PRETRIAD

Alternative pre-trial detention measures

D3.1 Recommendation paper on Pre-Trial Detention national application

PRE-TRIAD Project

Alternative pre-trial detention measures

Version 1.3

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Alternative PRE-TRIAl Detention measures: Judicial awareness and cooperation towards the realisation of common standards

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1. Change Control

1.1. Document Properties

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1.2. Revision History

Version	Date	Comments
1.0	25.01.2022	IRKS produced the first draft and shared it with partners for internal review.
1.1	31.01.2022	BMoJ reviewed the document and added information.
1.2	09.02.2022	IPS reviews and formatted the document.
1.3	11.02.2022	IRKS finalised the document.

2. Contents

3. Acronyms and abbreviations

CJEU – Court of Justice of the European Union

CCP – Code of Criminal Procedure

EAW – European Arrest Warrant

EC – European Commission

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EJN – European Judicial Network

ES – Executing State

ESO – European Supervision Order

EU – European Union

FD – Framework Decision

IS – Issuing State

MS – Member State

MSs – Member States

PTD – Pre-trial detention

4. Executive summary

This report elaborates and presents recommendations aiming at common European standards for the national level pre-trial detention (PTD) practice and at supporting a moderate and cautious PTD practice valuing the *ultima ratio* principle and defendants' rights like the presumption of innocence, the principle of proportionality, the principle of legality, the principle of adequacy and the equality of arms, etc. It builds on insights gained by prior research and initiatives and above all on the empirical work carried out within the PRE-TRIAD project. The work on the topic carried out by the Fundamental Rights Agency, by Fair Trials as well as by the European project DETOUR (Towards Pre-trial Detention as Ultima Ratio) already provided a wealth of insights the PRE-TRIAD project could take advantage of. The empirical work carried out in the run of PRE-TRIAD was then able to deepen prior findings. Focusing also on awareness-raising and on communication with as well as among practitioners, one of the main interests of the PRE-TRIAD consortium are practical aspects of the pre-trial detention practices, including the (non) application of alternative measures. This perspective is central for the work on the subject within PRE-TRIAD.

The wheel does not have to be invented over and over again. Besides new observations of the PRE-TRIAD consortium, many of the central messages and findings of prior work on the topic still remain unquestionably important and therefore became part of the PRE-TRIAD recommendations. They are looked at from different angles and they are partially supplemented, not least considering practical needs of the practitioners involved – judges, prosecutors and defence counsellors. This way, even the well-informed reader will find an interesting and inspiring read in this report, offering a wide collection of recommendations.

For reasons of structure and a good overview, the recommendations are subordinated to the following topics:

- About PTD in general, the fundamental principles and the aim of common standards;
- On the grounds and motives for detention;
- On procedural aspects and on the decisions;
- On the (non) use of alternatives;
- Legal remedies and review hearings;
- On the roles of judges, prosecutors and defence counsellors;
- On foreigners and people living in precarious social conditions.

The central recommendations presented are formulated in a generalised way, not pointing at any particular country. This means that the individual recommendation may more or less fit the situation in the diverse countries. These recommendations will be an integral part of the presentations and the discussions at the workshops and conferences still to be carried out in the framework of the PRE-TRIAD project. Following the general recommendations also national recommendations are presented, elaborated by the project partners for their countries. In the end it is the, intention of all work carried out and of all events organised by the project consortium to stimulate discussions and hopefully steps forward towards common European standards and towards a moderate and cautious pre-trial detention practice in all European Member States (MSs). The research and the experiences gained with the project work make it clear: there is still quite some way to go.

5. Introduction

PTD is the most severe infringement of personal rights of a person suspected of a crime because everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. The right to liberty and the presumption of innocence is enshrined in Art. 5 and Art. 6 (2) of the European Convention on Human Rights (ECHR) and they guarantee that suspicion in itself may not lead to an infringement of rights. On the other hand, the State has the duty to investigate criminal suspicions and to initiate criminal proceedings, which in exceptional cases may include PTD.

This concept of PTD already indicates the potential for problems connected to its application. Besides the presumption of innocence and the right to liberty, the European Union (EU) MSs largely share fundamental principles substantiating the exceptional character of PTD: the principle of legality; the *ultima ratio* principle; the principle of proportionality and the principle of adequacy. This requires a substantiated suspicion and it means that PTD only may be applied on objective, heavy weighing grounds justifying this severe infringement as well as that no other means are available to secure the aims. National laws regulate the detailed criteria and procedures for its use, the requirements with respect to monitoring, review and time periods.

Despite similar regulations in the MSs, PTD practices vary widely and, in many countries, PTD appears to be used extensively, rather indicating a presumption of PTD than a presumption of liberty. Diverse research indicates that the addressed principles are often not adequately put into practice.

PTD means high costs and severe problems on many sides, first of all for the concerned suspects, for families and others dependent on or close to them and the states, which have to carry high direct and indirect costs. Not least, high rates of PTD contribute to prison overcrowding which again impacts negatively on prison conditions. Prison conditions violating Human Rights, as well as doubts about the realisation of fundamental rights and minimum standards affect mutual trust among EU MSs and hinder the implementation of mutual recognition instruments.

For many years, the need to push back the use of PTD and for common standards in the EU in PTD matters has been underlined in diverse research projects by practitioners and experts. Last not least, it can be deducted from programmatic documents like the Green Paper on Detention (European Commission, 2011) or the European Council Conclusions on Alternative Measures to Detention (2019). Still, the progress made is quite humble and the numbers of pre-trial detainees are still very high in many countries.

The PRE-TRIAD project is one more project or initiative engaging in activities and developments towards common (European) standards realising a careful, conscious and sensitive PTD practice. Following the saying "Constant dripping wears the stone", the project consortium is fully convinced about the importance of all work and all events carried out in this respect. Moreover, the research and the experiences collected within the project work make it clear that efforts in this direction have to be continued.

This paper elaborates and presents recommendations aiming at common European standards for the national level PTD practice, largely excluding aspects related to the application of the Council Framework Decision (FD) 2009/829/JHA, which is dealt with in a separate paper (D3.2). It builds on insights gained by prior research and initiatives as well as on the empirical work carried out within the PRE-TRIAD project. Considering the work done before as well as organisations and initiatives having been engaged in the subject matter for many years, several of the recommendations presented here have been heard or read before, at least with regard to their very central messages. This does not make them any less important, on the contrary. The wheel does not have to be invented over and over again. Important insights and messages have to be continued to be disseminated. Still, even the well-informed reader will find here an interesting and inspiring read, offering a wide collection of recommendations looking at the topic from diverse angles. On purpose, the central recommendations presented are formulated in a generalised way, not pointing at particularly one or the other country. Hence, the individual recommendation may more or less fit the situation in the diverse countries. Checking and discussing this will be part of the PRE-TRIAD events to come, but it is

also a recommendation directed at practitioners and experts in all EU MSs. Following, the general recommendations also national recommendations are presented, elaborated by the project partners for their countries. These national recommendations are supposed to provide the reader with some insights into relevant aspects discussed on the respective national level, but of course, they are also thought to inspire discussion on the national level.

6. Main sources for the recommendations

6.1. EU projects and organisations

6.1.1. Fundamental rights agency[1]

The work of the Fundamental rights agency (FRA) has to be stressed repeatedly as tremendously important. In recent years FRA's work on the Criminal detention conditions in the EU did not only provide valuable information[2]. It can be assumed that the collection and spread of this kind of information also has a potential to trigger positive developments (2019a). This work reveals the vicious cycle of extensive detention practice contributing to prison overcrowding and dire prison conditions.

Quite in line with the findings of the PRE-TRIAD project for the participating countries, the project report "Presumption of innocence and related rights – Professional perspectives" states that "the conduct of criminal proceedings appears, on the whole, to be well regulated in national law in the nine Member States studied" (2021, p. 97). Nevertheless, problems are observed with respect to the implementation of safeguards. Earlier FRA has, for instance, already identified shortcomings in practice, how defendants are informed about their rights in criminal proceedings and how access to a lawyer is facilitated (2019b).

FRA has also highlighted problems concerning the application of the presumption of innocence, which is fundamental for fair and unbiased proceedings (2021). They

[1] European Union Agency for Fundamental Rights | Helping to make fundamental rights a reality for everyone in the European Union (europa.eu)
[2] https://fra.europa.eu/en/databases/criminal-detention/criminal-detention/home

pointed at risks that particularly factors like the ethnic background or nationality of defendants, the economic and social background of defendants, their gender, the type of crime committed (2021, pp. 33), may affect the application of the presumption of innocence. Consequently, it was stated that MSs have to assure that the right to be presumed innocent is equally applied, irrespective of personal characteristics or histories.

6.1.2. DETOUR – Towards Pre-Trial Detention as Ultima Ratio[3]

DETOUR aimed at exploring and analysing PTD practices in seven European jurisdictions: Austria, Germany, Romania, Belgium, Lithuania, Ireland and the Netherlands (Hammerschick, et al., 2017). A focus of the project interest was identifying ways and strategies to reduce the application of pre-trial detention. While on the one hand, the Human Rights principles were stressed, on the other hand, the views and needs of the judiciary were addressed. The authors viewed the comparative study on PTD "a further step towards broadening knowledge on Criminal Justice Systems in Europe, to exchanging views and arguments, and to promoting a better understanding of the respective ways of dealing with the issue" (ibid, p. 69) Based on extensive research, a central outcome of the project were general recommendations addressing aspects observed across the countries involved, as well as country specific recommendations.

The outcomes of Detour:

- Concluded that the legal regulations and definitions concerning PTD provide a framework for the practical implementation, to some extent also directing the practice, which, however, appears particularly determined by prevalent legal cultures and wide margins of discretion;
- Therefore, assumed a restricted potential to push back the use of PTD by directives or legal changes;
- Pointed at hidden and extra-legal motives observed in PTD-practice as well as lacks of risk assessments and deficits with respect to the principle of

[3] https://www.irks.at/detour

proportionality and the *ultima ratio* principle. Based on these observations, a need for awareness-raising and (Human) Rights training for prosecutors and judges was recommended;

- Stressed a need for reflections on the roles of judges and prosecutors. In some countries, an observed closeness between judges and prosecutors nourishes doubts about unbiased decisions of the judges and thereby about the full functioning of the system of safeguards;
- Addressed the problems related to PTD practice dominated by preventive grounds;
- Stressed the need for criminal justice systems to counteract biases of PTD being ordered primarily with people living in precarious social condition;
- Pointed at the importance of extensive and good quality information available to the court. This information should include details on the person of the suspect, on his/her social background as well as possibly on available, suitable alternative measures;
- Suggested an order of PTD and denials of alternative measures to be only allowed in cases for which explicit explanations and reasons can be given why alternatives cannot apply;
- Highlighted the importance of an early and active representation by defence counsellors in order to possibly avoid detention and to improve the chances for suitable alternatives to be applied;
- Addressed a need for hearings and reviews to be effectively carried out, seriously assessing all options;
- Recommended evaluations of the legal remedies available on national levels, assessing needs for adaptations;
- Concluded that there is (much) room for improvement with respect to the application of alternatives to PTD qualitatively as well quantitatively;
- Recommended more and better data with respect to PTD practice, the use of alternatives and their effects to be regularly collected.

6.1.3. A measure of Last Resort? The practice of pre-trial detention making in the EU (Fair Trials)[4]

The initiation of this project was triggered by worries about an EU-wide crisis, caused by prison overcrowding threatening to undermine mutual trust. Partly, these worries were based on observations of an excessive use of PTD. Additionally, the promoters identified a "surprising lack of information on the practical operation of procedural rules designed to ensure that detention is only used when strictly legal and necessary" (Fair Trials, 2016, p. 1). The project therefore aimed at empirical information on problems observed with PTD practice to support the informed development of regional and national solutions. The research carried out in ten EU MSs (England and Wales, Greece, Hungary, Italy, Ireland, Lithuania, Netherlands, Poland, Romania and Spain) included legal and statistical analysis, case-file reviews, a survey among defence lawyers, interviews with judges and prosecutors as well as hearing monitoring.

Despite observations that the laws in principle protect the fundamental notions like the *ultima ratio* principle, the presumption of release, equality of arms, the principle of proportionality, access to adequate legal assistance, etc., the report paints a rather drastic picture of systematic failures to meet these standards effectively in practice in the countries included. The research, for instance, observed:

- Poorly reasoned decisions, relying on minimal information and unnecessarily leading to detention. The reasoning was described often to be formulaic and to fail to sufficiently assess the potential of alternative measures to substitute detention;
- A lack of awareness or understanding of the ECHR standards with respect to the application of PTD among judges and prosecutors;
- That access to adequate legal assistance and relevant case materials is not always given and even if it is, often there is not enough time to prepare for the hearings;

[4] https://www.fairtrials.org

- Perceptions that judges credited arguments of the prosecution higher than those of the defence;
- Perceptions of lawyers in some jurisdictions that PTD is used to coerce suspects into confessions, as well as indications of judges to apply PTD also for punitive motives;
- That reviews in practice did not always provide the quality and legal protection one would expect. Decisions to detain are rarely overturned and their quality tends to be below the decisions in the first instance;
- That a reluctant use of alternatives may also be due to a lack of experience in administering them. This has, for instance, been observed with Electronic Monitoring and house arrest.
- Judges and prosecutors lack faith in the efficacy of alternatives, due to a lack of data, no access to bail information services or pre-trial risk assessments.

The authors concluded that the findings "clearly indicate that the need for a better protection of minimum standards of PTD persists with as much urgency as ever." (Fair Trials, 2016, p. 7). In their view, EU legislation is required to enhance the standards of protection of suspects with respect to PTD. They derive this conclusion from the observation that existing soft law on the subject has not yet succeeded to improve the protection of rights to the extent required (ibid, p. 41). They explain that EU Legislation should not just restate ECHR standards but provide detailed guidance to the practitioners.

6.2. The PRE-TRIAD Project

In the framework of the PRE-TRIAD project three deliverables provide insights and information valuable for the deduction of recommendations: D2.1: Literature review - Legislative analysis and PTD impacts (Hammerschick et al., 2021a); D2.2: Pre-trial detention alternatives – Best practice (Hammerschick et al., 2021b); D2.4: Interview report (Hammerschick et al., 2021c). Two additional paths were followed within work package 3 to collect additional information supporting the elaboration of recommendations. On the one hand, an online interview was carried out with a

European Commission (EC) high official and, on the other, an online focus group was organised and carried out with European experts. Both research steps focused especially on transborder cooperation and on the European Supervision Order (ESO), but also aspects concerning PTD national application and practice were addressed.

6.2.1.D2.1: Literature review - Legislative analysis and pre-trial detention impacts

The aim of this first paper (Hammerschick et al., 2021a) elaborated within the project was to sharpen the focus and the angle of vision for the most critical aspects of the upcoming project activities, like the expert interviews, as well as the workshops to follow. Of central interest were the practices with respect to PTD and its alternatives, as well as problematic issues related to their application, alongside their costs and benefits. The basis of the report were national reports of the partners on the national legal bases, available data as well as relevant research and literature.

The report proved that, in principle, all countries involved largely share the same principles with respect to PTD, highlighting its exceptional character. Nevertheless, studies and literature reveal a rather strong practical preference by the authorities in most countries for detention rather than for its alternatives. This scenario calls into question the adherence to the generally acknowledged principles.

The following lines present some further, selected outcomes worth to be mentioned here.

- There is a big potential to save costs and to avoid many problems caused by an extensive use of PTD. Investments in alternatives can easily pay off, especially if they contribute to reducing the overall prison population, particularly to fighting prison overcrowding and thus to improvements of the prison conditions;
- The problem of an extensive use of PTD will not be solved if the high percentage of suspects with foreign nationality placed under PTD is not taken into consideration. Approaches to solving this particular issue will require a

certain level of creativity as well as open-mindedness to new solutions, including access to alternatives;

- A restrictively defined maximum duration of PTD can be viewed as a safeguard against an unreasonably long deprivation of the personal freedom of individuals, while protecting their right to trial within a reasonable time, according to Article 5 of the ECHR;
- There are no signs and indications that a moderate PTD practice endangers societies or the run of criminal procedures;
- There is a need for more information to base the decisions on PTD and alternatives. Reports from different countries also point at the need for improvements with respect to risk assessment;
- If PTD is supposed to be the *ultima ratio*, it is logical and recommendable to rather focus the substantiation of PTD decisions on why alternatives may not apply, instead of the other way around;
- The power of the public prosecution often appears underestimated;
- For most countries, a relatively wide margin of discretion of the decision-makers is observed;
- Legal representation is central to avoid a frequent application of PTD and to promote the application of suitable alternatives;
- An aspect observed to be highly relevant for guaranteeing the quality of legal representation is linked to the way legal support and legal aid are organised;
- The equality of arms between the defence and the prosecution often appears not sufficiently safeguarded;
- The legal safeguards appear to be well designed in most countries. In practice, their protective effects are, however, often questioned. Safeguards have to be put in practice and activated adequately;
- The quality of hearings has to be assured meaning a thorough review of all conditions to be fulfilled if PTD is considered to be continued;

- Alternatives are rather seldom applied. Low use of alternatives is not necessarily due to a lack of options, but rather to a lack of trust in the alternatives, alongside insufficient available information for the selection of suitable measures, too little time to finalise the decision, as well as to organisational hassles and difficulties;
- Investments in the collection of information and in qualitative as well as in organisational improvements concerning alternatives should be able to strengthen alternatives and to foster their application;
- Although it is not only their responsibility, practically it is of utmost importance for the protection of the suspect's rights that legal representatives actively search for the organisation and application of alternatives;
- EM is an alternative gaining increasing attention and interest. It carries advantages for suspects as well as for the prison system. It is, however, a rather intrusive measure also carrying a high risk of net widening;
- There are indications that specialised, possibly centralised institutions supporting trans-border matters and cases in the MS would support the application of measures like the ESO and trans-border cooperation in general.

6.2.2. D 2.2: Pre-trial detention alternatives – Best practice

This report (Hammerschick et al., 2021b) presents a collection of promising alternatives to PTD. Based on literature research as well as on reports provided by the project partners it goes beyond mere descriptions. It defines groups of approaches sharing certain characteristics, which are deemed valuable for explorations and discussions, and it discusses the presented measures, their qualities, shortcomings, possible problems and legal cultural aspects. The report shows that there are many valuable models which may usefully be applied in other jurisdictions or which may trigger new ideas or adaptations to be realised somewhere else.

The measures presented show that there is potential to avoid PTD more often in all these stages and approaches. Solutions to an overuse of PTD may not only be sought in approaches promoting alternatives to PTD. In fact, other steps should be considered even ahead of alternatives, especially measures supporting the decision-making process. The report stresses that alternatives may only be called, so if without them PTD would have been ordered. Otherwise, it is a widening of the nets of control and an unnecessary infringement of personal rights.

The report identifies five approaches to push back the use of PTD:

1. Legal procedural models and aspects are apt to avoid PTD. Examples in this respect are the Irish presumption of bail, but also narrowly defined time limits for PTD. Other examples are restorative justice models or the Italian early suspension of the trial for a 'testing' phase;

2. Considering the fact that PTD decisions are most often based on rather scarce information, particularly on the suspect, measures providing information and hereby supporting the decision-making process appear very valuable. Increasingly used and asked for are pre-trial assessment tools;

3. Apart from the offence, grounds for detention are regularly based on some kind of deficits on the side of the suspect. The aim to possibly avoid PTD therefore often asks for a support of the suspects which contributes to largely neutralise the assumed grounds for detention. Measures directed at organising alternatives and at redirecting offenders from the criminal justice system offer such broad services. These models build on broad and diverse support regularly involving several actors or institutions.;

4. While broad options of support and networks to cooperate with, definitely have advantages, individually focused and tailored measures in the hand of one institution also often cover the needs. Either they are specialised in one or the other problem, or they offer broad support themselves;

5. Electronic monitoring is a measure increasingly asked for in many countries with some potential to substitute PTD. Apart from reduced costs, part of the appeal

of EM to judges and prosecutors is the high level of control which, on the other hand, means rather heavy restrictions to the liberty of the suspects, who however can remain in their social surroundings. Apart from the low costs, this may be the specific appeal to practitioners. GPS-monitoring, in fact, also allows for less intrusive models, for instance only controlling the compliance with territorial restrictions like bans to enter or to leave certain areas.

6.2.3. D2.4: Interview report

Presented are the outcomes of 49 interviews carried out with judges, prosecutors, defence counsellors and other experts in the field of PTD in fourteen EU Mss (Hammerschick et al., 2021c). The central aim of this research and of the broad base of information stemming from several countries, from different legal cultures and diverse professional perspectives was not to put forward comparisons but to gain in-depth insights into the dynamics and motives that guide PTD practices, including the (non) application of alternatives.

While defence counsellors and others point at a room to avoid PTD more often, most judges and prosecutors, generally, do not see an overuse of the measure. They often refer to a practice guided by necessity. The report's conclusions assume a rather narrow perspective taken over by many judges and prosecutors, coined by an assessment of a necessity of PTD influenced by the predominant legal culture, individual views and possibly media or political pressure demanding tough approaches. Judges and prosecutors presented themselves largely content with the way and the (mostly little) use of alternatives in their countries. Repeatedly, they expressed doubts about their efficiency and this way little need for change was expressed. Often, they referred to PTD being the "safe way", indicating that the central focus of their attention is on assumed risks and less on the suspects' rights.

The results reveal much need for development, which is not easily stimulated considering these observations. According to the report, there is nevertheless a promising basis to build on: almost all experts agreed that there is room for more and better use of alternatives. A central observation of the report points to a need to strengthen the trust in suitable alternatives to PTD. Alternatives have to meet the

requirements effectively, and their efficiency must be ensured by empirical information. The need for empirical information on alternatives, their qualities, limits and needs for improvement are also explained with a need to establish an informed practice, which may have the potential to trigger a more frequent application. Like observed before, also these interviews presented EM (mostly connected to pre-trial house arrest) as an alternative much appreciated by many judges and prosecutors in many countries, who do not seem much worried about the risk of a net-widening.

Once again, it becomes apparent that foreigners are treated differently to nationals with respect to PTD, an aspect aggravated by the fact that often they are treated like a homogenous group, which they are not. The report concludes, in this respect, that more efforts are required to identify and promote alternatives that can be suitably applied with different groups of foreigners.

Other aspects identified here to be important for promoting the *ultima ratio* principle are in line with insights gained by prior research as well: strict time limits, adequate and active counselling, extending the basis for the decisions, strengthening and improving hearings and clear directions provided by the higher national as well as the European courts.

All recommendations formulated on the bases of the outcomes of the interviews are explained to have a common aim: "A legal culture, stressing the *ultima ratio* principle, the presumption of innocence, a presumption of freedom and Human Rights, without ignoring the fact that, in certain, narrowly defined cases, measures are necessary to secure proceedings or to protect people, with PTD being the measure of last resort." (Hammerschick et al., 2021, p. 78).

Besides recommendations already mentioned in this subchapter, the following are further samples appearing most relevant:

- Making sure the legal safeguards are not just an option but means to secure a detention practice in line with the *ultima rat*io principle, valuing Human Rights principles;

- Valuing the important and influential roles of prosecutors and defence counsellors;
- Promoting a legal culture valuing the *ultima ratio* principle, as well as the qualities of a sensible use of suitable alternatives;
- Extending the bases for PTD decisions - installing or taking advantage of existing institutions, which can provide these kinds of services;
- Installing social services and support for suspects threatened by PTD;
- Considering bail more often;
- Taking advantage of EM with care. Especially EM applied not to control the whole life of suspects, but only to control territorial bans and orders with GPS might be a promising model in suitable cases;
- Evaluating and improving the organisational structures for transborder cases and cooperation like for the application of the ESO;
- Continuing and increasing the efforts to promote judicial cooperation and communication between the MSs;
- Supporting measures to increase the knowledge about other MS. Insights and transparency strengthen mutual trust, therefore the collection and regular publication of relevant data of the MS would be very helpful.

6.2.4. Interview with an EC high official

The interview with the high official of the criminal justice branch was carried out by Ioan Durnescu and Walter Hammerschick and lasted about an hour. It primarily focused on the practice with respect to the ESO and transborder cooperation. Some aspects and responses are, however, also important and valuable for reflections on national PTD practice and the aim of heading towards common European standards.

Confirmed by the interview was an observation addressed quite often before: procedural economics are a most influential factor coining PTD-practices. This becomes particularly visible with respect to foreign suspects and means above all that the authorities want to have them on their territory. They are afraid that

suspects might not return to trial and there is also a lack of trust in other MS that procedures to get a hold of a suspect and to return him/her to the investigating state would work out well and fast. This tendency detected on the side of many authorities is aggravated by the observation that defence counsellors often lack activity and creativity to push for such possibilities in this respect.

Once more, the interview suggested that central organisational structures in the MSs could support improvements regarding cross-national cooperation and the application of European tools like the ESO. Although cross border-cases are almost daily business in criminal matters, cross-border cooperation does not really reflect this and it appears obvious that there is a high demand for improvement in this respect. Whatever can add to European standards is needed. The interviewee pointed at a need for data from the MSs about the application of the ESO. This can be generalised: The aim of common European standards also asks for more transparency with respect to the use of PTD and of alternatives in the MSs, respectively.

6.2.5. Focus Group with European Experts

For a review and in-depth discussion of the outcomes of the research carried out in the PRE-TRIAD project an online focus group was organised with high level European experts. The group involved the following experts:

Christine Morgenstern – University of Berlin

Ilze Tralmaka – Fair Trials International

Matylda Pogorzelska – Fundamental Rights Academy

Adriano Martufi – University of Leiden

Stefano Montaldo – University of Torino

Ioan Durnescu and Walter Hammerschick were the moderators of this focus group. Prior to the interview, all participants received a preliminary version of D3.2, the Recommendation Paper on the Application of the Council Framework Decision 2009/829/JHA at EU-level, as well as a list of topics to be discussed. All participants

agreed for their names to be mentioned in this report. Here is a summary of the most important outcomes of the focus group, apart from the ones exclusively concerning the ESO, which are dealt with in D 3.2:

- All experts agree on the need for common minimum standards. How to achieve them, however, is one of the big questions in criminal justice matters to be solved. Up to now, there are no standards on fundamental questions like the assessment of proportionality or with respect to the reviews of continued detention. Some existing standards, on the other hand, are not yet implemented properly, like the fast access to a lawyer or the timely access to case files. Access too short does not allow for sufficient preparation;
- There is no straight answer of whether to better realise common European Standards via European legislation or European soft law tools like Green Papers, recommendations or guidelines. Some basic guidelines in the shape of European Legislation could be helpful. Practically, it however seems that chances are slim in this respect, because it can be assumed that MSs will not agree and that a political will to do so will not be achieved;
- There should be regular monitoring on how Directives and other EU tools are put into practice in the MSs;
- Strict and rather short time limits have proven effective to avoid or to shorten PTD respectively;
- Preventive grounds or grounds for detention focusing on social order apparently tend to extend PTD practices. While of course such grounds have to be taken seriously, introducing additional thresholds, for instance, related to the proportionality and the time detained should be considered;
- According to Fair Trials research referred to during the focus group PTD hearings observed in many countries lasted 4 to 7 minutes on average. This fact by itself indicates that hearings often do not sufficiently control and assess whether the continuation of PTD is justified;
- A problem with alternatives to PTD is a perception in the public opinion that with custodial and prison measures justice is done, while non-custodial

measures give a sense that suspects get away: Politicians should fight this view, but politicians aim for votes, which you hardly get with such topics;

- With all alternatives, the practical needs of the authorities and of the law enforcement agencies have to be considered as much as possible, because, if e.g., a suspect goes into hiding this makes their job much more complicated. Against this background Human Rights as well as the principle, that liberty has to be the rule and detention the exception, are easily threatened. This means that, for alternative measures to be promoted, sound information is needed about their potential to succeed, about administrative requirements, costs and time requirements;
- There is a need to change the reasoning about PTD. A long-term strategy to push back the use of PTD should aim at changes with respect to prevalent legal cultures, e.g., with awareness-raising and training. Bail being the default option, like in Ireland or the UK, is obviously connected to a rather little use of PTD;
- The aim to change legal cultures is supported by information and transparency. Meaningful national data about the application of PTD and alternatives regularly collected and published would serve this aim;
- A transnational context may ask for different safeguards than a purely domestic context. The principle of proportionality nevertheless has to apply to foreigners or homeless no less than to nationals. This however is not the general practice. There is a need for guidelines in this respect;
- The EU and national courts should bring cases to the European Court of Justice, so that more guidelines will be provided this way in the future;
- If the judiciary is reluctant to apply alternatives with nationals it is not much of a surprise they are even more so with foreigners. This means that the demand for sound information about alternatives, their potential to succeed, about administrative requirements, about costs and time requirements particularly applies to alternatives possibly employed with foreigners.

7. Recommendations for European Member States with respect to the national application of pre-trial detention

This final and central chapter of the report is elaborated on the basis of the material described above. There are demands shared by experts and acknowledged by the vast majority of all professionals working in the field of PTD. This is particularly true for the need for common standards within the EU. On the one hand, common standards are needed because of the many trans-border cases dealt with by authorities of the MSs every day. On the other hand, common standards should be a matter of course in a community of States based on common values. The Treaty of Lisbon (European Union, 2007) holds that

> "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail*" (Article 1a)

Practice shows that transborder cases and cooperation may become difficult if there are doubts about common minimum standards. This was for instance proven by the cases Aranyosi and Căldăraru[5], with the Court of Justice of the European Union (CJEU) stating that courts asked by other MSs' authorities to execute a European Arrest Warrant (EAW) may deny this request if minimum standards of prison conditions are not met. This ruling indeed has quite far-reaching implications for the EAW. Doubts in minimum standards in general bear a risk to affect mutual trust among the authorities of MS.

The following deliberations and recommendations are formulated in an abstract way, not directed at any specific country. In fact, there are recommendations included which are or which may be already realised by one or the other country, however not by others. The deliberations and recommendations aim at common

[5] C-404/15 und C-659/15 April 2016 Court of Justice of the European Union

standards and are intended as another step towards their realisation in all of the EU MSs, who should share

> "*A legal culture, highlighting the ultima ratio principle, the presumption of innocence, a presumption of freedom and Human Rights, without ignoring the fact that, in certain, narrowly defined cases, measures are necessary to secure proceedings or to protect people, with PTD being the measure of last resort*" (Hammerschick et al., 2021 c)

7.1. About pre-trial detention in general, the fundamental principles and the aim of common standards

In most countries, a potential is seen to avoid PTD more often. Apart from avoiding a lot of pain and problems on the side of suspects and their close ones, a more restrictive use of PTD would also mean a big potential to save huge costs and to improve prison conditions in many places. It is important to note that there are no signs and indications that a moderate PTD practice unseemly endangers societies or the run of criminal procedures.

Before entering the discussions on PTD practice in detail, it has to be highlighted that PTD also has to be viewed in the context of broader criminal policies**. If the *ultima ratio* principle is also taken seriously with prison sentences and if diversionary measures, including restorative justice, are options to react on not just minor offences, this can also have an impact on PTD practice and may allow to avoid PTD more often.**

Valuing the principle of proportionality, **minor offences should be excluded** from the possibility of PTD in principle. Italy, for instance, introduced a statutory minimum sentence to be expected before PTD can be ordered in recent years. Furthermore, Italian judges also **may not order PTD in case of a conviction, if they expect the sentence to be suspended**.

Research indicates that the **national laws in principle protect fundamental notions like the *ultima ratio* principle**, the presumption of innocence, the equality

of arms, the principle of proportionality and access to time as well as adequate legal assistance, etc. **The practice, however, often fails to meet these standards.** Empirical information reveals a rather strong practical preference by the authorities in most countries for detention rather than for its alternatives. Judges and prosecutors refer to PTD being the "safe way", not least because of their doubts about the efficiency of alternatives to detention.

Such a scenario calls into question the adherence to the generally acknowledged principles. It seems the central focus of their attention is on assumed risks and less on the suspects' rights. This, on the one hand, points to a lack of awareness and understanding of the fundamental principles and standards with respect to the application of PTD. On the other hand, this, however, also shows that **the aim to push back detention also requires to take their doubts and practical problems seriously**.

There are indications that judges and prosecutors performing rigorously in PTD matters also react to pressure from the public or from politics, who often seem to wrongly view PTD as part of the punishment rituals, being unaware of or not understanding the fundamental principles supposed to protect suspects.

There is widespread agreement on the need for common standards on aspects like risk assessments concerning the grounds for detention, the assessment of proportionality, or with respect to the reviews of continued detention, etc. The question of how to reach such standards in line with the fundamental principles however remains very difficult to answer. **Should we aim for European legislation or rather for European soft law tools like Green Papers, recommendations or guidelines, or are there other strategies that should be employed?**

It was argued that the existing soft law measures did not yet sufficiently succeed in improving the level of protection of suspects. European legislation on the topic would be a stronger tool, coherently restating relevant standards, not least those defined by the European Court of Human Rights (ECtHR), easily applied by the legal professions and easily understood by the defendants. The greater clarity provided this way could positively influence the practice of judges and the enforcement

mechanisms via the EC as well as the interpretative power of the CJEU (Fair Trials, 2017, p. 41).

There is no doubt about the strength of legislation compared to soft law tools. However, also standards laid down in EU Directives, like the timely access to a lawyer,[6] do not always work out the way intended. The biggest hurdle though can be assumed to be the political will needed to reach EU-legislation in the field of PTD. As is well known, many MSs are not too fond of European legislation determining national criminal law. International and European soft law on the other hand may not be as strong, it however also provides important guidelines and contributes to the shaping of awareness.

While not denying the importance and the potential of good legislation, it has to be acknowledged that codifications alone will not sufficiently change PTD practices. Research shows that legal regulations and definitions concerning PTD provide a framework for the practical implementation and of course give relevant directions. In detail, however, practice is also very much coined by prevalent legal cultures and wide margins of discretion (e.g., Hammerschick et al., 2017). Hence, a cautious and restraining PTD practice is also about prevalent and shared mindsets with a deep understanding of the fundamental principles that are supposed to guide the practice, above all the realisation of the *ultima ratio* principle. **A long-term strategy to push back the use of PTD, therefore, has to aim at changes with respect to prevalent legal cultures.**

In the run of the PRE-TRIAD project, the Irish example of a different approach to PTD repeatedly appeared very appealing. Like in the UK, in Ireland bail is the default option. Besides the fact that Ireland has a rather low PTD-rate, the Irish judges, prosecutors and legal counsellors we talked to, very convincingly represented a mindset and a legal culture described above, explaining a reasoning in PTD matters, which describes PTD as the exemption only to be applied, if there is a well-substantiated need for as well as a well-substantiated denial of bail. **All in all, the aim of common standards and jurisdictions actively valuing the *ultima ratio***

[6] Directive 2013/48/**EU**

principle, as well as the qualities of a sensible use of suitable alternatives ideally build on all options available: national and possibly EU legislation, International and European soft law as well as other activities, which may support these aims, like trainings and other ways of awareness-raising.

If a need for awareness-raising is addressed in the context of PTD, most times this refers to judges and prosecutors. Some research however describes defence counsellors as often remaining rather passive in detention cases (e.g., Hammerschick et al., 2017, p. 29). While this may partially be explained with strategic reasons, it nevertheless indicates that **defence counsellors as well sometimes do not sufficiently consider the pain and problems PTD regularly means for the ones affected**. It is not a coincidence that suicide rates are reported to be much higher among pre-trial detainees than among other groups (Hammerschick et al., 2021a, p. 22). The fact that the time in PTD is deducted from an expected prison sentence is no sufficient reason to easily accept PTD.

Reservations are often promoted by a lack of knowledge and a lack of information. Common EU standards with respect to PTD, therefore, call for information and transparency about the practices in the MS. **Meaningful national data about the application of PTD, about the duration of the detention, about the application of alternatives and of rates of defendants (not) complying, etc. regularly collected and published would serve this aim**.

Of utmost importance for the aim of common standards are clear directions provided by the national high courts and particularly the European Courts - the ECtHR and the European Court of Justice. The national high courts are supposed to assure common standards on the national level and that the subordinated courts adhere to the fundamental PTD principles. The European courts do so on the European level. However, the courts on both sides are dependent on the motions and appeals brought forward.

7.1.1. Recommendations with respect to fundamental principles and the aim of common standards

- Evaluate the realisation of the *ultima ratio* principle also with prison sentences and take measures to strengthen it;
- Evaluate the tools available for diversionary measures (including restorative justice approaches) and measures to conditionally settle criminal proceedings and/or assess the options to introduce such new measures as well as their possible qualities;
- Introduce a threshold of possible punishment to avoid PTD with minor offences on principle;
- Judges should not be allowed to order PTD if - in case of a conviction - it can be expected already early in the proceedings that the sentence will be suspended;
- Support common European standards and strengthen the fundamental principles which aim at a moderate and cautious PTD practice valuing the *ultima ratio* principle and defendants' rights in any way possible - the presumption of innocence, the principle of proportionality, the principle of legality, the principle of adequacy, the equality of arms, etc:
  - Appraise the options of possible EU legislation on PTD and alternatives, highlighting the principles and providing clear rules to refer to and guidance;
  - Evaluate national regulations to ensure a legal base supporting a practice in line with the fundamental principles;
  - Support the development of and the resolution of suitable European soft law measures, which provide guidance and strengthen awareness;
  - Take advantage of diverse other ways to possibly influence prevalent legal cultures possibly not in line with the fundamental principles or ignorant to the problems PTD can cause, like:

- ✓ Assure continuing efforts with respect to awareness-raising and training for prosecutors, judges and also for lawyers with the ECHR Standards being a central topic. Particularly include young practitioners in such efforts;

- ✓ Provide practitioners with room for reflection on necessary standards as well as on problems and aspects connected to the use of PTD and on alternatives respectively;

- Consider and evaluate a legal solution promoting a legal culture more clearly underlining the exceptional character of PTD, like bail being the default option or the presumption of bail in the UK and Ireland;

- Take advantage of the options and encourage courts and parties to use the options with respect to calling for decisions and guidance by the ECtHR as well as the CJEU. More decisions by the European high courts provide more clear guidelines for future national practice.

- Encourage appeals on the national level to ensure common standards on this level.

- Support transparency, possibilities for reflection and developments and thereby steps towards common EU standards with regular collections and publications of meaningful national data about the application of PTD, about the duration of detention, about the application of alternatives and of rates of defendants (not) complying, etc.

7.2. On the grounds and motives for detention

PTD practices dominated by preventive aspects and social order have a tendency towards rather high rates of PTD. Preventive grounds appear more open to rather wide interpretations. Looking at the social changes in Europe and societal worries about possibly decreasing safety, which some political parties pick up to demand extensions of control measures, there are concerns that detention rates may not go down, but rather increase in many EU countries. Preventive aims

are sensitive because they take suspicions as a fact and thereby threaten the presumption of innocence. Nevertheless, on principle, such grounds have to be taken seriously as well. Considering their potential for extensive interpretation, specific safeguards are recommendable.

Research shows that **procedural economics is the most influential factor coining PTD-practice**. On the one hand, this points at a lack of awareness among many judges and prosecutors; on the other hand, this is also an effect of practical needs, problems and pressure they have to deal with. Due to limited resources, judges and prosecutors often work under quite some pressure. Not least, pre-trial procedures require fast handling. Aspects interfering with the routine procedures therefore easily mean aggravations hard to deal with. Unavailable suspects, for instance, mean additional work, more time to invest and additional pressure. Such worries are most often observed with foreign suspects, who indeed can mean quite some hassle if they don't show up for trial. Aggravating is the observation that practitioners often don't trust much in the support they may expect from other MSs authorities. It, however, also has to be considered that the trouble, costs and restrictions of a life on the run is a strong argument against an assumption of flight.

The DETOUR project as well as Fair trials **revealed the practical relevance of hidden and extra-legal (apocryphal) grounds for detention**. PTD may be used to coerce suspects into confessions and there are indications that judges sometimes apply PTD for punitive motives, contradicting the presumption of innocence.

7.2.1.Recommendations on the grounds and motives for detention

- Asses practical needs and problems judges and prosecutors have to deal with in their daily practice, which possibly favours the application of apocryphal grounds for detention and an extensive PTD practice. Take these needs and problems seriously and search for solutions;

- Introduce measures to avoid the influence of apocryphal grounds for detention, e.g.:

  - direct training and awareness-raising at this problem;

- introduce legal requirements to individually and concretely justify the named grounds based on facts laid down in the files;

- If preventive grounds are dominant in PTD practice, make sure there are strong safeguards installed to avoid an extensive PTD practice increasingly threatening the presumption of innocence. Additional thresholds could be introduced, for instance, related to the proportionality and the time detained.

7.3. On procedural aspects and on the decisions

Although the effects may not yet reach the hopes, it has to be stressed that in recent years some important progress has been made with respect to fundamental procedural aspects, e.g., with Directive 2012/13/EU on the right to information in criminal proceedings, with Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings. **Nevertheless, there are still reports that there is still need for improvement with respect to these rights. The legal safeguards appear to be well designed in most countries, in practice, their protective effects are however often questioned. Safeguards have to be put in practice and activated adequately. One of the most difficult aspects is the information of suspects on their rights, because only information fully understood by a suspect (willing to understand) fulfils the requirements.** Nevertheless, this is an aim not easily reached, since it is not only about the ability to communicate in a language, but also about a legal-technical language which is partially hard to understand also by a native speaker.

Counsellors often have no or hardly any time to prepare for the hearings. With electronic files more and more becoming the standard, the problem of restricted or late access to important documents should soon be a matter of the past. Up until then, there still have to be endeavours to assure that this aspect of equality of arms is realised adequately.

The chances to avoid PTD or to get out of it soon are closely connected to the representation by a lawyer. Apart from the problem of timely access to a lawyer,

there are also reports from diverse countries complaining about the quality of legal representation provided in legal aid cases. **Obviously highly relevant for the quality of legal aid representation is the way legal aid is organised.** If engagement in legal aid is not remunerated appropriately and if legal aid representation may have to be taken over without experience and special training in criminal law, there is quite some risk that the representation in such cases often will not reach the standards required.

Research reports about observing poorly reasoned decisions, relying on minimal information unnecessarily leading to detention. It is a fact that there is little time for the decisions on PTD and the little time restricts the chances to collect extensive and high-quality information. **Practitioners and experts however widely agree that more and high-quality information will lead to a better quality of decisions.** There is a tension between the need for a speedy decision, to not keep suspects in detention any longer than necessary, and extensive, good quality information, which most often needs some time to be collected. It is quite irritating if the speedy decision meant to be in favour of suspects may increase their risk of detention – the speed only allows for the collection of little information, while more time would increase the chance for more information possibly apt to help avoid detention. This means that as much valuable information as possible has to be collected as fast as possible. **This information should include details on the person of the suspect, on his/her social background and social environment, as well as possibly on available, suitable alternative measures.**

It is a matter of fact that prosecutors and judges - in most countries in this respect served only by the police - neither have the time nor the competency to fulfil this demand on their own. **A suitable solution to this problem seems to be the involvement of organisations/institutions providing this kind of service with staff specifically qualified to carry out such (social) inquiries and assessments.** Where possible, it of course makes sense to take advantage of existing (privately organised or public) institutions already offering such services (e.g., probation services, court aid, etc.). It goes without saying that such services need sufficient resources to be able to provide good quality support in all cases. There will still

remain some risk that the information will not always be available or complete before the initial hearing. If this is the case, the information will still remain valuable and serve the quality of the review processes, for instance, at the next hearing.

A critique often heard can be assumed to be at least partially connected to the problem of little information: there is no real, individual and substantial assessment carried out on the risks assumed. **Considering the severity of PTD, high-quality decisions and justifications have to be required. In practice, this often does not seem to be the case.** Research describes the decisions to often be formulaic and not least to fail to sufficiently assess the potential of alternative measures to substitute detention. **All in all, there seems to be a widespread potential for improvement concerning the substantiations of PTD decisions.** If PTD is supposed to be the *ultima ratio*, it seems logical and recommendable to require substantive explanations in PTD decisions on why alternatives may not apply. To avoid doubts about the equality of arms between prosecutors and defence counsellors, judges should be required to explicitly address the arguments of both sides in their decisions. This can be an incentive for counsellors to especially invest in the argumentation. All arguments brought forward in the decisions have to be substantiated by facts documented in the files available to all parties.

Last not least, all research confirms that a **restrictively defined maximum duration of PTD is a suitable safeguard against an unreasonably long deprivation of the personal freedom of individuals**, while protecting their right to trial within a reasonable time, according to Article 5 of the ECHR.

7.3.1. Recommendations on procedural aspects and on the decisions

- Evaluate the realisation and the effects of the following directives and take suitable measures to overcome observed problems and shortcomings
  - On the right to information in criminal proceedings;
  - On the right of access to a lawyer in criminal proceedings and
  - On legal aid for suspects and accused persons in criminal proceedings.

- Where not already provided, assess and consider to introduce the opportunity for judges to involve specialised professional organisations/institutions to carry out (social) inquiries and assessments in order to provide details on the person of the suspect, on his/her social background and social environment, as well as on available, suitable alternative measures to improve the bases for PTD decisions. Such reports can also provide valuable bail information.
- Assess the quality of the substantiations in PTD decisions and take measures to assure high-quality substantiations, that are appropriate in cases of this severe infringement of personal rights.
  - Require substantive explanations on why alternatives may not apply.
  - Require to explicitly address the arguments of both sides – prosecution and defence - in the decisions.
  - Require that all arguments brought forward in the decisions have to be substantiated by facts documented in the files available to all parties.
  - Assess the possibility and the potential improvement to be reached with the use of risk assessment tools.
- Evaluate the duration of PTD and the national regulations in this respect. Consider introducing restrictively defined maximum durations of PTD.

7.4. On the (non) use of alternatives

Although very little data is available, we can assume that there is little use of alternatives in most MSs of the EU based on recent research, not least the research carried out within the PRE-TRIAD project (Hammerschick et al, 2021c, p. 45). Considering observations that **in some countries, alternatives are, on the other hand, used in a net widening way** (ibid., p. 47), it is important to stress that alternatives to PTD are infringements of liberty rights as well. A European criminal political aim therefore cannot simply be a more frequent use of alternatives, but a more frequent use in cases in which otherwise PTD could not be avoided, when suitable. The best alternative should always be the option to abstain from PTD.

A little use of alternatives is not necessarily due to a lack of options. **The research shows that little use of alternatives is above all due to a lack of trust and faith of judges as well as prosecutors in the alternatives and their efficiency, alongside insufficient available information for the selection of suitable measures, too little time to finalise the decision, as well as too many organisational hassles and difficulties judges would rather avoid.** There were, for instance, reports about problems concerning the control of alternatives. Judges with little experience with the administration of alternatives seemingly develop routines without them. Even electronic monitoring and house arrest, two measures highly valued by many practitioners, are only reluctantly applied as long as the practitioners lack experience.

The outcome to build on is the fact that **almost all experts questioned in the run of the PRE-TRIAD project agreed that there is room for more and better use of alternatives.** There is quite some room and need for improvement with respect to their application qualitatively as well quantitatively. Of course, such developments need resources. **Investments in alternatives however can easily payoff**: if they, for instance, contribute to avoiding the social decline of clients of the criminal justice system, or if they contribute to reducing the overall prison population, particularly in the case of prison overcrowding, which not least may mean improvements of the prison conditions.

A most important outcome of the PRE-TRIAD project is the observation that **the practical problems and needs of the authorities and of the law enforcement agencies, respectively, have to be considered as much as possible.** This has already been addressed in chapter 7.2., but it is particularly true for the use of alternatives**. If a lack of trust in alternatives on the side of judges is a factor of major (negative) influence on the practice, this trust has to be strengthened.** Alternatives have to meet the requirements effectively, and their efficiency must be ensured by empirical information. Empirical information on alternatives, their qualities, their potential to succeed, limits and needs for improvement combined with information on administrative requirements have the potential to establish an informed practice, which can trigger a more frequent and suitable application.

In most countries, diverse alternatives are already available. Still, **there may be a need for additional alternatives. Developments in this respect should possibly take advantage of models already available in other countries** (see e.g., Hammerschick et al., 2021b) and they should be based on research and empirical information. Grounds for detention regularly point at some kind of personal (social) deficits on the side of the suspects. **The aim to possibly avoid PTD, therefore, often asks for a support for the suspect aiming at actively dealing with these problems and contributing to largely neutralising the assumed grounds for detention.** Of course, such measures may not build on an assumption of guilt, but on the needs observed, independently of a conviction. In some MSs, such offers are already available for juveniles but not or hardly for adults. Questioned judges and prosecutors rated such possible offers positively.

The already presented Irish example is above all built on a broad definition of bail, with the monetary aspect being often subordinated. This means that the sum of money a suspect has to provide may be rather symbolic, while other more substantial orders have to be fulfilled. The PRE-TRIAD report on Pre-trial detention alternatives: Best practices (Hammerschick et al., 2021b, p. 22-30) also presents different bail programs which, on the one hand, provide risk- and needs assessment to the courts and, on the other hand, alternatives to detention regularly including diverse social support to the suspects. **These successful models indicate that there might be room for more use of bail also in other countries, possibly with similar programs.**

Electronic monitoring is a measure increasingly asked for in many countries with some potential to substitute PTD. Apart from the smaller costs, it appears that judges and prosecutors above all value the high level of control which means rather heavy restrictions to the liberty of the suspect, who however can remain in his/her social surrounding. **It, however, has to stress that EM carries a rather high risk of net widening. GPS-monitoring, in fact, also allows for less intrusive models**, for instance only controlling the compliance with territorial restrictions like bans to enter or to leave certain areas.

7.4.1. Recommendations with respect to the (non) use of alternatives

- The practical problems and needs of judges and prosecutors with respect to the application of alternatives to PTD have to be taken seriously and measures have to be taken to increase the trust in alternatives, to solve the problems as well as to meet the needs:
  - Provide comprehensive information on available alternatives.
  - Research has to be ordered and carried out to provide empirical information on available alternatives, their qualities, their potential to succeed and fail, on limits and needs for improvement, as well as on risks of a net widening.
  - Assess the need for additional alternatives based on empirical research, considering models already available in other countries (see e.g., Hammerschick et al., 2021b), e.g.:
    - ✓ Consider installing programs aiming at a support for suspects to actively deal with their personal and social problems, which can contribute to largely neutralise the assumed grounds for detention.
    - ✓ Consider an extended use of bail with the monetary aspect subordinated, in connection with other orders. Successful programmes, for instance, provide risk- and needs assessment to the courts and offer alternatives to detention including diverse social support to the suspects.
    - ✓ If not already available, consider the introduction of EM. Take advantage of EM with care, especially considering the risk of net widening.
    - ✓ Especially EM applied not to control the whole life of suspects, but only to control territorial bans and orders with GPS might be a promising model in suitable cases.
- Alternatives always have to be the least restrictive measure ensuring the purpose aimed at.

- Make sure the needed resources are available for the run, monitoring and development of alternatives. Otherwise, valuable measures may remain behind the expectations.

7.5. Legal remedies and review hearings

The experts questioned in the run of the PRE-TRIAD project confirm the principal value and the importance of the review hearings. **Partially, the hearings however were described as formal acts with little influence on the decisions, which often had already been determined before**. According to Fair Trials research referred to in the focus group hearings in different observed countries lasted 4 to 7 minutes on average. This little time does not allow for thorough reviews of all conditions to be fulfilled if PTD is considered to be continued, not for adversarial debates and well-substantiated decisions based on the hearing. The decisions in reviews were said to, in the tendency be of less quality than the initial decisions and they are rarely overturned.

Neither interviews with practitioners and experts, nor literature reveal major complaints concerning the national regulations on safeguards and legal remedies for most of the countries. Again, it is the practice that seemingly often remains behind the possibilities and sometimes behind the necessities. There is no data available, but interviews indicate that **appeals on PTD decisions are an option rather seldom chosen in most countries**. Often it is for strategic reasons that defence counsellors rather concentrate on the criminal case and the procedures, e.g. afraid that a negative ruling on an appeal fighting detention may negatively influence the verdict. **If the possibilities to reach guidance on fundamental legal questions are not taken advantage of this way, this kind of strategic thinking may not only hurt the ones affected directly, but also weakens the legal systems and legal development.**

For most countries, **a rather wide margin of discretion is observed to be available to the decision-makers**. While this is understandable to a large extent, because of the particularities of the individual case, **PTD** being the most severe infringement of personal rights **requires a well-functioning system of legal**

safeguards, reviews and remedies effectively protecting affected suspects, the *ultima ratio* principle and valuing Human Rights principles. A well-functioning system however can only be assumed if these possibilities are actively used.

7.5.1. Recommendations on legal remedies and review hearings

- Ascertain high-quality hearings providing high-quality decisions. Strengthen them with adversarial procedural qualities, allowing and encouraging the parties to present their cases, enabling thorough reviews of all conditions to be fulfilled if PTD is considered to be continued, as well as requiring well-prepared decisions, developed largely on this basis, open to any outcome.

- Evaluate the legal remedies available on national levels, assessing needs for adaptations.
  - Take the steps necessary to support a practice with legal remedies not just being an option, but a regularly used means to secure a detention practice in line with the *ultima ratio* principle, valuing Human Rights principles that are accessible without practical restrictions.

- Support a legal culture appreciating appeals as an important way to initiate guidelines for decisions and to foster legal development e.g., via professional exchange at conferences and via trainings.

7.6. On the roles of judges, prosecutors and defense counselors

While of course judges are the ones ultimately deciding on PTD, release, or alternatives, a close view on the procedural steps makes it clear that there is not much less power on the side of the prosecutors. The empirical work in the PRE-TRIAD project shows that **the role and the power of the prosecution are often underestimated**. Without the prosecution the procedures towards a possible PTD don't even start. In many jurisdictions, the prosecutors actually would also be able to initiate alternatives, but they do not or hardly do so. The prosecution is generally viewed to be the authority rather pushing for PTD and for many it seems to be also a self-conception that alternatives are not their task, even if they can order them.

In some countries, a **closeness is observed between judges and prosecutors, which nourishes doubts about unbiased decisions of the judges, and thereby about the full functioning of the system of safeguards**. In many jurisdictions, the vast majority of all applications brought in by the prosecution is granted by the judges. This has led to perceptions on the side of the defence that there is no equality of arms and that arguments of the prosecution are credited higher than those of the defence.

One of the most important factors for the chances to possibly avoid detention and to improve the chances for suitable alternatives to be applied is an early and active representation by defence counsellors. Although it is definitely not their sole responsibility, **practically it is of utmost importance for the protection of the suspect's rights that legal representatives actively search for the organization and application of alternatives.**

7.6.1. Recommendations on the roles of judges, prosecutors and defence counsellors

- Strengthen a clear and correct understanding and perception of the roles of prosecutors and judges as a precondition for a proper functioning of the legal safeguards, which are dependent of these roles.
    - E.g., provide separate training and room for reflections on the roles.
- It appears worthwhile to strengthen the definition of the role of the prosecution as a law enforcement authority elaborating on incriminating as well as on exonerating facts, on justifying PTD as well as on aspects supporting release or the application of alternatives.
- Value the importance of the roles of prosecutors and defence counsellors for the system of legal safeguards. Involve them in awareness-raising activities and training directed at a moderate and cautious PTD practice, valuing the *ultima ratio* principle and defendants' rights as well as in activities aiming at developments of the legal system with respect to PTD and alternatives.

- Strengthen the understanding of defence counsellors that it is of utmost importance for the protection of the suspect's rights that they actively search for options to neutralise assumed risks, not least taking over or initiating organisational necessities and searching for suitable alternatives to PTD.

7.7. On foreigners and people living in precarious social conditions

With respect to the application of the ESO we may refer to the project report particularly addressing issues related to the (non) application of the ESO (Durnescu, 2021). Considering the wide implications of the topic PTD and foreign nationals for national PTD practice this report has to address this topic as well.

All research carried out and literature studied indicate that **foreigners are treated differently to nationals with respect to PTD**. Furthermore, they tend to be treated like a homogenous group, which they are not, because there are foreign nationals with a regular place of living in the host country and a permission to do so, there are asylum seekers, tourists, etc. What many of them have in common are rather precarious living conditions. Often, largely independent of their actual residential status, they have a higher risk of PTD. There may be a reason to assume for instance higher risks of flight with one or the other non-national suspect, based on the gravity of the offence, his/her social situation and/or the fact that there are no social bonds whatsoever with the host country. It definitely violates the Convention on Human Rights (Art. 5 in connection with Art. 6) and the generally acknowledged legal principles if factors like the ethnic background or nationality of defendants, their economic and social background or their gender, e.g., generally affect the application of the presumption of innocence, the principle of proportionality or the *ultima ratio* principle.

It is quite obvious by now and has been pointed out in diverse papers and research reports that the problem of an extensive use of PTD will not be solved if the high percentage of suspects with foreign nationality placed under PTD is ignored. "Without a suitable alternative, the pre-trial system becomes just one more place where the law for the poor is much heavier than the law for the rich" (Morris, 1981, p. 158). We cannot deny that it may be more difficult with one or the

other foreign national to avoid detention or to find suitable alternatives to detention. This however has to be assessed thoroughly, with the nationality *per se* being no criterion. Approaches to fairly deal with foreign nationals in PTD matters will require some creativity as well as open-mindedness to new solutions, including access to alternatives.

It is not much of a surprise that **alternatives to detention are hardly granted with foreign nationals**, if we consider that in many countries alternatives are seldom applied in general, given the options and models available. The Best Practice Report of the PRE-TRIAD Project for instance pointed at **the Toronto Bail project a programme explicitly also working with foreign nationals** (Hammerschick et al., 2021b, p. 23). A central aspect of the programme application with foreigners is the provision of housing (International Detention Coalition, 2015). Even if suspects have no social ties in the country where they are prosecuted, **at least some of them may qualify for release from detention if they have access to suitable housing**.

This Bail Verification and Supervision Programme is a transfer payment programme directed at low-risk individuals accused of criminal offences who would otherwise not qualify for bail. The programme takes on the role of a 'bondsperson', for those who have no other eligible guarantors to pay the bond, thereby contributing to reducing the financial discrimination most often posed by bail as an alternative measure. It includes screening and assessment processes to identify eligible detainees to be suggested to the court, as well as intense supervision with regular reporting, if the court agrees on release. **For most EU MS, such a programme would be quite an innovation and it definitely would be a strong statement highlighting the *ultima ratio* principle.** Considering the high cost of PTD, it can be assumed that this would be considerably cheaper, also avoiding the personal problems PTD creates. Another advantage is, that this kind of programme would not have to be restricted to EU nationals.

Today, cross-border cases are daily business in criminal matters, however, cross-border cooperation does not really reflect this. Although cross border cooperation may have improved over the years, practitioners still report about

formal requests for assistance to the authorities in other MSs receiving no or very much belated responses. It is obvious that there still is a high demand for improvement in this respect. **There are diverse interdependencies and connected problems: little cooperation, differing standards with respect to conditions of detention, differing detention practices, etc. In the end, all these aspects and the interdependencies are burdens and barriers for common (EU) standards as well as for mutual trust**, which only will be fully resolved when each and every one of these aspects and problems are solved. This will need long term strategies, openness for developments, readiness for cooperation and a lot of goodwill.

Since cross-border cases are regular practice, it seems wise to have an early focus on the national support for the handling of cross border cooperation and to improve the structures for this. Literature and experts talk indicate that **specialised, possibly centralised institutions supporting trans-border matters and cases in the MS have a potential to improve trans-border cooperation** in general and the application of measures like the ESO in particular. The Netherlands actually already have a specialised department to deal with criminal judicial cooperation issues, not least supporting better coordination.

Apart from structures, cooperation is about people and communication. **Good cooperation is most often achieved if there already has been good contact to build on and if there is some knowledge about other MSs and their legal system** (here with respect to PTD).

7.7.1. Recommendations on aspects related to foreigners and people living in precarious social condition

- Assess and take measures to assure that foreign nationals and other people living in precarious social conditions are not subject to an extensive PTD practice based on this characteristic. The application of the presumption of innocence, the principle of proportionality or the *ultima ratio* principle has to be applied without differentiation in this respect.
  - ➢ Provide training and awareness-raising covering these aspects.

- Order research on and assess options for alternatives to PTD to be suitably applied with different groups of foreigners.
  - Assess and consider introducing bail programs, similar to the Toronto Bail project, including housing, which successfully also includes low risk foreign national suspects.

- A transnational context may ask for different safeguards than a purely domestic context. Assess the existing safeguards with respect to their practical use and value when applied with foreigners and consider adaptations to better meet their legal protection needs.

- Evaluate the existing organisational structures for trans-border cases and cooperation and assess options to better support trans-border cooperation via improved, possibly centralised structures.

- Continue and increase the efforts to promote judicial cooperation and communication between the MSs.
  - Support and initiate trans-national trainings, seminars and project cooperation.

8. National recommendations

In the following final chapter, recommendations are presented, elaborated by the project partners based on the research outcomes for their countries. They provide the reader with detailed recommendations allowing also for some more insights into national particularities. Last but not least, they may serve for discussions on the national level, which are the bases for any development. To a large extent, they mirror recommendations already presented on an abstract level in chapter 7.

8.1. National Austrian recommendations

Walter Hammerschick (IRKS)

The following national recommendations build on the ones developed in the run of the DETOUR project (Hammerschick et al, 2017b), adapt them and elaborate on them on the basis of the outcomes of the work within PRETRIAD.

- **Early access to defence counselling of high quality has to be considered a main pillar of PTD law in Austria.** While quite some progress has been observed with respect to early access, in cases of legal aid the quality of counselling is often reported to be improvable. This is on the one hand due to the remuneration, which is not paid to the counsellor, but to the pension fund for counsellors. On the other hand, it is due to the legal aid system which also requires counsellors not practising in criminal law to take over such legal aid cases. While both regulations do not generally mean that legal aid representation is of low quality, they both carry a high risk, if counsellors are not motivated because of no payment or if they simply lack needed knowledge or competency due to missing experience.
    - Evaluate the system of legal aid and consider necessary adaptations to ensure high quality legal counselling also in legal aid cases.
- Like in other countries it has also been reported by experts and practitioners in Austria that **often there is very little information available on the person of the suspect, on his/her conditions of living and the social background**.

Practitioners and experts widely agree that more and high-quality information would support the quality of decisions. The court assistance in juvenile criminal matters is a highly valued institution offering this kind of information. Such professional support can also provide valuable information on suitable alternatives. Due to the short time available for the first decision, often the time may not suffice to receive completed reports. If this is the case and if PTD is ordered, the information provided by such a report will still be valuable at the first detention hearing. Preliminary probation could possibly also serve this purpose.

- Carry out research, assess the potential of court assistance collecting information on the person of the suspect, on his/her conditions of living as well as on the social background and providing suggestions for suitable alternatives. Consider to generally introducing it.

- **Alternatives to PTD are seldom applied with adult suspects in Austrian PTD cases**. The main reason for this is little trust Austrian judges and prosecutors have in the efficiency and the potential of these measures to largely neutralize the grounds for detention. This lack of trust has to be taken seriously and measures have to be taken to make alternatives to detention better useable for practitioners. So far however no data is available on the performance of alternatives.

  - Carry out research to provide empirical information on available alternatives, their qualities, their potential to succeed and fail, on limits and needs for improvement, as well as on risks of a net widening.

  - Share and discuss this information with practitioners and initiate needed improvements with the potential to improve the acceptance and the application of alternative measures.

  - Asses the possibilities to newly regulate bail in Austria, possibly introducing a bail program offering selection procedures based on assessments, with the program taking on the role of a 'bondsperson', offering intensive supervision and regular reporting (see chapter 7.7).

- Increase the requirements for PTD decisions to substantiate denials of alternatives based on individual facts of the case.

- **Austrian practitioners highlight the principal importance of the detention hearings** taking place in regular intervals. Nevertheless, and without challenging the principle of judicial independence, often critique has been expressed pointing at a restriction of many hearings to formal qualities. Indeed, most hearings only last a few minutes, the decisions seem to already have been elaborated before the hearing and hardly any suspect leaves the prison right after these hearings.
  - Take measures to improve the value of detention hearings, with adversarial procedural qualities, active participation of the parties and decisions not predetermined but open to any outcome.

- **PTD practice in Austria appears rather harmonic**. Judges mostly apply detention as requested by the prosecution and attorneys rarely challenge the decisions, most often for strategic reasons.
  - Without challenging the principle of judicial in-dependence, a general increase of "conflict orientation" appears recommendable not least also for the development of the legal system.

- Many Austrian criminal law practitioners – judges, prosecutors and also defence attorneys - still have little or hardly any Information about the **ESO** and it seems that it is not in practical use.
  - Assess the organisational structures for transborder cooperation in general and the ESO in particular and consider adaptations necessary and valuable for improvements, which not least make transborder cooperation and the application of European cooperation tools easier to handle for practitioners.
  - Provide specific trainings, workshops and seminars to spread the information about the ESO and its application, possibly providing examples of application.

8.2. National Bulgarian recommendations

Dimitar Markov, Daria Grigorieva (CSD)

- Introducing new and more flexible alternatives to detention in addition to the currently available non-custodial measures (mandatory reporting to the police, bail and house arrest), enabling stricter control of the accused combined with moderate restrictions on their freedom of movement (currently, one of the reasons for not applying alternatives to detention is the fear of judges that the accused may abscond);

- Introducing new alternative measures or adapting the currently available ones to effectively apply to foreigners (currently, foreigners are more likely to be placed in detention compared to Bulgarian nationals, because they often do not have a permanent address in the country where they can be found if an alternative measure is imposed);

- Expanding the scope of application of electronic monitoring (currently, according to the law, electronic monitoring applies only to accused persons under house arrest and cannot be imposed on accused persons under bail or mandatory reporting to the police);

- Providing pre-trial detainees with access to work, education, professional qualification, and social, sports and recreational activities (at present, such activities are available only to convicted prisoners);

- Revising the internal rules of PTD facilities and allowing detainees to spend more time outside the cells (currently pre-trial detainees are locked in their cells at all times except for outdoor and visiting time);

- Increasing the regularity of visits to at least one visit per week, extending the duration of visits to least one hour and introducing alternatives to in-person visits (e.g., online meetings);

- Improving the access to and quality of healthcare services in PTD facilities, including medical examinations on admission, psychiatric care, psychological assistance and first aid available 24/7.

- Improving the material conditions in PTD facilities and bringing them in line with applicable standards in terms of living space, light and ventilation, hygiene and availability of in-cell sanitary annexes;

- Introducing special rules for detention of women, including rules on special hygiene conditions and products and special healthcare services corresponding to women's specific needs.

8.3. National German recommendations

Johannes Aschermann & Eduard Matt (BMoJ)

In the run of the PRE-TRIAD project, we found that interviewees were mostly satisfied with the legal framework regarding the order of pretrial detention. However, there were statements indicating that in practice there is definitely potential for improvement.

In particular, potential for improvement emerged in the following areas or by means of the following measures:

1. The availability of information regarding the personal circumstances of the suspects respectively the flow of information between the involved actors. Decision-making at the court hearing to order PTD or alternative measures benefits from detailed (provable) information about the personal circumstances of the crime suspect. In practice, however, detailed information is often not readily available. Therefore, the flow of information resp. the procurement of information should be improved.

a) In the course of the investigations, the police and the public prosecutor's office should pay more attention to the personal circumstances of the suspect and also evaluate information obtained in terms of its relevance for the question of pre-trial detention.

b) It should be evaluated whether and how social services and probation services can be involved, if possible, before the first court date for ordering pretrial detention, as they may have information about the suspect's personal circumstances.

2. The existence of grounds for detention should be assessed more thoroughly and rigorously to better reflect the principle of *ultima ratio*

a) The legally binding delivery of mail (especially subpoenas for court dates) requires a postal address where the crime suspect can be reached. This is often not possible with the homeless, drug users, or other marginalised

groups. Since a court hearing in the absence of the suspect is not possible in Germany for legal reasons, PTD is often ordered on the grounds of a risk of flight. However, this is not true in the strict sense of the word, since the suspects simply cannot be reached by postal services, but as a rule make no effort to flee or remain hidden. A solution should be found urgently to solve this delivery problem. For example, the establishment of postal addresses/letterboxes (also with the cooperation of social services or defence attorneys) for the suspects could be solutions.

b) In the case of non-German suspects living in Germany, the real existence of a flight risk should also be better examined. In 2019 roughly 60% of all detainees in PTD in Germany did not have the German citizenship.[7] It should be evaluated whether a thorough examination and substantiation of the existence of a risk of flight in these cases is always carried out by the courts.

c) In general, it can be stated that the requirements for determining the existence of a flight risk on the part of the court are sometimes quite low. Isolated studies indicate an overestimation of the risk of flight in Germany.[8] The vast majority of all arrest warrants are based on a risk of flight, and there is reason to fear that not all cases have been subjected to a truly rigorous and thorough examination in advance. This should change.

d) Courts have to strictly adhere to the legal requirements for ordering pre-trial detention, thus excluding interference or pressure from society, politics or the media.

[7] Unfortunately, the data does not differentiate between foreigners living in Germany and foreigners living outside of Germany. See: Statistisches Bundesamt: Sonderauswertung Strafverfolgungsstatistik. Berichtsjahr 2019 vom 10.11.2021.
[8] Lind, Detlef, Der Haftgrund der Fluchtgefahr nach § 112 II Nr. 2 StPO in der Praxis: Zur rechtstatsächlichen Überprüfung von Fluchtprognosen, StV 2019, S. 118 ff. and Wolf, Lara, Die Fluchtprognose im Untersuchungshaftrecht, NOMOS, 2017.

3. The use of alternative measures to pretrial detention should be fostered

a) It is necessary to increase the trust of prosecutors and judges in the use and effectiveness of alternative measures;

b) There is a need to increase awareness of existing alternative measures and demonstrate their quality and reliability;

c) Effective, accessible and reasonable alternative measures (such as therapy places or shelters) should be available at all times.

4. The duration of PTD should be shortened

a) The acceleration mandate that applies to PTD cases should be strengthened to shorten the length of pretrial detention.

b) The instrument of "accelerated proceedings" pursuant to Sections 417 et seq. of the Code of Criminal Procedure (CCP) should be used more frequently in order to shorten the duration of PTD wherever possible

5. The politics of pre-trial detention

a) For discussions on accelerating PTD proceedings it should be noted that accelerated proceedings may not violate the suspect's Human Rights;

b) The principle of proportionality in ordering PTD should be followed more strictly. In recent years, the percentage of pre-trial detentions with a duration longer than the sentenced jail time has been growing. [9] This obviously contradicts the principle of proportionality.

[9] Haffner, Maximilian Valentin, Die Begründungsmuster von Untersuchungshaftentscheidungen, Peter Lang, 2021.

8.4. National Italian recommendations

Sergio Bianchi & Nicoletta Gallori (AGENFOR)

The following 7 recommendations are in line with the Italian policy debate of pre-trial measures aimed at (1) minimizing PTD through the introduction and use of alternatives measures based on the existing penal and procedural code and with a judicial and juridical view; (2) Expand the recognition of pre-trial measures among MSs; (3) Grant equal rights for EU-resident and non-resident citizens subject to non-custodial and supervision measures.

RECOMMENDATION N1.: Alternative Rites for crimes up to 2 years to reduce imprisonment through a new model of criminal 'plea bargain' for sentences not exceeding two years. We recommended the Ministry of Justice to favour the pre-trial agreement at the level of the judge of preliminary investigation (GIP) between the prosecutor and the lawyer extended to the ancillary penalties and their duration, as well as to the optional confiscation and the determination of its object and amount. This measure will facilitate an extension of the provisions of the Law 28 April 2014, n. 67, on alternative measures and probations for certain types of crime.

RECCOMENDATION N.2: Alternative Rites with penalty discount in the pre-trial phase and in front of the judge for preliminary hearing: We support the definition of pre-trial judgment with an abbreviated alternative rite in the preliminary phase, which in addition to the normal reduction of the expected sentence of 1/3 in the case of conviction, provides for some types of sub-threshold crimes, a further discount in the event that a preliminary agreement is made between defendants and preliminary judges/prosecutors to avoid any appeal. In the case of this bargain, the final expected penalty will still be reduced by 1/6 for certain crimes. For instance: Defendant A, following abbreviated, could be sentenced to 3 years of imprisonment, penalty determined as follows: 3 years – 1/3 = 2. By deciding not to appeal in the pre-trial phase, the final expected sentence could be further reduced by 1/6, so as to have: 2 years – 4 months (equal to 1/6 of 2 years) = 20 months. This agreement between the parties will shorten the legal

procedure at the preliminary phase (GIP) and reduce conditions for long trials and pre-trial detention. Therefore, the number of accused individuals who can benefit from the Art. 168-bis of the penal code (probation) will be expanded and accused individuals can benefit from the alternative measures offered by UEPE ex Art.2, c.4 of Legislative Decree n. 88/2015.

RECCOMENDATION N.3: Today in the Italian penal code there is the extension of detention exclusion from the punishability of minor offences. This measure includes occasional offences where there is no significant harm to the victim. We recommended extending this mechanism to all offences whose sentence does not exceed a minimum of two years, alone or in conjunction with a monetary penalty, offering, therefore, the opportunity for suspects to access alternative measures and suspend the trial. However, crimes of violence against women, which are considered particularly serious, are always excluded.

RECCOMENDATION N.4: We recommend the introduction of measures that favour criminal mediation as an alternative to detention, that is, the encounter between the offender and the victim during the penal proceeding, so that the former can recognize and repair the wrong he has caused and the trial can be avoided (or, if it is ongoing, reach a remission of the lawsuit), on the model of the Italian juvenile rite.

RECCOMENDATION N. 5: Extend these alternative measures to non-resident European investigated individuals, offering them the right to return home under the supervision of their home State, instead of being held unnecessarily in custody in Italy or subject to long-term non-custodial supervision measures in Italy, through the recognition of the pre-trial supervision measures described in the Italian penal code as integrated with these Recommendations.

RECCOMENDATION N. 6: Extend the 2008 FD on probation measures & alternative sanctions to the Recommendations 1-4

RECCOMENDATION N. 7: Extend the Recommendation 1 to 4 to the application of the measures foreseen in Art. 8 of the COUNCIL FD 2009/829/JHA, with a specific focus on Recommendation N.4.

8.5. National Portuguese recommendations

Joana Apóstolo, Raquel Venâncio (IPS)

Transversal problem: Prison overcrowding

Portugal presents one of the highest incarceration rates in Europe, according to the Portuguese Ombudsman. This issue also points to the need to increase the use of alternatives to pre-trial detention, in order to mitigate this pressure. Even if the prison overcrowding situation has suffered dramatic improvements since 2016 (Cordeiro, 2020), and the Portuguese PTD rate in 2020 was close to the European average (22,2 compared to 22,5) (Aebi & Tiago, 2021), many other factors leading to overcrowding could clearly still be improved, as we will note in the following paragraphs.

Problem: Extensive periods of pre-trial detention

The UN's Human Rights Committee's Final Observations about the fifth periodical report about Portugal expresses concern about an extensive duration for PTD foreseen by the Portuguese Penal Code (Comité dos Direitos Humanos, 2020). Moreover, it regrets that there is a lack of statistical data regarding the average duration of pre-trial detention, as the Human Rights Committee is preoccupied with several reports about individuals remaining under PTD for long periods of time. In this context, it is relevant to note that Portugal has been involved in two particular ECtHR cases relating to PTD, where violations to article 5 were found, one of them interlinked with long and unjustified PTD periods (Qing v. Portugal) and the other associated with the lack of a speedy judicial decision concerning the lawfulness of the detention (Martins O'Neil v. Portugal). In fact, as of 2017, the average length of pre-trial duration in Portugal was 8 months, but approximately 20% of pre-trial detainees spend more than one year in prison (Fair Trials, 2017).

As such, we would point to the recommendations below:

a) Stricter and more restrictive time limits for PTD

A reduction of the legal time limits for PTD application could contribute considerably to improving the negative impacts of PTD in Portugal. The Bulgarian

model, providing for a maximum of 2 months (besides the foreseen exceptions) could perhaps be considered for domestic alterations. On the other hand, it is also important to consider that, rather often, the length of the hearings, inquiries and course of the proceedings pose as impediments for a speedier process.

b) Increasing the speed of the inquiries and legal proceedings, to guarantee a deeper efficacy of justice

Effectively, the prolongation of the process, beyond the legal limits, due to delays related to the inquiries leads to compounding problems, not only for the individual but for their family, community, and also for the society as a whole including the State budget. Evidently, long judicial proceedings also lead to longer PTD periods, and to this extent, ensuring the respect for the established legal limits could also promote a more reasonable application of pre-trial detention, in terms of its extension (Alves, 2018). Moreover, even if the law in theory upholds the principle of the presumption of innocence, Alves (2018) argues that the violation of the legal limits regarding inquiries is in fact related to the notion of a "presumption of guilt", which in turn leads to extending the inquiry time limits, until sufficient evidence is considered to exist. This interaction of this "presumption of guilt" with PTD application will be discussed again, in a following section.

c) Considering expanding the possibilities for conditional suspension of PTD

As of present, article 216 of the CCP establishes the potential conditional suspension of PTD timelines in the case of profound illness, which demands hospitalisation, if the presence of the defendant is indispensable to the continuity of the investigation. Additionally, the enforcement measure in force may be suspended, in accordance with Art. 211 CCP in case of grave illness, pregnancy or puerperium. The moulds of this conditional suspension could be perhaps adapted, and the total suspension of PTD could even be considered, following the Italian example of *messa alla prova*, which has achieved considerable success.

Problem: Apocryphal grounds for detention in Portugal

Beyond the need to limit the negative consequences of already applied PTD decisions, if we consider the decision-making process and possible deviations from

the grounds for detention foreseen in the law, there is also much room for improvement. In this context, we highlight the following hypothesis which seem to contribute to an extensive PTD application, as derived from the PRE-TRIAD Interviews Report (D2.4).

- Punitive orientation in PTD application ("though on crime" approach, partially related to public and media pressure);
- Application of PTD to contain social alarm and maintain social tranquillity, even in cases which would not warrant it.

In this line, we point to the following recommendations:

a) Rigorously upholding the principle of legality, *ultima ratio*, proportionality and adequacy

If the PRE-TRIAD research indicates that, at times, judicial decisions might be influenced *inter alias* by those factors a reinforcement of the adherence to the mentioned principles would certainly be beneficial. This could be done, for instance, through the promotion of the pre-trial assessment tool. The instrument was prepared in order to help reduce misapplications of pre-trial detention, namely "its use as a disguised form of punishment." (Partnership for Good Governance, n.d.). As such, the instrument includes two methods of conducting a survey of application of PTD, including a statistical survey (empirical background data) and a thematic survey (designed in accordance with the principles of article 5 of the European Convention of Human Rights). Disseminating this tool and mainstreaming its use could therefore be pertinent.

b) Restorative justice and mediation

The PRE-TRIAD research also hinted at the perception shared by some judges that there might be an overuse of PTD, especially in sensationalist cases involving domestic violence offences, for example. In less grave cases, PTD decisions might be avoided entirely through the resort to restorative justice models. Since Law 21/2007 (Law of Portuguese Penal Mediation), the Portuguese framework typifies restorative justice as applicable to private and semi-public offences punishable with sentences no higher than 5 years. However, only one restorative circle was

effectively implemented in 2016 (Júnior, 2020). In parallel, NGOs also foster restorative justice practices – such as Associação de Apoio à Vítima (APAV, n.d.), which in fact works often with domestic violence cases. Therefore, it is clear that there is much room for improvement in this regard. In line with the Finnish model (Kalmthout, Knapen, Morgenstern & Bahtivar, 2009), Portugal could consider expanding efforts in the field of restorative justice, investing in mediation and sharing its results with the court. If the mediation results in a positive prognosis, largely excluding the previously assumed risks, the prosecutor, may dismiss the case. On the other hand, it is also important to consider that Restorative Justice and mediation might call into question the protection of the accused's due process rights, since such processes usually require admission of guilt. As such, this sort of initiative must be appropriately set up and implemented, to guarantee the protection of the accused's rights.

c) Considering changes in national practices so that they become more in line with the Tokyo Rules on the role of mass media

In particular, the Tokyo Rules' article 18 "Public understanding and cooperation", no. 3 notes that "All forms of "the mass media should be utilised to help creating a constructive public attitude, leading to activities conducive to a broader application of non-custodial treatment and the social integration of offenders." (United Nations General Assembly, 1990). Bearing in mind the far-reaching influence of the media on public pressure – and vice-versa – as well as the pressure of both of them on the judiciary to pursue punitive approaches, and consequently, on the decisions of judges on particularly mediatic PTD cases, a stricter adherence to the Tokyo rules would certainly contribute to reducing the application of PTD and ensuring its interpretation as *ultima ratio*. Extensive PTD decisions and practices are also associated to a number of negative consequences, as initially noted, of which judicial actors and decision-makers should be aware.

Problem: Lack of awareness on the negative impact of pre-trial detention or exclusion of such reflections from the decision-making process

PRE-TRIAD research hinted at the fact that some Portuguese judicial practitioners do not appreciate the dimension of the consequences associated to PTD, from the individual to the State-level, and encompassing impacts on the accused's families and society as well. While some highlighted PTD as a necessary evil, with tolerable or even beneficial consequences for the individual to assume, others noted that such reflections go well beyond their competencies and should not be an element in the PTD decision equation. In fact, this position emphasised that those issues must be solved through non-judicial solutions. However, these elements could and should take on a larger role in the decision-making, interlinked with reflections on the proportionality of the PTD application, for instance – and especially so for judges due to their preponderant weight in the decision-making, but prosecutors as well, given that often they request the application of PTD.

In this line, we point to the following recommendations:

a) Governmental investment in research activities pointing to the negative consequences of PTD

Concrete statistical and qualitative data could be collected and disseminated by the Portuguese Prison Services, in the form of user-friendly factsheets, specifically on the negative multi-level effects of PTD. Informative and advocacy-oriented material could be produced at the State-level, including key insights from international reports (i.e., from the PRE-TRIAD project, Fair Trials, Prison Reform International, but also Council of Europe's Committee for the Prevention of Torture, UN's Human Rights Committee). Nonetheless, the mere production of these materials will not achieve sustainable change in mentalities and practices. To that extent, well designed awareness-raising essential are important as well.

b) Awareness-raising activities

The design and implementation of awareness-raising activities seems to be a key strategy in working towards a more Human Rights sensitive application of PTD. These activities should be centred on the dissemination of concrete information framed by convincing arguments pointing to the disadvantages of PTD in Portugal today. To this end, this sort of initiative should also include lawyers, law enforcement agents and prison staff, since all these actors are involved, in one way

or the other, in the world of PTD application, and have a better grasp of the different impacts of PTD, at various stages of the proceedings. As such, the promotion of debates, and multi-agency debates could be a good strategy. In any case, durable changes can only be introduced if judicial practitioners trust in the alternatives, and the quality of their monitoring during the pre-trial phase.

Problem: Lack of trust in alternatives to pre-trial detention

PTD is often applied in the Portuguese context partially because of a generalised lack of trust in the effectiveness of alternatives to counter the assumed risks. Other than electronic monitoring (EM) combined with the obligation to house permanence, contacted experts noted that, overall, PTD is the only "safe way" in many cases, where the alternatives simply do not fit.

In this line, we would point to the following recommendations:

a) Collection of statistical records on the application of alternative measures

In reality, Portuguese courts do not maintain such records. Unequivocally, having access to this sort of data is crucial for any national policy aiming at expanding the use of alternatives to PTD, and working to improve their efficiency. To this extent, having trustworthy and periodical data collected and published on the use of alternative measures would surely facilitate research initiatives covering their actual efficiency in practice, as well as their costs and advantages.

b) Aggregation and dissemination of evidence on the effectiveness of alternatives

Beyond merely reporting on the use of alternatives, it is also essential to ensure that there is regular and trustworthy collection of evidence on the number of misconducts or violations of orders in Portugal. Only this way will it be possible to construct impactful awareness-raising approaches targeting judges and prosecutors, to highlight the advantages of alternatives to PTD, while demystifying their practical effectiveness. These reports should then be widely disseminated to local and regional courts, the Centre of Judiciary Studies, but also the Ombudsman and NGOs working in the field.

c) Installing social services and support for suspects threatened by PTD

Mainly in the case of particularly vulnerable individuals – such people in homelessness, or substance abuse situations or foreigners, for example – judges and prosecutors tend to hold on to particularly extensive PTD practices. The application of bail or the obligation to house permanence with EM often seems impossible with these categories of defendants, without additional support to ensure the conditions and orders will be respected. In this context, considering the creation or promotion of social support to vulnerable defendants could be an interesting strategy, following-up on already developed projects such as the Manhattan Bail Project (Kohler, 2007; Oliva, 2017), the Toronto Bail Programme (Brown, 2011; International Detention Coalition, 2015) or the Bail Centres in the UK (Brown, 2011) (Nacro, n.d.; NAPA, n.d.). By guaranteeing specific material conditions for the application of alternatives, offering physical, emotional and psychological support to the accused, in a professional way, these initiatives counter the assumed risks and avoid the application of PTD with a considerable rate of success. Therefore, the Portuguese State could envisage launching or supporting the instalment of similar initiatives.

Problem: Quality of the defence counselling

While judges and prosecutors take on preponderant roles for the application of PTD, legal representatives are most often the ones to argue in favour of the use of alternative measures. Effective access to justice is very much dependent on the quality of the defence counselling, as is the access to alternatives. On the one hand, especially for socially and economically deprived defendants, legal aid takes on a central importance in ensuring access to justice. However, the quality of the legal representation is not always guaranteed, especially in cases of legal aid, where *ex officio* lawyers are generally overloaded with cases and suffer even heavier time pressures than chosen representatives. On the other hand, setting up a defence in cross-border cases entails aggravated and additional difficulties and obstacles, when compared to national cases –, ranging from language barriers to ignorance about other MSs legal systems – and available alternatives – and encompassing a lack of awareness on EU mutual recognition instruments as well.

In this line, we would point to the following recommendations:

a) Strengthening the national legal aid system

According to a former United Nations Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, Portugal works with a legal aid system which, due to its restrictive requirements, excludes many from receiving it (United Nations Human Rights Office of the High Commissioner, 2015). Ensuring that costs to access justice are not prohibitively high, but instead accessible to all is a central step for increasing the quality of *ex officio* defence, and consequently the application of alternatives. In parallel, the quality of the provided legal aid could be improved through larger budgetary efforts to minimise the number of cases defended by each *ex officio* lawyer, the regular production of reports assessing the quality of the legal aid, and furthering access to continuous training for lawyers.

b) Introducing larger investment in training (both initial and continuous)

Especially in cooperation with the national and regional offices of the Lawyers' Bar, but also involving governmental agencies, Academia, and private bodies – such as NGOs or research-organisations –, lawyers should have access to more in-depth training, to prepare them more appropriately for cross-border cases. Training seems to be necessary specifically in the area of languages, but also on cross-border criminal proceedings, the legal systems of other EU Member-States (and shared available alternatives), along with EU instruments, such as the ESO – which we will touch upon in the final section.

Problem: Marginal resort to the European Supervision Order

According to the European Judicial Network (EJN) 2017-2018 Report on activities and management, Portugal has dealt with the ESO less than 50 times in the considered period (European Judicial Network Secretariat, 2019). A set of varying factors leads to this reduced use of the ESO, including lack of awareness and understanding of the instrument from the part of all actors involved, preference for already known and easier instruments to apply (such as the EAW), from the part of the judicial authorities, among others. Moreover, the lack of regular reports on the use of the instrument, both at national and EU-levels also add difficulties to mainstreaming its usage.

In this line, we would point to the following recommendations, in combination with the previously mentioned ones:

a) Critically assessing and improving conditions for the national competent authorities responsible for the ESO

Firstly, clearly determining the responsible body for managing the ESO is critical at the national level for upscaling usage of the ESO. The EJN Atlas notes that the contact point in Portugal for ESO matters is the Judicial Court of the Judicial District of Lisbon, specifically the Criminal Investigation Court (as of September this year) (EJN, 2021). Simultaneously, the June Report from the General Secretariat of the Council on the Council FD 2009/829/JHA of the same year states that, if Portugal is the issuing State, the court hearing the case is the competent authority; if Portugal is the Executing State (ES), the report points at the central chamber for the criminal preliminary judicial state (or, in specific cases, other authorities) as the central authority (General Secretariat of the Council, 2021). For inexperienced practitioners in the field of judicial cooperation in criminal matters, this scenario can add confusion and demotivate the use of the ESO. The often-mobilised Dutch example could shed some light on promising organisational practices enabling better coordination of the involved actors, with the creation of a specialised bureau to deal with criminal judicial cooperation issues, promoting the use of the ESO not only among judges and prosecutors, but lawyers as well.

b) Promoting joint initiatives with EU practitioners

As underlined, fostering training along with awareness-raising activities are central elements to improving the use of alternatives and the ESO, at the EU level. Such activities benefit considerably from the attendance of international audiences, to promote the exchange of knowledge, practices and solidify mutual trust. Any such activity should be grounded on a strong educational approach highlighting similarities between the legal systems of EU MSs, and especially shared available alternatives.

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8.6. National Romanian recommendations

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This paper is based on the research conducted in the PRE-TRIAD project but takes stock also of the findings of previous projects (e.g., DETOUR - Towards Pre-trial Detention as Ultima Ratio, co-funded by the Justice Programme of EU)[10].

1. The CCP lays down the conditions for imposing a preventive measure (including PTD). As a general principle, the CCP stipulates in Art. 202 para. 1 that pre-trial detention may be ordered if the evidence is leading to a reasonable suspicion that a person committed an offence and if such measures are necessary to ensure a proper run of the criminal proceedings (e.g.,not to hamper the evidence). Moreover, para. 3 establishes the principle of proportionality (the preventive measure needs to be proportional to the severity of the charge). Although they are not explicitly mentioned as principles regarding the preventive measures, a series of principles can be deduced from the analysis of the legislation (e.g., the legality verification of the measure by a judge; periodic review of preventive measures by a court; guaranteeing the right to defence by ensuring the participation of a lawyer chosen or appointed ex officio in all procedures that involve taking or prolonging a preventive measure, etc). However, it is a debatable aspect if PTD is the last ratio measure because the CCP allows significant discretion for the judge. In practice, the need for a preventive measure can be easily motivated by considering aspects such as severity of the crime, criminal record etc. (Art. 223 para. 2).

Recommendation:

- ✓ To limit the discretionary power of the judge and enhance the principle of PTD as *ultimo ratio*. One example can be the adoption of some guidelines for the use of PTD. This can be drafted by the National Institute of Magistracy or the Superior Council of Magistracy.

[10] https://www.irks.at/detour

- ✓ To improve the quality of decision making, judges should have the possibility to request social welfare institutions or probation services to carry out a social inquiry report, not only for juveniles but also for adults in some cases.

2. It was noted that one of the main reasons for imposing PTD is the seriousness of the offence or the circumstances of its commission. Other risks can also justify PTD, such as the risk of escaping criminal prosecution, the risk of committing new crimes, of influencing witnesses or experts or of destroying the evidence. In general, when assessing these risks, judges request from the prosecutor to indicate the evidence behind that risk. However, the seriousness of the crime seems to play a decisive role. Judges seem to follow a two steps process in the decision-making process. In the first step, the judges look at the offence and the person: the seriousness of the offence, the manner of committing the crime, the offence circumstances, the personal circumstances, and the stage of the trial. Another factor that is considered in the first step is the risk of committing further offences (risk of reoffending). In the second step of the process, judges seem to evaluate the risk of absconding, influencing the witnesses, or tampering with evidence. Most judges stressed that they take the PTD measure to ensure good progress of the trial. This means to ensure that the defendant will not contact the victim, will not run away, or influence the witnesses.

Recommendation:

- ✓ The risk of reoffending should be assessed using a risk assessment tool or another tool that would ensure minimum consistency and predictability.

3. Some procedural deadlines are inadequate. An example of such is the deadline provided in the case of the preventive measure of taking in custody for 24 hours which impose additional pressure on the prosecutor (who must elaborate a proposal for the preventive measure of PTD) and defender (who must prepare the defence within this time frame). In complex cases, involving the hearing of many persons, this period is seen by all practitioners as being too restrictive.

Recommendation:

- ✓ As regards the taking in custody measure, a review of the 24-hour period should be considered, at least in complex cases (e.g., cases involving organised crime networks, human traffic). In practice, the extension will be approved by the head prosecutor. The extension period granted should ensure a balance between the right to liberty of the suspect and the assurance of community safety (for example, a maximum of two extensions of 24 hours may be granted).

4. Another difficulty is the unequal position of the defence compared with the prosecutor. Lawyers tend to perceive that prosecutors have a privileged position in relation to judges. The main argument is the physical position of the prosecutor in a courtroom (the prosecutors sitting on a podium). Added to this, sometimes prosecutors have their workspaces in the courts. Lawyers complain that this is likely to create a familiarity with the judges.

Recommendation:

- ✓ Reconfigure the court space to ensure a better symbolic representation of the principle of equal power.

5. CCP provides three alternatives to PTD (judicial control, judicial control on bail and house arrest). Judicial control is considered to be very useful because it imposes on the defendants' certain obligations to guarantee their participation in the criminal proceedings. It also allows the defendants to continue their professional activity. However, these advantages were mentioned as leading to an extensive application of judicial control (net-widening effect). Judicial control of bail tends to be an exceptional measure because the legal provisions are not precise enough regarding how to set the bail amount. Another factor that leads to a limited application is that in many cases the defendants do not have the necessary financial resources to pay the bail. House arrest is considered a useful measure. However, one of the most important criticisms was that according to Art. 399 CCP the period of home arrest is deducted from the prison sentence by the equivalence of one day of home arrest with one day of detention. Another

criticism is related to electronic monitoring for defendants which has not yet been implemented, even though it is already provided by law.

Recommendation:

- ✓ The current legal framework needs to be revised to give judges more confidence in applying the alternatives. One effective way to achieve this aim is to ensure a proper enforcement of them in practice.
- ✓ Adopt some guidelines for setting the bail amounts.
- ✓ Ensure the infrastructure for the electronic monitoring and adopt guidelines to avoid its abuse in practice.
- ✓ Restrict the use of judicial control by involving the judge to review and prolong it every 30 days.

6. The legal framework is in line with international standards on preventive measures. Some provisions regarding preventive measures are specified in the Constitution. For example, provisions that require that PTD is imposed exclusively by a judge and only during criminal proceedings (Art. 23 para. 4), PTD may be ordered for 30 days, without exceeding 180 days in criminal proceedings (Art. 23 para. 5), the obligation of the court to periodically verify the validity and legality of PTD (Art. 23 para. 5), the possibility to appeal the decisions of the court imposing pre-trial detention (Art. 23 para. 7), the obligation to inform the defendant in a language that he/she understands about the reasons for his/her arrest (Art. 23 para. 8); the right of the defendant to request release under judicial control or bail (Art. 23 para. 10). CCP adds other safeguards like guaranteeing the presence of the suspect/defendant during the hearings or the obligation imposed on the judge to substantiate the reasons for the imposition of PTD. Access to legal aid is also provided by the CCP. The practice of the Constitutional Court was appreciated to strengthen the above-mentioned legal guarantees. Although they are provided by the law, they are not always observed in practice. In many cases the performance of the ex-officio lawyer is not up to the standards. Defendants are not always aware of their rights or about the criminal procedure.

Recommendation:

- ✓ Strengthen the right of defence by reviewing the legal framework regarding the ex officio lawyers (e.g. insert a recommendation that the defence be carried out by the same lawyer during the prosecution and trial; increase the fees paid by the Ministry of Justice so that the defence to be provided by experienced lawyers; introduce criteria for the selection of ex officio lawyers to ensure the quality of the defence, etc.).

- ✓ Draft a brochure for defendants regarding their procedural rights, explanation of criminal procedures focusing especially on the preventive measure.

7. It was highlighted that the jurisprudence of the ECHR has played an important role in shaping the practice of preventive measures. Judges are constantly mentioning the ECHR case law in their decisions. The National Institute of Magistracy included ECHR jurisprudence in the training of future magistrates. Council of Europe developed some guidelines (translated in Romanian) that summarize the jurisprudence of the ECHR regarding the application of rt. 5 of the Convention (on the right to freedom and security). However, the mutual trust instruments and, in particular, ESO is not well known by all judges and prosecutors in great detail.

Recommendation:

- ✓ The same measures and the same effort should be invested in promoting ESO among prosecutors and judges from all levels of jurisdiction. For example, the National Institute of Magistracy could include one topic on ESO and other mutual trust instruments in its annual curricula.

- ✓ Draft a brochure with information regarding the ESO procedure to inform all foreign defendants about the ESO procedure.

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PRETRIAD

Alternative pre-trial detention measures

D3.1 Recommendation paper on the application of PTD national application

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