

Coercive Measures in Criminal Proceedings

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ABSTRACT

This chapter introduces the basic problems of coercive measures applicable in criminal proceedings. The fundamental rights of the suspect or accused can be restricted in several forms to ensure the effective completion of an investigation and, if necessary, the court procedure. Coercive measures restricting personal liberty are the most serious limitations and should be of interest to international organizations protecting fundamental/human rights and empirical studies. Although we examine the relevant provisions of the national codes of criminal procedures of the Central European countries,¹ we will use this background material to refer to them only as examples. Considering the scope and complexity of the provisions, it would not be possible to outline the main rules concerning coercive measures in different states.

KEYWORDS

coercive measures, criminal procedure, custody, fundamental rights, pre-trial detention

1. Introduction

Rules of modern criminal procedural codes must meet this *double requirement*: to ensure the effectiveness of criminal justice and protect and respect the human rights of participants, among other fundamental rights of the suspect or accused.

This chapter addresses the basic questions of coercive measures in criminal procedure. The measures are appropriate to ensure effective completion of proceedings, though significantly restricting fundamental rights.

At the onset, note that it is impossible to examine all the measures in detail; therefore, we concentrate on the following questions:

- What does a coercive measure mean?
- Which international requirements concern coercive measures?
- What kinds of coercive measures are regulated in codes of criminal procedure?

1 We used only national codes of criminal procedure available in English.

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- What are the common content of national regulations, and which are the most important problems of the application of coercive measures?

Given the aim to provide a picture of different parts of criminal justice regarding legislations of Central European countries, we intended to follow national rules in force as far as possible. As it is well known and very often mentioned by scholars on criminal procedural problems, the rules of criminal procedure are modified frequently.² Thus, we must emphasize that we do not undertake a comparative analysis of coercive measures, as it is beyond the scope of this study. In the absence of reliable, up-to-date information, we cannot introduce the relevant regulation of all Central European countries concerning all sub-topics. We aim to use the regulation of such countries only as examples when analyzing the specific issues of coercive measures.

A common feature of the regulation of criminal procedure is that national rules must meet *international standards*. International standards stem primarily from international treaties, resolutions, and recommendations from framework decisions and directives of the European Parliament, the Council, the case law of the European Court of Human Rights (ECtHR), and the Court of the European Union. As the custody and the pre-trial detention (hereinafter, PTD) are executed in police detention centers and penitentiary institutions, other control bodies may formulate expectations³.

Coercive measures, especially related to law enforcement practice, are frequently and heavily criticized by scholars and civil organizations. In particular, problems of overuse of custody or PTD emerge regularly in empirical and ‘theoretical’ research.⁴

Although we try to discuss common and special problems of all coercive measures, it is obvious that PTD and its alternatives are the focus of the activity of international organizations and academia, while other coercive measures are only mentioned in papers. In some Codes of Criminal Procedure (hereinafter, CCP), even the place of coercive measures affecting property rights is quite different (e.g., they can be found among the rules concerning the collection of evidence and not under the title of coercive measures) (Croatian CCP Chapter VIII Evidence collecting actions).

2 The other problem is that not every Code of Criminal Procedure is available in foreign languages (especially in English), and, if available, there is no guarantee that the English version is an updated one. In some countries, only the basic rules can be found in the Code on Criminal Procedure, while detailed regulations, especially rules concerning their execution, are part of other acts or decrees. In some countries, modification of the Code of Criminal Procedure is in progress or is expected in the near future.

3 E.g., the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

4 See, for example, Open Society Foundation, 2014; Heard and Fair, 2019; A Measure of Last Resort? The practice of PTD decision making in the EU.

This chapter follows this trend and discusses problems of *custody*, *PTD*, and *its alternatives* in detail, paying less attention to other coercive measures.

2. Definition of coercive measures

Coercive measures are among the most problematic tools in criminal procedure. Although they are necessary, and all procedural systems allow their use, if unavoidable, to ensure the successful completion of criminal procedures, they restrict the fundamental rights of the suspect or accused and, frequently, some rights of other persons. Coercive measures interfere with personal liberty, private property, privacy, family life, home, or correspondence. The content of such rights and freedoms are declared by *international conventions* and *constitutions* of states and detailed conditions of their limitations are regulated in national *acts on criminal procedure*.

The first question we must answer is ‘what are coercive measures?’ It is not easy to give a precise definition that is applicable to all kinds of measures. Therefore, instead of a definition containing all elements in one sentence, we aim at collecting specific features of coercive measures used in criminal proceedings.

Generally speaking, coercive measures are used to force people to do something they are unwilling (do not want) to do. In criminal procedure, coercive measures may be ordered by the court or judge, the public prosecutor, and investigating authorities to compel participants of the criminal proceeding to perform their obligations or refrain from doing something. Such measures restrict the fundamental, constitutional rights of the defendant and others. The basic requirement for restricting fundamental rights in a criminal proceeding is the *lawfulness* of the application of such a measure, where lawfulness means the fundamental rights of any participant in the criminal proceeding (not only the fundamental rights of the suspect or accused) may be restricted only in a proceeding under the act on criminal procedure ‘for a reason, in a manner, and to an extent determined in the act, provided that the purpose to be achieved may not be guaranteed by any other procedural act or measure involving any lesser restriction.’⁵

Coercive measures can be divided according to different aspects, two of which are restricted rights and the aim of ordering or using coercive measures. Restricted rights include personal liberty, free movement, freedom to choose residence, right to respect privacy, home, and correspondence, and right to property. Notably, these rights and freedoms are guaranteed by the constitutions (international treaties) at the national (international) level. The most typical classification differentiates coercive measures restricting personal liberty and coercive measures concerning other rights

5 See Hungarian CCP Section 2 (3). Similar rules can be found in CCP of other states (e.g., Czech CCP Section 2 [4]; Slovakian CCP Section 2 [2]).

of the affected person.⁶ Though names of coercive measures may vary by country and the most typical ones include the following:⁷

- Remand/custody/arrest⁸
- PTD/custody⁹
- House arrest
- Precautionary measures
- Prohibition of leaving a temporary residence
- Prohibition of leaving a dwelling
- (Criminal) supervision/judicial control
- prohibition of approaching, meeting, or communicating with a certain person and visiting certain locations
- Restraining order
- Bail/pecuniary guarantee¹⁰
- Preliminary compulsory psychiatric treatment

Other rights are restricted by the following coercive measures:

- Search/house search/search of dwellings, other premises, land, movable property, bank safe¹¹
- Personal search/body search¹²
- Seizure/temporary seizure of objects¹³
- Sequestration
- Rendering electronic data is temporarily inaccessible.

The aim of ordering coercive measures restricting personal liberty may be

- Ensuring the presence of the suspect/accused
- Preventing the obstruction or frustration of the taking of evidence
- Ensuring the efficiency (the timely completion) of the procedure
- Eliminating the possibility of reoffending
- Protecting the public order.

6 The Serbian CCP uses a slightly different solution: we can find a group of measures aims of which must ensure the presence of the defendant and unobstructed conduct of criminal proceedings. This chapter includes not only detention, bail, prohibition of leaving temporary residence and other classical coercive measure restricting right to liberty but also summonses (Serbian CCP Chapter VIII. Measures to secure the presence of the defendant and for unobstructed conduct of criminal proceeding).

7 Other measures are similar to coercive measures and undoubtedly contain coercive elements (e.g., order to bring in to secure the presence of the defendant or other persons).

8 In general, we will use *custody* as name of this coercive measure.

9 The term *pre-trial detention* will be used.

10 The term *bail* will be used.

11 The term *search* will be used.

12 The term *body search* will be used.

13 The term *seizure* will be used.

The aim of ordering coercive measures affecting assets and other rights in criminal proceedings may be

- Finding and securing evidence,
- Ensuring the efficiency of the procedure,
- Securing the subsequent confiscation or forfeiture.

3. International framework

Some international conventions and several *resolutions, recommendations, framework decisions, and directives* were adopted under the auspices of the United Nations, the Council of Europe, and the European Union¹⁴ regarding coercive measures, directly or indirectly. The following documents are only the ‘tip of the iceberg’:

- International Covenant on Civil and Political Rights¹⁵
- European Convention on Human Rights¹⁶ (hereinafter, ECHR)
- Council Framework Decision 2009/829/JHA of October 23, 2009, on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
- Resolution (65) 11 (Adopted by the Ministers’ Deputies on April 9, 1965) on remand in custody
- Recommendation No. R (80) 11 of the Committee of Ministers to member states concerning custody pending trial
- Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place, and the provision of safeguards against abuse¹⁷

A few other documents can be mentioned in connection with coercive measures affecting assets; however, we refer only to two of them here:

- Council Framework Decision 2003/577/JHA of July 22, 2003 on the execution in the European Union of orders freezing property or evidence
- Directive 2014/42/EU of the European Parliament and of the Council of April 3, 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

14 The following part of this chapter will use the generally accepted abbreviations of international organizations: UN (United Nations), CE (Council of Europe), EU (European Union).

15 Adopted on 16 December 1966 by General Assembly resolution 2200A (XXI).

16 Convention for the Protection of Human Rights and Fundamental Freedoms. Adopted in Rome, on 4. XI. 1950

17 This Recommendation replaced the Resolution (65) 11 on remand in custody and Recommendation No. R (80) 11 of the Committee of Ministers to Member States concerning custody pending trial.

The EU directives, adopted as parts of the procedural rights package, contain articles that affect PTD and other coercive measures restricting the right to liberty. Article 2 of the International Covenant on Civil and Political Rights notes that ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...’ The following rights recognized by the Covenant are in connection with coercive measures: right to liberty and security¹⁸; right to liberty of movement and freedom to choose their residence¹⁹; right to respect for individual’s privacy, family, home, or correspondence²⁰.

The examined Central European countries are members of the CE and EU.²¹ Undoubtedly, the legal instruments adopted by these two organizations and the practice of the European Court of Human Rights (hereinafter, ECtHR) and European Court of Justice (hereinafter, ECJ) had the greatest impact on the states’ legislation and jurisprudence regarding coercive measures. Decisions of the ECtHR and the requirement to implement EU directives have influenced domestic laws considerably.

As we will see, a significant proportion of international instruments and decisions of control bodies concern the issue of coercive measures restricting the right to liberty: remand in custody, PTD, and its alternatives. Article 5 of the ECHR is the most important part of the Convention from our point of view. Paragraph 1 of this Article, states that ‘No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.’ The ECHR does not define what the criteria of lawfulness are, as the national law shall lay down the legal basis of arrest and detention. Point c) of Article 5 (1) is of outstanding importance in defining cases when deprivation of liberty in criminal proceedings is acceptable. It concerns

‘The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on 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.’

Paragraph 2 requires, that ‘everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.’ This obligation of the authorities, which is the right of the suspected or accused person is important when we examine the Directive on the right to information in criminal proceedings.²² Article 6 paragraph 2 of the Directive says that ‘Member

18 Article 9 point 1.

19 Article 12 point 1.

20 Article 17 point 1.

21 Serbia is the only exception.

22 Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings.

States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.’ Article 4 paragraph 1 prescribes the obligation that ‘Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights.’ According to paragraph 5, ‘Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand.’²³ Article 5 (3) of the ECHR requires, that

‘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 authorised 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.’

This provision guarantees that the suspect can be kept in custody only for a short period without a judicial decision. As far as the case law of the ECtHR is concerned, Article 5 of the ECHR is one of the articles most frequently alleged to have been violated. For example, the ECtHR found a violation of this article because PTD was not used as a measure of last resort.²⁴ Beyond that, ‘the lengthy periods of remand detention, insufficient and irrelevant reasons given for extending periods of detention, and its use as a disguised form of punishment are the most pressing issues in the practice of PTDs.’²⁵ As a consequence of the Court’s judgments, several Member States ‘have undertaken successful reforms to tackle systemic issues identified by the Court in respect of the detention on remand.’²⁶

The last *Recommendation* of the Committee of Ministers²⁷ adopted in 2006 provides a complex set of requirements in the field of remand in custody. Remand in custody means PTD, which must always be exceptional and justified. The Recommendation

23 In the Annex I of the Directive 2012/13/EU of the European Parliament and the Council of 22 May 2012 on the right to information in criminal proceedings, there is an Indicative model Letter of Rights (in Annex II, an Indicative model Letter of Rights for persons arrested on the basis of a European Arrest Warrant). It must contain information on the right of the arrested or detained person to access essential documents, inform someone about his detention, and be informed about the maximum period of detention and challenging the lawfulness of the arrest. CCP of some states contains detailed regulation on the information provided for the arrested or detained person. The content of such provisions is similar to the model Letter of Rights (e.g., Croatia and Hungary).

24 The requirement that PTD should be used as a last resort is emphasized in the resolution and recommendation of the Committee of Ministers of the Council of Europe.

25 See European Union and Council of Europe, no date, p. 3. This document notes that ‘Disproportional use of detention gives rise to other human rights violations ...’.

26 Council of Europe, Committee of Ministers, 2016.

27 Council of Europe, Committee of Ministers, 2006. As noted, this Recommendation replaced Resolution (65) 11 on remand in custody and Recommendation No. R (80) 11 of the Committee of Ministers to member states concerning custody pending trial. (hereinafter, Recommendation).

intends to set strict limits on the use of remand in custody and encourages the use of alternative measures wherever possible.²⁸

As some alternatives to PTD mean the limitation of the right to liberty of movement and freedom to choose residence, it is important to mention Article 2 of Protocol No. 4 to the ECHR, which guarantees such rights to everyone lawfully within the territory of a State.

Other rights declared in the ECHR that can be restricted by coercive measures are as follows: the right to respect private and family life, home, and correspondence (ECHR Article 8); the right to the peaceful enjoyment of possessions²⁹; and the right to liberty of movement and freedom of choice of residence³⁰.

Regarding the activity of the EU in this field, we must emphasize that the need for EU legislation emerged more than 10 years ago. Certain problems must be solved at the EU level because ‘deficiencies in Member State’s PTD regimes threaten to undermine mutual trust and, thus, the effective functioning of mutual recognition instruments, such as the European arrest warrant.’³¹ The issue is whether the EU has the competence to set common standards for detention. Some authors believe that

‘Legislation on pre-trial detention, to the extent it facilitates mutual recognition, falls within the ambit of Art 82(2) b) TFEU, since it is intimately linked to the rights of individuals in criminal procedures, and could therefore be considered. Setting maximum time-limits could strengthen mutual trust/mutual recognition and reinforce the current framework on fundamental rights’³², increase the effectiveness of mutual recognition instruments and demonstrate commitment to upholding the EU’s fundamental values.³³

However, other scholars are quite skeptical and consider this issue debatable.³⁴ At the EU level, questions related to PTD primarily concern the proper operation of the Framework Decision of European Arrest Warrant (hereinafter, FD EAW)³⁵ and the Framework Decision on European Supervision Order (hereinafter, FD ESO).³⁶

28 Preamble of the Recommendation.

29 Protocol (1st) to the ECHR Article 1.

30 Protocol No. 4 to the ECHR Article 2.

31 Baker et al., 2020, p. 221.

32 Sellier and Weyembergh, 2018, p. 102.

33 Baker et al., 2020, p. 223. Treaty on the Functioning of the European Union (hereinafter, TFEU).

34 See Martufi and Peristeridou, 2020, p. 1478.

35 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, 2002, pp. 1–20.

36 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, 2009, pp. 20–40.

Although many problems of using PTD have an EU dimension, it is not a field where harmonization of legislation of the Member States could easily be reached.³⁷ In 2011, a Green Paper was elaborated by the Commission as part of the procedural rights package. Why was it important? There are several reasons for this in the Green Paper, but we would like to underline only one, which justifies the necessity of formulating common minimum standards:

‘Without mutual confidence in the area of detention, European Union mutual recognition instruments that have a bearing on detention will not work properly, because a Member State might be reluctant to recognise and enforce the decision taken by another Member State’s authorities.’³⁸

The issues that should be regulated in a directive are listed in the study written by Baker et al. Following the authors, we would like to emphasize that ‘the new directive should not be restricted to cross-border cases but should apply to PTD in general.’³⁹ *The Framework Decision on European Supervision Order* is an important tool for reducing the number of PTDs.

‘The measures provided for in this Framework Decision should aim at enhancing the protection of the general public through enabling a person resident in one Member State, but subject to criminal proceedings in a second Member State, to be supervised by the authorities in the State in which he or she is resident whilst awaiting trial.’⁴⁰

Supervision measures are defined in the FD ESO. They are ‘obligations and instructions imposed on a natural person, in accordance with the national law and procedures of the issuing State.’⁴¹ in Article 8 paragraph 1 of the FD ESO lists the supervision measures, which mean obligations for the person concerned. In this list, several measures are regulated in national codes on the criminal procedure as obligations connected to criminal supervision in some countries and separate coercive measures (e.g., house arrest and prohibition of leaving residence) in other countries. The Member States may decide to accept other measures listed in Article 8 paragraph 2 of the FD ESO.

37 ‘Rules governing [PTD] regimes ... touch a very sensitive nerve of Member States sovereignty, as evidenced by the rejection of the establishment of a time-limit system in 2011.’ Sellier and Weyembergh, 2018, p. 102.

38 European Commission, 2011, p. 4.

39 Baker et al., 2020, p. 226.

40 Preamble (3) of the FD ESO.

41 Article 4 (b) of the FD ESO.

4. Basic principles concerning the application of coercive measures

The principle of *necessity* appears in national codes. It means that the rights and liberties of a defendant may be restricted only to the extent necessary for realizing the aim of the proceedings.⁴²

‘When ordering or enforcing a coercive measure, efforts shall be made to ensure that the application of the coercive measure leads to restricting the fundamental rights of the person concerned only to the extent and for the time strictly necessary’.⁴³

The principle of *proportionality* requires, that ‘a more restrictive coercive measure may be ordered if the objective of the coercive measure may not be achieved by applying a less restrictive coercive measure or any other procedural act’.⁴⁴ That is, a more severe measure is not applicable if a less serious measure can achieve the same purpose.⁴⁵ A coercive measure ‘shall also be repealed *ex officio* when the reasons for ordering it cease to exist or be replaced with a more lenient measure when the conditions thereto arise’.⁴⁶

Lawfulness, as noted in subsection 2, means that a fundamental right may be restricted only in a proceeding prescribed by law, for a reason, in a manner, and to an extent determined by law.⁴⁷ This principle has a specific meaning regarding deprivation of liberty: a suspect or accused can only be detained in cases stipulated by law. ‘Nobody may be taken into custody except for reasons set out by law, for the period set out by law, and on the basis of a court decision.’⁴⁸

Examining the lawfulness of deprivation of liberty is extremely important, as it is applied before the final decision of the court and, thus, affects a person protected by the principle of the presumption of innocence.⁴⁹

42 Czech CCP Section 2(4); Serbian CCP Article 10.

43 Hungarian CCP Article 271 (1). Necessity is an important requirement in codes of criminal procedure of other states. See Romanian CCP Article 202(1), (3); Slovakian CCP Section 2(2).

44 Hungarian CCP Article (2). Similar rules apply to ordering of coercive measures restricting right to liberty; for example, in Poland (Polish CCP Article 189 ‘... the authority conducting proceedings shall take care not to apply a harsher measure if the same purpose can be achieved by a more lenient measure.’) and Romania [Romanian CCP Article 202(3)].

45 Croatian CCP Section 95(1).

46 Serbian CCP Section 189; Croatian CCP Section 95(2).

47 See about it Croatian CCP Article 1(2); Section 2(3) of Hungarian CCP; Romanian CCP Article 9(2); CCP of Serbia Article 10; Slovak CCP Section 2(2) regarding custodial or freedom-restrictive measures; etc.

48 Karabec et al., 2017, p. 81.

49 ‘Detention is an institute that is an obvious exception to the principle of the presumption of innocence because in the same way as in the case of an unconditional sentence of imprisonment, detention affects a person who has not yet been finally convicted.’ Pelc, 2020, p. 51.

5. Coercive measures restricting the right to liberty

Before we address certain coercive measures restricting the right to liberty in detail, we must mention a special rule that allows for the application of coercion for anyone beyond the authorities acting in a criminal proceeding. Thus, a special form of *apprehension* may be *applied by anyone*. The personal liberty of a person caught committing a criminal offense (or immediately after) may be restricted by anyone if it is necessary to ascertain the identity of such person, prevent his escape, secure evidence, or prevent further crimes (Reasons for such apprehension may differ per country). However, the person applying apprehension is obliged to immediately hand the apprehended person over to the police authorities, or, if doing so is not possible, to inform the police without undue delay⁵⁰.

5.1. Deprivation of liberty by the police – custody

Custody is the ‘temporary deprivation of a defendant or a person reasonably suspected of having committed a criminal offence of his personal freedom’⁵¹. This is an *exceptional*, but frequently used, measure in all examined countries. It is exceptional because it is usually the only coercive measure restricting the right to liberty that can be ordered and executed without a court or judge’s decision. Police custody may be ordered if the police have sufficient reason to presume that a person has committed a crime (in some countries, a crime punishable by imprisonment or by a certain period of imprisonment) and that there are grounds for ordering other (more serious) coercive measures (e.g., PTD). Custody may be applied when the establishment of the identity of the arrested person is necessary, especially if the defendant is caught in the act. The term ‘temporary’ means that custody shall not exceed a short time limit prescribed by law, usually 24, 48, or 72 hours or the combination of these periods (e.g. the arrested person must be handed over to the court in 48 hours and the court has 24 hours to decide on ordering the PTD).⁵² In *Croatia*,

‘the deprivation of liberty from the moment of the arrest until the bringing before the judge of investigation may not exceed 48 hours or, in the case of criminal offences punishable by imprisonment for a term of up to one year, 36 hours.’⁵³

50 E.g., Croatian CCP Section 106(1); Czech CCP Section 76(2); Hungarian CCP Section 273; Polish CCP Article 243; Slovak CCP Section 85(2).

51 Hungarian CCP Section 274(1).

52 In Czech Republic, an arrested person must be interrogated within 48 hours of their arrest and ‘committed to a court or released. A judge must conduct the hearing of the arrested person within 24 hours of the committal and decide on custody or release.’ Karabec et al., 2017, p. 81.

53 Ivičević Karas, Bonačić and Burić, 2020, p. 29. Regulation of the time limit of custody in Croatian CCP is very complex. The reason of the arrest and the authority who ordered it influence the maximum term.

In Hungary, ‘custody may last until a decision is adopted on a coercive measure affecting personal freedom subject to judicial permission, but shall not exceed seventy-two hours’⁵⁴. According to the *Romanian* CCP, custody (taking in custody) may be ordered for a maximum of 24 hours by the investigation body or prosecutor.⁵⁵

Custody may be ordered by the public prosecutor or the investigating authority (in some states, with the previous consent of the public prosecutor; e.g. in the *Czech Republic*⁵⁶ and *Slovakia*).⁵⁷ In general, custody is ordered in most cases by the police during the investigation. Given that the public prosecutor controls the lawfulness of the investigation or oversees this phase of the criminal proceeding, they must be notified (at least), or their prior consent must be obtained.

The police must bring the arrested person before a court or judge without delay. In the *Czech Republic*, when a suspect is arrested without a judicial warrant,⁵⁸ the police must inform them of the reason for the arrest, interrogate them, and decide on the release or bring the arrested person before court within 48 hours. The judge must decide within 24 hours whether to set the person free or to take them into custody.⁵⁹

In *Poland*, the arrested person shall be released if they are not handed over to the court within 48 hours of their arrest or if a copy of the decision on this provisional detention is not served on them or such decision is not delivered to them at the court session within 24 hours of them being handed over to the court⁶⁰. In *Slovakia*, the court or judge ‘shall have to hear the accused and to decide on his detention within 48 hours and in case of serious crime within 72 hours or to release him’⁶¹. In *Hungary*, the police, the prosecutor or judge may order the arrest of suspects for 72 hours if there is a well-founded suspicion that an offense punishable by imprisonment was committed. A motion by the public prosecutor should be submitted to the court and the court must decide on (pre-trial) detention within 72 hours. ‘An investigatory judge may order pre-trial detention where there is a risk a detainee may flee, commit a

54 Hungarian CCP Section 274(3).

55 Romanian CCP Article 209(1).

56 Such a previous consent of the public prosecutor is not necessary when the person was caught committing a criminal offence or apprehended on the run. [Czech CCP Section 76(1)].

57 A ‘person suspected of committing a criminal offence may, if there is reason for the custody ... be apprehended and detained by a police officer’ with prior authorization of prosecutor, except in urgent cases [Slovak CCP Section 85(1)]. The police officer must notify the public prosecutor to draw up a report and deliver it to the prosecutor, and the detainee must be brought before the court within 48 hours (in criminal offences of terrorism, within 96 hours from his detention or arrest) [Slovak CCP Section 85(3), (4) and 86(1)].

58 ‘Police may make arrests without a warrant when they believe a prosecutable offense has been committed, when they regard arrest as necessary to prevent further offenses or the destruction of evidence, to protect a suspect, or when a person refuses to obey police orders to move.’ Bureau of Democracy, Human Rights and Labor, 2021a.

59 Bureau of Democracy, Human Rights and Labor, 2021a; Karabec et al., 2011. pp. 39–40; Czech CCP Section 76(4) and 77(2).

60 Polish CCP Article 248 paragraph 1, 2.

61 Slovak CCP Section 73(1), (4), (5).

new offense, or hinder an investigation. Cases involving PTD take priority over other expedited hearings.’⁶²

From the examples, the usual time limit of custody is 72 hours (a combination of 48 + 24 hours in some CCPs), within which the court must decide on further limitations of personal liberty. If a person is arrested on a warrant issued by the court, the arrested person must be brought before the court within the period prescribed by the law.

5.2. Pre-trial detention

PTD is ‘a measure of restraint by which a person accused of committing a crime is kept in custody, ordered by a judicial authority at pre-trial or trial stage of proceedings to ensure his/her appearance before a court, prevent his/her further criminal activity, and/or prevent unlawful interference with the investigation of the case.’⁶³

Given that PTD is (or at least should be) a measure of an exceptional nature or last resort,⁶⁴ it can be ordered only under the conditions specified in the act and only if the same purpose cannot be achieved by another measure.⁶⁵ Thus, PTD ‘is to be applied only when all other measures are judged to be insufficient.’⁶⁶

One of the important questions in the interpretation of PTD is *how long* we can talk about ‘pre-trial’ criminal proceedings and where it ends. For example, [PTD] in the context of the Green Paper issued by the European Commission covers the period until the sentence is final.⁶⁷ ‘Likewise in most EU Member States, the notion “pre-trial detention” in the Green Paper is used in a “broad” sense and includes all prisoners who have not been finally judged.’⁶⁸ There is a different interpretation in the case law of the ECtHR:

‘In determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance.’⁶⁹

62 Bureau of Democracy, Human Rights and Labor, 2021b.

63 European Union and Council of Europe, no date.

64 This notion is from a well elaborated research report, which we will use in this chapter. See A Measure of Last Resort? The practice of PTD decision making in the EU.

65 Regarding the character of the accused and ‘the nature and seriousness of the offence, the purpose of custody cannot be reached by other means at the time of making the decision on custody.’ (Czech CCP Section 67) This exceptional character is also emphasized, for example, in the CCP of Croatia Article 95(1), in the Hungarian CCP Section 277(4), and in the Polish CCP Article 257 paragraph 1, in the Serb CCP Article 210.

66 European Commission, 2011, (Hereinafter, Green Paper) p. 9.

67 Green Paper, p. 9.

68 Green Paper, p. 9, footnote 19.

69 European Court of Human Rights, 2022. p. 37.

So, ‘the period to be considered ends when the first instance court issues a decision (of acquittal or conviction). The period of detention following conviction by the trial court – for example during the appeal proceedings – is not taken into account.’⁷⁰ In contrast to the practice of the ECtHR, the examined Central European countries consider this coercive measure to be *pre-trial* detention until the court decision becomes final.

5.3. Proceeding of ordering pre-trial detention

According to international requirements, PTD (and some other coercive measures) can be ordered only by the court. Court means *investigating judge* (e.g. in Croatia and Hungary) or its equivalent (e.g. judge for the preliminary procedure in Slovakia or Judge for Rights and Liberties in Romania) in the investigating stage of the procedure and the *trial court* after the submission of the indictment. Commonly, in pre-trial proceedings, the court or judge and the public prosecutor are authorized to decide on releasing an accused from PTD.⁷¹

The motion for ordering detention is filed to the court by the public prosecutor. ‘The judge is obliged to interview this person and decide within 24 hours of the delivery of the public prosecutor’s petition either to release the detainee or take them into custody.’⁷² In most countries, the presence of the public prosecutor is mandatory at a court session if their motion is aimed at ordering a coercive measure affecting the right to liberty (e.g. PTD, among others) and criminal supervision order⁷³. However, according to the Czech CCP, ‘the participation of the public prosecutor in the [PTD] procedure is not obligatory ...’ although ‘the public prosecutor is the person who proposes the detention of a certain person.’⁷⁴

5.4. Reasons of detention

The basic requirement for the application of any coercive measure concerning the right to personal liberty is the existence of *well-founded* or *reasonable suspicion* that a person has committed an offense. ‘What may be regarded as “reasonable” will however depend upon all the circumstances ...’⁷⁵ The meaning of reasonable suspicion is well elaborated by the case law of the ECtHR: ‘A “reasonable suspicion” that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.’⁷⁶ Although the existence of reasonable suspicion is essential

70 Macovei, 2002, p. 34.

71 Hungarian CCP Section 279(7); Polish CCP Article 253 paragraph 2; Slovak CCP Section 76(2e).

72 Karabec et al., 2017, p. 82; Czech CCP Section 77(2). The procedure of ordering PTD is similar in other countries. See for example Hungarian CCP Section 278 and 463–479, the Polish CCP Article 250, the Slovak CCP Section 72, the Serb CCP Article 212–213.

73 E.g., Hungarian CCP Section 474(1); Romanian CCP Article 225(6).

74 Pelc, 2020, p. 52.

75 Fox, Campbell, and Hartley v. the United Kingdom, 12244/ 86, 12245/86 and 12383/86, 30 August 1990, 32. cited by McBride, 2009, p. 39.

76 European Court of Human Rights, 2022, pp. 21–22.

for ordering and prolonging the PTD, after a certain period, it is no longer sufficient.⁷⁷ Another generally accepted condition is that the criminal offense is *punishable by imprisonment*.

If these general conditions exist, at least one so-called special reason is necessary for ordering PTD.

‘The Convention case-law sets five distinct grounds for pre-trial detention of persons arrested under Article 5 § 1(c) of the Convention, namely, 1) risk of absconding; 2) risk of obstructing the investigation; 3) risk of committing further offence; 4) risk of causing public disturbance if released, and 5) the need to protect the detainee...’⁷⁸

Some of these special reasons are in the CCP of examined countries. PTD of the suspect or accused may be ordered only if specific facts of the case justify that

- a) They will escape or hide to avoid criminal prosecution or punishment, particularly if their identity cannot be immediately determined, if they have no permanent residence, or if they are liable to receive a severe sentence (*risk of absconding*).
- b) They will influence so far unquestioned witnesses or co-defendants, or, otherwise, obstruct the clarification of facts important for prosecution (*risk of collusion*).
- c) They will commit the offense for which they are prosecuted again, complete the attempted offense, or commit an offense they have planned or threatened to commit (*risk of reoffending*).⁷⁹

The above are positive requirements of PTD (custody), but the Czech CCP, for example, contains an exclusionary rule.⁸⁰

77 ‘The persistence of a reasonable suspicion is a condition sine qua non for the validity of the continued detention. [However], when the national judicial authorities first examine, “promptly” after the arrest, whether to place the arrestee in [PTD], that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention.’ European Court of Human Rights, 2022, p. 38.

78 European Union and Council of Europe, no date, p. 34.

79 Karabec et al., 2017, p. 82; Czech CCP Section 67. Similar reasons of ordering PTD can be found in the Hungarian CCP Section 276(2) and 277(4); the Romanian CCP Article 223(1) and the Slovakian CCP Section 71 (1). In some countries, there are additional special reasons of ordering PTD; for example, when long-term imprisonment is prescribed for an offence [Polish CCP Article 258 paragraph 2; Serbian CCP Article 211(4)]. In Croatia, PTD can be ordered during the investigation if the criminal offence punishable by long-term imprisonment and the circumstances of the commission are especially grave and if the duly summoned defendant evades appearance at the trial [CCP of Croatia Article 123(1)]. In Romania the seriousness of the offence may also be a reason for ordering PTD. See the Romanian CCP Article 223(2).

80 With several exceptions in the Czech CCP Section 68(3) and (4).

‘The accused person, who is prosecuted for an intentional criminal offence punishable according to law by incarceration for two years at maximum or for a negligent offence punishable according to law by incarceration for three years at maximum, cannot be taken into custody’⁸¹.

There are examples where ordering a PTD is compulsory, though it is rare. It is debatable whether this obligation of the court meets the requirements of the Council of Europe. For example, in Croatia, the ordering or prolongation of PTD is mandatory when, in its judgment, the court of first instance imposes imprisonment of five years or more.⁸²

For whatever reason the CCP of the given country allows the ordering of PTD, the *reasoning of the decision* must provide a detailed explanation of the circumstances that confirm the reason for detention. This reasoning is very crucial. It must contain concrete justification tailored to the case, special circumstances that confirm the necessity of ordering the detention,⁸³ and that no other measure was appropriate to reach the given procedural aim.⁸⁴

‘The absence or lack of reasoning in detention orders is one of the elements taken into account by the Court when assessing the lawfulness of detention under Article 5 § 1 ... a decision which is extremely laconic and makes no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness.’⁸⁵

5.5. *The length of pre-trial detention*

Usually, the PTD may last as long as necessary, but codes on criminal proceedings define the period after which the court has to *examine ex officio* whether this coercive measure must be extended; that is, *automatic judicial review* at reasonable intervals that takes place without the application of a detained person. The court is obliged to decide regularly whether the suspect or accused should remain in detention or should be released. The period of judicial review differs depending on the rules of the national law and the phase of the proceeding; in some countries, different causes of detention may justify different periods.

In *Hungary*, before filing the indictment ‘The period of [PTD] may be extended repeatedly by the court by up to three months each time for one year after ordering the [PTD], and up to two months each time afterward’.

81 Czech CCP Section 68 paragraph (2).

82 Ivičević Karas, Bonačić and Burić, 2020, p. 31; CCP of Croatia Article 123(2).

83 As the European Court of Human Rights noted in its several decisions ‘*the danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors [that] may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify [PTD].*’ *W. v. Switzerland*, 14379/88, 26 January 1993 point 33. McBride, 2009, p. 63.

84 See, for example, Czech CCP Section 73c.

85 European Court of Human Rights, 2022, p. 14.

In *Slovakia* ‘The basic period of custody in the pre-trial proceedings is seven months,’ which may be extended up to seven months⁸⁶. In *Romania*, the term of PTD may not exceed 30 days, but the extension of this period is allowed by the act and may be ordered several times, though each not exceeding 30 days. ‘The total duration of the defendant’s pre-trial arrest during the criminal investigation cannot exceed a reasonable term and can be no longer than 180 days’⁸⁷.

In the framework of this chapter, it is not possible to examine all provisions concerning the time limits of detention and periods when the necessity should be supervised by the court in all countries of interest. The main rule is (as a guarantee for the defendant) that authorities must keep the duration of detention as short as possible and act expeditiously if the defendant is in detention. Detention shall be revoked as soon as the reasons for which it was ordered cease to exist.

5.6. (Absolute) time limit of detention

The time limit (maximum period) of PTD depends on the seriousness of the offense (length of imprisonment) and may be different in the pre-trial stage of the proceeding (during the investigation) and the court procedure. In the *Czech Republic*

‘The total length of custody during criminal proceedings may not exceed either one, two, three or four years, depending on the nature of the offence. One third of the term of custody is allocated to pre-trial proceedings and two thirds to trial proceedings. Once this period expires, the accused must be released immediately.’⁸⁸

In *Hungary*, PTD may last up to one, two, three, four, or five years per the period of imprisonment by the punishable offense⁸⁹. In the exceptional cases defined by the CCP, the maximum period of PTD is extended by a further year; for instance, where the original maximum period would have been five years, the maximum period of PTD is six years in certain exceptional cases⁹⁰. In *Romania*, there are two maximum periods of PTD: during the investigation (see above) and during the trial in the first instance. In the latter phase of criminal proceedings,

‘The total duration of a defendant’s pre-trial arrest may not exceed a reasonable period of time and cannot exceed half of the special maximum limit

86 Slovak CCP Section 76(2).

87 Romanian CCP Article 226(2) and 236 (2)–(4).

88 Karabec et al., 2017, p. 83. ‘The total time of custody in criminal proceedings cannot exceed a) one year, if the criminal proceedings concern a misdemeanour, b) two years, if the criminal proceedings concern a felony, c) three years, if the criminal proceedings concern an especially serious felony, d) four years, if the criminal proceedings concern an especially serious felony, for which may be imposed an exceptional sentence of imprisonment according to the Criminal Code’ [Czech CCP Section 72a paragraph (1)].

89 Hungarian CCP Section 298(1).

90 Hungarian CCP Section 298(4).

provided by law for the offense with which the court was seized. In all cases, the duration of pre-trial arrest in first instance may not exceed five years⁹¹.

In *Serbia*

‘A defendant may be kept in detention for a maximum of three months from the date of being deprived of liberty. ... A panel of the immediately higher court ... may, acting on a reasoned motion of the public prosecutor, for important reasons extend detention by a maximum of another three months. ... If no indictment is filed by the expiry of the time limits ... the defendant shall be released’⁹².

‘From the filing of the indictment to the court until the commitment of the defendant to serve a custodial criminal sanction, detention may be ordered, extended, or repealed by a ruling of the panel’⁹³. Detention in the court proceeding ‘may last until the commitment of the defendant to serve a custodial criminal sanction, but no longer than the expiry of the duration of the criminal sanction pronounced in the first-instance judgment’.⁹⁴

In *Slovakia*, the maximum ‘overall’ term of PTD differs between 12 months and 60 months depending on the seriousness of the offense⁹⁵. The maximum duration does not always mean the PTD cannot last longer. Exceptions can be allowed by national CCPs.

5.7. Right to compensation

It is important to note that ‘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’⁹⁶. Persons wrongfully or unjustifiably deprived of their liberty or convicted of a criminal offense are also entitled to compensation of damages by the state under national laws. The Croatian CCP emphasizes also the right to full rehabilitation.⁹⁷

Compensation means ‘remedy for disadvantages suffered due to the fact and period of the restriction, or deprivation, of personal freedom’⁹⁸. ‘Compensation might cover loss of income, loss of opportunities, and moral damage.’⁹⁹ States established a compensation system for unjustified detention in national CCPs, but the content

91 Romanian CCP Article 239(1).

92 Serbian CCP Article 215.

93 Serbian CCP Article 216.

94 Serbian CCP Article 216.

95 The regulation is complex. See Slovak CCP Section 76(6), (7) and Section 76a.

96 ECHR Article 5 paragraph 5.

97 Croatian CCP Article 14, Hungarian CCP Section 844; Romanian CCP Article 9(5); Serbian CCP Article 18.

98 Hungarian CCP Section 844.

99 Council of Europe, Committee of Ministers, 2006, point 34.

varies per state. ‘The most striking differences occur in terms of grounds for application, amounts awarded, time-limits for application and eligibility criteria.’¹⁰⁰

However, a person deprived of their liberty is not entitled to compensation even when the conditions specified by law are met and if their behavior was the basis for ordering a coercive measure (e.g., their actions led to the deprivation of their liberties or they hid or escaped).¹⁰¹

5.8. Alternatives to detention

As noted, ordering detention is allowed as a last resort when the purpose of the detention could not be achieved by any other measure. The number of alternatives and their effectiveness influence the application (or overuse) of PTD.

5.8.1. Bail

Bail is *a sum determined by a court*. Usually, it aims to ensure the presence of a defendant at the procedural acts. However, in *Hungary*, for example, bail ensures ‘compliance with the rules of behavior relating to a restraining order or the criminal supervision’¹⁰². ‘The amount of bail may not be lower than five hundred thousand forints’¹⁰³.

In the *Czech Republic*, bail serves as an alternative to detention ‘except in cases of serious crimes or to prevent witness tampering.’¹⁰⁴ The minimum amount of bail (pecuniary guarantee) is 10 000 CZK, and the concrete sum depends on

‘the character and property relations of the accused person or the person depositing the pecuniary guarantee in his stead to the nature and seriousness of the criminal offence for which [...] the accused person [is] prosecuted and [...] seriousness of the reasons for custody’¹⁰⁵.

If the authority accepts the pecuniary guarantee, ‘it may also decide to impose a restriction [comprising the] prohibition of travelling abroad’¹⁰⁶.

In *Poland*, the suspect or accused and other people may deposit *bail* ‘in the form of cash, securities, pledge, or mortgage’¹⁰⁷.

The bail is connected to judicial control in *Romania* and may be ordered not only by the court or judge but also by the prosecutor during the investigation. The minimum value of bail, RON 1000, is also defined by the CCP Article 217(2). In *Serbia*, bail

100 Sellier and Weyembergh, 2018, pp. 123–124.

101 See, for example, Hungarian CCP Section 846(1), Serb CCP Article. 584.

102 Hungarian CCP Section 282.

103 Hungarian CCP Section 286(2).

104 Bureau of Democracy, Human Rights, and Labor, 2021a; See Section 73a paragraph (1) of the Czech CCP.

105 Czech CCP Section 73a paragraph (2).

106 Czech CCP Section 73a (3).

107 Polish CCP Article 266(1).

‘consists of depositing cash money, securities, valuables or other moveable assets of substantial value which are easy to sell and safeguard, or the placement of a mortgage in the amount of the guarantee on immovable assets of the person posting the guarantee, or a personal obligation of one or more persons ...’¹⁰⁸.

The defendant himself can make a promise before the court that he shall not go into hiding or leave his place of residence without the permission of the court¹⁰⁹.

5.8.2. *Judicial control/criminal supervision and other similar measures*

Judicial control (in Romania) or *criminal supervision* (in Hungary) indicate a similar limitation of the right to liberty of movement and freedom to choose a residence. The defendant shall comply with different obligations prescribed by the court or judge or, in the case of judicial control, the prosecutor. The list of *rules of behavior and obligation* is similar to those prescribed in the FD ESO. The scope of obligations connected to judicial control in Romania is wide, while rules of behavior in the Hungarian CCP comprise three items (not to leave a specified area, home, or other premises without permission, not to visit certain public places, and to report to a police organ at specific intervals); however, the list is not exhaustive. ‘The court may also impose additional rules of behaviour to ensure that the goal of the criminal supervision is achieved’¹¹⁰.

Similarly, in the *Czech Republic*, the measure of ‘supervision of the accused [is] by a probation officer instead of placement in custody. It could be combined with [the] obligation to stay at the designated residence or portion thereof over a [period] determined by the court.’¹¹¹

In *Croatia*, *precautionary measures* can be ordered by the court and the State Attorney instead of PTD if the same purpose may be achieved by such measures. Precautionary measures mean similar obligations for the defendant, as were noted regarding judicial control in Romania and criminal supervision in Hungary (e.g. prohibition to leave a residence, prohibition to visit a certain place or territory, and temporary seizure of passport or other documents to cross the state border).¹¹²

In *Poland*, *police supervision* as a precautionary measure means that the ‘person under supervision shall be obliged to comply with the conditions set forth in the decision of the court or public prosecutor’¹¹³. The list of obligations is very similar to those mentioned above.¹¹⁴ *House arrest* is an alternative measure to PTD in *Romania*; in other countries, it usually comprises (criminal) supervision¹¹⁵. In *Serbia*, different

108 Serbian CCP Article 203.

109 Serbian CCP Article 202.

110 Hungarian CCP Section 281(2), (3) and Romanian CCP Article 215(1), (2).

111 Karabec et al., 2017, p. 84.

112 Croatian CCP Article 98(1), (2).

113 Polish CCP Article 275 (2).

114 Polish CCP Article 275 (2).

115 Romanian CCP Article 218 (2).

prohibitions may be ordered (e.g. prohibition of meeting with certain persons, visiting certain places, and leaving dwelling without permission)¹¹⁶.

5.8.3. *Guarantee*

Guarantee is an interesting measure that serves as an alternative to PTD. In the *Czech Republic*, it may be ‘given by a citizens’ interest association or by a trustworthy person concerning the future behaviour of the accused and an assurance that they will not evade prosecution.’¹¹⁷ Guarantee is also an alternative to detention in *Slovakia*, where the association of citizens or a trustworthy person may propose to replace custody of the accused with their guarantee¹¹⁸. In *Poland*, social guarantee

‘may be given by an employer hiring the accused, the principals of the school or university of which the accused is a student, by a collective in which the accused works or studies, or by a community organisation of which they are a member, on the motion of such persons. Such a guaranty shall ensure that the accused would appear whenever summoned and would not obstruct the course of the proceedings’¹¹⁹.

5.8.4. *Pledge or written promise*

Another alternative to PTD in the *Czech Republic* is a ‘written promise by the accused to lead an orderly life, not evade prosecution, meet the obligations and observe the restrictions imposed on them’¹²⁰ In *Poland*, a pledge is a form of bail¹²¹.

5.8.5. *Other rules of measures alternative to pre-trial detention*

If any of the measures restricting personal liberty is ordered, in some countries (e.g. the *Czech Republic*, *Hungary*, and *Serbia*), the authorities may decide to use electronic monitoring to control compliance with the imposed obligations or restrictions.¹²²

A common feature of measures alternative to PTD is that, if required, the authorities may order two or more alternative measures if it seems necessary and more effective and that a harsher measure may be ordered against the defendant if they violate the rules of more lenient measures.

While detention usually has strict time limits, alternative measures may last longer, but the court shall examine regularly (e.g., every three or four months) whether the measure is justified.

116 Serbian CCP Article 197, 199, 202, 208.

117 Karabec et al., 2017, p. 84.

118 Slovak CCP Section 5(2).

119 Polish CCP Article 271(1).

120 Karabec et al., 2017, p. 84.

121 Polish CCP Article 266(1).

122 Karabec et al., 2017, p. 84.

6. Coercive measures restricting other rights

This subsection outlines the main features and basic rules of coercive measures affecting assets. While the catalog of coercive measures restricting the right to liberty is quite similar in almost all Central European countries, such coercive measures regarding other rights show a significant difference. Let's examine some examples of these measures.

Seizure is a frequently applied coercive measure concerning property rights in all examined countries. Usually, it may be ordered by all authorities acting in a criminal proceeding: police, public prosecutor, and court, including the investigating judge or judge who decides on questions prescribed by law before the trial stage. In some countries, the police need the prior approval of the public prosecutor to order this measure (e.g. the Czech Republic); in other countries, it is allowed to decide independently, though with some restrictions (e.g. Hungary).

In cases when the matter cannot be delayed, the seizure might be conducted without the prior consent of the public prosecutor or judge, but it is usually necessary to obtain posterior approval later. Seizure concerns objects that must be seized under the Criminal Code or that may serve as evidence in criminal proceedings to secure their safekeeping (Hungary, Serbia). Special rules concern electronic data that are increasingly used in criminal proceedings.¹²³ *Financial assets* might be the other special object of seizures.¹²⁴

A *search* of a house, a dwelling, other premises, a vehicle, or a person may be performed if it is probable that the search shall result in finding the defendant, traces of the criminal offense, or objects of importance for the proceedings. Given technical developments, special rules concern the search of electronic devices and electronic data search. In some countries, search may be ordered only by the court (with some rare exceptions); in other countries, investigating authorities and public prosecutors decide on it, and the cases when the permission of the court is required are exceptions to the general rules. It is also a common rule that a search should be conducted during the daytime and only exceptionally at night between 22:00 and 06:00 hours.

Stricter rules of search and seizure apply to special premises (e.g., the office of an attorney may have documents that contain facts subject to the obligation of confidentiality) and to undelivered postal consignments (e.g. the Czech Republic and Hungary).

As the *personal search* is a sensitive measure, it shall always be performed by a person of the same sex¹²⁵; however, in some countries, there are exceptions¹²⁶. Voluntarily surrendering the searched item is given priority, and the search as a coercive

123 E.g. Slovak CCP Section 90 Paragraph (1), Hungarian CCP Sections 315–316.

124 Slovak CCP Section 95.

125 Czech CCP Section 83b (3).

126 E.g. situations of extreme urgency in Hungary. Hungarian CCP Section 307(5).

measure may be performed only when the person concerned does not hand over the searched object to the authorities.

7. Legal remedy

A legal remedy must always be provided against decisions on ordering or extending coercive measures to restrict the right to liberty and other fundamental rights. Arbitrary arrest and detention are prohibited by the constitution and the code of criminal procedure. Any person has the right to challenge the lawfulness of their arrest or detention before the court.

A defendant and the defense counsel may appeal against decisions on coercive measures (e.g., pre-trial detention order). In some cases, the person concerned has the right to ask for a remedy if their right was affected by the given measure.

8. Conclusion

We can underline that strict and precise rules that leave no room for misunderstanding and misconception are crucial in the field of coercive measures. We have seen that the provisions of CCPs of Central European countries differ by country, though there are many common features. The amendments in recent years were rendered necessary by the implementation of international standards. Further harmonization is needed in some areas of coercive measures, especially at the EU level, to enhance the mutual trust between the Member States.

Bibliography

- Baker, E., Harkin, T., Mitsilegas, V., Peršak, N. (2020) 'The Need for and Possible Content of EU Pre-trial Detention Rules', *Eurocrim*, 2020/3, pp. 221–230; <https://doi.org/10.30709/eucrim-2020-020>.
- Bureau of Democracy, Human Rights, and Labor (2021a) *2020 Country Report on Human Rights Practices: Czech Republic* [Online]. Available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/czech-republic/> (Accessed: 18 September 2022).
- Bureau of Democracy, Human Rights, and Labor (2021b) *2020 Country Report on Human Rights Practices Hungary* [Online]. Available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/hungary/> (Accessed: 18 September 2022).
- Council of Europe, Committee of Ministers (1965) *Resolution (65) 11 (Adopted by the Ministers' Deputies on 9th April 1965) on remand in custody* [Online]. Available at: <https://rm.coe.int/native/09000016804c2839> (Accessed: 18 September 2022).
- Council of Europe, Committee of Ministers (1983) *Recommendation No. R (80) 11 of the Committee of Ministers to member states concerning custody pending trial* [Online]. Available at: <https://rm.coe.int/090000168050ba00> (Accessed: 18 September 2022).
- Council of Europe, Committee of Ministers (2006) *Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse* [Online]. Available at: <https://pjp-eu.coe.int/documents/41781569/42171329/CMRec+%282006%29+13+on+the+use+of+remand+in+custody%2C+the+conditions+in+which+it+takes+place+and+the+provision+of+safeguard+against+abuse.pdf/ccde55db-7aa4-4e11-90ba-38e4467efd7b> (Accessed: 18 September 2022).
- Council of Europe, Committee of Ministers (2016) *Abuse of pretrial detention in States Parties to the European Convention on Human Rights* [Online]. Available at: <https://pace.coe.int/en/files/22605/html> (Accessed: 18 September 2022).
- European Commission (2011) *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention* [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2011%3A0327%3AFIN> (Accessed: 18 September 2022).
- European Court of Human Rights (2022) *Guide on Article 5 of the European Convention on Human Rights. Prepared by the Registry* [Online]. Available at: https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf (Accessed: 18 September 2022).
- European Union, Council of Europe (no date) *Partnership for Good Governance. Pre-trial detention assessment tool* [Online]. Available at: <https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06> (Accessed: 18 September 2022).
- Heard, C., Fair, H. (2019) *Pre-trial detention and its over-use* [Online]. Available at: https://www.prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf (Accessed: 17 September 2022).

- Ivičević Karas, E., Bonačić, M., Burić, Z. (2020) 'Pre-trial procedure is Croatia' in Johnston, E., Erbaş, R., Jasinski, D. (eds.) *A comparative analysis of pre-trial procedure in Europe: the search for an ideal model*. Istanbul: Istanbul University Press, pp. 19–40.
- Karabec, Z., Vlach, J., Hulmáková, J., Diblíková, S., Zeman, P. (2017) *Criminal Justice System in the Czech Republic*. 3rd edn. Prague: Institute of Criminology and Social Prevention.
- Macovei, M. (2002) *The right to liberty and security of the person* [Online]. Available at: <https://rm.coe.int/168007ff4b> (Accessed: 18 September 2022).
- Martufi, A., Peristeridou, C. (2020) 'Pre-trial Detention and EU Law: Collecting Fragments of Harmonisation Within the Existing Legal Framework', *European Papers*, 5(3), pp. 1477–1492.
- McBride, J. (2009) *Human rights and criminal procedure. The case law of the European Court of Human Rights*. Strasbourg: Council of Europe Publishing.
- Open Society Foundation (2014) *Presumption of Guilt. The Global Overuse of Pretrial Detention* [Online]. Available at: <https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf> (Accessed: 18 September 2022).
- Pelc, V. (2020) 'Adversariality – Reality or Chimera of Czech Criminal Proceedings?' in Jelínek, J., Klíma, K. (eds.) *Protection of Fundamental Rights and Freedoms in Criminal Procedure*. Prague: Leges, pp. 42–53.
- Sellier, E., Weyembergh, A. (2018) *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation* [Online]. Available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU\(2018\)604977_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf) (Accessed: 18 September 2022).
- A Measure of Last Resort? The practice of pre-trial detention decision making in the EU* [Online]. Available at: <https://www.fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf> (Accessed: 18 September 2022).
- Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States* (2002) [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002F0584&from=EN/> (Accessed: 18 September 2022).
- Council Framework Decision. 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention* (2009) [Online]. Available at: https://eur-lex.europa.eu/eli/dec_framw/2009/829/oj (Accessed: 18 September 2022).

National Codes on Criminal Procedure

Croatia: Criminal Procedure Act of 2008 (Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 80/22).

Czech Republic: Act no. 141/1961 Coll. on Criminal Procedure.

Hungary: Act XC of 2017 on the Code of Criminal Procedure.

Poland: Act of 6 June 1997 – Code of Criminal Procedure.

Romania: Law 135 of 1 July 2010 of the Criminal Procedure Code.

Serbia: Criminal Procedure Code ('Official Gazette of RS', No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – Decision of the Constitutional Court and 62/2021 – Decision of the Constitutional Court).

Slovakia: Law No. 301/2005 Coll. Code of Criminal Procedure of the Slovak Republic.

Slovenia: Criminal Procedure Act ("Official Gazette of RS", No. 176/21 and 96/22 – Decision of the Constitutional Court).