

# The price of freedom

**[Back to Criminal Law publications \(/LPD/Criminal\\_Law\\_Section/Criminal\\_Law/Publications.aspx\)](#)**

**[Back to Business Crime publications \(/LPD/Criminal\\_Law\\_Section/Business\\_Crime/Publications.aspx\)](#)**

Lidia González

Pérez-Llorca, Madrid

**[lgonzalezgomez@perezllorca.com](mailto:lgonzalezgomez@perezllorca.com) (mailto:lgonzalezgomez@perezllorca.com)**

Alba Hernández

Pérez-Llorca, Madrid

**[ahernandezw@perezllorca.com](mailto:ahernandezw@perezllorca.com) (mailto:ahernandezw@perezllorca.com)**

## Introduction

Unfair detention can occur for a variety of reasons. For example, it can take place because an error was made in the procedure, but also because a person is acquitted after being held in pre-trial detention. In these cases, despite the fact that there has been no negligent or intentional misconduct in terms of the administration of justice, the state's liability arises from the fact that a person was deprived of a right they should not have been deprived of in the first place. Although no harmonised regulation exists at a European Union level, most Member States have compensation schemes in place for unjustified detention.

In a recent judgment, dated 19 June 2019, the Spanish Constitutional Court amended the wording of article 294 of the Judiciary Act (LOPJ), which establishes the right to compensation in cases of unjustified pre-trial detention, leading to a major change in the grounds for claiming compensation. This judgment presented the opportunity to reflect on compensation schemes in force in other EU Member States, taking into account the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR).

## Compensation for unjustified detention in Spain

In Spain, the state's liability for the functioning of the administration of justice is set out in articles 292 to 297 of the LOPJ. **[1]** Regarding pre-trial detention, article 294(1) of the LOPJ originally only provided for compensation to be awarded in the following scenarios: when a person was acquitted due to the non-existence of the alleged act and when the proceedings were dismissed before trial for the same reason. **[2]** Courts and legal scholars had interpreted this as including situations where the relevant acts had not taken place at all or, if they had, they did not constitute criminal activity. Another such scenario is one in which it was proven that the person was not involved in the alleged criminal activity. Conversely, the defendant was not awarded compensation in cases where acquittal or dismissal before trial took place due to insufficient evidence, either of the commission of the crime or of the person's involvement. **[3]**

Constitutional Court judgment No 85/2019 of 19 June 2019[4] marked a turning point in the state's liability regime regarding pre-trial detention. It declared the wording 'because of the non-existence of the alleged act' and 'for the same reason' of article 294(1) of the LOPJ to be unconstitutional. The Court established that the wording of the LOPJ contravened the interpretation of the ECtHR in relation to the presumption of innocence.

In this regard, while it is true that no article of the ECHR guarantees compensation in cases where detention was lawful but the defendant was acquitted or proceedings were discontinued, the ECtHR has firmly established that once a person has been acquitted, their presumption of innocence may not be undermined, for example, by judicial decisions that reflect the opinion that the person in question is guilty.[5]

In fact, the ECtHR itself had pronounced on the initial wording of the Spanish regulation which is the subject of this article. The ECtHR found that distinguishing between an acquittal based on evidence of non-participation or evidence regarding the lack of criminal conduct and an acquittal based on lack of evidence, constituted a violation of the presumption of innocence as enshrined in article 6 of the ECHR.[6]

Consequently, according to the Spanish Constitutional Court's judgment, except in cases where no loss or damage has been incurred (which is practically impossible to sustain in the case of unjustified imprisonment), in all other cases the time spent in detention must now be compensated.

The Constitutional Court's judgment affects the grounds for claiming compensation, but not the compensation rates, amounts or procedure. According to article 294(2) of the LOPJ, the amount of compensation shall be set in accordance with the length of time of deprivation of liberty and the damages incurred to the person and their family. In this sense, in a recent judgment in October 2019, the Supreme Court set some guidelines for achieving equitable treatment in the compensation of loss and damage, including both moral damage and loss of earnings, as well as an assessment of physical or mental deterioration on account of imprisonment, and taking into account all possible relevant personal circumstances. Moreover, the Supreme Court has stated that compensation must be increased progressively, instead of proportionally or cumulatively, so that the longer the period of deprivation of liberty, the higher the rate of compensation per day or per year. However, no fixed rate is set by the regulation or in case law. In terms of procedure, article 294(3) of the LOPJ also continues to apply and, therefore, the right to claim compensation is time-barred after one year from the day on which it could be exercised.

In light of the Spanish Constitutional Court's judgment and, taking into account the standards set by the ECtHR, it is worth considering some of the compensation schemes for unjustified detention that exist elsewhere in the EU.[7]

## Compensation for unjustified detention in other EU Member States

Member States must at least make it possible to claim compensation in cases where the pre-trial detention contravenes the rights contained in the ECHR – that is, when the detention is wrongful or illegal.[8] But what about cases where the detention itself is legal, but unjustified? In this case, the grounds for awarding compensation are based on the simple fact of having been detained while being innocent, or at least having not been proven guilty. However, different conditions apply in different jurisdictions.

In a similar way to the previous Spanish regulation, the Portuguese Code of Criminal Procedure provides for compensation only in cases where it is established that the defendant was not the perpetrator of the crime or that they acted justifiably.<sup>[9]</sup> In France, requests for compensation for loss and damage are admissible provided that the trial ended in a discharge, a decision of acquittal or the dropping of charges.<sup>[10]</sup> These decisions must be final. Likewise, a final decision on acquittal is needed in Italy to trigger the right to compensation. Nevertheless, this decision must be based on the grounds that the act did not take place or does not constitute a criminal offence.<sup>[11]</sup> Irrevocable decisions that determine that the case is closed or dismissed will also give way to compensation in Italy.<sup>[12]</sup>

There are less strict conditions in Northern European countries, such as Germany, Austria, the Netherlands, Belgium or Sweden. In these countries, compensation can be claimed by anyone who has incurred loss or damage as a result of pre-trial detention and has been acquitted or the proceedings against them have been discontinued,<sup>[13]</sup> without specific reference as to why the person was acquitted or the case dismissed. In Belgium and Germany, this right goes as far back as the 1970s. Notably, in Belgium, any person who has been held in preventive detention for more than eight days is entitled to compensation when exonerated or when the case is dismissed. In Sweden, perhaps the country with the most flexible regulations in this regard, extends the right to compensation even to those who have been detained for 24 hours on suspicion of a criminal offence, when the arrest warrant is subsequently revoked or the preliminary investigation is closed.

Time limits for applying for compensation vary significantly, ranging from a mere three months after the end of the case in the Netherlands;<sup>[14]</sup> to six months after the decision to dismiss the case, discharge or acquit has become final in France;<sup>[15]</sup> six months after the right to compensation has been established in Germany;<sup>[16]</sup> one year in Spain and Portugal;<sup>[17]</sup> or within two years of the day on which the acquittal has become irrevocable, the judgment has become final or the dismissal of the case has been notified to the defendant in Italy.<sup>[18]</sup>

Once the grounds are determined and the claim for compensation has been lodged in the period granted for this purpose, how do EU countries set 'the price of freedom'? Compensation amounts are calculated taking into account a variety of specific circumstances regarding the case and the personal situation of the defendant. As we have stated, in Spain the amount will depend on the time spent in detention and the consequences suffered by the person and their family. Overall, many EU countries have established fixed compensation rates per day. In Germany, in cases of unjustified detention, a rate of €25 per day spent in detention, by way of moral damages, is set.<sup>[19]</sup> In Austria, the fixed compensation rate per day ranges from €20-50, taking into account the specific circumstances of the case.<sup>[20]</sup> In the Netherlands, however, the standard amount of compensation per day ranges from €80-105 depending on whether the person has been detained in a police station, detention facility or prison.<sup>[21]</sup> Finally, in Italy, daily compensation rates are generally set at around €230, and the criminal procedural code expressly states that the amount of the compensation cannot in any case exceed €516,546.90.<sup>[22]</sup>

## Conclusions

As of 2019, the Spanish Constitutional Court recognises the right to be compensated to anyone who has been detained in the course of criminal proceedings that have subsequently been dismissed or ended with an acquittal judgment – that is, regardless of whether their non-involvement was actually proven or if the evidence merely did not suffice. This judgment has shaped the new system of pre-trial compensation and brought the Spanish regulation more in line with that of other EU Member States such as Germany, Austria, Belgium, the Netherlands and Sweden, as well as the standards of the ECtHR concerning the presumption of innocence.

However, the standards set out by the ECtHR do not suffice in terms of establishing a uniform EU perspective on this matter. A person held in pre-trial detention in Sweden, Germany or Belgium will be able to claim compensation on broader grounds and therefore more easily than in France, Italy or Portugal. In the same way, someone unjustly detained in Italy might be awarded a higher compensation than those in the same situation and conditions in Germany or Austria, where daily compensation rates are lower. And of course, in countries where no specific compensation rates are set, the damages awarded will vary depending on the assessment and reasoning on the court.

In this regard, the adoption of a legislative instrument on compensation for unjustified detention at an EU level, whereby minimum standards as to the grounds for compensation, the access to said compensation and the amount of compensation could be set, could be necessary and would be most welcome.

## Notes

[1] *Ley Orgánica no. 6/1985, de 1 de julio, del Poder Judicial* [BOE no. 157, 3 July 1985].

[2] Article 294(1) of the LOPJ: ‘those who, after having been remanded in custody, are acquitted because of the non-existence of the alleged act or for the same reason there has been a dismissal of proceedings, shall be entitled to compensation, provided that damages have been incurred’.

[3] In practice, this meant that compensation was awarded in a very limited number of cases, as it was unusual for the non-existence of the acts or of the involvement in the crime to be proven.

[4] *Sentencia del Tribunal Constitucional (Pleno) no. 85/2019, de 19 de junio* [ECLI:ES:TC:2019:85].

[5] ECtHR *Englert v Germany*, Application No 10282/83, 9 October 1985; and ECtHR *Sekanina v Austria*, Application No 13126/87, 1993.

[6] ECtHR *Puig Panella v Spain*, Application No 1483/02, 25 April 2006; and ECtHR *Tendam v Spain*, Application No 25720/05, 13 July 2007.

[7] The countries considered for this article were Austria, Belgium, France, Germany, Italy, the Netherlands, Portugal, and Sweden.

[8] Article 5(5) of the ECHR.

[9] Article 225(1) of the Portuguese *Código de Processo Penal*.

[10] Article 149 of the French *Code de procédure pénale*.

[11] Article 314(1) of the Italian *Codice di procedura penale*.

[12] Article 314(3) of the Italian *Codice di procedura penale*.

[13] Section 2 of the German *Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen* (StrEG); a article 2 of the Austrian *Strafrechtliches Entschädigungsgesetz*; article 533(1) of the Dutch *Wetboek van Strafvordering*; article 28 of the Belgian *Loi du 13 mars 1973*; and section 2 of the Swedish *Lag (1998:714) om ersättning vid frihetsberövanden och andra tvångsåtgärder*.

[14] Article 533(3) of the Dutch *Wetboek van Strafvordering*.

[15] Article 149-2 of the French *Code de procédure pénale*.

[16] Section 10 of the German StrEG.

[17] Article 226(1) of the Portuguese *Código de Processo Penal*.

[18] Article 315 of the Italian *Codice di procedura penale*.

[19] Section 7 of the German StrEG.

[20] Article 5 of the Austrian *Strafrechtliches Entschädigungsgesetz*.

[21] *Landelijk Overleg Vakinhoud Strafrecht 'LOVS'* arrangements (updated to March 2018), criteria cited in the Application for cassation in the interest of the law, No 18/02673, of 26 June 2018, brought by the Attorney General to the Supreme Court of the Netherlands [ECLI:NL:PHR:2018:671].

[22] Judgment No 24,287, of 14 June 2001, of the *Corte di Cassazione (Sezioni Unite)* has set the formula '€516,456.90/2,186 days = €235.82' as the standard parameter from which the judge may depart, upwards or downwards.

## Similar topics

**[Business Crime \(/Search/Taxonomy.aspx?Taxonomy=Business Crime&TaxonomyUid=ffefd996-326e-4b4c-ab3d-bf922f80567f\)](/Search/Taxonomy.aspx?Taxonomy=Business Crime&TaxonomyUid=ffefd996-326e-4b4c-ab3d-bf922f80567f), [Criminal law \(/Search/Taxonomy.aspx?Taxonomy=Criminal law&TaxonomyUid=0839c13d-31f4-4711-b2b7-79c14272f40f\)](/Search/Taxonomy.aspx?Taxonomy=Criminal law&TaxonomyUid=0839c13d-31f4-4711-b2b7-79c14272f40f)**