaintances.

4. When Alex went to the toilet, plainclothes police officers intervened, expecting to find exactly 2,000 tablets of ecstasy in the bag under the table.

5. In their statements, the applicant and his friends insisted that the drugs had in fact been given to the undercover agents by the police for the purpose of the covert operation. In support of their statements they pointed out that despite their constant surveillance over the previous few days the police could not explain where the friends had obtained the drugs.

(...)

6. It also decided to sever the criminal investigations from those concerning another participant in the trafficking, Bogdan, who had not yet been identified by the police. On 13 February 2003, the prosecutor's office at the Supreme Court of Justice identified Bogdan as being the same person as Gotti and closed the investigation against him.

(...)

7. The three accused denied their involvement in drug trafficking and claimed that they had been entrapped by the police. They repeatedly stated that Bogdan had also been present at restaurant M.

8. The defence lawyers insisted on the importance for the court of hearing evidence from Bogdan in the presence of the defendants. They also requested the police to produce the bag and the packets in which the tablets had been found and to collect fingerprints from them. They considered that the court should see the video tapes of the events. Lastly, they asked for a confrontation between the applicants, which would allow them to prove that the police had put pressure on them and made them promises in order to obtain the initial declarations.

The court did not hear that evidence.

9. The County Court gave judgment on 15 April 2003. It found the three accused guilty of drug trafficking and sentenced them each to four years' imprisonment. It deducted from the sentence the time spent in pretrial detention. The court also confiscated the 1,965 tablets of MDMA that were left after laboratory tests had been carried out.

10. The County Court dismissed the defence arguments on the ground that under Law no. 143 statements made by undercover agents and their collaborators can constitute evidence. The court was satisfied that those statements had not been obtained illegally and considered that the defence argument to the contrary could not taint the evidence. It also considered that the intention of the accused to sell drugs was evidenced by their entering into negotiations with Toni and Gotti, which in turn led to their authorising Sven to make the transaction with the defendants and obtain the drugs from them.

**CASE OF BULFINSKY v. ROMANIA** (Application no. 28823/04), Judgement, Strasbourg, 1 June 2010, European Court of Human Rights

\* This fragment is not a part of the interviews with judges, its purpose is to illustrate the case of a user who was charged and sentenced to prison as drug trafficker. The news was largely disseminated and commented in the Romanian media.

### Lawyers

There are situations which allow speculations on the good faith of investigators/ police. For example the police have found heroin at the entrance of a house with more rooms in line, while the suspects were sleeping in the last room of the house – this is too obvious: no dealer would hide the drugs behind the entry door!

The requests for the phone tapping are based on denunciation and obtained without any proof in the file. Following phone tapping, the information obtained is used to justify the request for the wire! Police is claiming that “we have credible information on...” without bringing any concrete proof.

The undercover police investigator is **causing the offence** by buying anything<sup>1</sup>, anytime from anyone and asking for drugs to everybody. In order to get users trust, the undercover investigators break the ethics code by using drugs with his targets (“I don’t need you to bring me the money back, you can bring me drugs instead”). In such a case, the suspects did not file a complaint to ECHR because they were in a high social position and they feared scandal.

There are more cases with drug users who were arrested after giving or buying drugs for/from? an undercover police officer. Once they are released or finalized the sentence, they are no longer motivated to initiate a plea to ECHR, they are just happy they are free.

### Trial

#### Judges

Case: the suspect was held in PTD for 2 years and 8 months. By the end of the trial, the judge has sentenced him to the equivalent in prison years and he was released. Comment: decisions like that are made due to practical reasons. If the person were to be acquitted, they could sue the state and ask for compensation.

From the criminal procedure point of view, if the suspect was acquitted, there is no base for them to ask for compensation unless the arrest was illegal; i.e. the arrest was made without a reason, which is not the case for a suspicion for drug offences.

In practice, if the suspect were acquitted, there should be an appeal for compensations.

Trial duration: it should not last long. The user recognizes the crime – there is material evidence (drugs) and a flagrant. Another judge estimates the average duration of PTD from 1 to 5 years. In this case the trial duration should be important, as PTD can be applied in the investigation phase for a maximum of 180 days.

---

<sup>1</sup> A similar reference was found in the forensic examination file: the suspect under examination was arrested after he offered part of his dose to a “friend” who was in fact an undercover investigator.

### Lawyers

Sometimes prosecutors ask for maximum sentence because everybody else is doing it. A new prosecutor asked for maximum sentence in one case because he was new in the office (transferred from another office) and he did not want to upset his superior.

Case: the accusation witness was a police officer, directed by his colleague, an undercover investigator in the Bucharest Police Department. The undercover witness was reading from the indictment during the trial hearing. The lawyer asked for the tape when the undercover witness recognized this fact, but this was not possible due to technical problems – the recorder broke right at that moment!

There are reasons to conclude that similar cases result in different sentences, according to the respective court's practice (county, region etc.). For example, in Bucharest, law enforcement is more tolerant with cannabis users/cases, while in other regions, where these cases are less common, the judge is tough in sentencing cannabis offenders. There is no assessment on the credibility of accusation's witness declarations.

### Probation

There is a difference in approach between judges and prosecutors in Bucharest compared to the rest of the country, especially in towns on the outskirts of the country: a drug user received the maximum penalty for cannabis possession in a court from a city in the Northern side of the country, where drug cases are less common compared to big cities; a judge from Bucharest appreciated the punishment as being excessive. A reason for this could be that judges in smaller courts are less exposed to drug cases and tend to be tougher than judges in the capital city, who encounter such cases very frequently.

There are not many good criminal case lawyers. Most of the good ones have previously worked in the system and know how it works. Poor drug users do not stand any chance in a trial if they have an assigned lawyer.

Prosecutors should have more options in court – alternatives to incarceration should be promoted, mandatory treatment too (Article 113, Criminal Code).

### Conditions in pre-trial detention

#### Judges

Conditions in police/penitentiary arrest should be in accordance with drug users medical needs.

Depriving drug users of medical care (cold turkey withdrawal) is subjection to ill-treatment. This is a problem.

### Doctors

There are two types of withdrawal: a) life threatening withdrawal (caused by alcohol or benzodiazepines), in which case the patient needs to be hospitalized and b) non-life threatening withdrawal (opiates) – the patient receives ambulatory assistance.

ATS users do not experience withdrawal, but craving (the insatiable desire to continue using).

Withdrawal intensity is a subjective experience and its intensity differs from person to person, also depending on the setting.

Opiate withdrawal can be managed with substitution medication. Out of all available substitution options, methadone is the most compliant with detention conditions for the following reasons:

- it is compatible with poly-use (for example benzodiazepines);
- it has a low risk of overdosage (in case patients would exchange medication, methadone can be used in excess, while suboxone overdose can be fatal).

Methadone treatment is the most convenient treatment option for managing withdrawal symptoms in heavy heroin users.

Non-substitutive treatment of heroin addiction is also prescribed; it is mainly symptomatic treatment, based on painkillers, sedatives, sleeping pills.

ER patients profile (drug users):

- mostly poor people;
- roma ethnicity for a lot of cases;
- chronic users;
- no family or dysfunctional family;
- acute psychosis;
- criminal background.

The poorest users get only to the ERs, as these are the only medical services that do not require medical insurance.

Every day there is at least one case of legal highs user in the ER. Compared to other patients, drug users are difficult to deal with, they threaten they will call a television, they are violent.

### Police is bringing drug users at the Psychiatric Hospital ER

This situation is not comfortable for the hospital doctors, who have to evaluate, diagnose and prescribe a treatment in a limited time and based on incomplete information, without being able to follow-up the case (the patient is taken back to the police lock-up or penitentiary hospital).

One doctor believes that police is bringing drug users to the Psychiatric Hospital Prof. Dr. Al. Obregia in order to avoid potential accusations on grounds of deprivation of medical treatment.

This is confirmed by the interviewed drug users: the medical unit in the arrest is poorly equipped, there is only a general practitioner, and psychiatric assistance is not possible.



The duration of the medical examination in the case of a drug user is estimated to 20-25 minutes.

Another doctor says that police is useful in the patient evaluation: they provide background information and can help in case the patient is violent. Most of patients in the psychiatric ER are brought by the police; DUs are just a small percentage out of this total.

One doctor met only 3 DUs brought in the ER by the police in the last year, at a rate of one day in ER per month. Another doctor in the ER estimated 300-400 drug abuse cases in the psychiatric hospital ER per year. There are 5 doctors at any time in the ER. The number of DUs brought by police is estimated to 30-40 cases per year.

A commission is established in order to determine the suspects' discernment. The commission meets if requested by the prosecution, judge or defence and it requires a payment. It can be implied that poor drug users cannot afford to request a commission to determine the discernment in their case – mainly for violent offenses in the case of ATS users.

### Probation

Police is a much bigger institution compared to the Prison Administration, therefore its organizational resilience and inertia is bigger. OST is more difficult to implement in this system. In addition, there was no program targeting IGPR, compared to ANP, where UNODC provided technical and financial assistance in OST development.

The probation officer interviewed believes that drug users are ill people more than criminals. An example was provided: a drug user was imprisoned for the last 5 years in Jilava penitentiary. He was working in the prison's kitchen and had good references, a clean file. He was executing the remaining sentence in the open section of the prison. The prison commission decided to grant him with two days permit at home. Only one day later, his mother brought him back to the prison. He relapsed on ATS (legal highs). The difference between a drug user and a regular thief is that the later is stealing for fun or for profit, while the user is stealing to supply his disease.

### Trends

A set of trends was extracted from the interviews:

– 60-70% of the total crimes involving violence are made by ATS (legal highs) users (estimation).

The number of cases involving drug users has increased considerably in the last years.

- Starting with 2008, law enforcement became more tolerant with drug users; possession for personal use is punished by administrative fine. Previously, users were sent in court, which is no longer the case in the present days.
- Starting with 2010-2011 there are prosecutors who ask for punishment with suspension and mandatory treatment for drug users.
- 2009-2010 – legal highs explosion
- 2011-2012 – heroin cases are less and less common.
- The practice of adding unsolved cases in a drug user's file has stopped. Judges started to ask for proofs, the case is no longer sustained by the accused declaration that would recognize he committed another crime besides the one in the file.
- The number of ATS users with psychiatric pathologies has been increasing in the last 2-3 years.
- HIV is increasing rapidly: in 2010 there were 2-3 cases/year, currently there are 2-3 cases per week!!! (the detox unit in Obregia Psychiatric Hospital performs rapid HIV testing. The positive results are communicated as non-conclusive and patients are referred to infectious disease hospitals. About half of the total patient with non-conclusive results continues the confirmation procedure. 99% of positive cases that continue the procedure are confirmed).

### Experts recommendations

The following recommendations express personal opinions of various professionals with a high level of expertise who agreed to participate in the interviews. The recommendations come from

#### Judges

- Publish all sentences in order to increase the judges vigilance and to make possible verification and comparison with other solutions in similar cases.
- Document the effectiveness of PTD in cases involving drug users.
- Operate a distinction between purchasing drugs for personal use and purchasing drug in order to sell them for profit. (Currently drug users purchasing drugs for them and for peers with no access to dealers are seen as drug traffickers).

#### Probation service

- Initiate trainings for police officers on drug use and medical needs of drug users.

#### Lawyers

- Publish all sentences in order to increase the judges vigilance and to make possible verification and comparison with other solutions in similar cases.
- Introduce or, if it already exists, increase the role of case assessment for drug users in order to identify measures that would not impede their already fragile social status and rehabilitation opportunities or would not aggravate their social situation by determining them to commit new crimes.

## Doctors

- Initiate OST in police arrest.
- Initiate information and awareness campaigns for policemen and police medical staff with regards to OST and its benefits.
- Introduce a report from the case manager in the forensic evaluation. (The case manager has the best knowledge of the case and they can provide useful information in the case.)
- The forensic examination/evaluation order should specifically ask for information on treatment and how it should be applied.

## CHAPTER 3

### RESEARCH EXPERIENCES OF DRUG USERS ON PRE-TRIAL DETENTION IN ROMANIA

This chapter includes two research reports, each of them based on the interviews with 30 drug users who experienced pre-trial detention prior or during the interview. The first report describes the encountered typologies of drug use, the mechanisms of stigmatizations that operate in such situations as well as their effects over drug users lives and provides a description of the overall detention conditions according to the interviewed drug users. The second report focuses on the application of article 16<sup>th</sup> of law 143/2000 analysing the “prisoner’s dilemma” implied by this provision and it also explores one of the research observations: detention of female drug users. The two reports were merged in order to provide a comprehensive image over drug users experience in pre-trial detention.

#### 3.1. Research methodology

##### 3.1.1. Aim and premise

The research *aims* to explore the consequences of pre-trial detention and its implications on the health status and social integration of offenders that are drug users (ODU). Together with an analysis of the pre-trial detention rules and regulation, the research results are to be used in a subsequent advocacy strategy that aims at improving the current judicial praxis in this matter.

The main *premise* of the research is that therapeutic measures are more useful than detention measures for the rehabilitation of ODU. It is generally considered that taking the drug user outside their community, where the primary risk factors are present, is beneficial for the process of rehabilitation. In spite of this view, the Romanian reality shows that custody, as a particular type of period spent outside the community, raises new difficulties for the drug user.

##### 3.1.2. Research design and sampling

The units of analysis are offenders that have a history of using drugs (ODU) and that experienced or were experiencing at the time of data gathering (June-September 2011) pre-trial detention, either in police or prison units. The crimes committed are not necessarily drug-related, the main focus of the analysis being on offenders’ status as drug users and not on their offence.

Sample framing is unlikely to be accurate for this type of population, thus qualitative methods and non-probability sampling strategies are more appropriate.

The research is exploratory in nature and it used *in-depth interview* as main method for data gathering. The interview (see Annex 2 – Interview guideline) is

divided into three main topics – life history, drug use history, pre-trial detention experience –, and follows three main highlights – affinity, affiliation and signification (see Matza, 1969). The structure of the interview is based on Matza’s theoretical development, with references to Becker’s labelling theory (1953) and Sutherland’s differential association theory (1947).

Data was collected from 30 persons, with 46 pre-trial detention experiences. The sampling is *non-probable* in nature and *theoretically stratified* according to four criteria: gender, age, experiences of pre-trial detention depending on type of unit (police and/or prison) and location of interview. The sample size per strata was decided based on official data made public by the Romanian National Anti-Drug Agency (ANA). The latest report issued by ANA (2011, 31) states that the prevalence of drug use among men (6.0) is higher than among women (2,1). In what concerns age, the same report shows a higher prevalence of drug use among the age group 15-24 years old (9.0) than among the age group 25-34 years old(6.8). Thus, the sample included more men and young people aged less than 25 years old. ANA’s report also shows regional differences regarding the use of certain types of drugs. Thus, the sample is stratified also per regions, by selecting four representative cities: Bucharest (for the Southern region), Cluj-Napoca (for the Central and Northern regions), Iași (for the Eastern region) and Timișoara (for the Western region). Additionally, the prison for women located near Târgșor village (in the Southern region) was selected for the special purpose of identifying female ODU on pre-trial detention<sup>1</sup>. The interviews were taken in three types of locations: public or private community centres for drug users rehabilitation (for persons released from arrest), police pre-trial detention units (for persons experiencing their first 30 days of arrest) and prison pre-trial detention units (for persons that were arrested for more than 30 days). Table 1 describes the distribution of the sample per each criteria and strata previously described.

Table 1. *Distribution of sample per criteria/strata*

		Sampling criteria/strata		no.
1	Gender	Men		22
		Women		8
2	Age	<i>At the time of their first experience in pre-trial arrest</i>	17 years and less	4
			18-24 years	16
			25-34 years	10
			35 years and over	-
		<i>At the time of their last experience in pre-trial arrest</i>	17 years and less	1
			18-24 years	17
			25-34 years	10
			35 years and over	2

1 Târgșor Penitentiary is the only penitentiary for women in Romania.

3	Location of interview	Bucharest Out of which:	11	
		<i>In community centres for drug rehabilitation</i>	5	
		<i>In police detention units</i>	2	
		<i>In prison units</i>	4	
		Cluj Out of which:	3	
		<i>In community centres for drug rehabilitation</i>	2	
		<i>In police detention units</i>	1	
		Iași Out of which:	4	
		<i>In community centres for drug rehabilitation</i>	2	
		<i>In police detention units</i>	1	
		<i>In prison units</i>	1	
		Timișoara Out of which:	7	
		<i>In police detention units</i>	5	
		<i>In prison units</i>	2	
Târgșor (prison unit)	5			
4	Experiences of pre-trial detention	<i>Number of experiences</i>	One experience	18
			Two experiences	9
			Three experiences	2
			Four experiences	1
		<b>Total number of experiences of pre-trial detention</b>		<b>46</b>
		Out of which:		
		Experiences only in police units		17
Experiences in police units and prison units		29		

Besides these sampling criteria and strata, a mixture non-probability methods was used as strategy for the identification of the interviewees: *convenience sampling* (interviewees were selected by representatives of the institutions where interviews were taken based on the fact that the person was willing to participate in the research) and *snowball sampling* (interviewees recommended other persons to participate in the research). The criteria of eligibility for interviewees were:

- be 18 years old when interviewed;
- have a history of using drugs (either problematic or recreational user);
- have committed a crime for which a pre-trial detention measure was imposed;
- be in pre-trial detention or have previously experienced pre-trial detention.

### 3.1.3. Research ethics

The research respects the general ethical principles, such as respect for the interviewees' dignity, rights, safety and welfare. Researchers ensured that the interviewees gave their informed consent before answering any question. The consent form was completed in two copies, one for the interviewee and another for the researcher. Also, researchers and those facilitating data gathering respect further specific ethical principles:

- interviewees were made fully aware of the true nature and aim of the research;
- interviewees gave their explicit written agreement to take part in the research;
- interviewees were informed at the beginning that they can withdraw at any moment from the research, both them and the data provided, and were not to be pressured to continue;
- the collected data are anonymous. The data are not used in any way that would facilitate the identification of interviewees and are stored in optimum safety conditions, so as the confidentiality is maintained and preserved;
- were it was made possible, interviewees agreed with audio recording of the data provided, were aware of this fact and were ensured that recordings are stored in safety conditions to maintain the data confidentiality;
- all those involved in data gathering and in facilitating the access to interviewees were fully aware of the abovementioned principles and respected them.

### 3.1.4. Limits of the research

As in any research, several obstacles were encountered during data collection. The access to possible interviewees in most of the police pre-trial detention units was delayed due to the slow official response. Thus, interviews in these units were conducted in August and September 2011. Also, in several pre-trial units (Bucharest police, Cluj-Napoca community centre and police, Iași police and prison, Timișoara police and prison, Târgșor prison) the research team was not granted access with audio recording (AR) devices, thus data was recorded by hand (HR). A number of 19 interviews were hand recorded and 11 interviews were audio recorded. Also, in some police pre-trial detention units (in Bucharest, Iași) officers stood outside the entrance of the interviewing room with the door open, stating that they need to preserve the safety of the researcher. At least three problems are raised here: the ethical problem of ensuring confidentiality of data at the time of data gathering, the practical problem of gaining trust of interviewees so as to collect the necessary data for the analysis, and the methodological problem of interpreting data that has inevitably passed through the selection filter of the interview operator.

## 3.2. Research results

### 3.2.1. Typologies of drug use

The analysis of the interviewees' experiences in relation with their history of drug use reveals the possibility to structure a series of typologies. A special feature is that these typologies are based on the experiences of drug users that committed offences, either drug-related or in connection with drug use. We acknowledge the existence of a larger palette of drug use typologies in the classic field literature.

First of all, we can differentiate between at least two types of drug use, depending on the extent at which the user's life is affected by this behavior. Thus, some persons use drugs with a *recreational* purpose, for relaxation. Their health and social life is not affected by this behavior. This type of drug use is usually occasional, happening in groups, targeting drugs that do not produce immediate and/or physical dependence, as well as less harmful ways of administration (such as smoking, ingesting, sniffing). The second type of drug use is the one that presents social interest and is used as argument for the development of social policies – the so-called *problematic drug use*. There isn't a common agreement in the current literature concerning a standard definition for this term. The reference definition for our geographical area is the one developed by the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) for the indicator *problem drug use* (PDU), namely “injecting drug use or long-duration/regular use of opioids, cocaine and/or amphetamines” (EMCDDA, 2009, 1). The reference definition at international level is developed by the United Nations Office on Drugs and Crime (UNODC), which states that *problematic drug users* are “those that might be regular or frequent users of the substances, considered dependent or injecting and who would have faced social and health consequences as a result of their drug use” (UNODC, 2010, 125). In what concerns our research, the two types of drug use are highlighted as follows:

- *Recreational drug use*: occasional use of smoked cannabis/cannabinoids (marijuana, hashish etc.) and ingested pills or other natural and/or synthetic drugs, in groups and during social events;
- *Problem drug use*: regular use of injected heroin, smoked cannabis and sniffed mephedrone, usually combined with other substances, either in group or alone, with or without connection to a social event.

Another way to classify drug use can be based on the combination of substances. Here, we can distinguish between *single-drug-use* and *poly-drug-use*. Poly-drug-use is more common than single-drug-use. However, even when we speak of poly-drug-use it should be noted that users tend to have a preference for a primary drug, the other substances being used with different purposes: to experiment due to curiosity, to diversify/intensify/diminish the effects of certain substances, and so on. Table 2 below offers a general picture for the types of combinations our research subjects have mentioned. A total of 21 persons are using or have used during their history of use more than one substance, injected heroin being for 14 of them the primary drug. Heroin is usually combined with methadone, cannabis and the so-called “legal” drugs. Cannabis is usually combined with “legal” drugs, hashish, cocaine and LSD.



Table 2. Distribution of sample per types of drug use, based on the combination of substances

Type of use	Primary drug (PD)			
	Heroin	Cannabis	Mephedrone	Medication
Single-use	5	3	1	-
Poly-use	14	6	1	1
	<i>PD in combination with other substances:</i>			
<i>Heroin</i>	PD	1	-	-
<i>Cannabis</i>	4	PD	1	-
<i>“Legal” drugs</i>	6	4	-	-
<i>Methadone</i>	6	-	-	-
<i>Hashish</i>	2	3	-	-
<i>Cocaine</i>	2	3	-	-
<i>LSD</i>	1	3	-	-
<i>Ecstasy</i>	2	1	-	1
<i>Mephedrone</i>	-	-	PD	-
<i>Medication</i>	2 Diazepam	2 Ketamine	-	PD Tramadol Xanax

Although the research is not quantitative in nature, and being aware of the fact that the sample is not representative, we can notice that primary heroin users experiment with cannabis, but primary cannabis users are less keen in experimenting with heroin. Also, it is interesting to see that the experimental use of the so-called “legal” drugs is rising. The most diverse poly-use among our subjects is that of a 19 years old male, who started using drugs in 2006 (by age of 14 ), mainly using cannabis, but that also used in the past 5 years hashish, cocaine, LSD, ecstasy, ketamine and “legal” drugs (“for smoking, sniffing, pills”).

### 3.2.2. The connection between drug use and crime

The main consequence of criminalizing possession of drugs for personal use is that the user remains in a social zone of illegality. Procuring drugs implies for most users entering into contact with dealers, getting exposed to at least two different sources of social and legal risks: the network of organized crime (getting recruited for

trafficking, debt recovery, etc.) and legal institutions (getting arrested or convicted, spending time in custody, losing jobs, interrupting school, etc.).

In what concerns problem drug users, such situations are even more inevitable as their capacity to resist the temptation of procuring drugs is substantially diminished due to physical and/or psychological dependence. Problem drug use usually implies the procurement of high risk drugs, in larger quantities and with a higher frequency, which means that the risk of “getting into trouble” (from either of the two sources abovementioned) is higher. Problem drug users with a precarious financial situation get involved in crime doing, drug trafficking or stealing, in order to sustain their personal use – the so-called “petty” dealing or “petty” stealing.

[AR] “When the kid [the dealer] told me and I heard he started doing good money, some ideas waved into my head and I was even discussing this with his brother: *It would be something to bring and sell some, but not if we get involved in selling by piece. That is, if you find someone like, say, he already has his people, and he says: bring me 200-300. But I won't bring these myself. I simply pack them in a box, on whatever name he wants, and you give the box to him.* So, I don't want a big income, a small gain with no pain and he sells by piece. Something like that (...) I was thinking about it, but I thought it very seriously, in order to get an income. You realize that you have no money. So, one is to have money and to want more, and another is not to have and then temptations are so much greater. But, I'm the kind of person that puts it in balance, advantages and disadvantages, what may happen, what may not happen. I always put the risks before anything, the harm” (Silviu)

[AR] “I've done all sorts of crimes, I'm telling you, so many that I don't even remember their number. So, in order to get money for dope I was going out to steal. I was stealing from shops sprays to give them to dealers or I was selling them to get the money for the needed dose, to make sure I have it. And this happened when I started feeling sick (...) I needed [drugs] because I was feeling sick. I had a runny nose, weeping eyes. Later my bones started to hurt. I'll say no more. I entered, I was in the dark and I couldn't get out, I practically wasn't able to. I stole and I stole until I gathered so many crimes that I got arrested” (Mihai)

[AR] “I did all kinds of crimes (...) breaking into cars, so car theft (...) money that I found [inside cars], the highest amount being 16 millions [meaning approximately 350 euro] and about 400 euro in a purse. Mobile phones, perfumes, whatever I could find (...) Dealers make capital out of anything” (Ștefan)

#### 3.2.3. The double marginalization

It is generally considered that taking the drug user outside their community, where different risk factors are present, is beneficial for the process of rehabilitation. In spite of this view, the reality shows that custody (as period spent outside the community) raises new difficulties for the drug user. A double type of marginalization occurs. First we talk of an initial marginalization, prior to conviction, happening as a

consequence of the social alienation of the drug user from the family and the community. And after release, we talk of a secondary marginalization, when the drug user is confronted with a double stigma: former prisoner and drug user.

### Initial marginalization. Risk factors for drug use debut. Pre-detention

For most of the persons interviewed within this research, the entourage (or the “peer group”) represented the main risk factor for the debut and continuation of drug use, as well as for lapses and relapses after periods of abstinence. The connection between this factor and drug use was analyzed by numerous studies (such as: Barber, Bolitho and Bertrand, 1999; Friedman and Glassman, 2000; Lloyd, 1998; Swadi, 1999) which showed that, especially during adolescence, having friends that use drugs and being pressured by them can trigger the debut and catalyze the persistence and ascendant dynamic of drug use behaviour. In what concerns our sample, we can state that peer influence as general risk factor becomes associated with the presence of drugs in the proximity of housing and with an easiness in accessing the offer.

[AR] “My entourage consists in users” (Ştefan)

[AR] “The first time [I used drugs was] with the entourage. I had some friends from childhood. I didn’t know they use drugs. I saw them all the time. What I’m telling happened in 2002 or 2003. It felt weird and I was wandering what could be. In the end they told me: *Well, we’re taking drugs, and so on.* I was sitting with them, I was holding their hand, I didn’t have any problem with this. I used to give them money for dope and for the taxi. I was working at Lido at that time. I had money. And I always had that question: *Hey, what do you feel? Why do you do this?* Because I saw they were taking more and more. One day I said: *It must be something! What could it be?* [Friends:] *Well, we can’t explain. Do it once and you’ll see on your own.* She made me only once a cigarette, it was enough. I smoked twice cigarette and right after that went on syringe. 8 years. Not 8, as I had breaks, but 6 [...] All my friends were users” (Selena)

[AR] “In my neighbourhood most people do bad things. Or if they don’t do bad things, they gather in groups and hang out in discos, parks [...] I didn’t have real friends [...] All of them used drugs, and then were going out to steal [...] They were pushing me, they weren’t my friends. Friends, yes, there are about three people who still use, but they don’t say a word about this while I’m there” (Ioana)

[AR] “The entourage made me do a lot of mistakes [...] the entourage destroys you. Me, the entourage destroyed me. I know that when I got out of prison I didn’t want to take drugs anymore. But I was hanging with the same entourage and I was seeing them getting high and, as a former user, I knew how it felt like, and I thought I can do it at least one more time. And so, easily, I started taking drugs again” (Aurel)

[AR] “Back in ‘99, when I started doing drugs, there was also my entourage. You know how it was. I just took it as, I don’t know, as a play, cause this is how it was back then. It was that kind of neighbourhood, if I wasn’t right in there, in the middle of attention, I was put off [...] I found o the ground, with a friend,

a syringe full of heroin. It looked like butter, like a cream, and my friend had already used once and he knew it was heroin and he said: *Look, this is heroin.* And I said to myself: *Let's sell it, and then go play pool, cause we we're playing a lot of pool at that time.* He had already injected once [and said]: *No man, let's go upstairs to Sorin, a friend of ours, to try it once, cause the syringe was full.* And he stood there and, as we say, he made me swear [and said]: *Come on man, let me give you two-three tiny units.* He insisted and I turned my head, he injected me and it didn't seem to me to be so good, as some say, when shooting for the first time. No, I really didn't like it. And, as I told you, the entourage. I did it for the second time, also inside a home. I had a basin in the middle, throwing up. And did it again and again, and then I started to like it, as there was that state of drowsiness, sitting so pale. I don't know, I wasn't thinking about anything, I was sitting inside my own thoughts, dreaming whatever came into my mind and so on. And in time, I told you, I started having pains, than my mother found out, got into fights" (Mihai)

Alongside the entourage, another factor having a similar influence is the presence of a so-called anomie in the organization of family life and of processes that result from family interaction. It appears as the majority of our research subjects had different types of problems with family bonds: deceased parents and being raised by other relatives, divorced parents or parents working abroad (lack of parental presence), violent fathers with drinking problems, and deficiencies with parental control during adolescence and so on. There are also cases in which close kin (brother, sister, cousin) were using drugs, have committed different types of crimes in the past and/or had experienced custody.

The persons interviewed have very different educational background: primary, secondary and tertiary levels. The dropout from school is not directly related with drug use. Factors directly contributing to school dropout are loss of parents, deficit of parental control and/or getting a job to gain money for the family. In the cases in which drug use contributes to school dropout, it appears indirectly, in connection with peer influence and getting arrested for offences related to drugs.

The working experience of the persons interviewed is also different. A common thread is the difficulty of finding and keeping a steady job.

#### Secondary marginalization. Risk factors for relapse

The secondary marginalization occurs in connection with the period spent in custody. The experience of pre-trial detention is depicted in negative terms by all persons interviewed. As a general remark, the problems identified are mostly related to bad living conditions.

Police units have very small rooms (approximately 2 by 4 sqm, but can differ), host up to 10 persons, are dirty and with no or very poor access to natural light. When the toilet is outside the room, the access to it is restricted by a schedule. In the cases where the toilet is in the room, a symbolic delimitation with the living area is present (for example a curtain). Access to hot water and shower is also scheduled. Prisoners are able to get fresh air for 30 minutes each day, but there were cases when access was granted once every 3 or 4 days. No other activities are available outside the room. Meals are

given three times a day and are considered of good quality. Family visits and packages from home can be received on a weekly basis. There are exceptions of police units with better living conditions, such as clean rooms and toilets, air conditioning, access to natural light and TV (for example the 4<sup>th</sup> precinct in Bucharest).

Prison units have larger rooms (approximately 6 by 6 sqm, but can differ), with more inmates (20 to 40 persons, but can be lower or higher), so overcrowding is still an issue. The windows are also larger and prisoners have access to natural light. But, the air in the rooms is not fresh due to overcrowding and heavy smoking. Each room has a toilet, but it is overused and usually unclean, depending on how prisoners get organized with sanitation. In general, prisoners complain about the quality of the food. They are able to get fresh air and a walk for 1 hour each day, but it can happen that no access is granted in certain days due to organizational problems. Prisoners can participate in social-educational activities after the quarantine period is finished (the first 21 days of imprisonment). They can also work, but declared drug users are restricted from specific types of work, especially those that involve movement in the prison perimeter or the kitchen. In general, for persons charged with drug related offences, family visits are granted behind the window. Prisoners have access to a store on a weekly basis and can receive packages from home according to a schedule.

*[About conditions in police unit]*

[AR] "Very bad. Indeed, there was hot water every day at any hour. But the toilet was in the room, with only a curtain. With this curtain you couldn't see who was using the toilet, but the smell and everything else you could" (Ioana)

[AR] "About four persons in the room, approximately three by three sqm ... two overlapped beds, a sink, a plastic round table, two back rested chairs and two tabourets. Hot water everyday. On the hallway we had a stove and washing machine. Our family could bring us detergent, softener, food that we could cook. We were five rooms, each room had one day, depending how you got organized" (Ștefan)

[AR] "It was better than the prison" (Mihai)

*[About conditions in prison unit]*

[AR] "It could be six by six square meters ... about 22 in the room ... a single bathroom" (Ioana)

[AR] "There was no drinking water [at the sink] ... 28-30 persons in two rooms like this one. There was even a third bed overlapped, although it was taken down whenever a TV crew was visiting the prison. They were taken in better rooms where certain shady important inmates were staying ... The filth is indescribable; rats were walking down the window exactly like cats do. And I don't wanna get to food" (Ștefan)

[AR] "Food was truly worst, you could pick anything. Rotten potatoes put together with other vegetables ... The soup you could eat because it was dim water ... Although the meat was brought to me on a regime basis, it was full of fat. I couldn't complain, I was one against all" (Mihai)

Regarding the medical services coverage in pre-trial detention, an improvement in police units is registered in the past four years. For example, a person declared that in 2001 he didn't receive any kind of treatment, while in 2008 received medication. In the majority of the cases, drug users have withdrawal symptoms while in police units. The types of medication prescribed by the doctors, as declared by the persons interviewed, are Carbamazepine, Diazepam, Dormicum (Midazolam), Levomepromazine, Phenobarbital, Piafen (Metamizole) and Tramadol. Drug users describe these pills as being "sleeping pills". Indeed, they have anxiolytic, anticonvulsant, sedative and analgesic properties (see Annex 3 – Properties of drugs used for withdraw symptoms), which help with withdraw symptoms. But, the main problem of using this type of medication concomitant with usual police procedures is the diminishing of the drug user's capacity to fully participate in the process of giving statements. To this we add the fact that even if the user is not under medication but manifests withdraw symptoms, the physical pain and the psychological changes occurring during this period make the user less capable to accurately understand the reality as it happens. In these cases, the usual police procedure of taking statements is hindered. On the one hand, it can happen that the statements are not real and do not serve to find the truth. On the other hand, the right of the person under arrest to fair procedures is violated, as he is not capable to fully participate in the process.

[AR] "I did not feel the withdrawal because they put me on heavy medication – *Do you remember what did they prescribe you?* – No, all I know is that they gave me about 8-9 pills" (Ioana)

[AR] "[While in the police unit] I felt sick as everybody else... Very bad, bad, bad. So I had hallucinations, the boys took care of me until I could come back to my senses. On my turn, I helped X, who was coming. They took care of me, they gave me cold showers. I had hallucinations, I was looking in garbage for the heroin ball, so I was very sick, could not take more of it. Believe me. At one point I asked to transfer me to Rahova [prison hospital] for perfusions, but I had the strength, I stood and I overcame the moment... while in police arrest they gave me Phenobarbital, and I wondered 'cause they gave me several boxes, just in case, to take them; when they sent me Jilava [prison unit] they did not give them to me, I don't know why. And I had to give cigarettes in exchange for diazepam, as I was still sick" (Mihai)

[HR] "The first 24 hours when she (Tudor) was brought in police custody were the most difficult ones, because although she got injected prior to being held, in several hours the withdraw symptoms settled in, so while the statements were taken she wasn't very lucid. She told me that while the statements were taken she sat in the same room with her friend, who actually sold the heroin, and didn't react when the friend blamed her as being the dealer. She didn't respond to this. During the first night while in police custody she felt very sick, the treatment from the hospital arriving very late. The guards tied her hands and feet to the bed. During the same night she was hit by one of the roommates because she made a lot of noise and she was aggressive. The next morning she was taken back to give statements and she was given the chance to change her statements, but she didn't do this because

she thought that her friend has a child and it was better if she got locked up. Her physical state was pretty precarious. While the statements were taken, a publicly appointed lawyer was present, but he didn't say anything. Her words were: *He's not even considering you.*" (Tudor)

[AR] "When I reached the General Police Inspectorate doctor ... he gave me a handful of drugs. I took it, say, it is better than feeling sick... But he gave me something to put me down. I think sleeping pills... When I entered the room I could not stay on my feet anymore. There, I met a girl aged about 30 years old ... And she took me, she helped me, took off my shoes, changed me ... I could speak, I was conscious, but ... hands, feet, nothing was working as it should ... The next day I had to go to term. Well, do you think I could wake up? ... They had to bring the swat team into my room: *Who is that person who does not want to wake up to go to court?* I could hear them, but I could not speak. They came into the room, looked and saw me: *Ah, she had those pills. This one we take up.* My roommate dressed me up. She also has struggled with me. One of the masked men took me by my arm and took me in the car, he cuffed me and took me in court" (Selena)

[AR] "*Did you have any support in there... pills or...?* In 2001? No. I haven't even told them I was on drugs. They were beating the shit out of you. If they would have found out you are a junky, they would wake you up by 2 and beat you like hell until 5. They took your finger and beat it with something, I don't know what it was, until they broke it... In 2008, in police unit 12 [in Bucharest], I have been supported, but not with methadone. I was on methadone prescription at CAIA Pantelimon. I was arrested and they gave me a treatment, took me to the doctor, asked me how much I was using and gave me diazepam, something to keep me quiet, dornicum. I knew about them from hospital, when I was there... *How long did the malaise last?* Physical pain, psychic pain, no. Bone pain. The pain continued until I arrived in reached Jilava [prison unit]. The pain stopped immediately. As soon as I arrived in Jilava I took drugs. So I got in Jilava, I entered the room by 4 pm and I was stoned by 8 pm" (Vasile)

To these it is added the fact that drugs are available inside both police and prison detention units. This is a reality that can no longer be denied and needs to be addressed properly. In what concern the specificity of prison custody, drug users keep quiet and don't ask for services related to drug use. They are even reluctant in participating to programs that aim at preventing relapse. Also, drugs that are trafficked in prison units are usually poorer in quality. To this it is added the fact that access to medication is more restricted, as drug users don't manifest withdraw symptoms upon arrival. Thus, while being inside prison units, drug users are even more exposed to health risks than in police units (where they have access to withdraw medication) or in the community (where they have access to all types of therapeutic services).

[AR] "During police custody I felt I was going mad. There was no TV and I was waiting for the pills so I could sleep. This friend of mine was used to sniffing them. She ground them, made a pipe out of paper and sniffed them. Not to tell that there were even drugs there. When drug users meet... – *In the arrest house?* – Yes, in the arrest house. So you can see that even police officers

are corrupt. My friend had someone visiting her ... She went out to make a phone call and got a visit the next day. – *She got something?* – Yes. She came into the room. I noticed she was talking funny, that her tongue was staggering. I said: *Do you have something in your mouth?* ... She spited on the table and I saw a pretty big ball [of heroin]. I went crazy. All the pain came back instantly. I felt like I could strangle her. I was expecting the door to be broken down by the masked unit. I didn't know how to react. I said: *Are you mad?* She said: *Shut up, nobody saw me. He kissed me, he put it in my mouth and so on. Can you go to the doctor's office to steal a syringe?* I said: *My goodness, you're mad?* She said: *Never mind, I can do without. Do you want some?* I said: *Does a horse want oatmeal?* ... When I sniffed it I felt that my brain blew up" (Selena)

[AR] "I also used drugs in prison. Initially I was using regularly, then I started using daily so that I started feeling sick in prison too ... A month and a half later I started occasionally, and about ... exactly when I had only 8 months until my release, I started again ... I heard that someone had two boxes, a ball ... Two months before getting out I stopped. – *And after being released?* – 3 or 4 days later I started again ... – *Did you use injectable drugs during the arrest?* – No, I chased the dragon. And about two or three times injection. – *And syringes?* – Someone had diabetes there and gave us two syringes. But I didn't inject too often because I didn't have syringes and salt lemon all the time ... It was easier to chase the dragon." (Ioana)

[AR] "I used drugs in jail too, I did it, why deny it ... I got stoned, really stoned. Well, I took Diazepam when I had to quit and there's drugs in there too, they get it from outside ... Very hard with the medical drugs [in prison]. Once I had trouble with my teeth ... I asked who was on call that night to get me something, an injection, a sedative. Nothing. *Take Algocalmin*, he said. I got stuffed with pills and the next day ... they gave me a sedative, not even a strong one, and I knew there was good stuff on another wing and I've got it, shoot several units and it passed. So I solved it." (Mihai)

[AR] "I used in there too, not day by day, but from time to time ... in Jilava [prison] I didn't do it, I in Rahova [prison] I shoot after almost two years ... A boy came to us ... He received stuff from outside and he gave it to me for a few times. Once I said I'll give out cigarettes or money ... after that I shoot once, twice, after that I was telling to my mother to send Kents or Marlboros ... Viceroy and that. If you had Viceroy you gave three cartons of Viceroy. If you had Kent or Marlboro, you gave just two ... Three quarters of the prisoners are users." (Iancu)

The belief of some police officers and doctors working with police detention units is that drug users should quit through abstinence and detoxification, methadone being just another drug. Despite this belief, access to methadone substitution treatment is seen beneficial in more than one way by drug users who went in such programs. A treatment circuit should be designed between the community and detention units. If drug users are under Methadone treatment in the community prior to incarceration, they should be able to continue their treatment while in police and prison units. Also, if drug users enter methadone treatment while in custody, they should be able to continue



with it upon release. As the persons interviewed declared, this continuation of treatment between community and detention units is lacking at present time, thus putting the drug users into the risk of lapse or relapse.

[AR] "I had many thoughts when I was released. I thought I was like an egg that falls and breaks and I feared taking it again and again. My family supported me very much ... I didn't miss anything, even cigarettes ... up to a point ... I resisted a while, they supported me, then I took drugs again, as I was seeing that one, and that one, and that one ... I don't know, I just twisted my mind. And I saw, unable to quit as I was. *Come on, this is the second time I fall*, I told to myself. In winter time, on strong wind, I was standing in the streets to steal and to put him [the trafficker] money in his pocket and hurt myself. No, I made a decision. I sat, I bought methadone from the black market ... I got it not to shoot heroin ... and I thank God that I was put here [CAIA Pericle] ... This one works best, I tried Suboxone in jail, 'cause I was using, using, no, no, I was vomiting, it just didn't pay off ... Methadone worked better. And I sat outside without shooting a month and more. Yes, this one works super well" (Mihai)

[AR] "Methadone, which is also a drug, if I think about it. You know? I've fallen from the lake into the fountain, as they say. But I say that when I was on drugs I was skinny, I had no money, my family was sad, angry, they were afraid I was going to die, that something might happen to me. Look, you see? These [scars] are from drugs. I destroyed the physical body, and I destroyed my mind. Everything. Since I'm on Methadone I gained weight, the way I think has also changed, I am more mature now. I don't know, it's different. It's like I'm back, I would not take anything. It's a style of living ... I do not know how to get rid of it, to stop taking it. But for now I feel I'm alright, and I'll stick to this as long as it lasts. Now I don't know what to say. Everybody is happy, my family, my boyfriend ... on the other hand he said if I start over again he doesn't know what he's going to do, because he cannot stand it anymore ... Anyway, it gave me a style of living that I believed I would not have without drugs" (Selena)

[AR] "Until being arrested, I was registered at CAIA Pantelimon. But they didn't give Methadone in Jilava [prison], and I did not take Methadone for 2 months and a half, the time I was arrested. I did not take Methadone, I used drugs. I was released, I wanted to go to the CAIA Pantelimon to take Methadone again and the doctor there told me that I cannot take Methadone out there because I live in District 3, and I do not belong there [to CAIA Pericle, which is treating patients living in District 5 and 6], that I need to be put on the waiting list ... I could not be there. I took drugs [and] Methadone. When I found it, I took methadone. Until I made it in here [CAIA Obregia] ... Since 2009 when I entered the program I stopped using heroin." (Vasile)

After release the user is confronted with a double stigma: former prisoners and drug user. Re-offending is usually overlapping with drug use relapse.

### 3.2.4. Article 16 as a prisoner's dilemma

According to Article 16 law 143/2000 on Prevention and Fighting against Drug Trafficking and Illicit Drug Use, “The person who has committed one of the crimes stipulated under Articles 2-10 and who, during the criminal prosecution, denounces and facilitates the identification and holding criminally accountable of other persons who have committed drug-related crimes shall benefit from a reduction by half of the sentence limits stipulated by the law.” This legal provision can be treated in the terms of “prisoner’s dilemma”. Should the drug user denounce or not denounce others?

While the collective logic would incline the user not to denounce, the psychological pressure during the investigation, the lack of trust cultivated by the police officers and the crisis in which he finds himself due to the abrupt interruption of use, determine the user to seek the benefits of article 16, denouncing the other(s). The table below describes a hypothetical case in which two drug users under arrest are posed in front of this dilemma. If both prisoners denounce each other, than they could get 5 years imprisonment each. On the other hand, if none of them denounce, they could get only 2 years each.

		Second prisoner	
		Denounce	Does not denounce
First prisoner	Denounces	5, 5	1, 10
	Does not denounce	10, 1	2, 2

Although both would prefer getting two years in prison, when they are warned (by the police, prosecutor, etc.), they will be very tempted to pull back on the position of article 16. This is a classic example of deceptive trade (bad bargain) practiced in conditions of poor transparency of information. Is this situation wanted? It is not wanted by the small drug users or dealers, but sought by police and even prosecutors.

Returning to the statements of the interviewees, they can be classified in the following table, depending on how the provisions of Article 16 have been used in law 143/2000:

	Police PTD	Prison PTD	CPECA/CAIA
They denounced	1	1	1
They have probably denounced	2	0	0
They were denounced	2	2	2
They have probably been denounced	1	0	0
They denounced and were denounced	0	0	2

They probably denounced and were denounced	2	0	0
They were caught in the act	0	1	1
Probably they were caught in the act	0	0	0
They did not denounced and were not denounced	1	1	2

Most commonly, people in police pre-trial detention experience the uncertainty caused by using the provisions of Article 16. Also, most commonly, respondents see themselves as victims of Articles 16, used against them by other people.

Thus, in conditions of poor transparency of information and shock of incarceration, persons remanded often find themselves captive in a game of “prisoner’s dilemma” based on Article 16 of Law no. 143/2000, managed by the state authorities; the game is possible, more so as we found already, the existence of consumer affiliation process. This is based on the theorizing of David Matza (1969, 144-145), on the *signalling* process: “This connection between the organized, though diversified authority of state and becoming deviant is the broadest meaning of signification I want to consider. [...] The main substance of the state function is the authorized ordaining of activities and persons as deviant, thus making them suitable objects of surveillance and control.”

In addition to the analysis of the interviews, compared to the general aspects, possible to find in most studies concerning the conditions in pre-trial detention, as perceived by drug users, the second part of this research highlights the following:

- 1) The first observation in this study is the possible excessive use/abuse of Article 16 of Law 143/2000 by the prosecution.
- 2) The second specificity is the detention of female drug users.

Two adjacent parts of this study are provided to prove the legitimacy to focus on this aspect:

- 2.a) the National Report on the drug situation, 2011, which shows, in many contexts (e.g. pp. 77 and 94) “upward trend” in the proportion of female persons among illicit drug users;
- 2.b) Following the situation of persons convicted under Law 143/2000, in electronic data bases on the activities of the Probation Service of the Bucharest Tribunal, 2011, we can observe the following:

Approximately one quarter of people under the supervision of the Probation Service of the Court in Bucharest by 31.12.2011, have been convicted under Law 143/2000.

Out of this total, over 500 people, approximately 40% were female – which is considered to be a fact of a special relevance.

### 3. RESEARCH EXPERIENCES OF DRUG USERS ON PRE-TRIAL DETENTION IN ROMANIA

Below, there is a table presenting the overall situation of female drug users, arrested at the time of interview.

Name	Elena	Corina	Mihaela	Laura	Cristina
Age	20	21	28	30	34
Level of education	6	4	2	10	3
No. of brothers/sisters	+1	+3	+3	+3	+5
No. of children	0	0	2	1	1
Age of debut in drug use	12	12	23	23	20
Place(s) of the previous detention	-	IGP + Târgșor	SP15 + Târgșor	SP15 + Târgșor	SP 5 + Penit. Rahova IGP + ...
Time (month) of the previous detention	-	(2009) 4 + 6	(2006/7) 6 + 2	(2006) 7 + ...	(2003) 5 + 6 (2008)1 + ...
Place(s) of the current detention	IJP Teleorman + Penit. Giurgiu + P. Târgșor	IGP + Târgșor	IGP + Târgșor	IGP + Târgșor	IGP + Târgșor
Time (month) of the current detention	(2010) 2+2+12	(2010) 1 + 5	(2010) 2 + 12	(2010) ...	(2010) ...
Time (month) to rearest	-	7	24	6	18
Their perception regarding the detention environment and treatment	IJP Teleorman: "grievously: a little suspended and closed window; no air; toilet with a curtain, in the cell"	IGP: with a little help from Obregia Hospital: carmapezină, levo, diazepam, tramadol; otherwise, no doctor, no psychologist	SP15: "a suitable cell, with bathroom and hot water non-stop"; 3-4 pers./2,5x2,5 sqm.	Treatment as usual (tramadol, diazepam, ...)	2003, SP5: no treatment, no empathy; IGP: 4 pers./6 sqm,
	Penit. Giurgiu: 14 pers./10x5 sq m; One of the most difficult problems she experienced in the cell: the harshness of women behavior.	Târgșor: With many activities (past-time)	Târgșor: 20 pers./5x10 sqm, "no shampoo, no balm..."; 1-2 hour(s) walk in the fresh air; about corruption: "in the penitentiary, as outside...";	2007, Târgșor: "freedom, but no medical treatment and no hot water"	

All the five girls and women were in detention as a consequence of drug (heroin) use and trafficking.

The length of the “preventive detention” varies from 6 to 16 months.

With a single exception, all the girls and women experienced the re-arrest. The time to re-arrest seems to be very short (from 6 to 24 months). If this observation is consistent, it will be possible to affirm: “traditional sentencing is a revolving door for drug dependent offenders” and to propose an alternative to detention, as the drug treatment model (e.g. Restrictive Intermediate Punishment, Drug and Alcohol).

#### Research conclusions

1. For problematic drug users, procuring drugs implies entering into contact with drug dealers, getting exposed to at least two different sources of social and legal risks: the network of organized crime (getting recruited for trafficking, debt recovery, etc.) and legal institutions (getting arrested or convicted, spending time in custody, losing jobs, interrupting school, etc.).
2. According to the interviewees, drugs are available inside detention units, usually being poorer in quality and thus posing higher risks for the user's health.
3. The conditions in pre-trial detention (access to clean air and water, natural light, space per individual, toilets) in police units does not correspond to minimum standards for healthy individuals and are harmful for drug users and other persons with medical problems.
4. Pre-trial detention units in police and penitentiary units are overcrowded compared to standards.
5. Currently, a considerable number of drug users involve in micro-trafficking in order to procure money for their daily dose, which puts them under article 2 of law 143/2000 – drug trafficking; thus, they receive disproportionate punishment compared to the offence (minimum sentence for drug trafficking is 3 years for risk drugs and 10 years imprisonment for high risk drugs). The law fails its objective in preventing and deterring drug trafficking at the street level; due to their daily use and addiction, problematic drug users are predisposed to involve in street trafficking, and sentencing to prison leads to worsening their condition.
6. Article 16 allows investigators to put pressure on suspects which, in the case of problem drug users represents a no go situation (prisoner's dilemma): in order to solve it, an unknown part of them choose to denounce and set up another drug user as trafficker; in this way, article 16 fails its goal, which is to allow the identification and sanction of drug traffickers.
7. The big number of sentences for drug possession in view of trafficking (e.g. for long terms), comparable with the ones on drug possession for personal use, seem to be the outcome, among others, of the abusive usage of article 16 (law 143/2000) provisions. This phenomenon can be possibly classified in the sociological category of perverse effects, and it can be stopped by initiating a information campaign on the existence of a recent legal provision, referring to negotiated justice: article 320, index 1, from the Law no. 202/2010 on measures oriented towards the acceleration of trials (these provisions are taken into account in the new Criminal Procedure Code as well).

### Research recommendations

1. Improve the living conditions in police pre-trial detention units.
2. Explore new strategies for reducing drug related crime recidivism in the case of drug users, such as alternatives to incarceration, mandatory treatment or social reinsertion programs – apply article 19(1) and article 19(2) of law 143/2000 as soon as possible.
3. Develop raising awareness campaigns and seminars targeting judges, prosecutors and police officers and initiate experience exchange and discussions among these professionals with the aim to identify and promote effective solutions to recidivism.
4. Define the term “drug trafficker” in law 143/2000 and introduce supplementary provisions in order to clarify the conditions and outcomes of applying article 16 during the criminal investigation phase.
5. Introduce quantities for personal possession or detail the provisions of article 2 of law 143/2000 in order to separate drug traffickers from problematic drug users involving in street dealing.
6. Create a referral system or a protocol/procedure in order to allow early intervention in pre-trial detention in terms of evaluation and inclusion in an integrated assistance program of problematic drug users.

## CHAPTER 4

### ECHR CASES AND PROCEDURES AND A CASE STUDY

#### 4.1. Cases and procedures related to custody on remand in drug use offences

##### Custody on remand and the provisions of the European Convention on Human Rights. Jurisprudence of the European Court of Human Rights.

Article 5 of the European Convention on Human Rights (the Convention) is called 'Right to liberty and security' and is the 'core matter' of the Convention on deprivation of liberty.

**Article 5 of the Convention** reads as follows:

**'Right to liberty and security'**

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

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



4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.'

Within the Convention's system, the right to liberty and security, enshrined in Article 5, is a fundamental and inalienable right (the beneficiary cannot waive it). It is not absolute but relative, since it can be restricted in circumstances that are limited (and clearly) regulated by law. An example of an absolute right is the one contained in Article 3 of the Convention, the prohibition of torture (this right does not stand any limitations, not even in war – see Article 15 of the Convention).

The entire text of Article 5 of the Convention is centred on a single purpose, namely the protection of individual freedom and security against **arbitrary** arrest and detention.

Custody on remand is a species of deprivation of liberty, because deprivation of liberty has a broader sense (including, for example, medical hospitalization or other non-criminal measures).

Substantive conditions of custody on remand are set out in Article 5(1)(c) of the Convention. Thus, retention/detention may be ordered if:

1) it is aimed at bringing the person before the competent judicial authority (hence, Article 5(3) states that any arrested person must be brought immediately before a judge) and

2) only if one of these three conditions is met:

- There are plausible reasons to suspect that the person has committed an offence
- There are solid reasons to believe in the need to prevent a person from committing an offence
- There are solid reasons to believe in the need to prevent a person from fleeing after committing an offence.

The apparently laconic provisions of the Convention on the topic are, however, developed and explained by the jurisprudence of the Court, which is very rich and allows us to select some relevant judgments.

Regarding the possibility to order custody on remand when there are **plausible reasons** to suspect that the person has committed an offence, it should be noted that these reasons need not have the weight of evidence necessary to justify a conviction. The reasons are plausible **if based on facts or information that may convince an objective/neutral observer that the person committed an offence**. Therefore, the Court did not accept complaints about arrests that were not in conformity with Article 5(1) of the Convention, if the applicants were arrested and kept in custody on remand, convicted by courts of first instance and then acquitted after appeals on form/procedural or substantive grounds. The Court held not contrary to Article 5(1) of the Convention the custody on remand based on plausible enough reasons to convince even a court of first instance (who ordered the conviction) that the person has committed an offence (cases *Benham v. United Kingdom*, *Krzycki v. Germany*).

In the case of *Engel v. Netherlands*, the European Court of Human Rights (The Court) found that the provisions of Article 5 must not be interpreted mechanically, since **not every deprivation of liberty is a breach of Article 5**. Thus, taking into account the particular status of the military, certain penalties or disciplinary measures imposed on them (in this case confining soldiers to barracks) are not deprivation of liberty, even though for a civilian, the same measure would be a restriction on his liberty. The Court also noted that other disciplinary measures imposed on the military, like locking them in cells, constitute a deprivation of liberty for the purposes of Article 5 because such a penalty exceeds normal conditions imposed by military service.

In the understanding of the Court, the detention of a person, even if she accepts/solicits it, may violate Article 5 of the Convention. In its decision in the case of *De Wilde, Ooms and Versyp v. Belgium*, the Court has held that even in such a situation there may be deprivation of liberty. The fact that the applicants appeared voluntarily before the authorities and their subsequent detention was the result of a request formulated in this regard, is not a sufficient argument for a person to lose the benefit of this rights (the authorities argued that the applicants, arrested for vagrancy, asked to be admitted in two special centres for people in difficulty. The Court held that their consent cannot replace the need to issue an admittance decision in the centre and the legal grounds that must underpin it). The inalienable character of the right to liberty makes it possible for such a ‘consented detention’ to be considered unlawful. The Court observes that the right to liberty has too much importance in a democratic society for a person to lose its benefit just because she turned herself in the hands of state authorities. In this context, the lack of consent can be inferred not only from physical means of restraint of the person (locking her in a room, handcuffs), but also from psychological means, sufficing that the person be under the impression that she cannot leave a room without serious consequences.

The first criterion applied by the Court to determine whether a deprivation of liberty is ‘lawful’ and ‘in conformity with legal procedures’, namely whether or not it complies with the conditions of Article 5(1) of the Convention, is that **the liberty-depriving measure be taken in accordance with national/international law** (*Assenov and others v. Bulgaria*). Therefore, national authorities should adopt a clear and predictable legislation, establishing the conditions and procedures for deprivation of liberty, legislation that the same authorities must respect to the letter whenever they authorise a deprivation of liberty.

The ‘legal’ character of the deprivation of liberty implies that the latter results from a sentence **delivered by a competent court** with the necessary authority to decide on the case and independent from the executive, within a procedure that provides adequate safeguards (the case of *Dacosta v. Spain*, no 69.966/01, § 43, 2 November 2006). In this case, the applicant, member of the Civil Guard of Spain, was disciplinary penalized with 6 days of house arrest by order of his immediate supervisor. The Court found that the immediate supervisor was not a ‘competent court’ for the purposes of Article 5(1) of the Convention. In another case, *Calmanovici v. Romania*, the Court held that the arrest authorized by a military court, although competent for judging the applicant, pertained to a civil court, hence it was an arrest authorized by a non competent court and in breach of Article 5(1) of the Convention.

Also, the Court has the right **to check how national authorities comply with domestic legislation** on taking the liberty-depriving measure (the case of *Douiyeb v. Netherlands*, Judgement of the Court from 4 August 1999, paragraphs 44-45). The applicant was arrested for human trafficking. He claimed that several provisions of domestic law concerning the arrest had not been observed, including disclosure of charge with the indication of the exact legal classification. The Court examined whether national authorities had complied with domestic legislation and found that they had acted properly.

In the case of *Steel and others v. United Kingdom*, the Court found the breach of substantive and procedural provisions of domestic law on the deprivation of liberty of the applicant. Thus, the applicant's arrest on grounds that he had shared out 'manifestos' at a conference, is illegal even if the law stipulated the possibility of retaining persons disturbing a public manifestation. The Court found that from a procedural point of view, this arresting case was clearly regulated by English law, but it was not applicable to the applicant. This is because the activity of the applicant did not prevent in any way the progress of the conference, nor did he commit any act inciting to violence, so the measure adopted in these circumstances by national authorities is unjustified.

But the control of the Court on the 'legality' of deprivation of liberty is not confined to a formal finding of the existence of domestic legislation regulating the deprivation of liberty. It must also undertake a **qualitative** examination of domestic legislation. Thus, the Court must be certain that the deprivation of liberty, regardless of its regulation by domestic legislation, is in conformity with the purposes of Article 5(1) of the Convention. Therefore, the Court has the right (that it exercises) to verify that the very norms of domestic law on arrest/detention comply with the Convention (the case of *Baranowski v. Poland*), and therefore if the domestic law meets the requirements of the Convention in order to be considered "law" (for example, be clear, predictable and accessible).

On the **predictability** of domestic law, the Court held that the law should be sufficiently precise as to enable the person, through expert advice (lawyer, for example) if necessary, to reasonably foresee, by referring to the actual data of the case, the adverse consequences of a specific action that she undertakes (the case of *Laumont v. France*, *Steel and others v. United Kingdom*).

An example of unclear, **unpredictable** law, is a provision of the type: 'a person disturbing public order may be retained as long as necessary'. The syntagm 'as long as necessary' makes the provision imprecise, unpredictable, leaving room for arbitrary, since it does not specifically indicate the termination of the liberty-depriving measure (the case of *Hilda Hafsteinsdottir v. Iceland*). In that case, the unpredictable provision concerned the situation of people on the street, in an advanced state of alcoholic intoxication or otherwise. National authorities have argued that, besides the imprecise regulation, there is a police regulation that sets out various criteria for determining the length of the deprivation of liberty, so the syntagm 'as long as necessary' is clearly and predictably determined by that internal regulation. But that regulation, having an internal character, is accessible only to the police. The Court held that because the regulation at issue is not publicly available, the regulation of the deprivation of liberty does not meet the conditions of 'law' for the purposes of the Convention, as the conditions

of predictability and accessibility are not met. Therefore, the deprivation of liberty of a person under that regulation constitutes a violation of Article 5(1) of the Convention.

Another example of law **unpredictability** is the regulation under which a person can be arrested in ‘exceptional circumstances’, without any detail/definition of these circumstances by law (the case of *Gusinskiy v. Russia*). This case refers to the Article 90 of Russia’s Criminal Procedure Code, which stipulates that in ‘exceptional circumstances’, a preventive measure may be taken concerning a suspect against whom no charge has been brought; the charge must be brought within 10 days of the preventive measure, otherwise the latter shall be revoked. Based on this text, the applicant, owner of a holding company, which deals, among other things, with media and natural gas trade, was arrested for 6 days without there being any criminal charge brought against him. On release, he was accused of fraud in connection with commercial operations against Gazprom, related mainly to the media trust he owned. After release, the applicant ceded the media trust he owned to Gazprom; in the transfer agreement of the media trust, Gazprom assumed explicit obligations to have withdrawn the criminal charges against the applicant, and so it happened. Shortly after, the applicant left the country, settling in Spain. The applicant challenged before national courts (in Russia) the legality of his arrest based on Article 90 of Russia’s CPP. The national courts dismissed his complaint on grounds that, when examining the complaint, the applicant was free, so the complaint was deemed superfluous (the national courts argued that they could only examine complaints of persons who, on the date of the decision, are under arrest). The Court reaffirmed, referring to the case of *Amuur v. France*, that the law under which a person can be arrested must be sufficiently accessible and precise as to eliminate any risk of arbitrariness in taking this measure. Accordingly, the Court found that the deprivation of liberty based on an unpredictable legal text, which refers to ‘exceptional circumstances’ without defining them, is a violation of Article 5(1) of the Convention.

The Court also held that the deprivation of liberty is a very serious measure, so that when assessing its compliance with the requirements of Article 5(1) of the Convention, it is not sufficient that detention be consistent with domestic law, but it should also be necessary in relation to the actual circumstances of the case. The necessity may arise from the fact that other measures, less severe, cannot be considered – in relation to the actual data of the case – as sufficient to achieve the purpose of ordering the arrest (the case of *Witold Litwa v. Poland*). In this case, the applicant is a person with serious vision problems, who needs an assistance dog to travel. On the day of the incident, apparently under the influence of alcohol, the applicant went to the post office to check his mailbox. Having found the mailbox empty and with the door opened, he complained to the post office workers that they had not properly supervised his mailbox. The workers from the post office called the police motivating that the applicant was intoxicated and was disturbing public order. The police arrested the applicant and admitted him to a rehab centre for 6 hours and a half, according to domestic regulations. The Court held that the domestic regulation under which the applicant was deprived of liberty alternatively stipulated other measures to be taken by the police in such cases, like transport to a hospital or at home, measures not involving deprivation of liberty for the purposes of Article 5(1) of the Convention. Given the applicant’s health condition and the existence of serious doubts on the danger that his aggressive

behaviour represented for the public or for himself, the Court held that the deprivation of liberty was unnecessary and unjustified in the case, since other measures milder than the deprivation of liberty would have sufficed, alternative measures that were stipulated by domestic law for such situations. As such, the Court held the breach of Article 5(1) of the Convention.

Also, in the case of *Ladent v. Poland*, the Court discussed the conditions of **necessity and proportionality of custody on remand**. The applicant is a French citizen that would occasionally travel to Poland, as his wife is Polish. During one of these travels, he had a verbal dispute with the administrator of the building where he lived when he came to Poland. Following the dispute, the administrator filed a criminal complaint against him for using obscene language (offence punishable by fine or community work). The criminal complaint was addressed to the court, which cited the applicant, who failed to appear, because, without knowing that he was involved in a trial, he had gone back to France. For this reason, the court issued an arrest warrant, for a period of three months, on the applicant's name, as well as a wanted notice. The arrest warrant is justified as follows: 'the defendant does not live permanently in Poland and the court does not know his address, therefore he prevents the proper conduct of the trial and the settlement of the case within a reasonable period of time. Custody on remand is needed to ensure the proper conduct of the trial. Considering that the defendant absents himself from trial, he will be issued a wanted notice'. 6 months after issuing the warrant, the applicant was arrested at the border, when he was about to leave Poland and return to France, after spending New Year's Eve in Poland. The arrest was conducted in front of his wife and two minor children (1 year and a half and 3 years) who had to wait in the car driven by the applicant, at -10 degrees C for several hours in a row. After a week of detention, the custody on remand was replaced by an obligation not to leave the country and his passport was detained. The decision to release him was given on a Friday and the court sent it to the penitentiary by fax. The penitentiary management informed the court that the applicant would be released only after receiving the original of the release decision and not just a fax. As such, he was released only on Monday, after the original decision was sent by courier to the penitentiary. After another week, the court lifted the ban on leaving the country, based on a bond constituted by the president of the France-Poland Friendship Society, so that the applicant could return to France. After 10 months, the claimant was acquitted, as a final decision.

The Court, referred by the applicant, held, first, that the arrest was motivated erroneously on the applicant having absented himself from trial, as long as he did not even know of the existence of the trial. This error in the arrest decision makes the measure of custody on remand not consistent with the requirement that it be prescribed by law. Although it specified that this finding was enough to ascertain the violation of Article 5(1) of the Convention, the Court could not limit itself to this assessment and found it necessary to examine, in this case, the proportionate and necessary character of custody on remand, given the importance of the principle that detention should not be arbitrarily authorised. In considering the arbitrariness of the detention, the necessity and proportionality of custody on remand will be assessed in relation to the purposes of the measure. The Court held that, although theoretically domestic law allowed arrest for that offence (only on grounds that the accused is absenting himself from trial),

in the case, given the nature of the offence (petty irrelevant crime), the arrest measure is disproportionate to the purpose of ensuring the proper conduct of the trial. The Court added that national courts should have chosen other measures, less harsh and more appropriate than custody on remand to ensure proper conduct of the trial.

Regarding the release of the applicant with a 3 days delay (after the weekend, that is Monday instead of Friday), on grounds that the penitentiary refused to consider the fax sent by the court and requested the original act, the Court held a distinct breach of Article 5(1) of the Convention. The Court reiterated that a certain delay in the execution of the release decision is understandable and often unavoidable, given the practical considerations related to the functioning of courts and administrative formalities to be fulfilled. But the Court also stressed that national authorities must ensure that these delays are minimized. Furthermore, citing the cases of *Labita v. Italy*, *Nikolov v. Bulgaria* *Gębura v. Poland*, the Court recalled that the duration of the release administrative formalities cannot exceed a few hours (in the case of *Labita*, the 10 hours delay was considered unjustified, in the case of *Nikolov*, the unjustified delay was for 7 days and in the case of *Gębura*, the unjustified delay was for 56 hours). In this regard, the Court stressed that national authorities have the obligation to remove any organizational deficiencies that would lead to an unjustified deprivation of liberty. The Court concluded that, in this case, national authorities have not minimized the duration of formalities for the release of the applicant, and thereby distinctively violated Article 5(1) of the Convention. The applicant claimed moral damages of 10,000 euros, which were fully granted by the Court.

Another relevant case on the conditions of **necessity and proportionality of custody on remand** is *Ambruszkiewicz v. Poland*. The applicant was prosecuted for having made denunciations consisting of unreal accusations against police officers and magistrates. At the first hearing, the applicant recused the panel of judges. For this reason, the case was delayed several hours and was resumed on the same day, after solving (rejecting) the request for recusal. On resumption, the court found that the applicant was no longer in the room and ordered his arrest for a period of three months on grounds of absencing himself from trial and affecting the proper conduct of the trial. After the arrest, the applicant requested release for six times on grounds that his detention is a too severe and disproportionate measure, taking into account the reduced gravity of the offence for which he was on trial. National courts rejected all requests on grounds that the arrest is necessary for the proper conduct of criminal proceedings and there is the risk of him absencing from trial. Request no. 7, however, was admitted and, after 2 months and 7 days of detention, his release on bail was ordered. In first instance, the applicant was initially sentenced to 10 months with suspension. He appealed and the decision was annulled and the case sent back to retrial. On retrial he was again sentenced to 10 months with suspension, he appealed and his appeal was again sent back for retrial. On the date of the decision of the Court, the first instance trial was not over, having entered in a loop. The Court held that the applicant was prosecuted for a crime punishable by up to 2 years in prison, so it may be considered that there was a legal basis for detention, in domestic law. The Court also reiterated that the lawfulness of detention shall be examined against the request of absence of arbitrary in authorising this measure. So it is not sufficient that the deprivation of liberty be consistent with domestic law, it should also be necessary in relation to the circumstances of the

case. The deprivation of liberty being a very serious measure, it is not justified unless other measures, less severe, were considered and found to be insufficient to achieve the purpose of the arrest. In the case of the applicant, the Court found that although it was not a complex or serious case (depending on the punishment the applicant 'risked' to receive) and there was no history of the applicant to justify the assumption that he would disrupt the proper conduct of the trial, national courts did not order less severe measures stipulated by domestic law and which were more appropriate to the situation. Thus, the Court stated that for bringing the applicant for hearing before the judge, a summons rather than an arrest warrant could have been issued. The applicant may also have been placed under judicial control, rather than arrested. Finally, because national courts have not considered the application of measures less severe than the deprivation of liberty, measures that were adequate to the circumstances, the Court found the violation of Article 5(1) of the Convention. It is noteworthy that the Court's decision also mentions a violation of Article 6 of the Convention, on the fairness of trial, breach that the Court was unable to retain for the simple reason that the applicant had not complained about it. But the Court's considerations on this topic are important for other possible causes. The Court, referring to the case of *Kyprianou v. Cyprus*, noted that the applicant was prosecuted for bringing complaints against several police officers and magistrates from police stations/courts with jurisdiction over his area of residence and that, for this reason, the court to judge him was required to act so as to avoid any appearance of partiality. In particular, the Court indicates, it should have adopted a cautious attitude on ordering a measure of deprivation of liberty towards the applicant, attitude that would have not allowed any possible doubts about its impartiality.

The Court noted in its jurisprudence that, for the purposes of Article 5, not even a relatively short term deprivation of liberty is admissible. Thus, in the case of *Foka v. Turkey*, the Court noted that although the applicant had stood with the police for only a few hours necessary for fulfilling formalities, the fact that she had been taken there by force, represents a coercion element that affected not only her freedom of movement, but her freedom in general, with the consequent violation of Article 5. Also, in the case of *Quinn v. France*, the Court ruled that the detention of a person already in custody on remand for another 12 hours, although the court had decided her release on that day, is contrary to Article 5 of the Convention. In the case of *Labita v. Italy*, the Court found violation of Article 5(1) of the Convention, as the applicant's release was delayed for 10 hours by fault of the administration of the detention centre (the absence of the registrar that had the competence to verify whether or not the applicant was accused in another case).

There is a similar ruling against Romania, in the case of *Răducu v. Romania*. The Court found violation of Article 5(1) of the Convention, since, although the Bucharest Court of Appeal ordered the applicant's release on 19 October 2000, he was released only on 20 October 2000, because the decision was communicated to the wrong penitentiary. Since this error is attributable to the authorities that failed to correct it for 12 hours, putting the applicant in a position to spend an extra night in prison, the Court concluded that the reasonable time for the execution of the decision was exceeded.

Likewise, in the case of *Calmanovici v. Romania*, the Court held that the delay of 16 hours in releasing the applicant, because the authorities had not taken the necessary

measures to minimize preparation time for administrative formalities, is a violation of Article 5(1) of the Convention.

It should be noted that, in its jurisprudence, the Court recognizes that executing a releasing decision requires a certain amount of time to fulfil domestic administrative procedures. This period of time should be reduced as much as possible, and if authorities exceed a reasonable delay, there is a breach of Article 5(1) of the Convention (the case of *Giulia Manzoni v. Italy*). However, this does not mean that the authorities can delay the immediate release of the person in any situation, claiming fulfilment of domestic administrative formalities. Thus, in the case of *K.-F. v. Germany*, the Court stated that no delay is allowed to the release of a person when the legal term of detention expires. This is because, unlike the release that follows the revocation of the arrest (when the authorities are taken somewhat by surprise by the release measure when unexpectedly receiving a communication from the judge in this regard), when the legal duration of detention expires, the authorities cannot claim anymore to have been taken by surprise, as they know very well that at a certain hour, the person must be released without needing any communication from the judge.

In the case of *K.-F. v. Germany*, the KFs, being on holiday in a resort in Germany, were detained by local police upon notification by the hotel owner where they were accommodated that they allegedly were planning to leave without paying the rent and the phone. The police had the right to hold them for 12 hours to establish identity and clarify the complaint. The couple was released after 12 hours and 45 minutes. The Court considered the 12 hours of deprivation of liberty as justified, but that holding the two for 45 minutes over the legal maximum was a violation of Article 5(1) of the Convention. National authorities argued that the duration of 45 minutes is irrelevantly short and that it served for fulfilling the release formalities, but the Court stated that since the period for the release of the applicants (after 12 hours) was known from the beginning by the authorities, they should have taken all necessary measures before the deadline. The Court noted that this situation was not similar to that in which the release is ordered after revocating the arrest measure (when the authorities detaining/holding the person receive a communication from the judge in this regard, and therefore, are taken somewhat, by surprise, requiring some time for fulfilling administrative formalities of release).

It should be noted that an earlier decision of former European Commission of Human Rights (The Commission) had determined that **there is no deprivation of liberty** for any person spending 3 hours in a police station because of concerns about her mental health. The short duration of the person's presence at the police station, on that specific ground, was considered reduced and it was concluded that it is no deprivation of liberty for the purposes of Article 5 of the Convention (decision of 13 December 1979, in the case of *X v. Austria*). In another decision, the Commission reaffirmed this point of view and stated that there is no deprivation of liberty in the presence of a 10 year old child, for 3 hours, in a police station, to be interrogated without being locked in a cell (Commission Ruling of 19 March 1981, in the case of *X v. Germany*).

The Court has repeatedly criticized the habit of national authorities in Romania of **not motivating exactly, precisely and concretely the measure of custody on remand**. Instead of this motivation, the authorities confine themselves to the generic



indication of applicable law text. Thus, in the cases of *Calmanovici v. Romania*, *Pantea v. Romania*, *Tase v. Romania*, the Court found the practice of not mentioning the specific reasons for custody on remand to be contrary to the provisions of national law, particularly regarding the alleged threat to public order, although the motivation requirement is expressly stipulated by the law.

Concerning the obligation of the court that has a pending case involving persons in custody on remand to **periodically review the legality and validity of the arrest**, it should be noted that, in the jurisprudence of the Court, the breach of this obligation resulting in the deprivation of liberty of a person without a decision to maintain detention constitutes a violation of Article 5(1) of the Convention (the cases of *Konolos v. Romania*, *Varga v. Romania*, *Tkacik v. Slovakia*). Similarly, keeping a person in detention during criminal investigation, if custody on remand has expired and the measure was not extended anymore, constitutes a breach of Article 5(1) of the Convention (the cases of *Baranowski v. Poland*, *Zielonka v. Poland*, *Boicenco v. Moldova*, *Jecius v. Lithuania*, *Holomiov v. Moldova*, *Stici v. Moldova*).

The Court also held that a **retroactive validation of a detention** is contrary both to domestic law and Article 5(1) of the Convention (the case of *Calmanovici v. Romania*).

In the case of *Jiga v. Romania*, the Court held, inter alia, **the excessive length of the applicant's arrest**, which is a violation of the right guaranteed by Article 5(3) of the Convention, which protects the right to release during proceedings. In this case, the applicant was prosecuted while in custody on remand for an offence of corruption (influence peddling) and was held in custody for 11 months and 24 days. The Court reasoned that, although certain offences pose a special danger to public order, it decreases with time, which imposes on the authorities the obligation to provide a concrete and very detailed motivation for the persistence of the motives justifying the custody on remand of a person. The Court held that the courts involved offered no reasons why this period had not reduced the danger to society that would have required the release of the applicant, or had not reduced the threat to the proper conduct of justice, especially after hearing the witnesses. The Court held that the extension of the arrest period cannot be explained only by the appreciations the courts have made on the seriousness of the offence, on the punishment stipulated by law or on the amount of the prejudice. Also, the Court said, the courts involved had failed to justify why other preventive measures, such as the obligation not to leave the country, could not fulfil the preventive purpose of the measure.

This statement of the court was criticized by the **domestic doctrine**. Without us rallying to this criticism, we consider there is some interest in briefly presenting the domestic counter-arguments, especially since they reflect the views of national magistrates. Thus, it has been replied that the danger posed by the defendant to public order does not decrease from one month to another (he was kept in custody for 11 months and 24 days for an offence of corruption). What decreases is the resonance among the general public of such an action that has been heavily publicized. At most, it was possible to say that the duration of the preventive measure had become unreasonable against the seriousness of the offence, but not that the danger posed by the defendant decreased from one month to another. Otherwise, it is argued that one can understand

that the idea behind the Court's rationale is: arrest him until the public opinion calms down and then release him. Also, the domestic doctrine complained that the Court's rationale forces national courts to be extremely creative when they have to explain why they have ordered or extended an arrest. However, they are obliged to use the general formula to motivate the decision of ordering, extending, maintaining custody, because a too detailed analysis of evidence would inevitably lead to a prejudgement.

We believe that all requirements imposed by the Court in connection with the arrest, but also with maintaining a person in custody, requirements considered excessive by part of the domestic doctrine, are just another way in which the Court underlines the fact that custody on remand is an exceptional measure: it cannot be taken easily, nor maintained easily, for each day of detention there must be a compelling and serious justification, strictly applied to the circumstances of the case (and not general considerations). See, in this respect, the cases of *Becciev v. Moldova* (paragraph 54), *Belchev v. Bulgaria* (paragraph 58).

The problem of **excessive length and lack of justification for extending the custody on remand measure** also arose, inter alia, in the case of *Calmanovici v. Romania* (the applicant, a police officer, was arrested along with a colleague, for taking bribe – 2,000 USD – and abstraction of documents). The ruling of the Court in this case has a more complex character and is of particular importance for custody on remand since it discusses several relevant issues on the matter.

The Court reiterated on this occasion an important statement concerning the right of a person to be released during trial, as provided by Article 5(3) of the Convention. The Court pointed out that after his conviction in first instance, any further detention of the applicant is not covered by Article 5(1)(c) of the Convention, but is required by Article 5(1)(a) (which stipulates the legal detention based on conviction by a competent court). When a person wishes to complain about the excessive length of detention after conviction in the first instance, she cannot invoke Article 5(3), but the failure to respect a reasonable length, referred to in Article 6(1) of the Convention (see case *Wemhoff v. Germany*, pages 19-20, Section 9).

Regarding the length of detention before the conviction in first instance, the Court held that Article 5(3) of the Convention is closely linked to (1)(c) of the same article. It aims at providing people that are deprived of liberty with a special safeguard consisting of a judicial proceeding whose rationale is to ensure that nobody is deprived of liberty in an arbitrary manner. The Court noted several times that Article 5(3) of the Convention provides persons in custody with safeguards against arbitrary or unjustified deprivation of liberty and has essentially the role to impose the release of a person when the detention ceases to have a reasonable character (for example, the case of *Assenov and others v. Bulgaria*).

In this context, the Court reaffirmed the principle that there is a **presumption in favour of the release**, because Article 5(3) does not provide judicial bodies with an option between prosecution within a reasonable period and provisional release. Until being convicted, the accused must be presumed innocent and should be released as soon as the detention ceases to be reasonable (the case of *Neumeister v. Austria*). Therefore, continued detention is no longer justified in a case unless there is concrete evidence strong enough to justify a necessity linked to public interest in continuing detention

and which, despite the presumption of innocence, is so serious that it prevails over the law of respecting individual liberty, established by Article 5 of the Convention (the case of *McKay v. United Kingdom*).

The Court recalled that a reasonable length of detention cannot be assessed in abstract, but only in relation to the circumstances of the case (see also the case of *Patsouria v. Georgia*). Nor can it be argued that Article 5(3) of the Convention would unconditionally authorize an arrest followed by custody on remand, if it should not exceed a certain duration. Any maintenance in custody of an accused, even for a short duration, must be convincingly justified by the authorities (the cases of *Chichkov v. Bulgaria*, *Musuc v. Moldova*).

In addition, a motivated decision of national courts proves that the parties were effectively heard and allows the interested party to appeal, while the judicial control court has the opportunity to analyse the appealed decision against the invoked reasons. The Court outlined, referring to the case of *Suominen v. Finland*, that only by offering the reasons grounding a decision, there is the possibility of public scrutiny of the administration of justice (*Suominen v. Finland*, no.37.801/97, § 37, 1 July 2003). On the other hand, recalling the decision in the case of *Smirnova v. Russia*, the Court indicated that the arguments for and against the release must not to be ‘general and abstract’, but specifically applied to the circumstances of the case.

The Court reiterated that its jurisprudence developed four fundamental reasons to justify the custody on remand of a defendant suspected of having committed an offence:

- The danger that the accused should **flee** (relevant case: *Stogmuller v. Austria*, the applicant was held in custody for a long time because there was a risk for him to flee, as he was a certified pilot, and his father was the owner of an aircraft, fear supported also by the severity of punishment to follow the conviction. the Court stated that there was no data or evidence justifying the risk invoked for prolonging the detention, because nothing in the applicant’s conduct justified the fear that he would absent himself from trial. The possible severity of the sentence does not justify, by itself, the fear that the applicant would absent himself from trial).
- The risk that the accused, once released, would prevent **the administration of justice** (relevant case: *Wemhoff v. Germany*; the applicant, broker by profession, was arrested for influencing the bank’s management to steal money from the bank. During the criminal trial, he had made several attempts to be released on bail, but failed to pay it or paid smaller amounts than established. The applicant had previous convictions and a medical examination presented him with an unstable personality, confirmed by his conduct in detention. Court held that keeping him in custody until convicted in first instance did not violate Article 5(3).
- The risk that the accused, once released, **would commit new offences** (relevant case: *Matzenetter v. Austria*).
- The risk that the accused, once released, **would disturb public order** (relevant cases: *Letellier v. France*, *Hendriks v. the Netherlands*. In the case of *Letellier v. France*, the applicant was arrested for killing her husband, by means of a paid assassin. After about 7 months, the investigating judge released her under judicial control. The judicial control court decided to keep the applicant in custody since the offence committed

was very serious and was, by itself, a danger to public order. The detention period was prolonged for about 3 years until the time she was convicted. The Court held that the danger to public order cannot be appreciated mechanically, only in relation to the seriousness of the offence committed, but other factors must be considered, such as the possible attitude and conduct of the defendant after release. The Court accepted that, depending on the seriousness of the offence and on the public reaction, one can appreciate the existence of a public danger that can justify the custody on remand, at least for a while. However, this reason for arrest remains relevant and sufficient only if it is based on facts able to prove that the defendant's release would represent an **immediate and present danger** to public order. The simple appreciation in abstract (without taking into account the circumstances of the case), that the accused has committed a serious offence is not a basis for maintaining custody. In this case, an example of 'specific circumstances' was the attitude of the mother and sister of the victim, who did not oppose the application for release filed by the applicant, but only the one made by the paid assassin. In conclusion, the Court held the violation of the right to be released during trial (Article 5(3)) for the detention that followed the release of the applicant ordered by the investigating judge, after 7 months of arrest. In the case of *Hendriks v. the Netherlands*, the applicant was arrested for rape and attempted murder. The duration of the custody on remand, until convicted in first instance, was about six months. The Court held that there was no violation of Article 5(3), since the short duration of the procedures justifies the assessment of national courts on the fact that the effect of disturbing public order, which resulted in the arrest, had not yet been exhausted).

Applying these principles to the case of *Calmanovici*, the court held that the extension of the arrest was made without indicating the specific reasons for which the release of the applicant would have been a danger to public order. The Court noted that, even in the absence of a national jurisprudence consistently coherent on the topic, national courts had defined over time criteria and elements to be considered in analyzing the existence of a 'threat to public order'. These included the public reaction triggered by the acts, the state of insecurity that could be generated by releasing the accused, as well as his personal profile. The Court noted that in this case, the decisions of domestic courts to hold the applicant in custody had not provided concrete reasons to support this argument of 'danger to public order' and to justify the need to maintain the applicant in detention. These decisions were essentially limited to reproducing, in a stereotype manner, the legal text which allows the extension and to adding, in abstract, the reason of proper conduct of criminal investigation, stating that the same reasons which had led to the arrest followed by custody on remand of the applicant were still valid for extension.

The Court noted that under domestic law (Code of Criminal Procedure), the notion of '*impeding the proper conduct of criminal investigation*' is different from the '*danger to public order*', which formed the legal basis for maintaining the applicant in custody. On the other hand, the Court held that domestic courts have never **specifically** indicated how these provisions would apply in the applicant's case. They have not analysed the reasons invoked by him shortly after its placing in custody, concerning his personal profile and family situation, although domestic law (Article 136 Criminal Procedure Code) requires that such reasons be taken into account, inter alia, in choosing the most appropriate preventive measures. In this regard, the Court recalled that,

according to Article 5(3), the authorities should consider **alternative measures** to custody on remand, if the defendant provides guarantees in terms of his appearance in court. However, without specifically justifying the impeding the applicant brought to the proper conduct of criminal investigation or claiming and demonstrating the risk that he would not appear in court, domestic courts have never considered the possibility of adopting an alternative measure stipulated by domestic law. The brief reference in a closing meeting, to the seriousness of the offences committed, to the manner in which the defendants seemed to have committed them and to their quality cannot compensate the lack of motivation of the measure, for such a 'motivation' is likely to raise more questions than answers regarding the role of these elements in the alleged existence of a threat to public order. In particular, the Court recalled having already stated that **it is the domestic courts' duty to provide in a concrete manner, based on relevant facts, the reasons why public order would actually be threatened if the accused was released.** Knowing that domestic courts must respect the presumption of innocence when considering the need to extend the detention of an accused, the Court reaffirmed that maintaining detention could not be used to anticipate the application of a liberty-depriving sentence, relying essentially and abstractly only on the gravity of the committed acts.

The Court also noted that in all decisions in question, the domestic courts **extended the custody on remand of the applicant by a global formula that equally concerned both him and the other defendant, without answering the arguments put forward separately by each of them and without taking into account their particular situation.** The Court, referring to the case of *Dolgova v. Russia*, considered that such an approach is incompatible with the safeguards provided in Article 5(3) of the Convention, since it allows keeping more people in detention without analysing on a case by case basis, for each person separately, the reasons that justify the need to extend detention.

Consequently, the Court held that since the national judicial authorities had no concrete facts regarding the risks involved if the applicant was released and by failing to take into account the alternative measures, as well as choosing to rely mainly on the seriousness of the offences committed without considering the applicant's situation individually, there were given no 'relevant and sufficient' reasons for justifying the need to maintain the applicant in custody, so that there was a violation of Article 5(3) of the Convention.

In *Khudoyorov v. Russia*, the applicant was arrested for the **purchase and possession** of 3 g of hashish. He was prosecuted while in custody, with another 20 defendants and remained in custody for five years and four months. The extension of the arrest was generically motivated by invoking the seriousness of the offence and the severity of the punishment to follow in case of conviction. The Court accepted that the severity of the punishment to follow can be a relevant element for assessing the risk that the applicant absents himself from trial, at least for the initial period of the measure of arrest. However, the Court recalled having repeatedly affirmed that the seriousness of the charge cannot justify, by itself, the extension of detention for a long time. The Court also indicated that national courts had not tried at all to consider replacing the arrest measure with a milder one, such as release on bail or prohibition to leave

the city, although Article 5(3) of the Convention obliges to this review (of course, the review could not have a formal character; the refusal to replace the measure of arrest must be compelling, based on actual data of the case, including those in favour of the applicant's release, such as, in this case: worsening health condition, family ties in the area – paragraph 184 of the Court's ruling in this case). The Court also noted that the decisions to extend the arrest were motivated in a stereotype manner, by reproducing (copy/paste or with small changes to) the same paragraph of previous decisions. Moreover, the Court noted that the extension of the arrest was ordered 'in block' for more arrested persons, without any customization according to their personal circumstances. In conclusion, the Court held that, by motivating the extension of the arrest in a generic way only, by invoking the seriousness of the offence, without indicating specific circumstances which justify it and failure to take into account alternative preventive measures to detention, national courts extended the detention of the applicant on grounds that cannot be considered as 'relevant and sufficient', so there was a violation of Article 5(3) of the Convention.

In another case, *Servet Gunduz and others v. Turkey*, the person (SG) was enlisted in the gendarmerie troops, **for the compulsory military service, even if he was a well-known (and proven) drug user** with episodes of self-inflicted wounds and attempted suicide, according to medical records (where he was described as 'drug addict'). During military service, he was not given a weapon, the commander took measures so as not to leave him alone and assigned him responsible for the bedroom in order to give him an occupation. Several times, he was penalized with warnings for indiscipline. After about 10 months of military service, SG came in conflict with a superior who offended him by reproaching him that he was not a true soldier, for he had no weapon, he was not on watch and only caused trouble. After more contradictory discussions, SG said that he would not stay where he was not needed and headed to the minefield, stepped on a mine and died. The Court was concerned about whether the authorities had tried to determine if SG's health condition was compatible with its presence in that restrictive environment and also if the authorities had taken therapeutic measures for the abstinence syndrome or other appropriate measures for his known mental problems. The Court noted that his personal file elaborated by the gendarmerie unit contained no mention of his health condition throughout the military service. In addition, the Court noted that military authorities had neglected one of the aspects of the human element, in relation to the specificity of military service, consisting of the tension affecting anyone in such a situation (situation that can be assimilated to concentration environments, for example detention facilities –ed.). In the case of a drug addict with acknowledged psychological vulnerability, this tension that is particular to the environment is clearly exacerbated. In this regard, the Court noted that SG showed an increased psychological instability and indiscipline, which is why he was imposed numerous warning penalties. The Court concluded that the failure of the authorities to take appropriate therapeutic measures, plus the conduct of certain persons among them in the period forerunning the suicide led to the death of SG, so the state is liable for breach of Article 2 of the Convention, which protects the right to life. Although this case refers to Article 2 of the Convention, it is also important for the topic of custody on remand, through the

principles it states, mainly through the state's obligation to provide adequate medical treatment to drug addicts, which are 'in the power of the state'.

In the case of *Iorga and others v. Romania*, there was, inter alia, **the problem of alcohol abstinence syndrome in detention**. I.M. was arrested in order to execute a contraventional sanction of 40 days in prison. Following medical examination conducted after imprisonment, it was noted the presence of old head injury, a manifest condition of confusion and the fact that I.M. was frequently consuming large quantities of alcohol. The Court held that the sudden withdrawal of alcohol use by an addict causes the abstinence syndrome, consisting of a change in the person's behaviour, with physiological and psychological effects that are characterized by several symptoms (agitation, confusion, incoherence, delirium), which manifest most strongly in the second and third day after withdrawal of alcohol use. Sometimes, the abstinence syndrome is accompanied by anxiety attacks, insomnia, depression, panic attacks. To relieve alcohol abstinence seizures, an appropriate medication is necessary, with drugs from the family of benzodiazepines (e.g. diazepam). In particular, I.M. has not received any medical care/treatment in the first 3 days of imprisonment (days in which the manifestations of the abstinence syndrome were at their peak) and, moreover, he was imprisoned in a cell with many violent inmates, arrested for committing serious offences, who responded aggressively to the manifestations of the abstinence syndrome, hitting him repeatedly. Finally, after a delay of more than 3 days, I.M. was prescribed some medication for alcohol abstinence syndrome, but instead of being administered directly to him, it was handed down to some cell mates, with the indication to give it to him so we cannot say that he was administered any medication. The Court noted that, by the way they proceeded, national authorities did not fulfil the obligation of the state to protect a person's life by providing appropriate medical treatment to prevent a fatal outcome.

The principles invoked by the Court in this case ruled against Romania in April 2011, concerning the need for appropriate therapeutic measures for alcoholic abstinence syndrome of a prisoner are also applicable in the case of the drug abstinence syndrome of a person deprived of liberty. With reference to the drug abstinence symptom, the Court had already delivered judgement in 2003 in a case against the United Kingdom.

In the case of *McGlinchey and others v. United Kingdom*, the applicants, children and mother of Judith McGlinchey, complained to the Court about the treatment administered to Judith before her death, saying she had been subjected to inhuman and degrading treatment. The circumstances of the case, as held by the ECHR ruling, show that Judith McGlinchey, addicted to heroin and asthma sufferer, was convicted of theft to the execution of four months in prison, even though judicial authorities had the alternative of probation with medical treatment for her addiction. At the time of imprisonment, on December 7, 1998, Judith McGlinchey weighed 50 kilograms. She brought to the attention of medical staff her health problems. A doctor consulted her the next day, prescribed her medication and recommended that prison staff constantly monitor her health condition. For one week, Judith McGlinchey felt increasingly worse indicating acute abstinence symptoms, some of them visible (frequent vomiting), but she was not transferred to hospital. After a weekend when no doctor had been called and she

was given only an anti-vomiting drug (metoclopramide), on the morning of Monday, December 14, 1998, Judith McGlinchey fainted in her cell and was eventually transported to hospital. Her condition was serious and her health continued to deteriorate until January 3, 1998 when Judith McGlinchey died. She was weighing 41 pounds. In this case, the Court held the violation of Article 3 of the European Convention – the right to be free from torture and inhuman or degrading treatment – because authorities had failed to take appropriate measures to treat the disorders of the detainee, to relieve her suffering and to prevent the deterioration of her health condition.

#### **4.2. A case study: report on the visit to Centre no. 1 for Preventive Detention and Arrest Attached to the Bucharest Municipality General Police Direction**

Two representatives of APADOR-Ch visited on November 3<sup>rd</sup>, 2011, the Facility no. 1 for Preventive Detention and Arrest attached to the Bucharest Municipality General Police Direction (DGPMB). The previous visit had taken place in January 2009.

##### **A matter of principle**

The enforcement of Law no. 275/2006 on the execution of sentences and of measures decided by judiciary bodies during criminal trials remains controversial in preventive detention and arrest facilities. Article 81(4) of Law no. 275/2006 provides that such facilities should be organized “according to regulations approved by a joint order of the Minister of Interior and Minister of Justice. It has been more than 5 years since the law came into effect, but *the joint order has not been issued yet. So far, the regulation enforced in such detention facilities is the one approved by Order no. 988/2005, therefore prior to the new law and never modified. Officials from the General Inspectorate of the Romanian Police claim that only such provisions are enforced that do not contravene to Law no. 275/2006, but are unable to point out exactly which provisions those are.*

The facts demonstrate that in detention facilities regulations are enforced that are against the law. In that respect, the practice of handcuffing detainees when taking them out of the facility is relevant. Law no. 275/2006 provides in Article 37(2), that “... restraining by handcuffs, straight jackets and other means of restraint is permitted *only in exceptional situations*”. Five years after the Law became effective, in all police custody facilities including Facility no. 1 for Preventive Detention and Arrest attached to the Bucharest Municipality General Police Direction, handcuffing detainees who are taken out of the facility *is the rule, not the exception, as provided by the old regulations, still in effect.* Even the officials of the facility pointed out to this problem.

##### **Aspects regarding the organization of preventive detention and arrest facilities subordinated to the DGPMB**

After the reorganization steps taken by the Ministry of Administration and Interior Affairs starting in 2009, organizational changes also took place in detention facilities



subordinated to the DGPMB. The Independent Service for Preventive Detention and Arrest was created and, for a few months, it governed over all 12 police custody facilities in Bucharest. Since July 2010, this Service has been responsible in coordinating/distributing persons detained by DGPMB (including the 107 strong escort) and has been in direct charge of two facilities (no. 1 and no. 12) where minors are held.

The remaining 10 facilities in Bucharest have been under the jurisdiction of police stations where they are situated. During the reorganization period, decisions have been made to manage detainee flows and related human resources more efficiently. As a result, all detainees with health problems, self-declared drug-users and women, including minors, are held at Facility no. 1 (the only one with a medical section) and all male minors are held at Facility no. 12 – so that all vulnerable categories remain under the direct responsibility of the Independent Service for Preventive Detention and Arrest (hereafter SIRAP).

In effect, all persons about to be detained in any of the 12 facilities are seen by a doctor or nurse at the DGPMB medical centre, subordinated to the Ministry of Interior Medical Direction. If detainees claim to be ill, they are seen by a specialist doctor (for drug use, detainees are sent to the Al. Obregia Hospital). Later, they are brought before the officer on duty, who checks the papers and decides to which facility to send each detainee, based on the profile, the vacancies and the proximity of investigators. The body search takes place upon arrival at the facility. The SIRAP chiefs said that procedures for both body searches and searches of detention rooms observe the norms – they are performed by same sex guards, they do not include flexions or cavity controls and room searches are performed in the presence of one of the detainees held in there.

### The type of facility, population, duration of detention

Detention facility no. 1 holds in fact all categories of vulnerable persons (women, sick persons, drug-users), except male minors. It also holds healthy adults.

On the day of the visit, the facility held 142 detainees, of whom:

– 43 women (22 retained or on preventive arrest, 12 convicted and 9 at the disposal of the court). One of the women was a minor at the time of her arrest and was registered as such, but at the time of the visit she had turned 18).

– 99 men (75 retained or on preventive arrest, 14 convicted and 10 held at the disposal of the court); 8 of them had declared they were drug-users.

Persons in charge of Facility no. 1 for Preventive Detention and Arrest attached to the Bucharest Municipality General Police Direction said that detainees remained here for at least 2-3 weeks and were transferred to preventive arrest sections of the penitentiary system when the criminal investigation is finalized. APADOR-CH reminds that persons against whom judges have issued arrest warrants should be immediately transferred to preventive arrest centres in prisons; they should only stay in police custody facilities for **24 hours, as long as they are retained**, and maybe a few more hours more while paperwork for transfer is completed, if an arrest warrant has been issued.

As for the personnel (6-7 persons per shift) those in charge declared that the facility was understaffed.

### Detention space and conditions, discussions with detainees – the serious situation in Room 19

The facility has 31 detention rooms with 171 beds. Compared with the previous visit, there are 24 beds more, although only one other room has been added (for disabled detainees).

Detention rooms are situated on two levels, lower ground floor and ground floor. Rooms on the ground floor host women and disabled persons, while lower ground floor rooms host men (drug users in two of the rooms).

In terms of size, detention rooms are either 12 square meter or 14 sq m large. The smaller ones have 4 beds each (except the room for disabled detainees, where there are 3 beds), while the rest hold 6-8 beds. Moreover, in some of the rooms, there are more detainees than there are beds. For instance, in Room no. 4 on the lower ground floor, of about 14 sq m, there were 8 beds and 6 detainees. That meant less than 3 sq m per person, and less than 2 sq m per person if all beds were occupied. In another 12 sq m room, with four beds to four detainees, one of the inmates said there had been cases when more than four people had to share those beds.

APADOR-CH reminds that, during its 2006 visit to Romania, the European Committee for the Prevention of Torture recommended that detention space should be of *at least 4 sq m per detainee not just in prisons, but also in police custody facilities. This request is not observed in the overcrowded Facility no. 1 for preventive detention and arrest.*

Each room has a lavatory, a 1 sq m cabin with a sink and a shower. Compared to the previous visit, the representatives of the Association noted that the cabins were provided with sinks and shower curtains.

The situation of lighting and airing was unchanged from the previous visit – relatively satisfactory. But the fact that lights remain on during the whole day and night – as the Association has repeatedly complained – may create a state of discomfort. The facility has a visual alarms system and video surveillance on the corridors.

The food for detainees is still brought from the Rahova Penitentiary and is of very poor quality. The detainees met on the day of the visit complained that they can rarely eat the soup and sometimes pick a few potatoes from the stew. Many inmates eat the food they receive from visitors – 10 kilos of shelf-stable food, plus juices and fruit which may be stored in refrigerators.

### Room 19 – one of the rooms for drug users.

In this room, detention conditions are at a level that the European Convention for Human Rights would term as inhuman. In the 12 sq m room, there were 4 beds occupied, at the time of the visit, by 5 detainees (one was out for interrogation, so the representatives of the Association only spoke to 4 of them). There was a fetid stench in the room, coming chiefly from the wall of the lavatory, damp and covered

in mould. The sink was out of order and water only ran at the shower – cold water only. Two of the drug users kept here said that they had been very sick in their first days of detention, when they entered the withdrawal phase. They had been taken to the specialist doctor, but the treatment consisted only of a few sedatives. The Association reminds that an efficient treatment for drug users is a legal imperative and that depriving detainees of adequate medical assistance means violating a fundamental right. Detainees in Room 19 also complained that the five of them had to squeeze in 4 beds, that the food was bad, that they had no TV and no activities in general. It must also be said that one of the detainees, M.F., a heart patient, had no history of drug use and did not understand why he had to be in that company. From explanations, it turned out that M.F. had been sent to Room 19 only because the facility was overcrowded when he had been brought in. But although the place was less crowded now, the detainee had not been moved to a room more appropriate for his heart problems.

### Activities, correspondence, contacts with the outside, other rights

*The four exercise yards* were in the same state as during the previous visit, that is empty closures where detainees could only stand idle or move a few steps. The lower ground floor yards measure about 10 sq m and the ones on the ground floor about 15 sq m. The representatives of APADOR-CH met detainees “walking”. They said they were taken outside for half an hour – one hour per day.

*The club*, on the ground floor, is a room with a ping-pong table. At the time of the visit, there was no one in the club. Some of the detainees didn’t even know that it existed, while others were discouraged by the obligation to make a written request to have access to the room. The Association suggests that access to the club should be based on a daily schedule, just like the exercise time. Of course, both activities should take place daily, without one replacing the other. Maintaining the current system, based on request, might partially destroy the benefits expected from such a welcome initiative.

*The gym*, on the lower ground floor, is filled with modern equipment. Detainees who want to use it need to fill a request, which may be approved after a doctor sees them and gives his consent. Several detainees complained that it takes a long time (almost 3 weeks) until permission is obtained to use the gym.

Most rooms had working TV sets property of the detainees.

Visits by the family, phone calls to the family and the judiciary offices are allowed every week, while phone calls to the legal advisor are allowed at any time, upon request. The mailbox is placed on the corridor and detainees may drop their letters themselves. The phone call room has been recently refurbished.

There has been no change in the activity of the liaison judge at this facility, who still turns up only in special situations (hunger strikes) and detainees have no idea about the attribution of this office. APADOR-CH reiterates its request, that chiefs of custody facilities inform detainees about the existence and attributions of liaison judges in charge with the execution of custodial sentences.

## Medical care

The medical office in charge of Facility no. 1, as well as of all the other preventive detention and arrest facilities in Bucharest and Ilfov County, is subordinated to the Ministry of Interior Medical Direction. At the time of the visit, the medical staff included three doctors and four nurses who worked on shifts to ensure permanent assistance. The three doctors worked in three locations: one inside the facility, for detainees held here; a second next to the entrance, for the medical exam for new arrivals and any health problems of detainees in other custody facilities in the city; and the third exclusively for DGPMB personnel. It is obvious that there is not enough staff, given the rather intense flux of arrestees.

However, both the facility staff and detainees said that, when necessary, any detainee who asks at the morning call to be seen by a doctor is seen by one during the same day.

The doctor on duty complained about the lack of drug supplies and about the poor co-operation with some of the neighbouring hospitals.

Similarly to the situation found at the 2009 visit, the custody facility of the Bucharest Municipality General Police Direction offers **no access to HIV/AIDS prevention services. The chiefs of the facility, as well as the doctor himself, continue to say that in this facility sexual intercourse is impossible.** Also, the situation **regarding the efficient treatment of drug addicts remained the same.** Substitute treatment is not accepted at the level of the General Inspectorate of the Romanian Police, although it is expressly provided by the law: the **Order of the Minister of Justice no. 1216/2006** on the modality to run integrated programs for medical, psychological and social assistance to drug users who are deprived of freedom and the **Joint Order no. 282/2007** issued by the Ministry of Health, Ministry of Interior and Ministry of Labour, Family and Equal Opportunities define the deprivation of freedom as a “special situation” and sets clear responsibilities **in continuing substitution treatment for drug addicts.**

### 4.3. Conclusions and recommendations

- APADOR-CH asks for Room 19 to be immediately closed until it is repaired and hygienized. Detaining persons in room no. 19 is a violation of Article 3 of the European Convention for Human Rights;
- The Association points out to the problem of overcrowding and asks for immediate steps to be taken, like, for instance, the speedy transfer of detainees who have received an arrest warrant to the penitentiary system;
- APADOR-CH considers that medical staff (already insufficient) should tend exclusively to the health of detainees;
- The Association asks those in charge of the General Inspectorate of the Romanian Police to review in-house regulations and procedures (which are not in accordance with the legislation in effect) regarding medical care for drug users in police custody and points out that failing to provide adequate medical care to drug addicted detainees is a flagrant violation of their rights.

Other conclusions and recommendations have been included in the report<sup>1</sup>.

<sup>1</sup> Report available at: <http://www.apador.org/en/index.htm> (accessed: 20.01.2013).

## REFERENCES

Criminal Code

Criminal Procedure Code

New Criminal Code

New Criminal Procedure Code

The European Convention on Human Rights

CASE OF BULFINSKY v. ROMANIA (Application no. 28823/04), Judgement, Strasbourg, 1 June 2010, European Court of Human Rights

Law no. 143 from 26 July 2000 on Prevention and Fighting against Drug Trafficking and Illicit Drug Use

Emergency ordinance no. 121 from 28 December 2006 on the judicial regime of drug precursors

National Report on Drugs Situation, National Anti-drug Agency, 2002-2011

### **Experiences of drug users on pre-trial detention in Romania**

Barber, J.G., Bolitho, F. and Bertrand, L.D. (1999). "Intrapersonal versus Peer Group Predictors of Adolescent Drug Use". In *Children and Youth Services Review*. 21(7), 565-579.

Becker, H.S. (1953) "Becoming a Marihuana User". In *The American Journal of Sociology*. 59(3). 235-242.

EMCDDA (2009). *An overview of the problem drug use (PDU) key indicator*. Lisbon: EMCDDA. Available online at <http://www.emcdda.europa.eu/publications/methods/pdu-overview>

Friedman, A.S. and Glassman, K. (2000). "Family risk factors versus peer risk factors for drug abuse. A longitudinal study of an African American urban community sample". In *Journal of Substance Abuse Treatment*. 18. 267-275.

Lloyd, C. (1998). "Risk factors for problem drug use: Identifying vulnerable groups". In *Drugs: Education, Prevention and Policy*. 5(3). 217-232.

Matza, D. (1969). *Becoming deviant*. 5<sup>th</sup> ed. Prentice-Hall.

Sutherland, E.H. (1947). *Principles of criminology*. 4th ed. Philadelphia: J.B. Lippincott.

Swadi, H. (1999). "Individual risk factors for adolescent substance use". In *Drug and Alcohol Dependence*. 55. 209-224.

UNODC (2010). *World Drug Report 2010*. New York: United Nations.

# ANNEXES

## Annex 1. Project description

### Project goal:

To raise awareness on the benefits of applying measures aimed to reduce the overuse of pre-trial incarceration and overcrowding in police arrest facilities and prisons, focusing on drug users in Romania, in the interest of society.

### Description of activities:

#### RESEARCH

*A1. Documenting the situation with regards to pre-trial detention rules and regulations, focusing on drug users.* RHRN conducted a legal framework analysis in cooperation with APADOR-CH. Data referring to drug users in pre-trial detention (detention conditions, medical care procedures) was collected by field visits, information requests, interviews with resource-persons and desk review (existing reports and statistics). The information gathered was put in the present report, with conclusions and recommendations to be disseminated and communicated to decision makers as measures to be taken into consideration for reducing the overuse of pre-trial detention for drug users.

*A2. Documenting relevant cases and decision in European Court of Human Rights (ECHR) practice with regards to pre-trial detention with special emphasis on drug users*

European Court of Human Rights (ECHR) decisions with special emphasis on drug users were analyzed via internet (<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>) by APADOR-CH. The research focused on the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 article 3 (Prohibition of torture), article 6 (Right to a fair trial), article 8 (Right to respect for private and family life). A synthesis of ECHR jurisprudence on this topic will be produced and results will be communicated to stakeholders.

*A3. Conducting a research aimed to document opinions and testimonies from drug users or their families with regards to pre-trial detention and its consequences in terms of accessing health and social care during incarceration.*

A quality study documented drug users and their relatives perspective on pre-trial detention and its consequences. The study was based on an interview guide to be applied to at least 30 drug users or close relatives on experienced pre-trial detention in 5 Romanian cities.

The research was done by two sociologists and RHRN staff, who participated in the data collection phase.

The research is integrated in the present report.

### ADVOCACY

#### *A4. Meetings with decision makers*

The meetings are aimed to promote research findings and recommendations with regards to pre-trial incarceration procedures and ways to improve the judicial *praxis* and not necessary legal change. Primary targets for the meetings: Superior Council of Magistracy, Ministry of Justice, National Prison Administration, the Prosecutor General (the Prosecutor General can submit to the Superior Council of Magistracy proposals referring to establishing judicial practices in solving particular cases).

Secondary targets: Ministry of Administration and Interior, General Inspectorate of Romanian Police, National Anti-drug Agency.

An international consultant was contracted for providing technical support in implementing project activities.

The meetings concept is based on two distinct phases: 1) presentation of conclusions and recommendations resulted from the research; 2) identifying potential causes/solutions to highlighted problems. The international consultant reviewed the research reports, designed the advocacy strategy and participated in the meetings with decision makers

### COMMUNICATION

#### *A5. Information dissemination*

Advocating for a change means organizing for power, gathering public support for the change you promote. After documenting the situation, the information produced by the research will be disseminated through various communication channels, depending on capacity and opportunities: report copies, Internet, press articles, radio, television). One or two press conferences can be organized in order to increase the visibility of the research and to initiate public discussions on pre-trial detention.

## **Annex 2. Experiences of drug users on pre-trial detention in Romania – Interview guideline**

### **I. Life history**

- I.1. Family (members, relationships, resources)
- I.2. House (neighbourhoods and changes)
- I.3. Peer group/friends
- I.4. Formal education and professional career (school and work trajectories)
- I.5. Habits in managing financial resources (income/expenses balance, personal and in the family)
- I.6. Facts (gender; age, at the moment of interviewing; offence; ...)

### **II. Drug using history**

- II.1. Types (mixtures) of substances
- II.2. Types of using (alone/in group, exceptional/occasional /...)
- II.3. Drug using trajectory (starting point, abstinence periods, relapses)
- II.4. Maximum level of drug use
- II.5. Losses generated by use (material, psychological, social, ...)
- II.6. Specialized care services, in time

### **III. Pre-trial detention experience**

- III.1. Pre-trial period
    - zero moment – the arrest
    - pre-trial detention in Police jails
    - pre-trial detention in prison settings
  - III.2. Detention conditions (space, access to natural light/air, hygiene, food, activities etc)
  - III.3. Level of drug use, immediately before the arrest
  - III.4. Specialized care services, before the arrest and during pre-trial detention
  - III.5. Needs felt during detention (hierarchy), including medical problems due to use and evolution of socio-medical situation
  - III.6. Costs and benefits of the pre-trial detention experience (hierarchy)
  - III.7. Visits, while in pre-trial detention (family, peer-group, ...)
- Closing: future perspectives, after the experience of pre-trial detention



### Annex 3. Properties of medication used to treat withdrawal symptoms

No.	Drug/Substance	Properties
1	Carbamazepine	anticonvulsant and mood-stabilizing drug
2	Diazepam	anxiolytic, anticonvulsant, hypnotic, sedative, skeletal muscle relaxant, and amnestic properties
3	Dormicum/ Midazolam	profoundly potent anxiolytic, amnestic, hypnotic, anticonvulsant, skeletal muscle relaxant, and sedative properties
4	Levomepromazine	strong analgesic and antiemetic properties
5	Phenobarbital	barbiturate with anticonvulsant, sedative and hypnotic properties
6	Piafen/Metamizole	powerful analgesic and antipyretic
7	Tramadol	a centrally acting synthetic analgesic used to treat moderate to moderately-severe pain

Source: Wikipedia. The Free Encyclopedia. <http://en.wikipedia.org>

## Annex 4. Law no. 143 of 26 July 2000, selection of articles

### Law no. 143 of 26 July 2000 on the prevention and control of illicit drug traffic and use

#### CHAPTER II

Sanctioning traffic and other illicit operations with substances placed under national control

#### ARTICLE 2

(1) Growing, production, manufacture, experimentation, extraction, preparation, processing, offering, putting up for sale, sale, distribution, delivery either free of charge or for a consideration, dispatching, transportation, procurement, purchase, holding or other operations related to risk drug circulation, without legal right, shall be punishable by imprisonment from 3 to 15 years and the prohibition of certain rights.

(2) If the actions stipulated under paragraph (1) refer to high-risk drugs, the sentence shall be imprisonment from 10 to 20 years and prohibition of certain rights.

#### ARTICLE 3

(1) Bringing risk drugs into the country or taking them out of the country, as well as their import or export, without legal right, shall be punishable by imprisonment from 10 to 20 years and the prohibition of certain rights.

(2) If the actions stipulated under paragraph (1) refer to high-risk drugs, the sentence shall be imprisonment from 15 to 25 years and the prohibition of certain rights.

#### ARTICLE 4

(1) Illegally growing, producing, manufacturing, experimenting, extracting, preparing, processing, buying or holding risk drugs for one's personal use shall be punishable by prison between 6 months and 2 years, or a fine.

(2) If the actions stipulated under paragraph (1) involve high-risk drugs, the punishment shall be prison between 2 and 5 years.

#### ARTICLE 5

Knowingly making available, either free of charge or for a consideration, a precinct, dwelling or any other arranged place of public access, for illegal drug use, or tolerating illegal drug use in such spaces shall be punishable by imprisonment from 3 to 10 years and the prohibition of certain rights.

#### ARTICLE 6

(1) Intentional prescription of high-risk drugs by a physician, without this being medically necessary, shall be punishable by imprisonment from 1 to 5 years.

(2) The same sentence shall also sanction the intentional release or obtaining of high-risk drugs, based on a medical prescription issued under the terms stipulated under paragraph (1) or on a forged medical prescription.

#### ARTICLE 7

Administering high-risk drugs to a person, outside the terms of the law, shall be punishable by imprisonment from 1 to 5 years.

#### ARTICLE 8

Supplying toxic chemical inhalants to a minor, in view of use, shall be punishable by imprisonment from 6 months to 3 years.

#### ARTICLE 9

Production, manufacture, import, export, offering, sale, transportation, delivery either

free of charge or for a consideration, dispatching, procurement, purchase or holding of precursors, equipment or materials for the purpose of using them in the illicit growing, production or manufacture of high-risk drugs shall be punishable by imprisonment from 3 to 10 years and the prohibition of certain rights.

### ARTICLE 10

Organisation, management or funding of the actions stipulated under Articles 2-9 shall be punishable by the punishments provided by the law for such actions. The maximum limits of such punishments shall be increased by 3 years.

### ARTICLE 11

(1) The urge to illicit use of drugs, by any means, if followed by such action, shall be punishable by imprisonment from 6 months to 5 years.

(2) If the urge to consume drugs is not followed by such action, the punishment shall be imprisonment from 6 months to 2 years or a fine.

### ARTICLE 12

If the actions stipulated under Articles 2, 6-8 and 11 have resulted in the victim's death, the sentence shall be imprisonment from 10 to 20 years and the prohibition of certain rights.

### ARTICLE 13

(1) Attempts to commit the crimes stipulated under Articles 2-7, 9 and 10 shall be punishable.

(2) Production or procurement of the means or instruments, as well as taking steps aimed at committing the crimes stipulated under paragraph (1) shall also be deemed an attempted crime.

### ARTICLE 15

No punishment shall be applied to a person who, before the criminal prosecution starts, denounces to the competent authorities their participation in an association or in an agreement aimed at committing one of the crimes stipulated under Articles 2-10, thus allowing the competent authorities to identify and hold the other participants criminally accountable.

### ARTICLE 16

The person who has committed one of the crimes stipulated under Articles 2-10 and who, during the criminal prosecution, denounces and facilitates the identification and holding criminally accountable of other persons who have committed drug-related crimes shall benefit from a reduction by half of the sentence limits stipulated by the law.

(...)

### ARTICLE 19

If a consumer should be sentenced to prison for perpetrating other crimes than those stipulated under Article 4, the court may order their being included in a therapeutic programme taking place in the penitentiary system.

### ARTICLE 19(1)<sup>1</sup>

(1) If the crimes stipulated under Article 4 should be perpetrated, the public prosecutor shall order, within 24 hours from the beginning of the criminal investigation, an evaluation of the consumer by the centre for drug addiction prevention, evaluation and

---

<sup>1</sup> Article 19(1) of this law shall enter into force on the date when the new Criminal Code enters into force.

counselling, with a view to having them included in the integrated care circuit for drug consumers.

(2) After the evaluation report prepared by the centre for drug addiction prevention, evaluation and counselling is received, and based on the forensic examination performed within 5 days, the public prosecutor shall order, with the consent of the accused or defendant, the latter's inclusion in the integrated care programme for drug consumers.

(3) If the measure of placing the accused or defendant in custody has been taken, such measure may be cancelled or replaced by some other preventive measure.

(4) In all such instances, the criminal investigation shall be pursued under the provisions of the Criminal procedure code.

#### ARTICLE 19(2)<sup>1</sup>

(1) If, by the time a decree is passed, the defendant complies with the protocol of the integrated care programme for drug users, the court may apply no sentence onto them, or may defer sentence implementation.

(2) If sentence implementation should be deferred, the court shall set out, in the decree, the date on which it is to make a decision on the punishment, which time interval may not exceed 2 years, in correlation with the length of the integrated care programme for drug consumers.

(3) The time interval between sentence passing and the date set by the court, under paragraph (2), shall represent a probation period for the defendant.

(4) As regards an accused or a defendant who refuses to be included in an integrated care programme for drug consumers, the provisions of the Penal Code and the Criminal Procedure Code shall apply.

(5) If, during the probation period, the defendant has complied with the integrated care programme for drug consumers, the court may apply no sentence.

(6) If the defendant does not comply with the integrated care programme for drug consumers, the court may defer sentence passing one more time, for the same delay, and have them re-included in the integrated care programme for drug consumers, or may apply the punishment stipulated by the law.

---

<sup>1</sup> Article 19(2) of this law shall enter into force on the date when the new Criminal Code enters into force.



**This report is the result of documentation and analysis of information and opinions available on applying pre-trial detention in the case of drug users. The research was conducted within the project “Drug Users in Pre-trial Detention: A Human Rights Issue”, funded by Open Society Foundations and implemented by the Romanian Harm Reduction Network, together with the Association for the Defence of Human Rights in Romania – Helsinki Committee as main partner, along with the General Inspectorate of Romanian Police and the National Administration of Penitentiaries, as institutional partners.**