

## **Comparative Report**

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Vienna, December 2017



Funded by the Justice Programme of the European Union

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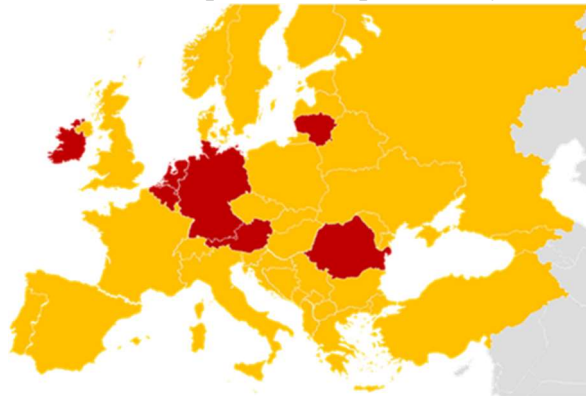
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# 1. Introduction

## 1.1. Background of the project and research questions

Everyone has the right to liberty and security of person. And everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. When a person is suspected of a crime, the state has the right and duty to examine the case, and to initiate criminal proceedings. However, the right to liberty and the presumption of innocence as enshrined in Art. 5 and Art. 6 (2) of the European Convention on Human Rights (and domestic constitutional and legal provisions) guarantee that the suspicion in itself may not lead to an infringement of rights: The **default option** during criminal proceedings therefore is **liberty** for the suspect awaiting trial and conviction. Only good reasons to assume that s/he will not stand trial or that s/he will offend while at liberty may lead to the option of using coercive means to secure the criminal process. Nevertheless, neither the suspicion nor the facts that lead to the assumption that a person may not be

available for trial should make this person ‘a little bit guilty’ in the eyes of the court; all state interventions in this phase of the criminal process must be carefully justified. Even if there is a need for coercive means, the state again has to use the least intrusive measure to secure both the (greatest possible amount) of liberty and the proceedings.



The second option is therefore **restricted liberty** for a suspect awaiting trial. This is why one focus of our research were those means of restricting liberty, often dubbed “alternatives to pre-trial detention” or included in the concept of (conditional) bail. It is only if the states (through their law enforcement agencies) are able to prove that no other means will ensure that the suspect actually stands trial, and that s/he will not continue offending, that the most intrusive measure can be justified, i.e. pre-trial detention (PTD). These arguments construct the starting point of this research, **the need to use PTD as ultima ratio**, as a means of last resort or ultimum remedium (all three expressions are used synonymously here).

Additionally, remand detainees often suffer **worse conditions** than sentenced prisoners, as, for example, the European Committee for the Prevention of Torture frequently has

found and identified as a pan-European problem.<sup>1</sup> The prison conditions sometimes are so bad that in some countries they infringed Art. 3 which guarantees that nobody may be subjected to torture or to inhuman or degrading treatment or punishment.<sup>2</sup>

Finally, the result – PTD or another means of securing the proceedings – can only be a justified result when the procedure has been fair. This requirement **of a fair trial** includes independence and impartiality of the decision-making bodies, a speedy trial, defence rights and rights to information and translation. The legal requirements are enshrined in Art. 6 (1) ECHR and correspond to the human need to understand what is happening to oneself, to be able to articulate one's own position ("voice") and to be treated with respect, not as an object of the state's investigation and intervention. In contrast, unfair procedures constitute a risk for the legitimacy of the criminal procedure as such.

One particular feature of PTD in many European jurisdictions made a comparative approach particularly feasible; this is the proportion of foreigners in PTD. In 2015/2016 we find percentages of more than 50% (Austria, Belgium) but also low shares such as in Lithuania (7%) and Romania (8,6%).<sup>3</sup> Citizens of these countries, however, can be found among those remanded in custody elsewhere in the European Union. This is why cooperation mechanisms provided within the European Union, such as the 'European Supervision Order' (ESO), are of interest. As this instrument seeks to provide non-custodial supervision of suspects in their home country while being prosecuted in another Member State of the EU, it could be a useful tool to avoid PTD. The application of such a mechanism, however, requires knowledge about the practice in the different countries and also trusts that some basic common understanding of the subject matter exists.

With the normative starting point described above shared across the countries of study, we could commonly assume that a country's PTD population should be as small as possible. The aim of our research therefore was to understand what factors shape the use of PTD, how it actually is justified in practice and whether these justifications are convincing in the light of the two basic human rights guarantees. The study was conducted in seven

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<sup>1</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2017): Remand detention. Extract from the 26th General Report of the CPT, CPT/Inf(2017)5-part; <https://www.coe.int/en/web/cpt/standards> (last retrieved 25 January 2018).

<sup>2</sup> CPT, see footnote 1; several decisions of the European Court of Human rights, as well as a key decision by the European Court refer to this problem, for more details, see chapter 6.1. of this report.

<sup>3</sup> See the 1. National Reports with data from different sources, see also the numbers given in the Penal Statistics published on behalf of the Council of Europe (SPACE I), ([http://wp.unil.ch/space/files/2017/04/SPACE\\_I\\_2015\\_FinalReport\\_161215\\_REV170425.pdf](http://wp.unil.ch/space/files/2017/04/SPACE_I_2015_FinalReport_161215_REV170425.pdf), last retrieved 19 January 2018).

countries: Austria (AT), Belgium (BE), Germany (DE), Ireland (IE), Lithuania (LT), the Netherlands (NL) and Romania (RO).

From a comparative and European point of view we wanted to understand in how far the comparable normative approach serves as explanation for comparable practices or how differences could be explained. This resulted in our main research question **“Is PTD in practice used as a means of last resort (*ultima ratio*) in the participating countries?”** and a number of more specific secondary research questions:

- How extensively is PTD used?
- What developments can be observed with respect to the use of PTD and alternatives, what factors appear to be relevant in this respect?
- What factors influence decision-making?
- What parties are involved and what are their roles?
- Are alternatives to PTD available and are they used? What are potential obstacles?
- If alternatives are used are there indications of net widening?
- Are there any groups which are treated differently and if so, which ones, and in what respect?
- To what extent do European aspects play a role for PTD practice, and could cooperation within Europe or internationally help to avoid PTD?

The results of our study are relevant not only for scholars but also, in particular, for practitioners and policy makers, both on the national and the European level. Practitioners – judges, defence lawyers, public prosecutors, as well as those from the police, criminal justice, social and related fields – should profit from our insights, which demonstrate that many problems affect different jurisdictions in the same way, but constructive options are sometimes found elsewhere. These options may serve as examples for domestic purposes.

## 1.2. Main concepts and terminology

One of the endeavours and objectives of doing comparative research is to understand each other and develop a common language. This objective is even more difficult to realise in the field of penal sentencing. Even within one language, many terms have several equivalents, which can be used alternatively, but sometimes have a slightly different meaning.<sup>4</sup>

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<sup>4</sup> M. Boone and N. Maguire (2018), Introduction, in: *The Enforcement of Offender Supervision in Europe, Understanding Breach Processes*, Routledge, London: 5.

Sometimes identical terms or literal translations have a totally different meaning in another language (e.g. probation or rehabilitation).<sup>5</sup> As some of the researchers involved worked in the comparative field for quite some time, they have developed a certain sensitivity for these misunderstandings. This helped to bring such possible misunderstandings to the surface and prevented us from talking in circles, or at cross-purposes. In this section we will clarify some of the main concepts of our research which are important to understand this comparative report. The specific meaning that is given to these and other concepts in the different jurisdictions is also discussed in the national reports.<sup>6</sup>

### *Pre-trial detention*

We use the term “pre-trial detention” as uniform way of translating the various different domestic terms (for example “investigation detention” in Germany and Austria, “preliminary detention” in the Netherlands). Nevertheless, the period of detention comprises not only the period before trial, but also the trial period and possibly the period after conviction in case of appeal or a cassation procedure. The terms ‘remand detention’ or ‘preventive arrest’ (Romania) are sometimes used synonymously. Usually, the initial arrest by the police is not counted as a period of PTD in most contexts (this is different, for example, for the question of deduction of the final sentence).

### *Ultima ratio*

As mentioned above, one of the crucial concepts for our research is the *ultima ratio* concept itself. Since our main research question is whether PTD is an *ultima ratio* in practice, we have to give a clear indication when we consider this requirement to be fulfilled and when not. The idea behind it is, as we already explained in the first paragraph, that PTD should only be used when it is absolutely necessary to fulfil the objectives that are intended by its use. Therefore, the *ultima ratio* principle is closely connected to the aims of PTD, which are, in general: preventing absconding; preventing re-offending; preventing interference with the investigation; and, in some countries, preventing the disturbance of the public order.<sup>7</sup> PTD is only in accordance with the *ultima ratio* principle if it is proportionate to the aims it serves. It is immediately clear that we will not be able to give a one-

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<sup>5</sup> Brants, C. (2011) Comparing criminal process as part of legal culture, in: D. Nelken (ed), *Comparative Criminal Justice and Globalisation*, Farnham: Ashgate: 49–68.

<sup>6</sup> See the 2<sup>nd</sup> National Reports on the project website <http://www.irks.at/detour/publications.html>.

<sup>7</sup> Although the aims of pre-trial detention are – as derived from the common basis of the ECHR – comparable in general, some countries have (recently introduced) deviating aims which one may question could ever fulfil the requirements of the *ultima ratio* principle. For example, we see the aim of

dimensional answer to our research question. One of the inherent problems within this area is precisely that both the aims of PTD as well as proportionality are very fluid, with multiple possible interpretations. Therefore, our approach in the national reports was to describe how these concepts were interpreted in the different countries by the different participants and how these different interpretations can be explained. Our judgement on the extent to which the ultima ratio principle is respected is based, in particular on two matters. The first is the extent to which our respondents could convince us of the possibility of other strategies or measures being used in cases where PTD is applied. The second is evidence of the absence of consideration of other strategies or measures besides PTD.

While they have considerable overlap, the principle of subsidiarity and the principle of proportionality have to be distinguished from the ultima ratio concept: the principle of subsidiarity refers to the use of less severe measures: such measures must always be chosen when they serve the same aim equally well as PTD. The principle of proportionality applies to all measures: as long as the legitimate aim is fulfilled, the least intrusive measure, for the shortest time possible, must be chosen.

#### *Alternatives for pre-trial detention/bail*

The concept of “alternatives” to PTD was difficult to grasp in the comparative context. It always referred to “more lenient”, “less severe” or “milder measures” to pursue the aims of securing the proceedings or prevent recidivism that include supervision in the community in the widest sense. Referring to a categorical distinction developed by *Morgenstern*<sup>8</sup> we distinguished between two models. In the first model (“substitution model”), milder measures can only be ordered when the detention threshold actually is met, that means that judges have to order an arrest warrant which is then, immediately or later, suspended under conditions. We find this in Germany, the Netherlands and Belgium.<sup>9</sup> The other model could be called the “bail model” where non-custodial measures to secure the proceedings can be ordered independently from the prerequisites for detention; PTD is just one option to choose. These measures therefore are not necessarily alternatives to PTD in the strict sense (Austria, Ireland, Romania, Lithuania). But even if these models can in theory be distinguished, in practice both serve the same aim and thus are not independent

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expedited proceedings that was introduced in the Netherlands in 2015. For other examples see the national reports.

<sup>8</sup> Morgenstern. *Die Untersuchungshaft*. Nomos, Baden-Baden, 756 pp.

<sup>9</sup> In Belgium, the same basic requirements have to be met for all pre-trial measures in the same way, i.e. PTD, Electronic Monitoring (EM), financial bail or release under conditions; it is not necessary, however, to order PTD and then suspend it.



from the legal framework for detention; often the non-custodial measure is the compromise between detention and unconditional liberty regardless of the legal model (see more in section 4. 1.2). “Bail” is the concept used in Ireland and Romania (the Romanian terminology is ‘control judiciar’ and ‘control judiciar pe cautiune’). An accused person who is granted bail or is “on bail“ is simply a person who is not held in pre-trial detention while the charges against him or her are pending before the courts. Conditions, including those of a financial nature, may be attached to the accused’s bail (and are normally).

While there may be a psychological effect on judges who must overcome the detention threshold, we found that this is also no guarantee that milder measures are not ordered by way of compromise in the three countries which follow the substitution model. In practice, therefore, the categorical distinction plays a smaller role. While the term “milder measures” would be more neutral, the term “alternatives“ is often used as a buzzword and therefore also acceptable in our context – we would like to emphasise, however that the term ‘alternatives‘ reinforces the position that detention is the norm; a position that needs to be changed.

#### *Foreigners (foreign nationals)*

An important aim of the DETOUR project is to determine and eventually explain the proportion of foreigners in the pre-trial population. Also, this term can cause a lot of misunderstandings. In the context of our project we considered a foreigner to be a foreign national, that is, an individual who is not a citizen (does not have the identity papers) of the host country in which he/she is a suspect. This concept is often blurred with other concepts as for example irregular migrants or individuals from ethnic minority backgrounds. We thought, however, that it was most effective to concentrate on foreign nationals in order to evaluate whether PTD procedures and/or practices act in a discriminatory manner. Foreign nationals also constitute a more delineated category of individuals when compared to irregular migrants, and the numbers thereof could therefore also be compared using more reliable data. The term also covers individuals who stay in the host country on a regular as on an irregular basis. As the reasons behind the overrepresentation of these groups are different, we often distinguish between these groups in the national reports. To capture all types of discriminatory practices it would probably have been preferable to consider an even more extensive group, including individuals that from ethnic minority backgrounds (who, of course, can be citizens of the residence country) but that category is too undefined to work with in this comparative context.

### 1.3. Pre-trial detainee rates as a starting point for comparative research

One of the drivers behind our eagerness to do this comparative study concerns the varying rates of pre-trial detainees (pre-trial prisoners per 100,000 of the population) in the different jurisdictions as published, for example yearly by the Council of Europe. These statistics show remarkable differences between the jurisdictions involved in this study.<sup>10</sup> Earlier comparative research<sup>11</sup> has taught us, however, that we should have a critical attitude towards the reliability of statistics.<sup>12</sup> We know from the Council of Europe that it must work with the numbers which the member states themselves count as pre-trial detainees, which means that the domestic definition is accepted as such.<sup>13</sup> As we explained in the paragraph on terminology, however, there can be slight differences in what countries count as pre-trial detainees and what are not so counted.<sup>14</sup> In general, however, the jurisdictions involved in this study count their pre-trial detainees in a similar way: all countries consider prisoners as remand prisoners until the final verdict. Suspects that have their remand detention suspended under conditions or serve non-custodial measures through another legal modality are not counted as pre-trial detainees.<sup>15</sup> It is to this extent that the statistics of the Council of Europe on the pre-trial detainee rate can be considered as rather comparable for the countries involved in this study. Other type of statistics on pre-trial detainees are, however, less suitable to use in a comparative context or simply not available. The relative number (percentage) of pre-trial detainees of the total prison population does not give much indication concerning good or bad practices with regard to PTD. A relatively low proportion of pre-trial detainees can, for example, reflect a prison

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<sup>10</sup> See SPACE in footnote 3: Rates per 100.000 inhabitants 2015: Austria = 23,7 / Belgium = 28,3 / Germany = 13,2 / Ireland = 12,5 / Lithuania = 34,3 / the Netherlands = 23,0 / Romania = 12,2 /.

<sup>11</sup> F. Dünkel, T. Lappi-Seppälä, C. Morgenstern and D. van Zyl Smit D. (2010): *Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich*. Mönchengladbach: Forum; A. van Kalmthout, M. Knapen, C. Morgenstern (2009): *Pre-trial Detention in Europe*. Nijmegen: Wolf.

<sup>12</sup> M. Boone and N. Maguire (2018), Introduction, in: *The Enforcement of Offender Supervision in Europe, Understanding Breach Processes*, Routledge, London: p. 11.

<sup>13</sup> See footnote 3: SPACE also differentiates between certain groups, for example those awaiting trial, those in trial awaiting conviction, those awaiting sentence (a concept that is not used on the continent as conviction and sentencing are spelled out together) and those who are appealing or are in a time limit of doing so.

<sup>14</sup> See for instance Dutch Chamber of Audit critically reviewing the comparability of current statistics like SPACE, <https://english.rekenkamer.nl/publications/reports/2017/11/14/pre-trial-detention-suspects-in-the-cells>

<sup>15</sup> In Belgium, Electronic Monitoring is considered as a “modality of execution” of an arrest warrant, and therefore, legally speaking, they are considered as “prisoners” (with deduction of the term served on EM from the final sentence). The national official prison statistics, however, differentiate between the “normal” prison population and the EM-population (as people under EM do not occupy prison cells). The Council of Europe also reports on ‘adjusted’ and ‘non-adjusted’ figures. In the non-adjusted figures, EM is included where it concerns Belgium.

population that serves mostly long sentences. On the other hand, a relatively high proportion of pre-trial detainees can also be explained by a relatively small prison population serving short prison sentences. Although we would have been eager to compare the different rates of suspects who are put in PTD for the different countries, these statistics were not available, or the ways of calculating them were not comparable.

#### 1.4. Importance of legal-social and cultural context

Although the statistics published by the Council of Europe were one of the factors that stimulated our curiosity, those statistics alone do not shed a great deal of light on good or bad pre-trial practices in the different countries. The ultimate aim of our project was to research and evaluate the practice of pre-trial decision making in its legal-social and cultural context. We did not approach decision-making as an individual activity, but as a collective enterprise in which different parties and individuals are involved who mutually influence each other.<sup>16</sup> As will be explained in the methodological section we chose a qualitative, interdisciplinary and interpretative approach that could help us to achieve our aim. The clear importance of such an approach can be explained with a few examples. The high rates of foreigners in PTD in Austria compared to other countries can only be understood in the context of migration movements during the nineties and above all since 2000, which happened to a much larger extent in Austria compared to the surrounding countries. Of course, this does not make the question of whether foreign nationals are treated differently to Austrians any less relevant, but these differences in numbers should first be analysed in the context of differences in national contexts. Another example of this contextual approach considers the differences in grounds that are used in the jurisdictions to substantiate pre-trial orders. We could not understand the extensive use of the risk of absconding in Germany as a ground for PTD compared to for example the Netherlands without knowing that it is obligatory to appear in court in Germany while in the Netherlands trials can also take place in the absence of the suspect. Finally, we could not understand the developments in pre-trial rates of Lithuania, without analysing these in the context of its history as an Eastern European country that only recently became a member state of the European Union. The significant downward trend in PTD applications in the last decade can at least be partly explained by the adaption of PTD practices to European values and norms of PTD.

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<sup>16</sup> What Hawkins calls individual decision-making, Hawkins, K. (2003). Order, rationality and silence: some reflections on criminal justice decision-making, in L. Gelsthorpe and N. Padfield (eds.) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond*. Collumpton: Willan, pp. 186–219

### 1.5. Conducting the research – some notes on methodology

As described above, our starting points were the common normative human rights concepts on the one hand, and apparent differences reflected in statistics about the pre-trial prison population on the other. We could build on a huge body of jurisprudence, both on the national level and the level of the European Court of Human Rights. We also could build on some, but not many research findings – often, however, the existing research concentrated on theoretical approaches and only few empirical studies exist.<sup>17</sup>

The value of a **comparative study** that combines both desk research and fieldwork in our view lies in the **additional level of reflection**: Comparing with other systems has analytical potential to understand one's own system, finding similarities helps us practically to work together – both in the research and in solving cross-border cases. Looking at good practices in other countries provides us with a reservoir of possible solutions for problems in our own, as long as we are aware of the legal and social culture in which they emerge (that, again, depends on careful research).

The **qualitative approach** can explore relevant contextual factors and show possible variations within the same context. The development of the tools used (interview guidelines, guidelines for the thematic analysis etc.) was not an easy task given the six different languages represented in this research, the different legal backgrounds, the different disciplines the researchers are coming from (law, criminology, sociology, social work, psychology). The necessary ongoing discussions between the project partners on the one hand and the respective translation efforts by the researchers on the other hand offered the possibility (or, rather, forced us) to **reflect constantly on the content and methods of our study – an approach that is paradigmatic for qualitative research** and provides for valid results. When we developed our instruments, we paid attention to finding common structures, but sought also to allow for adaptations to accommodate national particularities (for example as regards the choice of interview partners: where the probation service is never involved in the decision-making process as in Germany or Romania, there is no need to interview probation officers).

We opted for a two-phase approach: in an explorative phase we looked into a number of files, mainly to see what arrest warrants and other decisions on PTD actually look like, and we observed “detention hearings” (when a detention is actually ordered or reviewed) to get an impression of how different actors influence the decision-making on PTD. The

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<sup>17</sup> The results of our reviews of national literature, statistical data and jurisprudence are published in the 1<sup>st</sup> National Reports on the project's website: <http://www.irks.at/detour/publications.html>.

data gathered in this phase were not analysed as such but were used for the detailed planning of the following research particularly for the development of the interview guidelines. **In-depth interviews in the second phase thus were the core part of our research.** In every country around 30- 35 were conducted **with judges, defence lawyers and public prosecutors**, in some countries additionally with probation officers, prison staff or police officers. A most **innovative tool** we developed and used was a **case vignette** as part of the interviews to be able to compare reactions to the same burglary scenario by interview partners across countries.<sup>18</sup> The construction of this vignette was a major task in itself, as it needed to be an ordinary case, leaving enough room for different kinds of decisions, which would work in all jurisdictions. During the research three workshops with practitioners served as fora for the presentation and discussion of preliminary findings, giving us important insights, in particular with regard to aspects of legal or professional traditions and cultures which are sometimes often difficult to extract from research data.

**This comparative report** tries to summarise the most relevant findings with potential not only to explain certain practices and critical issues, but also to highlight good practices and give policy and practice recommendations: It is based on **two comprehensive national reports per country** that are available on the project website.<sup>19</sup> The first one contains the results of our desk-top research reflecting the legal situation, statistics and existing research, and the second one presents the findings of our respective empirical studies. In the following chapter 2, the legal grounds for detention and the factors relevant for decision-making are covered. Chapter 3 deals with the different actors, their legal and factual roles and performances. Chapter 4 examines the practice regarding less severe (or ‘alternative’) measures. Chapter 5 contains the findings on procedural aspects as regards both practical problems and legal safeguards, namely review procedures. The last substantive chapter, chapter 6, covers European aspects, namely with regard to cross-border cooperation, before conclusions are drawn from all chapters and recommendations are formulated.

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<sup>18</sup> For an examination of vignette methodology in a comparative criminological context see *Maguire et al*, *European Journal of Probation* 2015.

<sup>19</sup> <http://www.irks.at/detour/publications.html>

## 2. The basis for decision-making: Legal grounds, factual motives *and* influential factors

### 2.1. Introduction

The descriptions of the fundamental legal regulations with respect to PTD in the project countries<sup>20</sup> indicate that the basic principles are quite similar and respect the standards set by the ECHR and the jurisprudence of the ECtHR with regard to Art. 5 (1) and (3).<sup>21</sup> The following principles can be viewed as common across the countries. A person may only be remanded in custody if the following conditions are satisfied:

- There is a reasonable suspicion that s/he committed an offence and a reasonable likelihood that s/he will face conviction and prison sentence if found guilty;
- There are substantial reasons to believe that, if released, he or she would either
  - try to avoid criminal investigations, trial and punishment;
  - interfere with the course of justice by for instance through tampering of evidence or by influencing witnesses or;
  - commit (a) serious offence(s);<sup>22</sup>
- In view of both the presumption of innocence and the presumption in favour of liberty PTD of persons suspected of offences shall be the exception;
- The proportionality principle in criminal matters requires that coercive measures are only used when this is proportionate, considering the offence as well as the expected sentence and only for as long as required;
- Remand in custody shall only be used as a measure of last resort when less severe mechanisms are insufficient to exercise control over the suspect and to guarantee his or her presence at trial;

From these starting points this chapter explores in more detail the grounds and the motives for PTD in practice, as well as other factors reported to be influential in the decision-making process in the project countries.

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<sup>20</sup> For details see the 1<sup>st</sup> National Reports on Austria, Belgium, Germany, Ireland, Lithuania, the Netherlands and Romania, <http://www.irks.at/detour/publications.html>

<sup>21</sup> See chapter 6.1.

<sup>22</sup> In exceptional cases also a “shocked legal order” can be the ground to order PTD, see below and chapter 6.1 and the 1<sup>st</sup> National Report on the Netherlands, <http://www.irks.at/detour/publications.html>

## 2.2. The legally defined grounds for PTD in practice

### 2.2.1. *The risk of absconding and preventive grounds*

Looking at the practical meaning of the grounds for detention, the countries represented in this study, at first sight, appear divided in two groups: on the one hand countries in which PTD is mostly justified on the assumption that suspects will try to avoid criminal procedures, convictions and punishment. The answers of the practitioners questioned in the course of our research and available data indicate that this is true for Germany, Ireland, Lithuania and for Romania. Besides the risk of interfering with the course of justice, this ground for detention can be viewed as “classical”. The term classical refers to the fact that these grounds are directed at securing the criminal investigations, the criminal proceedings, verdicts and finally the execution of sentences, which are, taken together, the motivations historically central to most legal systems.<sup>23</sup> Risks with respect to interfering with the course of justice only play a minor role in all countries observed – such applications primarily concern the early stages of the proceedings and, mostly, cases involving several suspects. Only in Belgium was the risk of collusion reported to be applied quite frequently in the early stages of the investigations, for instance in drug related crimes.

In the other group of countries, it is mainly preventive reasons which are most often employed to ground PTD. Interestingly, for instance, Austria and Germany the two neighbouring countries with very similar legal traditions appear contrasting in this respect. While in Austria available data shows that the risk of reoffending is applied in about 90% of all PTD-cases, it is the opposite in Germany with 90% of all PTD-cases based on a risk of absconding. With an estimated rate of applications in about 60% of all PTD cases, the risk of absconding is also often applied in Austria, while in Germany the risk of reoffending was explained to play a minor role being only applied in about 6% of all PTD cases. The dominance of the risk of reoffending in Austrian PTD-practice appears, not least, due to very detailed regulations with respect to this ground for detention which allow for diverse options to apply it. These regulations were reported to have been introduced in 1993 not least in order to reduce the already frequent application of this ground at that time.<sup>24</sup> This obviously has not worked, providing an example of the difficulty in regulating and reducing PTD via legal changes. Another reason behind the domination of this ground related to the legal bases, which insight became visible in the expert interviews. The legal

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<sup>23</sup> See for instance Morgensten, C., *Die Untersuchungshaft. Eine Untersuchung unter rechtsdogmatischen, kriminologischen, rechtsvergleichenden und europarechtlichen Aspekten*. Baden-Baden, Nomos, 2017

<sup>24</sup> 2<sup>nd</sup> National report on Austria p.21, <http://www.irks.at/detour/publications.html>

requirements for the risk of absconding in order to justify PTD were explained by participants as being more difficult to be fulfilled. The risk of reoffending was, on the other hand, repeatedly referred to as the ground for detention one would prefer, because it is a strong ground and one which is rather easily applied in many cases. The broad scope of application of this ground is also emphasised by the fact that it is often applied to rather minor offences involving so called “criminal tourists” who are for instance accused of engaging in multiple property offences as a source of regular income. The outcomes of the German research, however, despite some regional differences, indicate that the risk of absconding is the ground for detention applied more easily, which can be explained by reference to the legal requirements. There, the risk of reoffending is only defined as a subsidiary ground for detention and depends on additional criteria; for example, that the alleged offence must be committed “repeatedly or continually”.

According to estimates in Lithuania, the risk of absconding is applied in 80 to 90% of all PTD-cases, mostly in combination, and frequently together with a risk of reoffending (about 50% of all PTD cases). As in Germany, here the risk of absconding is described as being applicable without particular restrictions. Despite there being references to the regular use of the risk of reoffending in the reasons given for PTD in Romania as well, securing the criminal investigation, the trial and punishment were reported as the primary motivation.

A critique discussed with respect to the risk of reoffending as a ground for detention refers to the combination of criminal prosecution and criminal prevention.<sup>25</sup> Ireland only introduced this ground for detention in 1997 with a new Article (40.4.6) to the Irish Constitution. In so doing a ruling of the Supreme Court was reversed, which had denied this ground for detention because it would allow for a preventive justice.<sup>26</sup> Preventive detention would not be compatible with the key rationale of bail being a measure to secure the proceedings. Interestingly the Irish practitioners reported that the practice did not change much since the introduction of the amendment permitting the risk of reoffending to justify detention. This demonstrates how important and persistent legal traditions and legal culture are for actual practice. Still, the “new” ground, which asks for rather concrete evidence for the risk and severe offences, is applied, mostly however in combination with other grounds. The legal culture of most of the countries represented in this project being quite different in general, the legal culture of Ireland again represented a quite distinctive position. This distinction is especially visible through the presumption in favour of bail

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<sup>25</sup> Morgensten, C., *Die Untersuchungshaft. Eine Untersuchung unter rechtsdogmatischen, kriminologischen, rechtsvergleichenden und europarechtlichen Aspekten*. Baden-Baden, Nomos, 2017, p. 392

<sup>26</sup> *People (Attorney General) v. O’Callaghan* [1966] I.R. 501.



and with bail being the default procedure in PTD-cases. This by itself indicates a different approach of dealing with grounds for detention. The risk of absconding is the ground for detention most often applied in Ireland. As in the other countries, prior record, expected sentences, residential status/regular place of living, social ties (e.g. family, employment) in the country are criteria considered in Bail-/PTD-decisions. Another factor that played a role in the interviews conducted in Ireland – because of the importance in the assessment of the risk of absconding – is the bail-history of a suspect, with prior violations increasing the likelihood of PTD considerably. In the other countries, this aspect was hardly, or not at least not explicitly, addressed. This may be partially explained by the limited use of alternatives to PTD in some countries (e.g. Germany, Austria) or by high numbers of foreigners, who often don't have records in the country of the proceedings (e.g. Belgium). The difference, however, may also be explained by the fact that bail is considered the default procedure which, according to the outcomes of the Irish research, also means there is a particular openness towards and an active search for solutions/conditions allowing for bail. As a consequence, violations may also receive more attention than in systems not paying much attention to alternatives in the first place. An interesting aspect of the assessment of a risk of absconding was stressed in Lithuania. Against the background of many Lithuanians leaving the country for economic reasons, attention is paid to contacts and social ties outside the country, with the assumption being that there are higher risks of absconding in such cases. Social ties with other countries however are also considered in the assessment of risks of flight in the other countries studied.

Looking again at the dominance of preventive grounds, Belgium and the Netherlands seem to represent this position most sharply. Similar to Austria, in both countries the legal possibilities for an assumption of a risk of reoffending appear rather broad and practitioners there also described this ground as being one which can be justified quite easily. In both countries it was also explained by practitioners that the assumption of a risk of reoffending does not necessarily require a prior record of offending, and that social conditions and personal problems (e.g. substance dependency, financial problems, aggression, etc.) may suffice to justify this ground for detention. In these countries, the legal concept and rationales behind the dominance of preventive considerations appear broader than in Austria. Central to the legal provisions for PTD in Belgium and in the Netherlands, is the notion of “public security”. In Belgium a warrant is only possible when it is absolutely necessary for public security. According to the responses of the practitioners, this criterion however appears to be fulfilled rather easily, and does not require detailed substantiation. Besides broad definitions of risks with respect to security aspects (e.g. also security of the state), in the Netherlands there is also a ground requiring PTD in circumstances where it is argued there is a need to facilitate expedited proceedings against people suspected of unsettling crimes in public areas, (what we might also call disturbing

the peace) or against public officials (policemen, firemen and ambulance staff). An aspect possibly explaining part of the subordinated or lesser use of the risk of absconding to justify PTD is the fact that Belgium<sup>27</sup> and the Netherlands also allow for trials and verdicts in the absence of the suspect while this is for instance no option in Germany. In Austria, this is also possible, but is rarely done according to the judges interviewed, probably because of the rather narrowly defined conditions which have to be fulfilled.<sup>28</sup>

The PTD-rates of the project countries suggest that the countries focusing on preventive aspects in PTD decisions in the tendency have higher pre-trial detainee rates than the others focussing primarily on securing the criminal investigation, the trial and punishment.<sup>29</sup> The rather high detention rate of Lithuania does not support this hypothesis, but probably this is to be explained by historical-political reasons.<sup>30</sup>

### *2.2.2. The seriousness of offences and decisions on PTD*

The seriousness of offences is an aspect considered in all countries in decision-making on PTD (or release). The seriousness of the offence is also an aspect highly relevant for the assessment of the proportionality of PTD. Interestingly, the issue of proportionality was rarely addressed by the experts interviewed. Some judges and prosecutors in Austria and Belgium explained the proportionality principle to be fulfilled easily, considering the sentences which mostly can be expected in these cases. Not very surprisingly, some defence lawyers had a different perspective (e.g. in AT and B). In fact, the assessment of the seriousness of offences appears to be subject to a wide margin of discretion in all countries observed in this study. The research indicated, however, that there were quite diverse definitions or assessments within the countries on this issue, and therefore comparisons between the countries are not feasible. The German report for instance shows a remarkable variation within the sample: when asked about detention thresholds, some interview partners referred to minimum thresholds and explained that in some cases PTD was acceptable for crimes where a sentence of six months to one year of imprisonment can be ex-

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<sup>27</sup> It should be noted that the risk of absconding is nevertheless also often applied with foreign nationals without residency in Belgium.

<sup>28</sup> In cases with possible sentences of up to three years, if the suspect has already been interrogated with respect to the suspicion and if there is a registered address where summons can be delivered.

<sup>29</sup> See chapter 1.3.

<sup>30</sup> Lithuania underwent far reaching (also legal) changes in the recent past which already lead to considerable declines in the numbers of detainees. Continuing efforts give rise to hopes that the rates will continue to drop. Considering the political past and also the total number of prisoners Romania actually appears to be the big surprise with respect to the low PTD-rates.

pected. Others referred to maximum thresholds and said that for crimes carrying a minimum of five years of imprisonment, PTD was hardly avoidable.<sup>31</sup> While the expected sentence often played a significant role in the interviews in all countries, outside of the most severe offences, decisions on PTD in the end and generally will not exclusively be based on the seriousness of the offence. At the very least, judges and prosecutors interviewed in the project countries regularly explained that they look at a multitude of factors in their decisions.

There are some kinds of offences which have been reported to have a rather high likelihood of PTD in general, such as sexual offences, severe violence, human trafficking or drug related crimes. In the Netherlands “high impact crimes”, which are considered to have high impact on the general perception of safety and high rates of recidivism such as robbery and burglary were reported to almost automatically lead to PTD. From Austria, Germany, Belgium, Ireland and the Netherlands it was also reported that domestic violence would often justify PTD. Some respondents (AT, IE) noted difficulties in assessing such cases.<sup>32</sup>

In Germany the seriousness of an offence is a ground for detention by itself, which, however, is reported to be seldom applied, because it is largely connected to most severe offences like homicide, which don't occur very often. The motivation behind this ground is the impact of such crimes on the public.<sup>33</sup> Similarly in the Netherlands there is also a ground requiring PTD if someone is suspected of an offence subject to a sentence of 12 years or more in circumstances which give rise to serious indications that this will cause serious upset to the legal order (the society).<sup>34</sup> There are indications that, in practice, this ground is mostly applied in a way which focuses on the severity of the offence and often lacks detail regarding the grounds giving rise to the alleged serious upset to the legal order. In Austria, the law requires PTD for offences subject to sentences of a least ten years, unless there are reasons to assume that all grounds for detention defined by law can be excluded.<sup>35</sup> In practice, offenders accused of such offences are always detained, giving rise to the assumption that the impact of the most severe crimes on the public plays a role here as well. Homicide offences will lead to PTD in most countries, while this is not necessarily true for Ireland. Although it was reported that the seriousness of capital offences is a crucial factor regularly resulting in objections to bail, it was also reported that even in murder

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<sup>31</sup> 2<sup>nd</sup> National Report on Germany, p. 32 ff, <http://www.irks.at/detour/publications.html>

<sup>32</sup> Mostly probably because of regularly contradicting statements of suspects and victims.

<sup>33</sup> 1<sup>st</sup> National Report on Germany, p. 12, <http://www.irks.at/detour/publications.html>

<sup>34</sup> 2<sup>nd</sup> National Report on the Netherlands, p. 43, <http://www.irks.at/detour/publications.html>

<sup>35</sup> 1<sup>st</sup> National Report on Austria, p. 10, <http://www.irks.at/detour/publications.html>

cases judges would not always deny bail. Even more surprising are reported examples from Lithuania, suggesting that there, too, the most severe offences (like murder or drug trafficking) do not always mean PTD.

Additionally, in all countries, the seriousness of the offence is a factor considered in the assessment of the risk of absconding, and in some countries also with respect to the risk of reoffending (e.g. in AT and NL there is, among other things, a definition of a risk of reoffending based on the seriousness of the offence). Indirectly, the seriousness of offences in all jurisdictions also has an impact on the assessment of the risk of absconding by reason of the expected sentences.

## 2.3. Substantiating the grounds

### *2.3.1. Time pressure and personal and social information on the suspects*

The decisions on PTD or release with or without conditions are often defined by the little time available to prepare them.<sup>36</sup> Prosecutors and judges in the partner countries refer to the time pressure and some of them explain that the information available is often very restricted, but, generally, these actors do not complain about this situation. On the contrary, judges and prosecutors often explicitly called the available time and information sufficient (e.g. AT, DE, ROM). Across the countries they apparently have arranged their practice accordingly and learned to deal with this situation. Concerning personal and social information on the suspects, however, there were regular indications in the responses of our interview partners that there is often a lack of this kind of information (above all in AT, DE, BE, ROM, NL). On the other hand, we can conclude from our research that this kind of information is considered important and helpful for the decisions in general and particularly for the application of less severe measures or for release without conditions. Only the responses in Romania indicated that rather little attention is paid to these aspects in the decision making. Mostly this kind of information is provided by the suspects themselves and/or is expected from the defence lawyer.

Social work support can play an important role in this respect. Apart from the support for the decision-makers and the decisions, the involvement of practical social work can actually also support the defendants to organise measures that would allow the application of less severe measures (e.g. to find housing, possibly treatment or employment, etc.). In

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<sup>36</sup> See chapter 5.

Germany the existing court aid for adults could be involved for this, but this is not practised. The juvenile justice court aid (Jugendgerichtshilfe) present there is actually regularly employed in juvenile cases as in Austria, where this option is very well received, though it does not exist for adults. In the Netherlands, the reports about experiences with the option to involve the probation services were mixed, however participants gave positive evaluations of this system where sufficient resources were in reported to be in place. In Belgium, probation officers can also be asked for reports, which is seldom done, however, due to time restraints. Asked about this kind of support, prosecutors and judges in general (AT, BE, DE, NL) responded very differently, some were in favour, others rather opposed. Often the little time available for such involvement was mentioned by participants, which would also restrict the possibilities for and the usefulness of social inquiries.

### *2.3.2. Decision-making and discretion*

Looking at the main criteria considered in the partner countries in the assessment of the grounds for detention it appears that, to a large extent, these aspects are the same for the risk of absconding as well as for the risk of reoffending: Prior criminal records, seriousness of the charge, expected sentence, employment situation, (lack of) income, (lack of) social and/or family ties and even a lack of residency may not only be used to ground a risk of absconding but also for assessing the risk of reoffending.

One of the particularly interesting findings of this comparative study, therefore, is that the grounds for detention to some extent seem interchangeable. We had responses indicating that the grounds for detention applied are not necessarily the ones considered most relevant in individual cases. In Austria for instance, we heard about cases in which a central motivation for PTD was to avoid absconding, while a risk of reoffending was central to the formal motivation of detention. This was explained by the risk of reoffending being the ground which was easier to substantiate and because it would make it more certain that a suspect will remain in detention. In Germany it was explained the other way around: there were indications that the ground of a risk of absconding may be applied in cases in which a risk of reoffending is, in fact, essential to the actual motivation for PTD. As mentioned before, here the risk of absconding is considered the stronger ground and easier to apply. This gives rise to the impression that the normative framework for the legal grounds may be of lesser importance once decision-makers are convinced that PTD is necessary and are able to interpret the grounds in a way that fit to the factual risks (mainly posed by suspects in difficult social circumstances). Regarding the Netherlands, this suspicion was confirmed also with reference to literature.<sup>37</sup> After having determined whether there is a case

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<sup>37</sup> 2<sup>nd</sup> National Report on the Netherlands, p. 39, <http://www.irks.at/detour/publications.html>

for PTD and a grave suspicion, judges will firstly see if they want the suspect remanded in custody or not. Only then do they choose the right grounds on which to base their decision, most often the risk of reoffending, because of its broad definition. The actual motivation behind PTD may, in fact, be based on prevention, considerations of security, retribution/punishment and anticipation on the expected sentence, etc.

A critique reported from most countries refers to a prevailing practice of justifying PTD on the bases of rather general assumptions about the suspect accompanied by a lack of thorough assessment of the risk (AT, DE, BE, NL, LT, RO). In Germany the difficulty was expressed with regard to risk prognoses.<sup>38</sup> It is the case that such prognoses can be difficult, but we can assume that assessments benefit from broad information on the person and on social conditions. This situation may therefore recommend institutional support to the courts concerning social inquiries. With respect to the risk of absconding, responses for instance from Germany and from Lithuania expressed that the risk would be overstated regularly. A high risk is often not considered realistic by such participants as evading justice means a huge burden and requires financial means which most of the suspects do not have. On the other hand, the Austrian, Dutch and Belgian reports feed the suspicion that the risk of reoffending may not only be assumed for the (rather short) time of the criminal proceedings but that practice in these jurisdictions consider risks beyond this timeframe.

PTD practice in all countries appears very much dependent of the approaches and the personal attitudes of the individual decision makers. Their discretionary power seems to be quite extensive and is hardly constrained by legal provisions such as explicit thresholds. This becomes, for instance, visible in the differing PTD practice in the east (rather extensive PTD) and in the west (less PTD) of Austria and significant regional differences between the Federal States in Germany.<sup>39</sup> Interestingly, judges and prosecutors often reported having little knowledge about the general practice with respect to PTD and alternatives, which suggests rather limited reflection on their individual practice (e.g. AT, LT, IE). Decisions on PTD require, of course, some discretion considering the little time and the little information often only available as well as the complexity of cases. At the same time, however, considerable attention has to be paid to the procedural and legal safeguards which protect of the rights of the suspects. In most of the countries we had responses commenting critically on the fact that judges rarely deny applications for PTD brought forward by the prosecution. Of course, the selection processes by the prosecutors

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<sup>38</sup> 2<sup>nd</sup> National Report on Germany, p. 23, <http://www.irks.at/detour/publications.html>

<sup>39</sup> 1<sup>st</sup> National Reports on Austria, p.18, and Germany, p. 27, <http://www.irks.at/detour/publications.html>

have to be taken into account in understanding pre-trial detention practice. The very high rates of acceptance of applications reported from most project countries and also by Fair Trials at least remind us of the need for critical assessments of such applications.<sup>40</sup> Among the project countries Ireland stands out for its practice of it being unremarkable for applications for PTD to be denied, or, more precisely, for objections to bail not being upheld.

## 2.4. Hidden and extra-legal grounds for PTD and motivations

### 2.4.1. *Procedural economics, foreign nationals and general prevention*

PTD appears sometimes motivated by the fact that it is the easiest way to secure the proceedings and to promote the investigations. There is an imminent danger that procedural economics may prevail in relation to the ultima ratio principle. A regular place of residence within the European Union is for instance also supposed to be treated like a regular place of residence within the particular country.<sup>41</sup> In our interviews, for instance in Austria and in Belgium, but also in Germany, we nevertheless had some responses expressing that a European residency may not necessarily suffice to exclude an assumption of a risk of absconding. Practitioners explained this by reference to problems in verifying places of residence and addresses in other countries and to worries about apprehending suspects when abroad. Although the European Arrest Warrant was described in all countries as a tool functioning mostly well, some participants indicated worries about delays and hassle.<sup>42</sup> In view of delays in the proceedings and of administrative difficulties participants reported that it may be tempting to keep the suspect in custody and at one's disposal rather than rely on a European Arrest Warrant in the future.

In some of the project countries more than 50% of the pre-trial detainees are foreigners. (Austria, Belgium and Germany).<sup>43</sup> The frequent use of PTD for foreigners feeds the worry that foreigners may not be treated equal to nationals. The outcomes of the research do not imply that foreign nationals have a higher risk of detention per se. There are however certain groups of foreigners who definitely appear to have a higher risk than others, particularly “mobile offenders” also described by some as “criminal tourists” as well as, more

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<sup>40</sup> Fair Trials, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, 2017, p. 13

<https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>

<sup>41</sup> See chapter 6.2. and for instance the ruling of the Austrian Supreme Court 11 Os 31/08f, 27.02.2008.

<sup>42</sup> see also chapter 6.2.

<sup>43</sup> In Germany there are however big differences in this respect between the federal states, see 1<sup>st</sup> National report, p. 25. <http://www.irks.at/detour/publications.html>

generally, foreigners who lack social ties and proven residency, along with foreign nationals suspected to be involved in drug dealing. We can assume that for the majority of these groups the characteristic “precarious social conditions” applies to them. Suspects who are socially integrated have a better chance to avoid PTD while others living in vulnerable conditions, and engaging in criminal activities for reasons related to poverty and marginality, are increasingly the ones in detention, often because of rather minor offences. The states and societies are understandably anxious to prevent such offences. Moreover, the situation of such individuals is compounded by the fact that the social conditions of the suspects often make it rather easy to substantiate grounds for detention.

In this context, on the one hand the question is whether the principle of proportionality and the risks assumed are always assessed adequately. On the other hand, it seems that general preventive considerations may influence the decisions made in this area. A few Austrian judges and prosecutors explicitly said that PTD for “criminal tourists” may sometimes also aim at deterring others, a view occasionally also presented in interviews conducted in Germany. In any case, we gained the impression that the risks described are attributed in a blanket way to all members belonging to a certain group rather than being individually assessed in concrete cases.

#### *2.4.2. 2.4.2 Pre-sentence motivations*

The notion that PTD may teach the suspect a lesson seems to be a widespread one (reported in AT, BE, DE, NL). There is some room for interpretation, but this is at least close to what can be described as a “pre-sentencing motivation” i.e. a desire to ensure the person spends some time in prison. In a powerful leading judgement, the Irish Supreme Court considered it an improper use of detention to “... refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment”.<sup>44</sup> This statement of principle, however, is not being observed everywhere in the countries studied. Some observations express motives which are quite clearly of a pre-sentencing nature. In the Netherlands and Belgium it was, for instance, reported that judges in charge of PTD decisions may order detention because they would be afraid that suspects may be able to fully avoid prison – in Belgium because of the fact that short term sentences are regularly substituted by non-custodial alternatives, in the Netherlands because the trial judges may be reluctant to send a suspect released from PTD back to prison. Closely connected to this, the Dutch report referred to motivations based on the notion that you cannot explain to the public

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<sup>44</sup> People (Attorney General) v. O’Callaghan, [1966] I.R. 501 at 517.



or to victims of serious crimes that somebody who just committed some serious crime would be released quickly.<sup>45</sup>

Decisions in favour of PTD sometimes appear to be promoted by the view that a suspect will face an unconditional prison sentence anyway (e.g. reported in Germany and in Austria). Since the time in PTD will be deducted from the sentence, this practice is explained as being for the benefit of the suspect, who can complete his prison term quickly rather than going back to prison after release. Leaving the presumption of innocence aside, this reasoning is nevertheless wrong: the conditions in PTD are often worse than in prison in general and the situation for the suspect is particularly difficult because of the many uncertainties he/she is confronted with. Release from PTD may also have favourable effects on the ability to prepare for a case, and to the eventual sentence, while detention may have a negative impact when it comes to the decision of suspending a prison sentence or not (indicated, for example in interviews with German defence lawyers and judges).

#### *2.4.3. Public perceptions and discussions - their influence on the decision makers*

Judges and prosecutors in most countries regularly deny the following matters influence their PTD- and bail-decisions: the media; political groups; public discussions about security in general and event-based ones in particular.<sup>46</sup> Some responses, however, in all project countries however indicate that such influences can play a role. Even in Ireland where defence lawyers largely agreed with judges and prosecutors that there is no such influence in general, defence lawyers said that the prosecution might be more reluctant to consent to bail where sensitive features of a case might trigger negative media commentary. In Romania for instance public pressure appears to be regularly directed towards PTD in cases of public officials suspected of corruption. The Netherlands seem to be the only country represented in this study where public expectations and perceptions with respect to feelings of safety appear to be quite explicitly and largely undisputed considered factors relevant in decisions on PTD. This is also expressed by the fact that there is a ground for detention on the basis of indications that an offence will cause serious upset to the legal order (see above). Referring to other references the Dutch report further explained that judges not least aim at a feeling of safety amongst victim(s) and others affected by offences.<sup>47</sup>

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<sup>45</sup> 2nd National Report on the Netherlands, p. 83 , <http://www.irks.at/detour/publications.html>

<sup>46</sup> See also chapter 3.5.

<sup>47</sup> 2nd National Report on the Netherlands, p. 12 . <http://www.irks.at/detour/publications.html>

## 3. The role of the players

### 3.1. Introduction

In this chapter, we look into the role of the most important players in the PTD proceedings: the prosecution, the defence, the judiciary and the probation. From our interviews with experts in the participating countries, similarities and differences between practices came forward. We will point out the most apparent similarities as well as the most striking differences between the roles of the players in the proceedings in the different countries that participated in our research. That said, our interviews not only showed differences and similarities between the participating countries. Sometimes practice within the same country showed quite some variety, which demonstrates that the same legal framework offers room for different practices.

It was clear from all countries that, while the legal framework is obviously a critical influence on decision-making, legal cultures are also very consequential. The relationship between judges and prosecutors deserves particular attention, as this dynamic seems to influence higher usage of PTD. More active and well-resourced defence lawyers seem to contribute more to application of alternatives. The countries in this study had variable practice regarding the involvement of probation staff, with mixed views also being expressed concerning the desirability of such involvement.

Special mention should be made on the police, who, while not directly the focus of this work, were clearly an important part of the pre-trial process. The police do not have the power to order PTD, but, in practice of course have a highly influential and sometimes determinative role.

### 3.2. Prosecution

Public prosecutors have an important filtering role in the proceedings in most of the countries. The initiative for pre-trial proceedings lies with the prosecution and as the prosecution often is also leading the police-investigation – and therefore is the party with the most relevant information on the suspect – their influence can hardly be exaggerated. That said, there are big differences between the countries when it comes to the position of the prosecutor in the legal system. In some countries, prosecutors have more autonomy than in other countries. Also, there are considerable differences as to their accountability to the (local) government. The German report, for example, mentions that the head of the public

prosecution authority in each Federal State (*Bundesland*) has a post that may be politically influenced since the respective Minister of Justice can issue orders to him or her and usually also influences the decision on who is appointed.<sup>48</sup> In other countries, direct political influence on the appointment may not be common, but Ministerial influence on, e.g., policy on crime control is not unusual (see, e.g. The Netherlands, Austria, Belgium). Politics and/or policy are therefore possible influences on the decision making, as is mentioned in most of the country-reports.

Where there is a shared legal, and, to some extent, social culture between the judges and prosecutors, participants reported their view that PTD was more likely to be imposed. It was notable that, across many countries, it was felt by participants that judges and prosecutors have largely shared views about PTD and offending, for example in Austria, where one of the prosecutors put forward that prosecutors simply see it pretty similar to the judges.<sup>49</sup> In Germany, too, it was clear that the judicial decision to order PTD was based to a considerable degree on the submissions of the public prosecutor. Strikingly, some prosecutors in Germany therefore felt that they were the dominant players in the process, with the judge felt to be relying primarily on what they presented, and a few judges agreed on that. Other judges, however, insisted on dominating the decision-making process or at least at having the last and decisive word.<sup>50</sup> Similar views were expressed in Lithuania, where it was found that a judge was very likely to approve a prosecutor's request for PTD. The prosecutor was also seen as highly influential in the proceedings, as the actor which ultimately decides whether a case for PTD should be put forward or not.<sup>51</sup> In the Netherlands, too, the power of the prosecutor was significant, with refusals of requests for PTD by the prosecutor being rare.<sup>52</sup>

An important point to emerge from this research, therefore, and one which has not been canvassed to any great extent in pre-existing literature, is that prosecutors can and often do play an important 'filtering' role in the PTD process. This was especially notable in Ireland, and the prosecutorial 'self-restraint' noted there may be an important factor influencing the comparatively lower rates of PTD. Equally the German development that for

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<sup>48</sup> 2<sup>nd</sup> National report on Germany, p. 72., <http://www.irks.at/detour/publications.html>

<sup>49</sup> 2<sup>nd</sup> National report on Austria, p. 62. <http://www.irks.at/detour/publications.html>

<sup>50</sup> 2<sup>nd</sup> National report on Germany, p. 67. <http://www.irks.at/detour/publications.html>

<sup>51</sup> 2<sup>nd</sup> National report on Lithuania, p. 12. <http://www.irks.at/detour/publications.html>

<sup>52</sup> 2<sup>nd</sup> National report on Netherlands, p. 17. <http://www.irks.at/detour/publications.html>

a long time was characterised by falling numbers of pre-trial prison is at least partly attributed to a more cautious practice by public prosecutors when requesting an arrest warrant.

The role of the prosecutor therefore merits particular attention in any efforts to reduce PTD in the countries examined.

In their decision-making, prosecutors are very much dependent on the information they receive from the police. That means that the police can also have considerable influence on the proceedings leading to PTD. In Ireland, the role for the police is likely to be the most substantial. In some other countries (Austria, Germany) respondents indicated that the police would sometimes present the cases ‘tailor-made’ for PTD, at the same time more or less expecting the prosecution to apply for PTD. This practice is also described vividly in the Lithuanian report, in which it is described as ‘classical’ that the police would pester the prosecutor to apply for PTD – although this practice seems to have decreased somewhat in the last ten years.<sup>53</sup> The outcomes of our research did not allow for more in-depth insights on how prosecutors deal with the dilemmas they are faced with in these occasions or how they filter out those cases in which merely acquiescing to the police’s wishes (not seldom the course of action that would meet the wishes of the *vox populi*) might above all have a premature punitive effect which would be at odds with the presumption of innocence.

In most of the countries that were involved in our research, prosecutors did not seem to actively pursue alternatives to PTD. However, it should be noted that the legal systems differ considerably as to the moment where proceedings towards PTD start and the possibilities the prosecution and/or the police have to apply for less severe/more lenient measures before turning to the *ultimum remedium*. In Lithuania and Austria, for example, a prosecutor can and should apply less intrusive/drastring provisional measures<sup>54</sup> outside the context of the PTD framework. However, the Austrian report reveals that even when the prosecution has ample possibilities before applying for PTD, these possibilities are hardly ever used.<sup>55</sup> The Lithuanian report reveals that the prosecution may even impose alternatives on such a large scale that the problem of so-called net widening occurs.<sup>56</sup>

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<sup>53</sup> 2<sup>nd</sup> National report on Lithuania, p. 31-32. <http://www.irks.at/detour/publications.html>

<sup>54</sup> 1<sup>st</sup> county report Lithuania, p. 33; 2<sup>nd</sup> National report on Austria, p. 61 *et seq.* <http://www.irks.at/detour/publications.html>

<sup>55</sup> 2<sup>nd</sup> National report on Austria, p. 62. <http://www.irks.at/detour/publications.html>

<sup>56</sup> 2<sup>nd</sup> National report on Lithuania, p. 21. <http://www.irks.at/detour/publications.html>

Dutch prosecutors have very limited possibilities in this regard and will have to apply for a PTD order by default before conditions to an eventual suspension of the PTD can be added. And while it is technically possible for the prosecution to order PTD and ask for a conditional suspension in one and the same application, this is not something that prosecutors usually do. The situation in Germany is comparable.

In all countries, the prosecutor has possibilities (and sometimes is urged by regulation) to initiate alternatives, but in most of the countries (Lithuania and Ireland being exceptions) the prosecution 'bypasses' the alternatives and opts for a simple, straightforward approach. The Irish system is different in that prosecutors do not plead in favour of PTD, but they oppose to an application for bail made by the defence. Irish prosecutors are not the ones to initiate the alternatives – they merely have to oppose to them, though, fairly frequently, they will agree to an alternative. Yet even in Ireland, some of the respondents feel that opposition to bail seems to be increasing and that the sentiment that in sensitive cases the suspect should not be set free during the pre-trial phase sometimes predominates.<sup>57</sup>

All in all, in most of the countries there seems to be little incentive for prosecutors to change their reticent attitude towards the use of alternatives in PTD cases. On the contrary: finding suitable alternatives for PTD costs time and necessitates information both of which mostly are not at hand. A straightforward application for PTD often is the line of the least resistance. And as there is little societal encouragement for a broader use of alternatives – and sometimes even possible political encouragement *against* such use – this approach seems unlikely to change in the current climate of criminal law enforcement.

In some countries, prosecutors indicated that they anticipate the assessment of the case by the judiciary: established practice towards certain types of suspects or certain types of crimes would be taken into consideration regarding the decision to apply for PTD or not.<sup>58</sup> While this is in itself may not really be that surprising – it is common sense and professional to abide to established practice – it may become problematic when the person of the judge dealing with the application is a determinative factor in the decision making process. The Belgian report on French-speaking experts mentions that this can be the case and that prosecutors may choose to not refer the case to the investigation judge because they know that the judge in question will likely not provide an arrest warrant.<sup>59</sup>

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<sup>57</sup> 2<sup>nd</sup> National report on Ireland, p. 94-95. <http://www.irks.at/detour/publications.html>

<sup>58</sup> 2<sup>nd</sup> National report on Austria. <http://www.irks.at/detour/publications.html>

<sup>59</sup> 2<sup>nd</sup> National report on Belgium (French-speaking), p. 32, 36. <http://www.irks.at/detour/publications.html>

A last remark regarding the role of the prosecution relates to the first judicial hearing. In several reports, it is mentioned that the prosecution usually is not present during this hearing. (e.g. Netherlands, Germany, Belgium<sup>60</sup>). Prosecutors claim to have no time to attend all these hearings and apparently they feel that by ordering PTD they are on the safe side and that the case is in good hands with the judge, the suspect and the counsellors. And if a prosecutor is present, it is not uncommon that it's a prosecutor who is not (very) familiar with the case.

### 3.3. Defence

The importance of the role of the defence lawyer in pre-trial proceedings can hardly be overstated. Unlike the case with the prosecution, within the Council of Europe and the European Union, a legal framework as to the lawyer's tasks within criminal proceedings, has been developed. The European Court of Human Rights has never left much doubt to the assumption that article 6 of the Convention casts its shadow before the actual hearing before the trial court:

“The guarantees of Article 6 ECHR are applicable from the moment that a “criminal charge” exists and may therefore be relevant during pre-trial proceedings if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them”.<sup>61</sup>

In the past decade, since the Salduz judgement<sup>62</sup>, assistance from a lawyer in the earliest phase of the investigation has become be the norm, while in the Dayanan judgement, the court made clear that ‘assistance’ refers to the whole range of services specifically associated with legal assistance should be available to the suspect. Particularly focussing on PTD proceedings, the ECtHR held that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, PTD proceedings should in principle also meet – to the largest extent possible under the circumstances of an on-going investigation – the basic requirements of a fair trial as guaranteed by article 6 of the convention. This means that there should be equality of arms, more specifically disclosure of relevant

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<sup>60</sup> In Belgium, prosecutors are even not allowed to be present during the hearing by the investigating judge (i.e. within – nowadays – 48 hours after police arrest). However, they will be present at all consecutive review hearings. 2<sup>nd</sup> country report Belgium (Dutch-speaking), p. 26. <http://www.irks.at/detour/publications.html>

<sup>61</sup> ECtHR 24 November 1993, Imbrioscia v. Switzerland.

<sup>62</sup> ECtHR 13 October 2009, Dayanan v. Turkey.

documents and files.<sup>63</sup> In the meantime, the EU has issued a number of relevant instruments, such as directives as well as a green paper and an impact assessment.<sup>64</sup> All this makes clear that legal aid to remand prisoners is one of the core defence rights.

Our researchers have spoken to numerous lawyers and it seems that in most countries, lawyers feel that they indeed play an important role that contributes to fair proceedings and limited use of PTD. In some countries (e.g. BE, NL, DE), the lawyers emphasise that, if it wasn't for their input, alternatives to PTD would hardly be considered as an option. As such, a defence lawyer can really make a difference. At the same time, almost all lawyers stress the limitations they encounter, especially at the very beginning of PTD: the very short time-span between the moment of their involvement and the first hearing simply doesn't allow for much thorough research or scrutiny. It seems that in some of the countries lawyers simply take this for granted, whereas in other countries, lawyers can be quite frustrated.<sup>65</sup> The Austrian report mentions that there are reservations from prosecutors and judges regarding early representation from counsellors: they feel that lawyers could hamper the investigation by urging their clients to remain silent.<sup>66</sup> On the other hand, limited access to lawyers is simply caused by organisational problems: sometimes there are too many suspects in the same case and not enough different lawyers (Belgium).<sup>67</sup>

As mentioned earlier, access to case files is of the utmost importance in PTD cases.<sup>68</sup> Most of our respondents put forward that access to case files is often limited in pre-trial cases. This may often be due to logistical issues and deliberate non-disclosure of parts of the case file doesn't seem to occur very regularly. Still the prosecution can 'play for time' quite a bit without having to admit that they rather not share certain information yet.

Apart from some of the practical issues discussed above, the quality of legal aid and the financing of legal aid sometimes were issues that were put forward by our respondents. In some countries state paid lawyers do not seem to provide legal aid that meets the standard (Lithuania, Romania). In other countries, no measurable differences between legal aid

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<sup>63</sup> ECtHR 13 February 2001, Schöps v Germany, Lietzowa v. Germany, Garcia Alva v. Germany. See Chapter 5 on proceedings.

<sup>64</sup> See Chapter 6 on European influences.

<sup>65</sup> Romanian lawyers in particular seem to have the impression that they do not have an equal position compared to the prosecutors. "The prosecutor stands on a 5 cm podium, the judge on 10 cm and the lawyer stays in the gallery. Why?"

<sup>66</sup> 2<sup>nd</sup> National report on Austria, p. 78. <http://www.irks.at/detour/publications.html>

<sup>67</sup> 2<sup>nd</sup> National report on Belgium (French speaking), p. 42. <http://www.irks.at/detour/publications.html>

<sup>68</sup> Also see Chapter 5.

scheme lawyers and private lawyers were reported. Austria is one of those countries, although at the same time the Austrians seem to have problems with the fact that their legal aid scheme is organised in such a way that inexperienced lawyers are forced to represent suspects as well.<sup>69</sup> Lawyers in the Netherlands are currently fiercely campaigning for a considerable extension of the budget available for legal aid schemes.

All in all, it has become clear that lawyers do not necessarily have an easy job when it comes to pre-trial proceedings. In some countries, they feel they are fighting a lost case, as PTD is applied extensively, due to a legal culture aimed at alleged public interest that seems to be fuelled by knee-jerk reactions demanding a very punitive climate. The picture is not necessarily as grim in all countries, with a notable mention to Ireland, where all respondents seem to agree that their system of PTD prioritises liberty. And in Lithuania, where PTD statistics may still be relatively high, the positive impact of losing the deterrent attitude of the former Soviet Union for now seems to prevail.

In general, lawyers seem to be the ones to bring up alternatives. In some countries there seems to be room for improvement: lawyers could try and show more initiative. In Austria for instance lawyers are the ones most often initiating and promoting the use of alternatives. Still some Austrian practitioners see room for more creativity.<sup>70</sup> But also in Ireland, our best practice example, some judges seem to find that lawyers should do more than just suggest 'some kind of bail'. Yet this is easier said than done, as finding the right information within a short amount of time is hard, especially when the information needs to be obtained through semi-official channels which means that the defence lawyer is dependent on those channels. For example, in the Netherlands, lawyers can not directly ask the probation service for information: this will have to go through the public prosecutor. And then of course in some countries there is no involvement of the probation service at all.

As mentioned before, a general exception on the rule that lawyers initiate alternatives is Ireland where it is expected that the prosecution should argue why bail should be refused. One of the most striking and explicative features of the Irish way seems to be informal

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<sup>69</sup> 2<sup>nd</sup> National report on Austria, p. 52. <http://www.irks.at/detour/publications.html>

<sup>70</sup> 2<sup>nd</sup> National report on Austria, p. 51. <http://www.irks.at/detour/publications.html>



conversations with the prosecution, which can lead to agreement to avoid pre-trial detention:” if you can obviously tee it up outside the court, that’s the ideal scenario”.<sup>71</sup> This is something that is mentioned in other reports as well.<sup>72</sup>

A perhaps unexpected turn of events is that the mere existence of alternatives may have a so-called net-widening effect: prosecutors and judges may choose for an alternative even in cases where PTD might be rejected. Lawyers may not always contest: for them it doesn’t matter how they get their client out of jail: if they expect a more favourable attitude towards alternatives than towards unconditional release, they may try and steer the proceedings towards the application of an alternative measure rather than risk the request for unconditional release being denied. Specific mention of this was made in the Belgian and German reports.<sup>73</sup>

### 3.4. The role of judges in the decision-making process

In accordance with art. 5 ECHR, in all countries, the judge is the final decision-maker concerning the use of PTD and therefore plays a decisive role. However, it is also clear that the dynamics between the different players can act to ensure that the judge does not take the decision in a vacuum. The decision is influenced by not only the facts of the case and the arguments presented, but also the legal culture and relative positions of the prosecution and defence.

As noted earlier in § 3.2, a particularly important factor influencing the decision-making process which emerged from this research is the dynamic between the prosecutor and the judge. As mentioned above, it was felt in most countries that judges and prosecutors have shared views on the legal culture regarding PTD. A common theme to emerge across the countries was that prosecutors were generally viewed by judges as responsible and careful, and this could mean that judges were inclined to follow their view.<sup>74</sup> In Lithuania, too, participants felt that the requests made by prosecutors were of high quality and this was the reason why they were so likely to be accepted. In Romania, prosecutors felt that judges

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<sup>71</sup> 2<sup>nd</sup> National report on Ireland, p. 65. <http://www.irks.at/detour/publications.html>

<sup>72</sup> 2<sup>nd</sup> National report on Netherlands, p. 56-57. 2<sup>nd</sup> National report on Austria, p. 73 *et. seq.* <http://www.irks.at/detour/publications.html>

<sup>73</sup> 2<sup>nd</sup> National report on Germany, p. 53. 2<sup>nd</sup> National report on Belgium (Dutch speaking), p. 26. <http://www.irks.at/detour/publications.html>

<sup>74</sup> 2<sup>nd</sup> National report on Germany, p. 67. <http://www.irks.at/detour/publications.html>

tended to follow their applications because they applied only when the likelihood of success was high.<sup>75</sup>

Informal communications between judges and prosecutors on the case were reported in most countries with the exception of Ireland and Lithuania, where such discussions would be considered irregular. In some of the countries (Romania, Belgium, Austria) the relation between the prosecutors and the judges were mentioned as potentially prejudicial of the outcome of the case. The fact that these actors work in the same building, use the same canteen and enter the court room through the same door is, in the perception of lawyers, an indication that they are possibilities for the prosecution to influence the decision making by the judge. Defence lawyers expressed concern about this closeness and felt that it could weaken the procedural safeguards in place to protect the accused person and the administration of justice. By contrast, Belgian judges reported that they were not constrained by the decisions or views of the public prosecutor, and some even reported frustration with public prosecutors seeking detention too frequently.<sup>76</sup> Informal connections and discussions between prosecutors and judges were also, however, reported here.

In Ireland, most participants felt that there was generally ‘equality of arms’ between prosecutors and defence lawyers, with prosecutors having some more access to resources. It was not felt by participants that there was a particular closeness between judges and prosecutors, nor that prosecutors’ arguments were afforded a special status. However, the opinion of the prosecutor could be determinative in situations where the prosecution was not seeking PTD.

The discretion given to judges was not described as being problematic by the participants in this research. There was variation amongst countries concerning whether the judge plays a role in advocating for alternatives to PTD. By way of example, in the Netherlands, the attitude of the judge was described as “passive”<sup>77</sup> in this respect. However, in Austria, judges do play a stronger role than prosecutors in putting forth the possibility of the use of an alternative. For Ireland, it was felt that judges were, on the whole, unlikely to rule that bail should not be granted when the prosecution was consenting to it, but that there may be situations where judges would question such an agreement.

Many countries reported concerns about a lack of time given to judges to prepare for applications for PTD. This was viewed to be a particular problem which could mean that less

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<sup>75</sup> 2<sup>nd</sup> National report on Romania, p. 25. <http://www.irks.at/detour/publications.html>

<sup>76</sup> 2<sup>nd</sup> National report on Belgium (Dutch speaking), p. 10. 2<sup>nd</sup> National report on Belgium (French speaking), p. 36 - 37. <http://www.irks.at/detour/publications.html>

<sup>77</sup> 2<sup>nd</sup> National report on, Netherlands, p. 50. <http://www.irks.at/detour/publications.html>

severe measures were not imposed simply because of a lack of time to consider the matter. In Germany, participants reported that the decision had to be made within a relatively short period of time and on quite limited information.<sup>78</sup> The workload for judges was also mentioned in all countries. In the Austrian report, specific mention was made of a heavy workload being a possible restraint on the use of alternatives to detention, as it could be viewed as more efficient for the investigation to have the person in PTD and because using alternative methods meant the file had not really left the judge as it was not finalised.<sup>79</sup>

### 3.5. The Media

The research also explored political and/or media pressure on judges and its possible effects. This was a particular concern for judges in Germany, who reported instances where judges came in for very heavy and personalised criticism following high profile incidents.<sup>80</sup> Personalised and direct criticism of judges was also referred to by participants in Lithuania.<sup>81</sup>

Some participants in Germany there felt that this pressure had contributed to a greater likelihood for certain groups of migrants to receive PTD. Judges, however, tended to report that they were able to resist this pressure. Participants in Belgium also noted a more politicised climate around PTD decisions.<sup>82</sup> Judges here, too, however, did not consider such a climate to influence their decisions. Increased media pressure for more PTD was also felt in Romania.<sup>83</sup> Judges referred to public expectations about PTD practice, but, interestingly, that their practice can also influence the public, who come to understand that PTD is the exception rather than the rule.<sup>84</sup> For Ireland, media pressure and political concern about particular offences or types of offences was also a feature of the system. Some defence lawyers in particular felt that this could influence judicial practice, though prosecutors and judges felt that it did not.<sup>85</sup>

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<sup>78</sup> 2<sup>nd</sup> National report on Germany, p. 63. <http://www.irks.at/detour/publications.html>

<sup>79</sup> 2<sup>nd</sup> National report on Austria, p. 49. <http://www.irks.at/detour/publications.html>

<sup>80</sup> 2<sup>nd</sup> National report on, Germany, p. 16. <http://www.irks.at/detour/publications.html>

<sup>81</sup> 2<sup>nd</sup> National report on, Lithuania, p. 35. <http://www.irks.at/detour/publications.html>

<sup>82</sup> 2<sup>nd</sup> National report on, Romania, p. 19. <http://www.irks.at/detour/publications.html>

<sup>83</sup> 2<sup>nd</sup> National report on, Romania, p. 11. <http://www.irks.at/detour/publications.html>

<sup>84</sup> 2<sup>nd</sup> National report on, the Netherlands, p. 12. <http://www.irks.at/detour/publications.html>

<sup>85</sup> 2<sup>nd</sup> National report on, Ireland, p. 15. <http://www.irks.at/detour/publications.html>

It is of concern that judges in many of the countries examined in this research felt under direct and personal critique from sections of the media. This is a threat to the rule of law as well as a proportionate use of PTD.

### 3.6. The role of probation services

The countries studied varied with respect to the involvement of probation staff. Some countries had quite extensive and intensive involvement by probation staff in the decision-making process, where in others they were not formally involved at all.

Probation officers do not play a role in pre-trial decision-making in Germany, nor do any other criminal justice social work institutions deal with adults during this phase.<sup>86</sup> There is no role for probation staff or social services in Lithuania either.<sup>87</sup> Romania, similarly, has no role for probation staff in the decision-making process.<sup>88</sup> In Ireland, there is no formal role for probation staff, who begin their work after the sentencing process has concluded. However, probation staff could be involved on an informal basis, for example where a person was under the supervision of the probation service for a different matter.

In Belgium, probation officers can be involved in the process; in practice probation officers are unlikely to be asked to produce social inquiry reports by an investigating judge.<sup>89</sup> The Netherlands also has an active role for the probation service, which can be involved at the early stages.<sup>90</sup> Probation staff are also involved in Austria,<sup>91</sup> where preliminary probation can be ordered as an alternative to PTD.<sup>92</sup>

Whether probation staff were involved or not at the pre-trial stage, similar themes emerged concerning their work. A recurring concern was that of time pressure on probation staff and high workloads.

In Germany, there were mixed views about a greater role for probation staff. Defence lawyers generally felt that their support and involvement for the accused person was suffi-

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<sup>86</sup> 2<sup>nd</sup> National report on, Germany, p. 12. <http://www.irks.at/detour/publications.html>

<sup>87</sup> 2<sup>nd</sup> National report on, Lithuania, p. 33. <http://www.irks.at/detour/publications.html>

<sup>88</sup> 2<sup>nd</sup> National report on, Romania. <http://www.irks.at/detour/publications.html>

<sup>89</sup> 2<sup>nd</sup> National report on, Belgium, <http://www.irks.at/detour/publications.html>

<sup>90</sup> 2<sup>nd</sup> National report on Netherlands, p. 49. <http://www.irks.at/detour/publications.html>

<sup>91</sup> But not in social inquiries and in the decision making process.

<sup>92</sup> 2<sup>nd</sup> National report on Austria. <http://www.irks.at/detour/publications.html>

cient. Several interview partners indicated that it would be unwise to involve the probation staff as they are already very overburdened.<sup>93</sup> The time pressure involved in decision-making was also a factor behind the limited involvement of probation staff in the Dutch-speaking part of Belgium,<sup>94</sup> with a heavy workload also cited in the French-speaking part.<sup>95</sup> In the latter case, the investigating judge tends to attribute a role to the probation staff only after a decision to release under conditions has been made, with probation staff working mainly on the monitoring and enforcement of conditions,<sup>96</sup> though this work was generally favourably viewed. For the Netherlands, the pressure of time in the proceedings was also cited as a factor which can lead to reports which are of insufficient quality.<sup>97</sup> The problem of workload amongst probation staff was also cited as a reason against the introduction of more probation involvement in Romania.<sup>98</sup> Austrian respondents considered judges were reluctant to use preliminary probation with adults, especially at the early stages, because of the time it takes for probation staff to be appointed.<sup>99</sup> Irish participants also felt that it would be unfeasible for the probation service to be involved as they did not have the resources to be involved at present.<sup>100</sup>

A further recurring issue in some countries was the possible effect of probation involvement on the presumption of innocence. In the Netherlands, which has a lot of experience of probation involvement at the pre-trial stage, the question of admitting the offence before some probation officers are willing to carry out any work was raised as an issue.<sup>101</sup> Officially, it is not necessary for admissions to the offence to be made before alternatives to PTD can be applied, but probation staff reported difficulties in carrying out their work without such admissions. There is an evident tension here with the presumption of innocence which should apply at the pre-trial stage. There was also clear concern there amongst defence lawyers about infringing the presumption of innocence. In the Netherlands, it was reported that some suspects were wary of speaking to probation staff as they are seen as part of the system.<sup>102</sup> Defence lawyers in Germany also reported concerns that the probation staff does not act under confidentiality and that probation staff also have to

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<sup>93</sup> 2<sup>nd</sup> National report on Germany, p. 61. <http://www.irks.at/detour/publications.html>

<sup>94</sup> 2<sup>nd</sup> National report on Belgium, p. 27. <http://www.irks.at/detour/publications.html>

<sup>95</sup> 2<sup>nd</sup> National report on Belgium, p. 38. <http://www.irks.at/detour/publications.html>

<sup>96</sup> 2<sup>nd</sup> National report on Belgium, p. 38. <http://www.irks.at/detour/publications.html>

<sup>97</sup> 2<sup>nd</sup> National report on Netherlands, p. 50. <http://www.irks.at/detour/publications.html>

<sup>98</sup> 2<sup>nd</sup> National report on Romania, p. 49. <http://www.irks.at/detour/publications.html>

<sup>99</sup> 2<sup>nd</sup> National report on Austria, p. 44. <http://www.irks.at/detour/publications.html>

<sup>100</sup> 2<sup>nd</sup> National report on Ireland, p. 73. <http://www.irks.at/detour/publications.html>

<sup>101</sup> 2<sup>nd</sup> National report on Netherlands, p. 48. <http://www.irks.at/detour/publications.html>

<sup>102</sup> 2<sup>nd</sup> National report on Netherlands, p. 50. <http://www.irks.at/detour/publications.html>

provide all information they get from the suspect to the courts.<sup>103</sup> Similarly, a possible effect on the presumption of innocence was cited in Ireland, where it was also felt that adding in probation involvement could lead to net-widening.<sup>104</sup>

Another problem reported concerning probation involvement came from the Netherlands, where the prosecutor must agree to a probation report being ordered before it can be made. Agreement was usually forthcoming, but not always, as the prosecutor may believe it unlikely a person who has, for example, remained silent in the proceedings, will talk to a member of the probation staff.

In the Netherlands, however, it was felt strongly that the probation service plays an important role in advocating for alternatives to PTD, with almost all successful requests for suspension of PTD following a positive report by the probation service. However, the Dutch report also mentions that the availability of a report can depend on very arbitrary grounds.<sup>105</sup>

While there was no clear consensus about the benefits of involving probation staff formally amongst the countries and within the countries, participants generally agreed that there was a need for more social work strategies and support for at least some groups facing PTD. A recurring concern was the prevalence of drug use and housing problems amongst suspects, and it was clear participants felt that some support mechanisms were needed to address these issues. Defence lawyers in Romania considered, however, that an evaluation by probation staff would be helpful to provide reliable information about the social background of the accused person and support better decision-making,<sup>106</sup> though prosecutors and judges did not feel this would be helpful.<sup>107</sup>

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<sup>103</sup> 2<sup>nd</sup> National report on Germany, p. 61. <http://www.irks.at/detour/publications.html>

<sup>104</sup> 2<sup>nd</sup> National report on Ireland, p. 73. <http://www.irks.at/detour/publications.html>

<sup>105</sup> 2<sup>nd</sup> National report on Netherlands, p. 13. <http://www.irks.at/detour/publications.html>

<sup>106</sup> 2<sup>nd</sup> National report on Romania, p. 9. <http://www.irks.at/detour/publications.html>

<sup>107</sup> 2<sup>nd</sup> National report on Romania, p. 16. <http://www.irks.at/detour/publications.html>

## 4. Pre-trial detention: do we have anything else credible? Dilemmas about the alternatives

### 4.1. Introduction

The DETOUR project highlights the diversity of the legal frameworks about alternatives to pre-trial detention in prison in the seven countries participating in the research<sup>108</sup>, but we can observe that in all countries such alternatives are available, in one form or another.<sup>109</sup>

In practice, the use of alternatives is quite diverse. First of all, we have to lament the lack of statistical data about the use of less severe measures and about the impact of these less severe measures on the use of pre-trial detention. Although for some countries no valid/official statistical data are available (AT, DE, IE, RO), there is some useful information with respect to other countries (BE, LT, NL).<sup>110</sup> Based on interviews, we observe, however, that alternative measures to pre-trial detention play a comparably minor role in certain countries (AT, DE, NL) but are quite popular in others (BE, IE, LT, RO). There are diverse traditions and cultural differences between these last countries: in Ireland, there is a comparatively low use of pre-trial detention while in the other three countries, pre-trial detention remains quite popular.<sup>111</sup> This explains the net-widening effect that statistics show for Belgium: while crime rates remain in general stable<sup>112</sup>, the overall population under judicial control<sup>113</sup> keeps growing over time, due to a dual long-term trend of increased pre-trial detention (executed in prison or at home under electronic monitoring) and release under conditions (judicial supervision). This observation specific to Belgium

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<sup>108</sup> For more details see the National Reports on Austria, Belgium, Germany, Ireland, Lithuania, the Netherlands and Romania, <http://www.irks.at/detour/publications.html>

<sup>109</sup> In this chapter, we will only consider those alternative measures that are specifically designed to avoid detention, excluding therefore diversion measures which prevent both pre-trial detention and alternative measures. This concerns the measures that could precede the decision on pre-trial detention, for example, the use of an accelerated procedure (“speedy procedure”) instead of an investigative procedure (BE) of the behaviour order and the ZSM-procedure and alternatives offered by the probation service in the Netherlands.

<sup>110</sup> In the annual SPACE II survey carried out for the Council of Europe by the University of Lausanne, data are reported for Austria and Belgium but these data are limited to alternative measures in which probation services are involved.

<sup>111</sup> But we observe a huge decline of detained suspects in Lithuania.

<sup>112</sup> Marcelo Aebi, Natalia Delgrande and Yann Marguet, ‘Have Community Sanctions and Measures Widened the Net of the European Criminal Justice Systems?’ (2015) 17 *Punishment & Society* 575.

<sup>113</sup> In this chapter we use the term ‘judicial control’ in a broad sense to indicate all kinds of measures that can be taken in the pre-trial phase (including pre-trial detention), whereas ‘judicial supervision (with conditions)’ refers to specific measures where the suspect is released under conditions (see chapter 4.2), other than financial bail (see chapter 4.3) or house arrest and electronic monitoring (see chapter 4.4).

is not observable in other countries where the use of alternatives seems to remain relatively moderate (AT, DE), even if an increase is observable (NL). It reminds to the fact that the promotion of alternatives calls for vigilance with regard to possible negative effects, such as the extension of the number of people under judicial control, in or out of prison.

Regarding the legal framework, three kinds of measures can be considered as less severe than incarceration under arrest warrant: (1.) judicial supervision with conditions, (2.) financial bail and, (3.) house arrest and electronic monitoring. In the seven countries involved in this project, these measures can be applied by different authorities: judges of course (in the seven countries) but also, for certain measures, public prosecutors (AT, LT), and even the police (IE, LT). The decision can be taken at any moment of the criminal procedure but in practice, for some countries this type of decision is taken more often at the beginning of the procedure (in Lithuania, usually from the very beginning of the proceedings, because of a common attitude that “*no suspect should be free from at least some provisional measure*”<sup>114</sup>) while in other countries it is rarely taken immediately but more generally after a few weeks (AT, BE, DE, NL). Some practitioners in these countries tend to consider that they have not enough time to reflect about a release under conditions shortly after (police) arrest or the first phase of detention. Consequently, in these countries, the alternative rather allows for a reduction of the time spent in prison than avoiding incarceration from the start.

#### 4.2. Judicial supervision with conditions

Less severe measures, other than financial bail and house arrest/electronic monitoring (see below), are quite diverse, but they all comprise, at their core, of allowing the suspect to remain at liberty or to be released, with the obligation to respect one or more, more or less intrusive, conditions. With the exception of Lithuania, national laws do not provide for exhaustive lists of conditions. Therefore, in these countries both the choice of conditions and the number thereof is left to the discretion of the authorities. In some countries, the conditions imposed can be significant both with regard to their number and their ‘depth’, i.e. their intrusiveness (BE, IE; e.g. follow treatment in a specialised residential care facility).

Defence lawyers have an important role in preparing, organising and suggesting liberty/release under conditions. In most cases, they are the ones who start the discussion about the alternatives. If they do not, often no alternative will be granted. A point that was

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<sup>114</sup> 2<sup>nd</sup> National Report on Lithuania, <http://www.irks.at/detour/publications.html>



raised by Belgian lawyers is that a ‘new dilemma’ emerged because lawyers do not ‘dare’ to apply for release without conditions and thereby attract an eventually negative decision by the judge. To avoid prison for their client and to convince the judge, they often prefer to ask for electronic monitoring or a release with conditions.<sup>115</sup> Also, in Germany, a form of negotiation of measures by lawyers was observed, as they try to obtain a compromise and accept a restriction of the suspect’s liberty, as long as detention is avoided and especially when the restriction is fairly lenient. Other actors involved in the process accept this strong position of lawyers: judges expect lawyers to take the initiative in terms of alternatives and public prosecutors sometimes indicate in advance that they will not oppose such measures (BE, DE, IE).

A wide variety of conditions exists in the seven countries: standard conditions, imposed in a *pro forma manner*, but also tailored conditions. Standard conditions are for example conditions such as: the duty to report to the police (the most frequent form of condition in Germany, usually on a weekly basis; considered to be “good tool” by some practitioners in Austria) or to the probation officer; the obligation to have a fixed residence<sup>116</sup> and/or to inform the authorities of any change of address; the prohibition on committing new offences; the seizure of documents; the obligation to appear before an authority on demand or to be reachable at all times by phone. Tailored conditions are dependent on the suspect’s situation. Different categories of conditions can be distinguished:

- Restriction on movement: not to leave the country (with or without the seizure of documents such as a passport), not to visit bars or coffee shops, not to leave the residence during the night (curfew), etc.
- Communication restrictions: for instance, the prohibition to have contact with other suspects or with the victim.
- Other restrictions: not to practice a profession or activity associated to the offence committed, not to take part in sports or cultural events, not to issue cheques, not to use the internet etc.
- Daily occupation: to seek actively for employment, to follow training, etc.
- Psycho-medico-social guidance: medical treatment, psychological follow-up. This implies in some countries (NL) that the problem is recognised and that a competent authority has made a diagnosis.

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<sup>115</sup> This process of anticipation, by evaluating consciously or unconsciously the decision that will be taken by the next practitioner, is also seen in the practice of public prosecutors: they will apply for pre-trial detention mainly when they know that they might have good chances of success (BE, RO).

<sup>116</sup> The problem of the homeless has been mentioned everywhere. It seems that practical solutions are sometimes found (e.g. the use of hostels in Ireland), especially at the initiative of defence lawyers, but this situation is potentially a source of discrimination between suspects.

- Medical test: for instance, blood test for drugs users. A major problem is that these tests are expensive and have to be paid by the suspects themselves in some countries.
- Formal pledges: in Austria (e.g. to refrain from any contact with the victim); this kind of condition often seems to be considered as a rather symbolic one, with rather little impact, in Ireland ‘to keep the peace’.
- Other conditions: to read a book on the condition of the woman affected by the alleged conduct, to go regularly to a fitness centre or to go running in the park, to buy detergent to clean the suspect’s apartment, to be polite...

The latter type of conditions appears to be very ‘weak’ in view of investigative needs and the presumption of innocence. They are sometimes considered by practitioners themselves as unnecessary and disproportionate.

A dilemma also exists with respect to the position of **foreign nationals**. In certain countries (e.g. AT, BE, DE), foreign nationals are overrepresented in the pre-trial detention statistics and/or underrepresented in statistics on release under conditions. A number of practitioners interviewed have the impression that being a foreign national made it more likely that they would not obtain less severe measures than pre-trial detention (AT, BE, IE)<sup>117</sup>. Elsewhere, there is an impression that they are not treated differently (RO), or at least not if they are from within the EU (IE). However, a distinction has to be made between different subgroups of foreigners. An essential criterion is the status of residence: do they have a permanent address or a regular residence permit in the country? Other essential criteria are financial resources and family bonds. If one or more of these factors are lacking, pre-trial detention is viewed as the only answer because of a perceived high risk of recidivism or absconding. Other factors may also affect the use of lenient measures, e.g. language barriers, personal attitude of suspects during interrogations. A particular category that is also distinguished in certain countries (AT, DE) are refugees and asylum seekers (e.g. arising out of some major incidents which received international media-coverage were reported in these countries). Finally, a particular problem is often mentioned by practitioners in some countries regarding so-called “mobile offenders” (AT, BE, DE) who often come from other EU member states. Judges often feel somewhat ‘obliged’ (having no other choice than) to issue an arrest warrant and order PTD, because these suspects generally do not give an address where they can be reached or found with certainty and/or because of an assumed risk of reoffending. For this group, the risk of flight seems to be

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<sup>117</sup> This was viewed as primarily relating to non-EU nationals in the Irish case.

the most important ground for detention and the instrument of the European Supervision Order which was specifically designed for them is almost never used.

Also, some other types of suspects – suspects with a particular profile – face more difficulties to get less severe measures: drug addicts, sex offenders, suspects with alcohol problems and those requiring psychiatric care. For drug addicts, different reasons may explain why there is little use of alternative measures for them: the assumption that an addict person is not reliable (DE) and a lack of institutions accepting to take charge of those suspects (long waiting lists) (AT, BE, DE). Costs connected to their addiction can also be perceived as increasing the risk of reoffending. For sex offenders, suspects with alcohol problems and people requiring psychiatric care, practitioners appear to be uninformed about alternative measures that could be adequately proposed, in particular because of a lack of adequate institutions. In general, treatment is sometimes difficult to implement regarding the limited time-frame within the pre-trial proceedings, and furthermore because the treatment itself takes time (AT, BE).

Some national laws do not provide for any overall time limit (AT, DE, IE, NL) while other legislation partially provides for maximum periods: 3 months, renewable for release under conditions in Belgium (except for release under financial bail: no time limits); 6 months, renewable for intense supervision and house arrest in Lithuania (for other measures, no time limit); 30 days maximum (with extensions of 30 days maximum) for a total of 180 days maximum for the house arrest in Romania (for other measures, no time limit).

As described in more detail in Chapter 3, probation services are only involved in Austria,<sup>118</sup> Belgium and the Netherlands, if the service has received a formal assignment of the competent authority.<sup>119</sup> Their role is quite diverse: support on all relevant issues and control (AT) or support only in the framework of the conditions and control with the police (BE). The particularity of the probation services is that they have at the same time to help the suspect to comply with the conditions imposed, but also to control if the conditions are respected.

In most countries problems arise with the control of compliance with conditions and the effectiveness of the control. This seems to be one of the weak points of alternative

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<sup>118</sup> In Austria, the alternative called “preliminary probation” above all plays a more relevant role for young suspects, due to the fact that probation is seen as an educational measure more appropriate for this age cohort. Within the German juvenile justice system, a comparable situation occurs, with youth court aid managing to avoid pre-trial detention, at least in those regions where it is working effectively.

<sup>119</sup> Moreover, in Ireland, we observe also practical situations in which probation staff would become involved at the pre-trial stage.

measures: more possibilities to monitor and control compliance and more information on the control of suspects could probably increase the trust of the actors in such measures, but this would require a better understanding of judges' expectations in this regard. In other words, is the imposition of the measure in itself sufficient to them (the measure would then be pure symbolic, see e.g. above, the formal pledges in Austria, with little interest in compliance with the conditions) or do they desire certain effects that can be controlled? Under this hypothesis, the question arises: what feedback do judges need about compliance? A particular problem arises when conditions are not clearly defined (e.g. to get help or assistance in order to de-radicalise) and are difficult to comply with (e.g. to look for work while the suspect does not have a work permit in the country). Compliance and its control or enforcement may be especially difficult in these circumstances. Another problem also emerges: the excessive use of less severe measures could impact upon the effectiveness of the control. In Lithuania for example, it was mentioned that this excessive use may provoke weaker control and more tolerance in case of breach of conditions.

Although, for example, Irish interview respondents indicated that it was by no means clear what the rates of compliance were, with concerns that compliance may not always be closely monitored expressed, very low (official) revocation rates can be observed in Belgium. There, as far as practitioners can assess, conditions can be and are effectively controlled or enforced; most interview respondents experienced that the vast majority of suspects complies with the conditions. The reaction to incidences of breach is either provided for in the law or left to the discretion of the authorities. Such discretionary power is often judged positively by most actors, who state that minor non-compliance with conditions may not have severe consequences such as issuing an arrest warrant.

In Belgium, it is observed that, in some cases, if the suspect complies with the conditions, judges tend to prolong the measure because things are going well. For example, psychiatric treatment will be prolonged if it has a beneficial effect on the suspect. Again, in such a situation, alternative measures can be and are being used as instruments of social policy rather than criminal policies. Finally, it must also be noted that a breach of conditions does not necessarily lead to a quick, or immediate, reaction (e.g. by re-arresting the suspect). However, if a suspect did not comply with his conditions previously, s/he will no longer benefit from alternative measures in the future or will be sentenced more severely (i.e. that the sentencing court will not grant a more favourable sentence/measure, such as a probationary supervision order). This is particularly evident in the Irish context.

We also observed a preference for what might be termed gradual release at times. For Belgium, at least, a progressive scale for pre-trial measures seems to emerge: after a pre-trial detention in prison, certain suspects will first be released at home under electronic

monitoring, and then, under conditions, before finally being released unconditionally. A similar observation is made in Romania, as mentioned above: *“it seems that there is a pattern whereby pre-trial detention is replaced after 2-3 months with house arrest which is later replaced with judicial control”*. This new practice may contribute to a net-widening effect. Such practices risk imposing alternative measures automatically rather than in a way that is justified and warranted in the circumstances. In some countries, alternative measures have been criticised because they are imposed too easily, even when they can have significant impact on the lives of suspects and their families. Is it not disturbing that particular alternative measures are sometimes imposed, even if judges actually do not consider them effective or useful (AT)? Once again, we see a factor displayed that contributes to possible net-widening effects.

#### 4.3. Financial bail

The possibility of ordering release upon payment of a financial bail or bond exists in the seven countries. Nevertheless, only in Ireland, is this measure popular, being embedded in a long cultural tradition, and being viewed as highly persuasive. Caselaw exists which requires judges to set the financial bail at a level which is not excessive compared to the person’s means. In Lithuania, practitioners evaluate financial bail very positively; yet available statistics show that the use of financial bail is quite rare in this country. Financial bail, in combination with another alternative measure or not, is also used to a very limited extent elsewhere, due to a question of principle (freedom and absolute necessity for security cannot be bought), perceived inequality of the measure (privilege for the rich, rejection of a *“class justice”*), poverty of suspects, its irrelevance to the risk of absconding, doubt about the legality of the funds (and consequently, fear that authorities would be laundering criminal proceeds) or unfamiliarity with the applicable procedures. No statistics about the practice are available in the countries participating in the DETOUR project, except for Lithuania and the Netherlands.

National laws provide for different forms of financial bail: the payment in advance, cash and in full, by the suspect (BE, DE) or by a third person (DE), the availability of a certain amount of money, securities (AT) or a material guarantee (RO). The Irish system provides for three forms: an *“own bond”* monetary amount, a cash lodgement and an independent surety. The bail can be applied solely, or in combination with each other, or combined with other conditions.

The determination of the amount of the deposit is left to the discretion of the actors, legislation providing neither a minimum amount (except in LT: a recommendation of the Prosecutor General establishes an amount of minimum 1,500 euros from 1 January 2018

onwards) nor a maximum amount. During interviews, it was observed that, in practice, the requested amount can vary significantly.

In general, the money will be lost if the accused person fails to turn up for trial, except in Lithuania where the financial bail has to be forfeited also in case of the commission of a new offence. In Ireland, a breach of any bail condition can also give rise to a revocation of bail.

#### 4.4. House arrest and electronic monitoring

Although the legislation of some countries does not provide for house arrest (BE, DE, IE), this measure is provided for specifically in Lithuanian legislation and in Romanian legislation (since 2014). In Lithuania, the measure is in practice very rarely imposed, this is because of a series of problems similar to those encountered regarding judicial supervision, see above). In Romania, during the house arrest the suspect is obliged to stay at home (except in a situation where this requirement has been dispensed with, for instance to allow a person to go to work or to engage in training), to appear before the prosecutor, the judge or the court anytime he/she is required to do so, and not to communicate with the victim. According to Romanian judges interviewed, the house arrest is imposed most often after a period of pre-trial detention as a transition towards judicial supervision (see below concerning the question of the progressive scale for pre-trial measures). *De facto*, house arrest also seems to appear reserved for suspects who have a fixed address and means of subsistence.

With respect to electronic monitoring (EM) we observed that all of the seven jurisdictions have legal regulations governing or otherwise provide for a legal basis for the application of electronic monitoring as a pre-sentence measure.<sup>120</sup> In Germany and the Netherlands, electronic monitoring is not mentioned in the law as such, but a legal basis for it nevertheless exists; in Germany it is considered as an ‘other suitable measure’ among the obligations or conditions that can be imposed to a suspended arrest warrant (DE). In the Netherlands the use of EM is dealt with under the general provision for adding requirements to a suspension of the pre-trial detention (NL). In all other jurisdictions, legislation explicitly refers to electronic monitoring as a possible measure. In Ireland, the possibility of applying EM has been introduced in legislation, but this legal provision has not yet come into force for pre-trial detention (IE).

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<sup>120</sup> See, with respect to electronic monitoring in some EU-countries, also the EMEU-project and the respective reports published on: <http://emeu.leeds.ac.uk/reports/>

Whilst in most of the countries EM is (legally) conceived of as an ‘alternative’ measure (in LT, RO: an obligation that can be imposed during house arrest), a bail condition (IE) or a condition attached to a suspension of an arrest warrant (DE, NL), in Austria and Belgium EM constitutes a ‘modality of execution of an arrest warrant’ (AT, BE). Being considered as a ‘modality of execution’ (rather than an ‘alternative’ or specific condition) has some important, and more ‘favourable’ consequences for the defendant. As such, time spent under EM is deducted from the final prison sentence, inappropriate EM-detention can lead to financial compensation, and – at least in Belgium – the measure of EM is subject to automatic periodic review by judicial bodies. In countries where EM is a condition/alternative, these rules do not apply.

Although the public prosecution service plays an important decision-making role with respect to alternative measures in Lithuania (and in Romania in the case of ‘judicial control’) this role only concerns less severe measures, and not the most severe measures like EM (LT). Furthermore, in all other jurisdictions it is ultimately for a judge/court to decide on the application of EM. While it is possible to apply EM immediately, complicated procedures (cf. e.g. NL, LT) most often result in an application for EM after an initial arrest warrant has been issued and executed (i.e. after some time spent in pre-trial detention). In general, there is no ‘absolute’ legal maximum duration of EM, although in Austria PTD-rules apply (AT) and, where time limits are mentioned, extensions are possible (LT).

The technologies used and content of the EM-measure differ between countries. Belgium has a very strict regime of EM – only a very limited number of movements outside the assigned place of residence can be authorised (for reasons connected to the criminal investigative proceedings, medical reasons, *force majeure*) (BE). There, the technology used within the pre-trial phase is GPS-tracking (BE). In other countries, the suspect is (or can be) allowed to leave the assigned place of residence (within specific time frames), e.g. for work, educational reasons, therapy, and the most common technology is radio frequency (RF). However, in some countries, GPS-tracking is possible, but not necessarily known by judicial actors (AT), is becoming used more frequently (LT), or it is used in specific cases, e.g. in the Netherlands in case of ‘location bans’ (NL), whether or not these are combined with a location order (movement restriction) (NL).

All jurisdictions thus have a legal basis for the application of EM in the pre-trial stage, but significant differences occur with regard to its use in practice. In Romania EM is not used, due to lack of infrastructure (RO), in Lithuania and Austria it is practised only in very small number of cases (LT, AT), in Germany only in one Land (Hessen) and also to a quite limited amount (DE). In contrast, in the Netherlands and especially in Belgium, EM is – comparatively speaking – very much more frequently applied (about 800 EM-placements

in Belgium in 2016, corresponding to a daily population of some 200 EM-suspects, around 345 instances of the application of EM in the Netherlands in 2016<sup>121</sup>). However, the application of EM in Belgium has recently been qualified as “*peanuts*” (by a MP), i.e. in comparison to its expanded use within other stages of the criminal justice system (in particular, the execution of prison sentences. In 2016, a total number of 5610 prison sentences were executed, calculated under all legal frameworks taken together). The comparison with the yearly number of committals to prison in the pre-trial stage is also striking (more than 10,000). In this jurisdiction, big variations between judicial districts in the practical use of EM are also evident; in some districts EM is not much or never used.

Practitioners and/or researchers from the different countries gave several and often quite similar explanations to the question as to why EM is not always used on a large scale. They also made critical comments and interesting observations with respect to the use of EM generally. Some interview respondents mentioned a couple of possible benefits of EM, e.g. that:

- Alternatives would be applied more often (e.g. DE, IE; in AT it was considered that GPS could be a good alternative, e.g. to define ban areas) as a result of the fact that decision-makers would have more confidence to avoid pre-trial detention with such a kind of additional ‘electronic’ control (RO). Such confidence might exist at least in circumstances where actors are sufficiently informed about technological possibilities, which seems not always to be the case (e.g. AT, BE);
- EM could possibly enhance better compliance of the suspect with other conditions imposed (IE, RO);
- EM would result in less administrative burden for other institutions currently supervising compliance with conditions by means of human resources (IE), and;
- EM could create a greater measure of comfort to the public at large (IE).

Many critical comments and observations, however, were also made and concerns expressed, including the following:

- There may be a fear (and experience) of additional administrative caseloads for judges who have to deal with breaches of EM-conditions (BE); or with respect to the practical implementation of EM more generally (AT). A lack of experience with or information about the concrete functioning of the measure and technology was also a concern (AT, BE);

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<sup>121</sup> 2<sup>nd</sup> National report on the Netherlands, p. 61.



- Serious doubts arise with respect to EM's ability effectively to prevent risks of recidivism – or non-compliance with the strict conditions of the regime, this was especially the case for offenders with mental health problems). Such doubts also arise about the ability to prevent absconding (e.g. foreign suspects with no residence), and/or collusion (with prison seen as the most 'secure' solution) (e.g. AT, BE, DE, NL, LT). More generally, the added value of electronic monitoring is questioned (IE).
- Some suspects are/may be excluded from the application of the measure as it only suits 'well integrated' suspects (AT); homeless or foreign defendants do not meet the criteria of residence or occupation (BE, DE, NL, RO, LT);
- More specific to the Belgian case, the very 'strict' regime of electronic monitoring (almost comparable to a '24-hour home detention') already does severely limit its scope of application, and leaves no place for individualisation and proportional allocation:
- Some also emphasise discriminatory aspects of electronic monitoring (referring to differences in material 'comfort' of the own living spaces or EM-detention places) (BE), and the psychological impact of the measure on suspects and their families (BE). In this analysis, we see EM being considered as a very intrusive measure, while the same purposes can be served by less severe measures (AT).

While these comments can explain why in most jurisdictions EM is only used in a limited number of cases, the question also arose as to whether the use of EM should be extended, thereby referring to 'net-widening' or '-strengthening'.<sup>122</sup> Concerns were expressed that there is a risk that EM would not be substitute for PTD but rather be used in cases where the suspect otherwise would not have been held in custody, or that a certain 'progressiveness' (gradual transition) is put in place (BE, LT).<sup>123</sup> Furthermore, the principle of expediency may not fully apply which (can) result(s) in the whole procedure being more prolonged. Instead of obtaining a greater rate of compliance, EM might also result in more breaches of bail (IE).

These concerns are all the more pressing since electronic monitoring resembles a kind of "preliminary probation" (with no differences in treatment between suspects and convicted

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<sup>122</sup> Recent European research on Electronic Monitoring indicates that countries with high rates of prisoners are likely to also have high rates of Electronic Monitoring, see Hucklesby A., et al. Creativity and Effectiveness in the use of electronic monitoring: a case study of five jurisdictions, 2016, p. 9. (<http://28uzqb445tcn4c24864ahmel.wpengine.netdna-cdn.com/files/2016/06/EMEU-Creativity-and-effectiveness-in-EM-Long-version.pdf>) Retrieved at 07.02.2018

<sup>123</sup> The latter is sometimes also seen as an 'advantage' in order to 'test' the suspect in a more restricted environment.

offenders, e.g. DE; or even a more 'severe' treatment, cf. BE) – while often not being deducted from the final (prison or pecuniary) sentence (except AT, BE). These concerns again raise questions about the application of the presumption of innocence in this context.

## 5. Procedural aspects and detention control

### 5.1. Introductory remarks

From most of the interviews, and throughout all countries, we gained the impression that the legal framework as such was less of a concern for our respondents, but that certain practices and obstacles were worrying them. In this section of the report we therefore try to categorise and explain different procedural aspects which influence the decision-making in favour of or against pre-trial detention. The second aspect of this chapter concerns the process of review or other forms of control of detention or bail decisions that impact, in particular, on detention length. Here we find different legal frameworks, outlined below in table 1.

**Table: Timeline<sup>124</sup>**

	First judicial hearing	Second judicial hearing	1 <sup>st</sup> Review	Judicial control by higher court <sup>125</sup>
<b>Austria</b>	Max. 96 h after first arrest	---	14 days; ex officio; oral hearing, but defendant can abstain from it/not attend	- Appeal; upon request no oral hearing
<b>Belgium</b>	Max. 48 hours after first arrest (until 2017: 24 hours)	After 5 days; <i>ex officio</i> by the judicial council (a special chamber)	The following reviews are in place: After 1 month, again after another month, then every 2 months during the investigation phase <i>ex officio</i> ; after that upon request Oral hearings	- Appeal against decisions of the judicial council to the Chamber of Indictments; <sup>126</sup> upon request oral hearings

<sup>124</sup> This timeline gives an overview over typical cases and does not consider any particularities such as speedy procedures or procedures for special groups or crimes.

<sup>125</sup> Extraordinary complaint mechanisms for example to a Constitutional Court are not included here.

<sup>126</sup> A further ex-officio-examination after 6 months was abolished in 2016; see 1<sup>st</sup> National Report on Belgium, p. 21.

	First judicial hearing	Second judicial hearing	1 <sup>st</sup> Review	Judicial control by higher court <sup>127</sup>
<b>Germany</b>	Max. 48 hours after arrest; PTD is ordered without fixed time limit	--	Usually after 2 - 3 weeks; upon request	- Appeal ( <i>Beschwerde</i> ), upon request; no oral hearing - after six months, when Higher Regional Court has to decide upon extraordinary prolongation of PTD (upon request of the public prosecution); Oral hearing optional
<b>Ireland</b>	Max. 72 hours when arrest occurs and as soon as possible after charge <sup>128</sup>	At district court: after 8 days, then after 15 days (or 30 days, with the consent of the accused and the prosecution), again after every 15 days, ex officio. <sup>129</sup> No formal time limits for higher courts.	--	When the trial has not started within four months of the date of refusal, the accused person can apply to the court for bail on the basis of delay by the prosecution when s. 2 of the Bail Act 1997 has been used; upon request by the accused; all refusals of bail can be appealed to the High Court and are subject to judicial review

<sup>127</sup> Extraordinary complaint mechanisms for example to a Constitutional Court are not included here.

<sup>128</sup> 144 h. for drug trafficking or murder, possession of firearms with intent to endanger life. As in other countries, a person may also appear before a court without being arrested – i.e. using a summons for the District Court

<sup>129</sup> No formal time limits apply for proceeding before higher courts, such as the Circuit Court, Central Criminal Court or Special Criminal Court, see 1<sup>st</sup> National Report on Ireland, p. 11.

	First judicial hearing	Second judicial hearing	1 <sup>st</sup> Review	Judicial control by higher court <sup>130</sup>
<b>Lithuania</b>	Max. 48 hours after arrest; PTD is ordered for a definite term, max. 3 months	After 3 months, PTD may be prolonged for another 3 months (in total max. 9 months for adults during the investigation, and max. 18 months in the investigation in serious cases); <sup>131</sup> all prolongation hearings are oral hearings <sup>132</sup>	--	- appeal to a higher court upon request; oral hearing if requested - after six months, when the Regional Court has to decide upon extraordinary prolongation of PTD upon request of the PP; Oral hearing
<b>Netherlands</b>	Max. 72 h (in certain cases + another 72 hours); PTD may be ordered for up to 14 days	- upon request of the PP to prolong PTD after 14 days by the court in chambers, PTD may be ordered for up to 90 days; oral hearing; - after that ex officio in “ <i>pro forma</i> -hearings” every 60 days (oral hearings)	- the court in chambers can also decide 30 days and then there has to be a new hearing in order to extend for 30 or 60 days; oral hearing - suspect can file for termination of PTD at any time; Oral hearing	Appeal to the Court of Appeals upon request Oral hearing
<b>Romania</b>	Max. 24 hours after arrest, PTD may be ordered for a max. of 30 days	<i>Ex officio</i> after 30 days - extensions of up to 30 days are possible (max. 180 days altogether during the investigation)	Periodic reviews ex officio every 60 days	Appeal upon request against every decision / prolongation decision

<sup>130</sup> Extraordinary complaint mechanisms for example to a Constitutional Court are not included here.

<sup>131</sup> Investigation of serious offences/offences committed by accomplices and organized groups/ also when the suspect is arrested in foreign country

<sup>132</sup> With mandatory participation of the prosecutor and either both suspect and defence lawyer or lawyer alone; when PTD last more than 6 months, participation of suspect is mandatory.

## 5.2. Producing the decision

### 5.2.1. *Time aspects*

Decision-making on PTD or release without or with conditions is characterised by the little time available to prepare such decisions; the maximum time amounts for all parties involved can be as little as 24 hours (BE, see above table 1). This is why prosecutors and judges in the partner countries often refer to the time pressure to explain that the information available for the first decision is usually very restricted (see above chapter 2.3.1). This pressure is even more pronounced for defence lawyers (see, for example, DE). It is interesting, however, that at least in some countries, judicial practitioners do not argue that they need more time. On the contrary, judges and public prosecutors regularly explicitly said that they have sufficient time and information for ordinary cases (e.g. AT, DE, LT, NL, RO). Nevertheless, in the same countries the issue of heavy workload was also addressed, and judges further explained that the time provided for in the law is, in fact, often not fully at their disposal, because e.g. of the dependence on other actors such as the police, who provide most of the necessary investigative information (e.g. AT, DE).

One of the interesting findings of our study therefore is that – while practitioners acknowledge that they have to decide under time pressure – in all the countries judges and prosecutors seem to have arranged their practice and learned to deal with this situation; ultimately finding it normal and indicating a certain *déformation professionnelle*. Some judges and public prosecutors also seem to have strategies to justify this kind of sometimes overly hasty decision-making about PTD, arguing that they try to speed up the process and sometimes advocate for more speedy (simplified) procedures (AT, DE, NL) in order to make the PTD period as short as possible.

### 5.2.2. *Hearing the suspect*

The first judicial hearing according to domestic legislation and to Art. 5 (1) and (3) ECHR<sup>133</sup> is crucial to protect the rights of the suspect against undue infringements by the law enforcement agencies: A personal encounter is indispensable. While (some) judges in all countries emphasised that it is essential to their decision-making to meet the suspect in person and to interact with him or her, our observations and interview results suggested that mostly the hearing is a very brief affair. Partly judges argued that this was due to a

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<sup>133</sup> Since ECtHR, 1 July 1961 – 332/57 (Lawless ./ Ireland, No. 3), para. 14; see also ECtHR, 26 October 2000 - 30210/96 (Kudła ./ Poland), para.110 or ECtHR 13 December 2012 - 39630/09 (Al-Masri ./ Macedonia ), para. 230.

high caseload in court sittings, especially at the District Court (for example IE). Our interviews also confirmed statistical findings and older research to the effect that, in the end, judges mostly do not deviate from the request for PTD by the public prosecution – this was then explained by public prosecutors properly fulfilling their filtering function and acting with sufficient self-restraint (see above chapter 3.2). It is noteworthy that only in some countries the presence of the public prosecutor is obligatory (IE (where the prosecution can be represented by a police officer in the lower courts), LT, RO. In BE the public prosecutor is not present at hearings by the investigating judge (within 24/now 48 hours), but at all review hearings that follow (hearings by judicial council or chamber of indictment). In other countries it is not: in DE and NL in many court districts public prosecutors are regularly not present. This is unfortunate, because there is no chance in such circumstances that the public prosecutor can be convinced during the hearing to withdraw his/her request or at least not to object bail/a suspension of the arrest warrant. It seems, however, that informal communication between defence lawyers and public prosecutors can sometimes solve problems before the matter even comes to a hearing (AT, DE, NL, IE). In Ireland again we see nuance, where the request from the prosecutor to deny bail seems to be less determinative than elsewhere.

The hearing and its circumstances may also be of importance for the overall fairness (or procedural justice) of the procedure as perceived by the suspect. The role of the suspect in general, however, was not discussed a great deal in the interviews.<sup>134</sup> On the other hand certain good practice examples showed that it is possible to take into account the difficult situation of the suspect and the defence, for example by creating a communicative and less formal atmosphere in the hearings<sup>135</sup> and to notify defence lawyers in due time before the hearing, giving them some time to prepare and talk to their clients (examples from DE, NL).<sup>136</sup>

### *5.2.3. Gathering evidence and personal information*

In many interviews judges described their dependence on information coming from other sources, mainly from police and public prosecution. The public prosecution sometimes echoed this – while then pointing to the police. Problems sometimes related to case evidence to substantiate the suspicion as the basic requirement for PTD, but more often related to personal information that is crucial to assess the grounds for detention. It became

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<sup>134</sup> While the detention hearings themselves are not public, defence lawyers from RO and DE criticised exposing suspects to the public by informing the media in high profile (corruption) cases.

<sup>135</sup> See 2<sup>nd</sup> National Report on Belgium, p. 62.

<sup>136</sup> See 2<sup>nd</sup> National Report on Germany, p. 85; 2<sup>nd</sup> National Report on the Netherlands, p. 72.

clear that the inclination to look for as much of this information as needed to properly prepare the decision exists to varying degrees. There thus was quite some variation, also within countries, concerning how far actors felt themselves responsible for gathering more information if they felt they needed it. This applied mainly to personal and social circumstances, being factors that could help to avoid PTD and which are matters often not put before the court by the actors who have requested detention). This lack of clarity concerning responsibility for obtaining relevant information also meant that some actors only accepted their responsibility for decision-making to a limited extent while others feel that burden quite heavily.<sup>137</sup>

As discussed in chapters 2 and 3, using additional sources of information, namely from the probation (or comparable) services are options which could alleviate this situation. There were, however, mixed responses from our interview partners as to how far this would be a successful or at least promising endeavour. One problem in this regard was mentioned by Dutch respondents: the prosecutor here holds the key to accessing the probation service as s/he is the one who can order the probation service to provide information. In our interviews it also became clear that many actors expected information that would be beneficial to the defendant (in the sense of avoiding PTD) to come from the defence. This means that it often only is available for the second or a later hearing or review, although it may have existed - and could have been known - already when detention was ordered.

#### 5.2.4. Files

As mentioned in chapter 3.3., access to case files for the defence is crucial in controlling pre-trial detention cases. Routinely, lawyers do not become active before they have inspected the files – as soon as they are involved they usually would advise the client to stay silent until they have received the files and studied them (see for example DE, AT). This means that the timeliness and practical accessibility to files is decisive. This has been highlighted on many occasions by the ECtHR,<sup>138</sup> and led to changes in the law for example in Germany.

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<sup>137</sup> See, for example the 2<sup>nd</sup> National Report on Ireland, p. 78 pp; 2<sup>nd</sup> National Report on Germany, p. 95 and the 2<sup>nd</sup> National Report on Belgium, p. 67.

<sup>138</sup> Since ECtHR, 30 March 1989 - 10444/83 (Lamy ./ Belgium), para. 29; ECtHR, 13 December 2007 – 11364/03 (Mooren ./ Germany) and ECtHR, 9 July 2009 (Great Chamber) on the same case, with reference to earlier cases against Germany, for example ECtHR, 13 February 2001 – 24479/94 (Lietzow ./ Germany); ECtHR, 19 January 2016 - 1886/06 (Albrechtas ./ Lithuania), para. 76.



Many defence lawyers said that access to case files is often limited in pre-trial cases; often there are at best thin police files. Other limitations were mentioned for example by Belgian lawyers who emphasise that they do not get access to the files in the initial stage of the proceedings and that they may have to go to the court house, during office hours, to consult the files. Lithuanian lawyers, on the contrary, report no significant obstacles that prevent attorneys from executing their duties. German lawyers on one hand did not report significant problems with regard to file access. They are, however, the only ones who have to make a formal request in each and every pre-trial detention case in order to get the case files: a requirement that – indeed – doesn't seem to make much sense as it is obvious that a lawyer would need access to the files in order to prepare the hearing. It may be worth noting that deliberate non-disclosure of parts of the case file doesn't seem to occur very regularly. Our findings indicate, however, that limited access to the case file may mainly be a logistical issue but that unwillingness from the prosecution side may play a role as well: they can 'play for time' quite a bit without having to admit that they would rather not share certain information yet.

While some countries have introduced electronic files or other forms of electronic processing in criminal procedures at least in some regions or for some parts of the procedure (BE, LT), others are still waiting for these modern blessings (DE, IE). Defence lawyers in Ireland rely heavily on an initial, often brief, meeting with the accused person and informal conversations with the prosecution to gather the necessary information. Both the existing experiences and the expectations of electronic procedures were mixed within the country samples.

### 5.3. Controlling detention decisions

#### 5.3.1. *Reviews*

As can be seen from table 1, control mechanisms can take diverse forms with regard to the first opportunity, frequency, the level of decision-making and the question whether they are instigated *ex officio* or upon request by the defendant or are connected to the decision to prolong pre-trial detention. Again, the ECHR just stipulates that control mechanisms must exist (Art. 5 [4] ECHR) but not what they must look like. These control mechanisms, in particular when an oral hearing takes place, are opportunities to discuss the necessity of further PTD and to opt for another, less severe measure; they are therefore crucial for the defendant. They may shorten the period of detention sometimes considerably – that they actually function in that way was acknowledged in many interviews (for example DE, NL, IE). This indicates that the review hearings should take place relatively early and

should be scheduled automatically, without waiting for a defence lawyer to request it (as it still is the case in Germany). They should take place regularly and not be limited to only one possibility within a lengthy period (see criticism in LT).

Nevertheless among our respondents the views differed in how far review hearings, in particular when they happen very quickly after the initial hearing (as in BE) and/or quite regularly, are of use: Across our country samples we received opinions that they often are a ‘second brew’ of the same facts and arguments, and not very helpful (examples from AT, BE, DE, NL), as well as arguing that the time span between hearings is not always used to find more information that could be in favour of the use of alternatives.<sup>139</sup> On the other hand our respondents indicated that the review hearings were often the first opportunity to actually discuss the personal circumstances of the defendant and thus opening up important chances to get him or her released. As mentioned above, the duty of delivering that kind of information depends heavily on the initiative of the defence lawyers.

As mentioned in chapter 2.3.2, often decision-making is not thorough and suffers from superficial/inconclusive substantiation of the factors leading to PTD. In particular, the written motivation for the decision is scarce and therefore difficult for the defence to handle. This problem often continues in the review decisions that simply repeat the reasons given in the first decision and has been criticised in various judgments of the ECtHR.<sup>140</sup> Problems have been reported here both by defence lawyers from various countries<sup>141</sup> and by judges from a higher instance in Germany.<sup>142</sup> Often several reviews are necessary before a suspect is released, indicating that the progress of the proceedings and the lapse of time play an important role in the review decision-making.

This leads to the conclusion that reviews could be used more efficiently - all in all, however, regular reviews, and even the possibilities of having a review, were seen as the most important tool to control detention length in individual cases. They also have to be considered as ‘systemic measures’ to constrain the overall use of PTD, both points were made in by Irish respondents – Ireland therefore again can serve as good practice example.<sup>143</sup>

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<sup>139</sup> See, for example, the 2<sup>nd</sup> National Report on the Netherlands, p. 55 where it is also highlighted that the decision-making is done “assembly-line-style” because of enormous caseloads per day for the judges.

<sup>140</sup> For example ECtHR, 31 March 2002 - 7679/99 (Stasaitis ./ Lithuania), para. 90; ECtHR, 3 June 2009 - 45219/06 (Kauczor ./ Poland), para. 39.

<sup>141</sup> For example 2<sup>nd</sup> National Report on Belgium, for the Flemish part (p. 59); 2<sup>nd</sup> National Report on the Netherlands, p. 68; these assessments by interview partners were confirmed also following a presentation during our 2<sup>nd</sup> workshop in Brussels.

<sup>142</sup> 2<sup>nd</sup> National Report on Germany, p. 88.

<sup>143</sup> 2<sup>nd</sup> National Report on Ireland, p. 79.

### 5.3.2. *Appeals and other (extraordinary) judicial remedies*

Where appeals procedures exist, they are often described as cumbersome (AT, DE, NL) and sometimes also risky from a tactical point of view (AT, DE) on defence side. Others, however, pointed to the fact that in certain cases only do these appeals enable the higher courts to influence practice and ultimately legal culture. It was only in certain cases too that appeals acted to control the lower courts' practice by means of authoritative rulings, for example dealing with certain decisive factors substantiating the legal grounds for detention (DE, AT). The landmark decision by the Irish Supreme Court in 1966 anchored the presumption of innocence in the PTD practice and directly impacts on its legal culture until today as many Irish interview partners stressed.<sup>144</sup>

Furthermore, extraordinary or ultimate remedies – not least by appealing to the European Court of Human Rights – have significantly shaped judicial practice and legal culture in all countries involved in our study. In continental countries where the judicial system is less oriented around leading cases, we nevertheless find evidence of a great impact of constitutional court decisions (for example DE), even if they are less explicit and seldom discussed in our interviews (this was the case, however, in Romania, where the positive role of the Constitutional court was explicitly mentioned).<sup>145</sup>

From our interviews it transpired, however, that defence lawyers were often quite reluctant to use these more cumbersome remedies. This may be understandable as, for them, sometimes the development of the case itself may be more important than matters that have to do with PTD generally. It is, however, a missed chance to restrict the judge's leeway, to change outmoded traditions and to further shape a liberal practice on the way suspects are treated while awaiting trial.

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<sup>144</sup> Supreme Court in *People (Attorney General) v. O'Callaghan*, [1966] I.R. 501; see 1<sup>st</sup> National Report on Ireland, p. 7 and 2<sup>nd</sup> National Report on Ireland, p. 23p.

<sup>145</sup> 2<sup>nd</sup> National Report on Romania, p. 40.

## 6. European Aspects

### 6.1. The Council of Europe

#### 6.1.1. *The European Convention and the jurisprudence of the European Court of Human Rights*

Across this research, our common normative background has been the European Convention on Human Rights and its basic values and guarantees. Of course, comparable standards can be found in domestic constitutional provisions or domestic statutes such as the codes of criminal procedure as well; often the domestic requirements go beyond those of the ECHR. Nevertheless, we, as comparative researchers, had the great privilege to have such a theoretical framework and a lot of material in form of jurisprudence of the European Court of Human Rights.

In our desk research we analysed the impact of the case law and standards set by the ECtHR and other bodies of the Council of Europe (namely the CPT) for the participating countries. This influence of the case law has been mentioned in this report already a few times and is important for all of the countries; it represents the whole scope of relevant human rights issues in PTD matters: Austria, for example, has been found in breach because of unjustified supervision of the communication between defense counsel and defendant.<sup>146</sup> Belgium was the first country affected by a decision relating to insufficient access to case files in PTD matters;<sup>147</sup> later the *Salduz* case against Turkey here was important and underlined in the *Bouglame* case about access of lawyers in police interrogations;<sup>148</sup> finally Belgium was convicted because of inhuman prison conditions that also affected, in some cases, pre-trial detainees.<sup>149</sup> Germany was held to be in breach of the Convention by the ECtHR, in both matters several times, because of insufficient access to files<sup>150</sup> and the unacceptable length of detention.<sup>151</sup> Lithuanian cases dealt with, for example, decision-making in cases with very long PTD phases, in which no substantial reasons

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<sup>146</sup> ECtHR, 1 January 2001 – 24430/94 (Lanz ./ Austria).

<sup>147</sup> ECtHR, 30 March 1989 - 10444/83 (Lamy ./ Belgium).

<sup>148</sup> ECtHR, 27 November 2008 - 36391/02 (Salduz ./ Turkey); in the *Bouglame* case Belgium was not found in breach because the appellant later had been acquitted, the court nevertheless reiterated early access to a lawyer is indispensable, ECtHR, 2 March 2010 - 16147/08 (*Bouglame* ./ Belgium).

<sup>149</sup> ECtHR, 25 November 2014 – 64682/12 (Vasilescu ./ Belgium).

<sup>150</sup> ECtHR, 13 February 2001 - 24479/94 (Lietzow ./ Germany) and, of the same day, 23541/94 (Garcia Alva ./ Germany); ECtHR, 5 July 2001 - 38321/97 (Erdem ./ Germany).

<sup>151</sup> For example ECtHR, 9 July 2015 - 8824/09 und 42836/12 (El Khoury ./ Germany).

were given for the prolongation of detention,<sup>152</sup> with inhuman prison conditions,<sup>153</sup> and with insufficient access to files.<sup>154</sup> With regard to the Netherlands, the ECtHR critically dealt with the “shocked legal order” as sole ground for detention: while it is generally accepted under strict conditions, it was not in the specific case.<sup>155</sup> Romania was found to breach the Convention in a case where (under old legislation) detention was not ordered by an independent judge and, more recently, because of inhuman prison conditions.<sup>156</sup>

Of the seven countries in this research, only Ireland has never been found to be in breach by the Court in PTD matters.<sup>157</sup> Interestingly, the ECHR did play a role when the legal provisions for PTD were amended and PTD for preventive purposes was introduced in 1996: during the criminal policy debate preceding this change in 1996 (that made a change in the constitution necessary) the reform was justified, in part, by reference to Art. 5 (1) lit.c ECHR, that explicitly allows for “the lawful arrest or detention [...] necessary to prevent his committing an offence.”

#### 6.1.2. *Recommendations of the Council of Europe*

Further impact on criminal policy can be attributed to the activities of the Council of Europe’s Committee for the Prevention of Torture (CPT) that visits all places of detention in Member States of the Council of Europe and reports problems or possible risks with regard to Art. 3 ECHR. All country reports by the CPT are (or have been for earlier visits) critical with regard to prison conditions in PTD (including Ireland).<sup>158</sup> Apart from the country visit reports, the CPT also publishes General Reports and the “CPT standards”. In both, the PTD practice in Europe is described as problematic in many, in some aspects in all countries. The CPT is particularly critical about the restricted out-of-cell opportunities for remand detainees: “[...], prisoners cannot simply be left to languish for weeks, possibly months, locked up in their cells, and this regardless of how good material conditions might

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<sup>152</sup> ECtHR, 21 March 2002 – 47679/99 (*Stašaitis ./.* Lithuania).

<sup>153</sup> ECtHR, 18 November 2008 - 871/02 (*Savenkovas ./.* Lithuania).

<sup>154</sup> ECtHR, 19 Januar 2016 - 1886/06 (*Albrechtas ./.* Lithuania).

<sup>155</sup> ECtHR, 9 December 2014 - 15911/08 (*Geisterfer ./.* The Netherlands).

<sup>156</sup> ECtHR, 3 June 2003 – 33343/96 (*Pantea ./.* Romania); ECtHR, 28 April 2015 - 54539/12 (*Cojan ./.* Romania).

<sup>157</sup> Interestingly, the first ECtHR case ever dealing with PTD was an Irish case (ECtHR, 1 July 1961 – 332/57 [*Lawless ./.* Ireland, Nr. 3]); Ireland was not in breach because the Court accepted a restriction of the suspect’s rights because of a declared public emergency threatening the life of the nation; the suspect was a member of the IRA. Cases on pre-trial delays in criminal proceedings have also been dealt with by the Court, with (ECtHR (GC), 10 September 2010 – 31333/06) *McFarlane ./.* Ireland deciding that the delay had breached Article 6(1).

<sup>158</sup> All country reports and other documents can be accessed on the CPT website, [www.coe.cpt.int](http://www.coe.cpt.int).

be within the cells.”<sup>159</sup> Just recently the Committee stated: “During visits to prisons throughout Europe, the CPT has often found that remand prisoners are held under very poor conditions and an impoverished regime.” It therefore “urges the 47 Council of Europe member states to use remand detention only as a measure of last resort and to provide remand prisoners with adequate detention conditions.”<sup>160</sup>

This means that in all the countries represented in this study human rights violations were found with regard to PTD that had not been solved within the judicial system in the country. As a consequence, sometimes the practice had to be changed accordingly, sometimes even legislation needed to be amended. In our interviews, however, these decisions hardly played any role – usually individual practitioners do not feel affected by these decisions and standards,<sup>161</sup> sometimes the notion transpired that domestic safeguards were enough and that additional safeguards (for example on instructions and translations) were unnecessary and made things more complicated.<sup>162</sup> Nevertheless both practitioners from Romania and Lithuania<sup>163</sup> explicitly attributed progress towards a more restrictive use of PTD to jurisprudence of the ECtHR. Given the significantly decreased number of pre-trial detainees in the two countries, this impact has to be emphasized.

## 6.2. The European Union

### *6.2.3. Introduction*

European cooperation in the criminal justice field is a gradual process and is influenced by various factors such as: globalisation of crime and crime structures, the fall of the internal borders between Member States (especially after the 80s), the development of the EU internal market law etc. Negotiations between the Member States on whether the Community’s competence should extend to criminal law ended with a compromise formulated in the Maastricht Treaty (1993). The Treaty established the Union competence in the justice and home affairs (the so called ‘third pillar’), including judicial cooperation in

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<sup>159</sup> From the CPT Standards.

<sup>160</sup> 26<sup>th</sup> General Report of the CPT, 2016, p. 31.

<sup>161</sup> See also results in the research conducted by Fair Trials International, <https://www.fairtrials.org/campaigns/pre-trial-detention/pre-trial-detention-in-europe/> last retrieved 30 January 2018.

<sup>162</sup> See for example 2<sup>nd</sup> National Report on Germany, p. 88.

<sup>163</sup> 2<sup>nd</sup> National Report on Romania, p. 19; 2<sup>nd</sup> National Report on Lithuania, p. 40.

the criminal matters, police cooperation, custom cooperation and so on, and was a seminal moment. In 1999, the Amsterdam Treaty renamed and reformed this pillar into ‘police and judicial cooperation in criminal matters’ and also introduced a very powerful tool for EU cooperation – the framework decisions. The principle underlying the framework decisions is the Member States are obliged in terms of results but they are free to determine their own ways of implementation, according to their traditions or institutional architectures. Therefore, the framework decisions need to be transposed into the national legislations before they can become active. The principle of mutual trust is another fundamental principle of the judicial cooperation and it means that a decision produced in the course of criminal procedure in one Member State is respected and given effect in the other 26 states.

Among the framework decisions that belong to the ‘free movement’ of criminal justice family, two are of special interest for our research: The Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW);<sup>164</sup> and the Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (hereinafter European Supervision Order or ESO).<sup>165</sup>

It must be mentioned, that the European Union has also set standards also with regard to suspects’ rights, since this may be an important aspect for mutual recognition and mutual trust. Following a “Roadmap on procedural rights”, six directives on interpretation and translation, the right to information, legal aid, on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest and on procedural safeguards on child defendants have been adopted and are partly already transposed into national legislation.<sup>166</sup> Parts of them are also important for PTD matters as they strengthen, for example, defence rights (see for example chapter 3.3. of this report).

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<sup>164</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L 190/1.

<sup>165</sup> Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L 294/20.

<sup>166</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings; Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings;

#### 6.2.4. *The Framework Decisions*

By far the most popular framework decision in the EU, at least in criminal matters, is the FD 2002/584/JHA on the European Arrest Warrant (hereinafter EAW). In brief, the EAW is a simplified cross-border judicial surrender procedure by which one person can be surrendered for the purposes of prosecution or executing a custodial sentence or detention order to another EU Member State. As a step forward from the previously complicated and lengthy extradition procedures, the EAW provided strict time limits for the procedure (60 days without the consent of the person, 10 days with the consent of the person), suspended the double criminality check for 32 categories of offences as long as they are punishable by at least three years of imprisonment in the issuing state, introduced some guarantees and limited the number of grounds for refusal. Since 2005, the number of EAW issued in the EU increased from 6,894 to 16,144 in 2015.<sup>167</sup>

As mentioned in the introductory chapter, one of the major problems of the criminal justice systems in Europe is the over-representation of foreigners in European prisons. One reason behind this reality is the lack of available alternatives to PTD for this group of offenders. The European Arrest Warrant sometimes is seen as a means to overcome that problem at least for those offenders that are residing legally in another state of the EU than the state conducting the criminal investigation – in principle, it should be possible to summon them and, if they do not appear for trial, to issue an arrest warrant, instead of detaining them in the respective country.<sup>168</sup>

In order to respond to this issue, the ESO was adopted. By using this FD, it is expected that the judiciary will treat non-residents (that have a fixed residence in another EU state) in the same manner as residents, by opening up alternatives to pre-trial detention for everybody. Like the EAW, the ESO is based on the same procedure of forwarding the certificate together with the supporting documents from the issuing state to the executing state. The person may be transferred for supervision to the Member State in which he or she is

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Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

<sup>167</sup> Source: [https://e-justice.europa.eu/content\\_european\\_arrest\\_warrant-90-en.do](https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do) Retrieved at: 26.01.2018.

<sup>168</sup> For legal problems to issue an arrest warrant in these cases for example in Germany see Morgenstern 2018, *Die Untersuchungshaft*, Baden-Baden: Nomos, p. 508.



lawfully and ordinary residing. The transfer is also possible to a third state but only if this Member State consents to this procedure.

In order to facilitate the communication between the Member States, the FD provides that a central competent authority should be established in each Member State. The certificate will thus be forwarded from the competent authority in the issuing state to the competent authority in the executing state. Article 8 of the ESO provides that at least the following supervision measures shall be supervised by all member states:

- a) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings;*
- b) an obligation not to enter certain localities, places or defined areas in the issuing or executing State;*
- c) an obligation to remain at a specified place, where applicable during specified times;*
- d) an obligation containing limitations on leaving the territory of the executing State;*
- e) an obligation to report at specified times to a specific authority;*
- f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.*

In the case where the nature of the supervision measure is incompatible with the law of the executing state for the same offence, the measure may be adapted but the outcome should be as close as possible to the initial decision and never worse for the person. As opposed to the EAW, where consent is not always required for surrender, ESO provides that transfer may take place only upon the consent of the person.

Although the law governing the monitoring of the supervision measures falls under the authority of the executing state, all the subsequent decisions are taken by the issuing state: renewal, review or withdrawal, modification, issuing an arrest warrant or any other enforceable judicial decision having the same effect. As in the EAW procedure, the ESO provides for the same suspension of the double criminality check and almost the same grounds for refusal.

Based on the European Judicial Network website, Ireland is the only country which has not yet transposed the ESO<sup>169</sup> into the national legislation. However, the use of the ESO in the EU is still at its infancy in general. For instance, 16 incoming cases and 18 outgoing

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<sup>169</sup> Source: <https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=39> Retrieved at 26.01.2018.

cases were registered in the Netherlands from the moment of transposition until September 2017; in Germany two cases were mentioned during our research.<sup>170</sup>

### *6.2.1. The Framework Decision's use in our study*

As far as the European Arrest Warrant is concerned there seems to be a large consensus among the participants in our study. EAW works very well in almost all jurisdictions and contributes significantly to the realisation of 'Europe without borders' (particularly positive responses came from LT and RO).<sup>171</sup> It should be mentioned, however, that several respondents in our study expressed reservations about the possibility of avoiding PTD by applying the EAW as described above (BE, DE, mixed impressions in the Netherlands).<sup>172</sup> Other participants in different jurisdictions mentioned also some difficulties, sometimes localised in certain jurisdictions. For instance, countries like England and Wales, France, Malta or Cyprus were mentioned several times as using rather lengthy procedures or demanding certain guarantees from the executing states prior to surrender. The lengthy procedure appears, in some jurisdictions, mainly due to the procedures for hearings or appeals that can be exercised by the suspects or sentenced persons.

The guarantees required by some jurisdictions in relation to the surrender of a person should be placed in the context of the Aranyosi and Caldăraru judgement of the Court of Justice of the European Union<sup>173</sup> which states that, when deciding on EAW, the judicial authorities in the issuing state should assess the 'real risk of inhuman or degrading treatment' in the executing state. While the European Court of Justice for a long time seemed to prioritise the European cooperation according to the principle of mutual recognition and did not accept a rejection of the EAW because of human rights issues, repeated jurisprudence by the European Court of Human Rights that identified inhuman and degrading treatment of prisoners because of the prison conditions (see above 6.1) has given rise to this judgment by the CJEU.

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<sup>170</sup> For NL: Beun, M. (2017) Conference presentation during CEP Expert meeting on the 26<sup>th</sup> of September 2017; for Germany see 2<sup>nd</sup> National Report on Germany, p. 99.

<sup>171</sup> 2<sup>nd</sup> National Report on Lithuania, p. 40; 2<sup>nd</sup> National Report on Romania, p. 40 pp.

<sup>172</sup> See 2<sup>nd</sup> National Report on Belgium (Flemish respondents), p. 62, from the side of the respondents in Wallonia less problems were reported (p. 47); 2<sup>nd</sup> National Report on Germany, p. 98; 2<sup>nd</sup> National Report on the Netherlands, p. 75.

<sup>173</sup> EUGH Aktenzeichen C-404/15 u. EUGH Aktenzeichen C-659/15 PPU (Aranyosi u. Căldăraru), ECLI:EU:C:2016:198, available at:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=E&N&mode=lst&dir=&occ=first&part=1&cid=185162>, last retrieved 29 January 2018.

Another set of difficulties is related to the insufficient information available to judges prior to making the decision. For instance, when assessing the risk of absconding, some prosecutors in the Netherlands would like to have more information on the social background of the person or on whether the person has a job or other ties in the Netherlands. Another group generally seemed to be reluctant to use these means of cooperation, as for example some critical remarks by German defense lawyers indicate, when they complained about unwilling and Eurosceptic judges:<sup>174</sup>

*“[...] on every occasion you talk about a unified Europe, but when you look at detention judges’ decisions, you would find often enough arrest warrants saying ‘He does not have a fixed abode in the Federal Republic of Germany’ and then it is not fussed about this person having in the neighbouring country Poland the same address for 20 years, because they are too lazy and too comfortable or too delicate to respect this and to get that information.”<sup>175</sup> (interview 26, Lawyer, Germany).*

Having mentioned these obstacles, we should emphasise that most participants in our study stressed that they are marginal or could be considered as areas for improvement. The EAW was usually perceived as an effective and reliable instrument for European cooperation.

If EAW was described in all jurisdictions as a success, not the same applies to the ESO. In most jurisdictions, the ESO is hardly known by the stakeholders and only seldom used in practice. In most cases, this reality can be explained by the novelty of the tool. In Belgium, for instance, by the time of interviews the FD was not even transposed in the national legislation. In the others, the FD was enacted only for one or two years at a maximum. However, most participants mentioned no training or other systematic awareness campaign to promote this FD. In this respect, the Netherlands could be a good example to follow. As mentioned in Art. 7 of the FD, the Netherlands designated one single central competent authority – Public Prosecution Service/ the Centre for International Assistance in Criminal Matters (CILA). The CILA processes all incoming and outgoing requests of ESO and decides independently on the incoming requests. This kind of institutional arrangement facilitates the cooperation at the European level and creates expertise on certain fields. Although the numbers are still low, the trend is going up and looks promising

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<sup>174</sup> 2<sup>nd</sup> National Report on Germany, p. 99 pp.

<sup>175</sup> „[...] ,dass bei jeder Gelegenheit vom geeinten Europa geredet wird, wenn es aber um Haftrichterentscheidungen geht, dann finden sie oft genug Haftbefehle in XY in denen steht, "Er hat in der Bundesrepublik keinen festen Wohnsitz", dann ist es piepsegal, ob der Mensch im Nachbarland Polen seit 20 Jahren unter der gleichen Anschrift gemeldet ist, weil sie zu faul und zu bequem oder zu fein sind, das zu respektieren oder da Auskünfte einzuholen.“

at least in the Netherlands: Both in 2016 and 2017 eight cases were forwarded respectively, in 2017 again eight cases. There were two incoming cases in 2016, but in 2017 this number has risen significantly to ten.

Administrative burdens and time pressure were mentioned as obstacles in many jurisdictions (Austria, Lithuania, Ireland):

*“there are more important things than to saddle myself with additional work and with tremendous efforts and delays (...) I’d rather follow the acceleration order and deal with the case next week and the thing is done”* (Judge 11 Austria)

or

*“I am deterred by all the bureaucracy”* (interview 10, Judge, Germany)

Indeed, most prosecutors and judges expressed real concerns regarding the time they have available in the investigation phase. Taking the ESO option seems to add even more pressure on the short time available and the other resources. For instance, ensuring translation is not always straightforward; it means time and also financial resources.

Therefore, instead of imposing ESO, some judges stated that they would take an accelerated procedure and pass the sentence as soon as possible. Obviously, this is the position for rather easy cases. In more complicated cases, where evidence needs to be collected from many jurisdictions, or if there are many offenders involved, this speedy procedure is not possible. Cases such as drug trafficking or human trafficking seem to be the right candidates for the use of ESO. Due to the time needed in these cases, the prosecution or the judge could use the ESO to allow the suspects to return to their home countries under some control that would ensure their presence in court when needed. Another alternative to ESO mentioned by some participants is the financial surety (LT, DE). Instead of following a rather lengthy and bureaucratic procedure some judges prefer to impose financial bail or surety. This procedure seems to be faster and under the control of the judiciary in the issuing state.

The lack of control or the lack of information regarding the manner in which the supervision order is implemented in other jurisdictions were other obstacles mentioned in some country reports (IE, BE, AT). Not having this information easily accessible makes some judges “happy that I have the person here on-site” (judge 16 DE). The lack of information may in some cases lead to the lack of trust about how the conditions would be monitored in another country (IE, AT). Similarly, the lack of information about how the other countries implement the supervision may fuel the fear of absconding:

*“how can it be guaranteed that he comes back to trial, that’s something he most likely won’t do. That’s totally unrealistic.”* (Prosecution 7 Austria).

Overall, the ESO has triggered mixed responses. There are still many practitioners not even aware of this European mechanism. It could work in more complex cases that require long investigative activities. In order to make the ESO work better the participants suggested national or judicial authorities to conduct systematic awareness campaigns. Information on how each jurisdiction constructs and implements the supervision measures is also required. This information should be easily accessible – eventually on the European Judicial Network website – and regularly updated. National central authorities should be assigned in each EU member state and take a more active role in promoting and coordinating the ESO implementation. Probably more research should be conducted on the implementation of the ESO after a few years of its implementation in order to identify the bottlenecks. Results of this research should be easily available to the judiciary in order to bust their confidence in cross-border co-operation.

Although the ESO is at its infancy, there are countries which have started to use it. As mentioned above, the Netherlands provides a good example in this respect. One of the Dutch participants in our second workshop in Brussels had successfully requested the use of a ESO for his client. He explained that he made quite an effort to explain the mechanism to judges – written and orally - , so the most important means to achieve better implementation would be “nagging defense lawyers”.<sup>176</sup> Once again, Ireland – that still has to transpose the Framework Decision on the ESO into national law – shows constructive and perhaps characteristically informal ways to deal with the factual problem: While there was a lack of awareness or reservation with regard to the ESO, respondents mentioned cases in which persons from outside Ireland were granted bail and allowed to go back to another country, with informal, “creative” solutions developed to deal with the question of monitoring and compliance. This possibility was developed in particular with regard to British defendants from Northern Ireland but shows that PTD can be avoided that way once certain practices have been established and there is a will to avoid detention in that way.

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<sup>176</sup> Following our first workshop in Berlin we heard from another participant that she did not achieve the same for her client in Germany, and that judges were not ready to at least consider this option.

## 7. Conclusions

### 7.1. Conducting comparative research on PTD and bail

Our comparative study on PTD is 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. It also made us reflect on our own systems. Comparing a legal construct and its implementation in practice means both detecting differences and highlighting similarities – the matter of which one prevails over the other can sometimes be compared to the question of whether the glass is half full or half empty. With the common normative basis in the ECHR, the legal framework certainly showed many similarities. Since our respondents agreed that in the participating countries it is mostly not the legal framework which has deficiencies, but rather the practice which can be of concern, the differences between systems *de facto* rather than *de jure* were harder to pin down. These differences and subtleties could often only be understood with a lot of context information stemming from constant exchange between the partners. It is important to note that, apart from visible differences or comparable problems and solutions, the qualitative approach of our research could show that, in all countries, there is considerable variation in the approaches of decision-makers in many respects, which can best be explained by the discretion they possess in each of our countries.

On the more practical side, we noticed a deplorable lack of suitable statistics - not only that European statistics only exist to a limited degree (the work done on behalf of the Council of Europe with the SPACE data compilation being, however, of enormous value), national statistics are, in some countries, also scarce at best. The European Union does not provide any additional material although evidence based criminal policy should be able to be built on reliable data, both on the national and the European level.

One of the explicit aims of this study was to connect research and practice and to support those decision-makers that are increasingly involved in cross-border cases and often complain – in all countries involved – about the problems in this area. We also hoped to create exchange and even networks between practitioners in all countries that often deal with the same sort of problems, again both on the national and the cross-border level. We also wanted to interact with practitioners during our research and to feed in their views on preliminary findings. We therefore invited judges, public prosecutors and defence lawyers to three one-day workshops with different focus groups and focus topics. These workshops proved to be very helpful for us, particularly to understand aspects of legal cultures and tradition. According to feedback given, they were also very interesting and fruitful for

the practitioners participating. We were nevertheless surprised how hard it was to convince practitioners to participate - high workloads may be one reason, a certain lack of awareness concerning training events a second one, and scepticism towards European and “foreign” matters a third one. Being focused on one’s own national situation and daily practice may also mean possible participants find it difficult to see the value in cross-European exchange. A real obstacle for some who had expressed an interest was their lacking knowledge of the English language. This problem sometimes perhaps is underestimated by those used to English as a working language but is significant particularly among older (potential) participants in (Eastern) Germany, Austria, Romania or Lithuania. Translation services perhaps would have attracted some more participants.

## 7.2. Grounds and motives in the decisions on PTD

The legal regulations and definitions concerning PTD provide a framework directing practice, but only to some extent. The actual practice appears particularly determined by the prevalent legal culture, a wide margin of discretion of the decision-makers and also societal developments and concerns. Countries focussing on preventive aspects in their PTD-practice seem to have rather high rates of PTD. This consideration suggests that there seems to be some risk that PTD rates may rise rather than decline. This raises concerns about the possibility of reducing PTD in Europe. We observe social changes and, connected to this, a decreasing perception of safety which is taken advantage of by political parties and groups seeking the extension of control measures and increasing restrictions on liberty. This gives rise to concerns that preventive motives may generally gain importance in PTD practice and that thereby detention rates may increase. Even in Ireland where risks of reoffending are still reported to be of subordinated and lesser relevance, there were indications that this ground may gain influence. Examples of legal developments directed to a considerable extent towards increasing the chances of ordering PTD were observed in recent years in the matter of domestic burglary in Germany, Ireland, in the Netherlands and in Austria. These developments are happening in these countries almost in parallel. As a matter of fact, these developments were clearly motivated by preventive reasons, because those convicted of burglary are often considered to be repeat offenders.

Considering the definition of PTD as an exception and a measure of last resort, strategies employing PTD as a tool for prevention are most sensitive and contentious. In view of the scenerios addressed above it seems of utmost importance to work on and strengthen the understanding of prosecutors and judges about PTD being the ultima ratio. The legal culture in Ireland - rejecting strong preventive notions with regard to PTD – continues to persist, and has not led to a breakdown of the criminal justice system. Apart from the

different legal tradition, a different attitude has been expressed by all players involved in Ireland, one which allows for the presumption in favour of bail to guide the practice in reality.

We found a certain degree of interchangeability in the grounds of detention as well as the justifications provided for them. Our research shows that, besides the official grounds for detention, there are also hidden and extra-legal motives influencing the decisions. In addition, some reports also referred to limited or weak reasoning for decision-making. PTD practice across most countries therefore appears somewhat arbitrary, and which does not pay sufficient attention to the ultima ratio principle and the drastic infringement PTD means for the personal rights. Understanding that this practice is longstanding and persistent, we do not assume this can be improved by directives or legal changes. Changing this situation requires continuing efforts including awareness raising and training for prosecutors and judges. Such activities can build on the reflections about practice emerging from this research and be directed towards highlighting and seeking to minimise the use of hidden motivations in decision-making, to make sure the principle of proportionality is a reality in practice, and to pay attention to fact-based assessments of risk.

There are groups which can be observed as being particularly at risk of entering PTD. Foreign nationals do not have a higher risk of detention per se. There are however certain groups of foreigners who definitely appear to have a higher risk than others of entering PTD not least because of the “precarious social conditions” they are living in, which provide justifications for PTD. Criminal law cannot solve social inequalities. Its application however should try to avoid aggravating them. If the ultima ratio principle and the proportionality principle are taken seriously, and if the real risks are assessed thoroughly we can expect there will be little reason to suspect that certain groups (of foreign nationals) would be treated differently to nationals. There are still judges and prosecutors, however, who are reluctant to release foreign national suspects - including citizens of other EU member states - because a lack of trust in cooperation or in other judicial systems respectively. Considering this, we conclude that there continues to be a need for exchange, for learning about and with each other, and, not least, for aiming to realise common standards.

### 7.3. Actors and roles

Public prosecutors are of pivotal importance in all countries, as in all countries except for Ireland, they are the ones to initiate PTD and therefore have a determinative ‘filtering’ role. In Ireland, their decisions to object to bail, or, for the police, not to grant bail at an early stage, also mean they have considerable influence.



Public prosecutors' decisions can be influenced by the police, (local) politics, policy, media and social pressure, while at the same time, judges often seem to put a lot of trust in the scrutiny applied by the prosecutor. With some exceptions, in most countries the prosecutors do not play an active role in applying alternatives to PTD. Their preference often seems to be to stay on the safe side and apply for PTD. Therefore, any ambition to reduce the use of PTD can only be successful if prosecution agrees to apply 'self-restraint' in this regard. The prosecutor's role merits particular attention in any efforts to reduce PTD in the countries examined. More comparative research on the role of the prosecution is advisable.

As the ultimate arbiter, the judge in all countries plays a decisive role in the PTD-process. However, the situation is more nuanced, with the role of the prosecutor particularly important in the dynamics of decision-making. It appears that countries where the legal culture involves a particular 'closeness' between judge and prosecutor, PTD is more likely to be ordered when it is applied for. Across all countries, interview partners expressed concern about the media and political pressure on judges.

Of utmost importance is an early and active representation by defence lawyers. Lawyers often find themselves in a tight spot with little information, limited time and limited resources. While their role in some of our sample countries has been strengthened in recent years to better ensure the quality of arms and in line with prescriptions of the ECtHR, this more important role is not without risks: The burden of providing information on the suspect and for initiatives towards non-custodial alternatives to PTD may be shifted to them; in any case they carry a lot of responsibility for the evolution of the case. It must be made clear that this does not mean that the other actors involved, in particular judges, are freed of their responsibilities in this respect. Notwithstanding the EU-legislation on their role, there are quite some differences in the countries on legal aid schemes and on the extent to which lawyers can and/or will be involved in pre-trial proceedings. Still, more emphasis on the procedural rights concerning legal aid to remand prisoners is necessary. Defence lawyers need to be well prepared and active to ensure an effective representation of their clients.

Five of the countries in this research do not have a formal role for probation staff (Germany, Ireland, Romania and Lithuania and Austria) as to advising on the appropriateness of PTD or the making of social inquiries at the pre-trial stage, while two do (Belgium, the Netherlands). In Austria, probation staff are active in supervision or support as an alternative for PTD, however in a limited number of cases. It was clear, however, across all countries that, particularly for drug addiction and housing problems, there is a need for

support for accused persons. While this is so, there were concerns reported by many participants that the presumption of innocence could be infringed through probation work. Practical problems were also frequently mentioned by participants including time pressure militating against getting probation reports, and excessive workloads for probation staff. Interestingly, the suspects themselves hardly have been addressed as actors having much influence on the proceedings.

#### 7.4. Alternatives to PTD and more lenient measures

According to the principle of subsidiarity PTD may never be used when another, less severe, measure would have the same effect. This is why suitable alternatives to PTD are needed and are called for also by (many, but not all) respondents in our research. These options, however, must be used as alternatives to PTD and not as alternatives to unrestricted liberty (or unconditional bail) while awaiting trial. In the countries in our sample, we find quite different legal traditions in using alternatives to PTD. But even within these different frameworks we can state that often alternatives to PTD are employed too reluctantly and PTD is ordered in cases which are suitable for some kind of alternative to PTD.

There is still progress to be made in terms of less severe measures in the framework of the pre-trial process. In order to achieve this, qualitative research and the elaboration of suitable statistical information is required to provide adequate information about current practice, to reveal areas in need of development, to support developments, and, in the end, to enhance the trust of practitioners in less severe measures. Related to the latter point is the need for improvement with respect to the effectiveness of supervision. In fact, better involvement of probation/social services in PTD procedures is recommended and organisational problems need to be tackled. Organisational problems often disturb the practical implementation of legislation, and to no small extent, also of initiatives aimed at promoting the use of alternatives to PTD. Developments with respect to less severe measures also ask for the provision of opportunities for professional groups involved in the criminal procedures at one point or the other to have an exchange and discussions on the practice (above all judges, public prosecutors, defence lawyers, probation officers, police officers). At the very least, continuous, in-depth reflection about the interdependency between social policies, migration policies and criminal policies has to be stimulated. Finally, with all initiatives and developments the fundamental rule has to be kept in mind that also in the use of alternative measures the principle of proportionality has to be respected.

## 7.5. Procedural Aspects and Detention Control

First detention or bail hearings before a judge or court are the essential safeguards for the suspects' rights after s/he is arrested. This requirement foreseen in Art. 5 I and III EctHR (and national equivalents) is met in all countries. The interview results, however, showed that the quality of these hearings and of the decision-making in general often leave much to be desired. Even if the decision-makers – public prosecutors for requesting an arrest warrant (in Ireland: for opposing bail) and judges for ordering PTD – seem to cope in their own assessment relatively well with the time and information they have at that early stage of the proceedings, their decision is based on very little information and has to be made in limited time; too limited perhaps with regard to the impact of the decision. Defense lawyers are involved at an even later stage in most countries, and throughout our interviews in all countries, explained that their preparation time was too limited to allow them to actually be able to influence the decision during this first hearing in most cases. Taking into account the timeframe (leaving often only a few hours or, at most, a working day) for the decision-makers to prepare the PTD or bail decision, a second judicial hearing very quickly after the first one may appear to be a good idea. Findings from the only country in our sample that foresees such a quick second judicial decision (Belgium, after 4 days), however, do not suggest that this makes a great difference in the overall quality of decision-making even if there was more time to prepare.

Connected to the question of preparation time before the first hearing is the amount of information that can be collected. The collection of relevant information which can speak to arguments for and against PTD is a duty of all parties involved, and in particular, of public prosecutors and judges. Nevertheless, another common feature of our research findings was that the responsibility for gathering information often was shifted, at least with regards to personal information and information on relevant social circumstances (for example work place, family ties etc.) beyond the criminal record onto the defense lawyers. The judge relied on the material presented by the police or the public prosecution, the public prosecution in turn thought that it was the judge who has to assess the information and therefore decide if it is sufficient or needs to be supplemented. Once a defense lawyer is involved, this burden of providing additional information is often shifted to him or her.

Based on this research, we can assume that the extent and the quality of information available particularly with respect to the person of the suspect and the social conditions he/she is living in largely determines the quality of the decisions and the scope of options. The limited time available for the first decision definitely restricts the possibilities, but support by (external) social work agencies (e.g. probation services, court aid) - possibly including

information on available and suitable measures supporting (conditional) release - could have benefits in this respect. Even if such reports are not completed for the first decision, this information may still be valuable for review hearings. It seems at least worthwhile to assess on a national level whether this kind of assistance could help to avoid PTD more often, and what would be needed in this respect. Such a debate should not only be about resources. Considering the problems resulting from PTD on the side of the suspects, but also the high costs of PTD, any such expenses will be well invested if positive effects can be derived.

With regard to the importance of the personal encounter between suspect and judge in the first hearing we received different views within the country results, with occasional examples of good practice of procedural fairness; showing how a suspect should be treated as a participant in the procedure and not as an object of decision-making. However, we also found evidence supporting the notion that files are the essential basis and tool for decision-making, as most of the relevant information on the case and the person of the suspect is contained in files. Sometimes even the transfer of files between court and public prosecution is difficult and leads to a loss of time (such that a person may spend in PTD longer than necessary). Even in Ireland, where oral evidence and argument is still of paramount importance, deficits in information were also considered a recurring problem. But for defense lawyers this problem may be crucial, since they have to complement their often very sketchy information on the suspect with material used by the judiciary; this raises a serious question of the equality of arms. While the overall situation according to most of our respondents has improved, and usually the access to files is not denied anymore, practical problems of sending and receiving or copying files still are a problem, may impede the work of the defense and, again, mean that a person may spend time in PTD unnecessarily.

Besides the basic requirement of the judicial hearing, the support of a defense lawyer is the most important procedural safeguard for suspects, putting, as mentioned before quite some responsibility on them. A third safeguard are mechanisms of judicial control or review of the ongoing need for PTD and its length. In our countries we find quite some variation for these review mechanisms regarding the first opportunity, the frequency and the question whether they take place *ex officio* or upon request. In any case the role of the lawyers is crucial. While again many respondents described that these reviews leave much to be desired in practice, they seem to be powerful instruments to at least shorten periods of PTD, to speed up the process and to enable all parties involved to discuss – perhaps to negotiate – alternative options. Often the first review hearing is the first opportunity to actually talk about the case with all necessary information on the table. An early review therefore is recommended. Whether appeal mechanisms that bring the case to a higher

court are promising was debated amongst participants; defense lawyers in several countries often were reluctant for tactical and time reasons. Extraordinary complaints or using the ultimate avenues of redress, for example to the constitutional court or similar bodies, were sometimes mentioned to play (or have played) a beneficial role in shaping the legal culture and usually an approach directed towards the ultima ratio concept.

## 7.6. Results of the vignette

As an additional tool for our comparative study we presented all prosecutors, judges and defense lawyers a short case description (vignette) and discussed with them how they would respond on it along the lines of an extensive list of questions. The national reports provide a (country-specific) description of the vignette and the questions, here we suffice with the general description of the vignette we presented to the judges.

*A 23-year-old male is suspected of burglary in a house at 3 o'clock at night, while the house-owners and their 4 years old daughter were sleeping upstairs. He went into the house by cutting the glass of the entrance door and opened the door. Next morning the owners discovered that precious jewelry, a lap top and money all together worth 3000 euro was stolen. The police identified the suspect from cctv recordings. The suspect is currently unemployed and was sentenced before to a cso/conditional sentence (depending on the national situations) two years ago. Apparently, he is living with his parents.*

The vignette methodology turned out to be a very useful tool for our comparative study. Although we had some doubts about whether we should either use both instruments (questionnaire and vignette) or only one, using both instruments contributed a lot to the internal validity of our research. Some of us used the vignette as 'a starter', which turned out to be a good way to gain trust (show that we knew what we were talking about) and 'make people talk.' If the vignette was used as a closure of our conversations, it operated as a summary or check of what was said earlier and gave new energy to the discussion.

In our comparative reflections and analysis, the vignette served as an instrument to check and sharpen the commonalities and differences we thought to observe. Very briefly, our main conclusions can be summarized as follows. Decisive for the decision to apply pre-trial detention or not was the evaluation of the severity of the offence in combination with the nature of the earlier offence. The combination of these two elements could either constitute a risk of absconding or a risk of recidivism. These two elements were weighed considerably differently in Ireland and, to a lesser extent, in Lithuania compared to the other countries. While the offence itself was considered severe enough in the five other countries

to justify the use of PTD (depending on all other circumstances), it was considered relatively minor in Lithuania, and, though considered serious by some participants in Ireland, the nature of the offence was not nearly as important as the person's prior record. Because the act itself was not considered as serious enough, the nature and severity of the earlier offence didn't matter that much and was evaluated as long ago anyway. In the other countries, however, the appearance of an earlier offence turned out to be a decisive factor in the decision-making process. In particular Austrian and German decision-makers wanted to know first if the nature of the earlier offence was similar to the actual offence what would make the application of PTD more probable. In the Netherlands it was considered important that an earlier offence had happened (what could substantiate a risk of recidivism) while the nature of the offence was considered less relevant. A very small minority of participants in Ireland said PTD would (probably) be ordered in the case described, while no judge came to that conclusion. It was clear that in the other countries answers were much more mixed and conditional.

The vignette also uncovered some interesting differences with regard to the use of alternatives. While in Ireland, Lithuania and Belgium alternatives for PTD were considered and used immediately after the arrest (for different reasons and in different contexts), in the other countries alternatives were also possible (in varying degrees), but usually only in a later stage. This could have different reasons, however. Practical constraints were hindering the immediate use of alternatives in all countries, but in Germany, in particular, respondents also emphasized the contradiction they experienced with accepting a ground for PTD (risk of absconding in particular) and accepting an alternative at the same time.

### 7.7. European Aspects


In our desk research we analyzed the impact of the case law and standards set by the ECtHR and other bodies of the Council of Europe (namely the CPT) for the participating countries. This influence of the case law is important for all of them, even where not directly examined by the Court, such as Ireland. In many of our interviews, however, this influence hardly played a role – usually individual practitioners do not feel affected by these decisions and standards, sometimes the notion transpired that domestic safeguards were enough and that additional safeguards (for example on instructions and translations) were unnecessary and made things more complicated. Nevertheless, both practitioners from Romania and Lithuania explicitly attributed progress towards a more restrictive use of PTD to jurisprudence of the ECtHR. Given the significantly decreased number of pre-trial detainees in the two countries, this impact has to be emphasized.

In some countries, the number of foreigners in PTD is of great concern; many of them come from other EU countries. Nevertheless, cross-border matters that affect concrete cases and would require “cross-border action” for some of our interview partners even within the EU were not of much relevance, and they seemed to fend this issue off. For others, however, it was an important matter, also depending on the country and there of the region they were working. Many of the participants involved in our study thus acknowledged directly or indirectly that Europe construction requires effective tools for the judicial co-operation. The European Arrest Warrant was known to all of them and accepted as a well-established and a tool which is generally working well.


The situation is different when it comes to the European Supervision Order (ESO). This tool is still new in many jurisdictions and there are still many amongst the judiciary who are not aware of its potential; many of our respondents had never heard of it. Those who had the opportunity to use it seem to find it useful but also time-consuming and bureaucratic. Lack of information concerning how other jurisdictions implement different supervisory measures and the variety of supervisory measures contributes to the lack of confidence that the monitoring will be effective, and absconding will be unlikely. In this context, some judges would rather apply financial surety or speed up the trial and impose a quick sentence. This procedure may be possible in easy cases but not available in more complicated ones. It could work in more complex cases that require long investigative activities.

In order to make ESO work better, the participants suggested national or judicial authorities to conduct systematic awareness campaigns, and to make available information on how each jurisdiction constructs and implements the supervision measures. Platforms like the European Judicial Network website should make this information accessible and must regularly be updated. Equally, research should be conducted on the implementation of the ESO after a few years of its implementation and results of this research made accessible to practitioners to bust their confidence in the cross-border co-operation. For the time being it will probably be in the responsibility of the defense lawyers to request ESOs and to convince judges that with regard to proportionality it is indispensable to apply this measure in suitable cases.






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