PRETRIAD

Alternative pre-trial detention measures

D2.2 Pre-trial detention alternatives:

Best practices

PRE-TRIAD Project
Alternative pre-trial detention measures

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

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1. Change Control

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2. Content

3. Index of abbreviations and acronyms

BSP – Bail Support Programme

BVSP – Bail Verification and Supervision Programme

CISP – Court Integrated Services Programme

CPT – Committee for the Prevention of Torture

DGRSP – Directorate-General for Reintegration and Prison Services

EAW – European Arrest Warrant

ECHR – European Convention of Human Rights

ECtHR – European Court for Human Rights

EM – Electronic Monitoring

ESO – European Supervision Order

EU – European Union

FRA – Fundamental Rights Agency

GPS – Global Positioning System

ILPAS – The Inner London Probation and After-care Service

LEAD – Law Enforcement Assisted Diversion

MBP – Manhattan Bail Programme

NAPA – Independent National Approved Premises Association

NGO – Non-governmental organisation

NPM – National Prevention Mechanism

PTD – Pre-trial detention

RJ – Restorative Justice

TBP – Toronto Bail Programme

4. Executive Summary

The following report provides valuable information and insights on models and ways to avoid PTD more often. It presents a collection of promising practices especially directed at legal professionals practicing in this field. Based on literature research as well as on reports provided by the project partners it goes beyond mere descriptions. It defines groups of approaches sharing certain characteristics, which are deemed valuable for discussions and it discusses the presented measures, their qualities, shortcomings, possible problems and legal cultural aspects. This way the report aims to stimulate interest in ways to avoid PTD more often and to support developments in this respect. There are many valuable models which may usefully be applied in other jurisdictions or which may trigger new ideas or adaptations to be realised somewhere else.

Central for the research approach was a focus on measures and alternatives for which evaluations and data are available. Unfortunately, in most countries, there is not even routine data available. This lack of information appears symptomatic for a widespread rather little interest in alternatives and in the avoidance of PTD altogether. On the one hand this made the research more difficult, but on the other hand this increases the value of the information provided with this report. Consequently, but different to the initial plans, we refer to the models and measures presented as 'promising practice'. While the presented measures appear convincing, the empirical data and the information available do not fulfil the requirements which would justify a presentation as 'best practice'. There remains a need for more research and evaluation in the field of concern.

In most countries, alternatives are seldom used, and there are hardly initiatives observable in the direction of new developments in this respect. The presented report shows that this is not due to a lack of good or promising models. It captures diverse angles, stages and principal approaches on how to avoid PTD more often.

Legal procedural models and aspects are legal constructions apt to avoid PTD. Examples are the Irish presumption of bail, but also narrowly defined time limits for PTD. Other examples are restorative justice models or the Italian early suspension of the trial for a 'testing' phase, which sometimes may also mean avoidance of PTD.

Considering the fact that PTD decisions are often based on rather scarce information, particularly on the suspect, **measures providing information and hereby supporting the decision-making process** appear very valuable. Most North American bail programmes for instance build on the collection of thorough information on the suspect.

Grounds for detention are regularly based on some kind of deficits on the side of the suspect. The aim to possibly avoid PTD therefore asks for a support of the suspects which contributes to largely neutralise the assumed grounds for detention. **Measures directed at organising alternatives and at redirecting offenders from the criminal justice system** offer such broad services. Bail programmes or conferencing models aiming to activate social networks of the suspects are examples in this respect. These models build on broad and diverse support regularly involving several actors or institutions.

While broad options of support and networks to cooperate with definitely have advantages, **individually focused and tailored measures in the hand of one institution** also often cover the needs. Either they are specialised in one or the other problem, like drug-abuse, or they offer a broad support themselves. In Austria and in the Netherlands the probation services offer such broad support.

Combined with house arrest **electronic monitoring** is a measure quite heavily restricting the liberty of suspects, while they nevertheless can remain in their social surrounding. Apart from the low costs this may be the specific appeal to practitioners. GPS-monitoring in fact also allows for less intrusive models, for instance only controlling the compliance with territorial restrictions like bans to enter or to leave certain areas.

5. Little interest in alternatives to detention, lack of data and the presumption of innocence – an introduction

5.1. No need to invent the wheel again, but a need to pay more attention to foreigners

This report presents a collection of good and promising practices with respect to the application of alternatives to pre-trial detention (PTD) and the avoidance of PTD, respectively. It is based on literature research as well as on reports provided by the partners of the PRE-TRIAD project.

There are already collections of alternatives available (e.g., Penal Reform International, 2005; Cho et. al, 2017). The added value of this report is that it goes beyond mere presentations and descriptions. It defines groups of approaches sharing certain characteristics, which are deemed valuable for discussions on measures to avoid PTD and it discusses the presented measures, their qualities, shortcomings, possible problems and also legal cultural aspects. A central idea of this report is the notion that many valuable models and concepts are out there, which may be usefully applied in other jurisdictions or which may trigger new ideas or adaptations to be realised somewhere else. We don't have to invent the wheel over and over again. We should rather take advantage of suitable models and concepts already existing more often.

Considering the fact that in many European countries, non-nationals represent major parts of the pre-trial detention population, there is a specific need to particularly pay attention to alternatives apt to also reach them.

5.2. Models to learn from and boundaries to consider

Like often in criminal justice, for instance, specific regulations for juveniles may have a potential to be valuably applied with adults also in the context of PTD. Of course, the concepts mostly have to be adapted, but in principle, it seems worthwhile to take advantage of such models and experiences which already have shown positive outcomes. Therefore, this report also presents models successfully implemented in Juvenile Justice. This, however, touches a very sensitive topic. With juveniles, alternatives are regularly applied and accepted, which include rehabilitative elements and pedagogical aspects, while such requests for adults are often excluded or at least viewed critically. During the

pre-trial stage, rehabilitative elements and pedagogical aspects concerning adult offenders can be threats to the presumption of innocence (see, e.g., Morgenstern, 2018, p. 559). The boundaries between rehabilitative measures and useful measures aiming at counteracting grounds for detention sometimes may indeed appear blurry. With suspects living in precarious social conditions, it is often necessary to take up measures to stabilise their living conditions to exclude certain grounds for detention (e.g., find a place to stay, organise steps towards subsistence, etc. – to exclude assumed risks of reoffending to make some money). Similar measures often will be necessary with convicted offenders towards their rehabilitation. The presumption of innocence may not be questioned, but it also may not be used to principally exclude the application of suitable measures with a potential to avoid PTD. In fact, this concerns several measures presented in this report, such as support service programmes presented in chapter 8 or preliminary probation in Chapter 9.

The assumed existence of grounds for detention does not violate the presumption of innocence, according to Art. 6.2. of the European Convention on Human Rights (ECHR, e.g., Nimmervoll, 2015, p. 115). Consequently, measures directed at neutralising the grounds for detention are not violating the presumption of innocence as long as two fundamental rules are adhered to:

1. Any such measure must be accepted by the suspect concerned voluntarily and without any pressure;
2. No such measure may be grounded in any notion indicating doubt about the innocence of a suspect or aiming at rehabilitative goals requiring a verdict clearly expressing guilt.

Similarly, as shown in chapter 6.1 and 6.2, the strict boundaries between the decisions on PTD and the procedural settlement of criminal cases may become blurry. Both measures addressed there, early suspension of the trial and restorative justice, can be critically viewed with respect to the presumption of innocence, but they also can be valuable. We present these models for the sake of completeness. The procedures presented value a certain behaviour or certain activities of a suspect. With certain voluntary activities or with the adherence to certain voluntary tasks, persons suspected of a crime express their readiness to cooperate and take over responsibility in the handling of a criminal case,

show commitment to their social integration and confirm that they can be trusted to comply with agreed-upon arrangements. Although decisions on PTD and in the case are fully distinct decisions, both may appreciate the same activities or behaviour of a suspect, on the one side favourable with respect to PTD and on the other side favourable with respect to the decision in the case (e.g., suspension of the proceedings).

5.3. Little use and lack of evidence

Our research aimed to focus on measures and alternatives for which evaluations and data are available. The outcome of this intention was disappointing. There are hardly any evaluations and studies on the measures of interest. The little available almost entirely comes from North America. While we knew about deficits in this respect (e.g., Bechtel et al., 2016), we did not expect to be confronted with that little material to use in this respect. As a rule, in most countries, there is not even routine data available, like the number of applications of measures or numbers of misconduct or violations of orders. This lack of information appears symptomatic for a widespread rather little interest in alternatives and in the avoidance of PTD altogether (Hammerschick et al., 2020, p. 35). For our research, this meant to adapt our strategy with respect to the selection of examples and models to present. We ended up including models on which we found at least sound indications of positive effects. In fact, we also include measures which are not uniformly approved in the literature for the sake of extensive information and valuable discussion. Consequently, the following chapters will exclusively talk about 'promising' practice. An identification of 'best' practice would require mor robust evidence.

In most countries, alternatives are seldom used, and there are very little initiatives observable in the direction of new developments in this respect. This report will show that this is not due to a lack of promising models. An exception to the little use is electronic monitoring (EM), which indeed has spread in many countries in the last 10 to 15 years, also in the context of PTD. EM will be a topic to be discussed in detail in the run of this report (see Chapter 10). Besides qualities to avoid detention in prison, house

arrest[1] with EM is a measure very close to detention in prison and it also carries some risk of a net widening[2].

5.4. Preferences for alternative measures and ways to promote them

The principal stance of this report is guided by a preference for alternative measures, apart from cases where circumstances of an offence or personal factors leave no other choice than to detain a person to protect others and to secure the run of justice. Alternatives can help to uphold personal rights, avoid unnecessary grieve, help to avoid personal downward developments, help to avoid overcrowded and overburdened prison systems and, as a rule, they are much cheaper than detention. While favouring alternatives, however, one may not forget that they as well are infringements of personal freedom and should only be applied if suitable, needed, and proportional.

In the 2019 Conclusions of the Council of the EU on alternative measures to detention, the importance of alternatives to PTD was stressed (Council of the European Union, 2019). An increased use of alternatives was even called a common aim in agreements among the Ministers of Justice and Internal affairs (ibid, 2019, p. 11). Considering the little use of alternatives to PTD in most European countries, the practice appears quite far away from these political messages. Like said before, the little use of alternatives is not necessarily due to a lack of options. Regularly, there is little time for the preparation of the decisions and alternatives often also mean organisational hassles. These problems, however, can be overcome if there is a prevalent awareness and understanding of the principles that are supposed to guide PTD practice. Legal cultural aspects appear to play a decisive role in this respect. Legal cultures have grown for long periods of time. Therefore, they are changed neither easily nor quickly. A promising way to foster developments towards a more careful application of PTD and alternatives is via awareness-raising, information, training and last not least, by stimulating interest in alternatives, especially among practitioners. This is what the PRE-TRIAD project aims to

[1] House arrest is the term used in most countries for such measures applied during the pre-trial phase as well post sentence. Some countries however, like Portugal, differentiate terminologically, calling pre-trial arrest at home "house permanence". Being aware of this the report goes with the general terminology for simplicity reasons.
[2] A tendency to be applied in cases in which pre-trial detention actually could be avoided without any measures or with much more lenient measures.

contribute to. The information provided by this report about measures to avoid PTD is directed at improving knowledge, at stimulating interest and at discussions on the subject.

We know that the applicability of measures to push back the use of PTD is in the end dependent on the particular national legal system and on national frame conditions. It may, for instance, make a difference whether the use of alternatives requires a formal decision ordering PTD like in Germany or whether PTD may not be ordered if alternatives can fulfil the purpose aimed at with PTD, like in Austria. It would go beyond the scope of this report to go into that extensive national details. At this stage of the project work, we would consider it inappropriate to recommend certain measures for individual countries. Specific recommendations in this respect, above all, must be developed inside the individual national system. Bearing this in mind in the work steps to come within the PRETRIAD project the partners will also focus on transversal recommendations, addressing shared problems. Where sufficiently grounded specific recommendations for individual countries may then be addressed by the partners for their countries. This project will have fulfilled its aim if its work in general, this report in particular and the discussions on it support and stimulate such recommendations and developments. The national workshops to come within the PRETRIAD project should be fora for these kinds of discussions.

5.5. The structure of this report

There are diverse ways to avoid PTD. The following chapters try to capture diverse angles, stages and principal approaches in this respect. The chapters follow a structure which by itself indicates stages and approaches for the implementation of such measures:

- Legal procedural models and aspects apt to avoid PTD;
- Measures supporting the decision-making process;
- Measures directed at organising alternatives and at redirecting offenders from the criminal justice system;
- Individually focused and tailored measures apt to avoid PTD;
- Electronic monitoring – potential and a reminder of risks of netwidening connected to the use of alternatives to PTD.

6. Legal procedural models and regulations apt to avoid PTD

Typical to the measures presented in this chapter is the characteristic that they are no precautionary measures. These models can be subdivided into two groups:

- On the one hand, measures which value a certain behaviour or certain activities of a suspect. With certain activities or with the adherence to certain obligations, persons suspected of a crime may express their readiness to cooperate and possibly also to take over responsibility, show commitment to their social integration and confirm that they can be trusted to comply with arrangements agreed on. Like already addressed in chapter 5.2. there may be risks for violations of the presumption of innocence. The number of such cases in the context of PTD can be assumed to be rather small. Mostly these kinds of measures are applied in cases of minor severity, which also means that cases involving PTD will be rare;
- On the other hand, certain legal 'strategies' which foster a restrictive use of PTD.

6.1. Early suspension of the trial

Measures which may lead to an early suspension of the trial sometimes may also avoid or, at least, shorten PTD. An example in this respect is the Italian *messa alla prova*, the suspension of the trial for a 'testing' phase. This measure was introduced in 1988 for juveniles only, but it was extended to general use in 2014 for crimes punishable with no more than four years of prison. In such cases, the defendant may apply for a suspension of the criminal proceedings. This option, however, is only granted once, excluding particularly professional or habitual offenders. If the suspension is granted by the judge, the person is ordered probation and to follow a programme individually designed. Such programmes can include activities directed at the restoration of damages caused by the offence, the reliance on the support and the supervision of social services, as well as unpaid services of public use (community sanctions). The suspension of the trial may last up to two years (three years in juvenile cases). If the probation period is successfully completed with the orders adhered to, the suspension of the trial is declared permanent. If, however, orders are violated or other crimes are committed, the judge will revoke the suspension and resume the proceedings. There is no data available about the performance of the *messa alla prova* in adult cases. The outcomes in juvenile cases,

nonetheless, have been described as excellent: "The involvement of the social services in the management of the measure guarantees a greater attention paid to the individual life courses" (Marieti, 2015, p. 24). Once more, we may address here the sensitive issue with the presumption of innocence.

6.2. Restorative justice

Restorative Justice (RJ) is not commonly considered in the context of PTD. Notwithstanding, the Finnish example shows that RJ can very well be employed in PTD cases (van Kalmthout et al., 2009, p. 348). Since 2006, mediation, a kind of RJ, is available to all Finnish citizens in criminal cases. Mediation is a procedure outside the criminal justice system, which can be employed parallel or complementary to Court proceedings. Despite its place outside of the criminal justice system, it nevertheless can have an impact on criminal proceedings because the outcomes of the mediation have to be taken into account in the criminal proceedings. Outcomes of a mediation can never overrule decisions in criminal proceedings, but prosecutors may dismiss cases because of the outcome of a mediation and, in some cases, even PTD may be suspended due to a positive prognosis based on the mediation, largely excluding the risks assumed before. Beyond the regular paths of the criminal justice procedures, mediation provides the opportunity for the parties involved in a criminal case to meet in a setting moderated by a professional, independent moderator, to discuss the harm caused to the victim and to possibly come to an agreement on how to resolve damages and consequences. The qualities of RJ measures in cases of criminal justice for victims, for the personal development of offenders and for the settlement of conflicts have been acknowledged already by Recommendations issued by the Council of Europe in 1999 (99/19).

6.3. *Prima facie* entitlement to bail

The low rates of pre-trial detainees in Ireland (16,5 % on January 1st, 2019)[3] appear to be at least partially due to a legal culture different to many other European countries. Suspects charged with criminal offences and threatened by PTD have a *prima facie*

[3] Own calculation based on data published in Aebi, M. F., & Tiago, M. (2019), SPACE I - 2019 – Council of Europe Annual Penal Statistics: Prison populations. Council of Europe.

entitlement to be released on bail (Murphy and Perry, 2016, p. 6). An accused person may only be detained if the prosecution can provide well-founded objections to bail and to release, respectively. This approach rather strongly upholds the ultima ratio principle. In most European countries, the legal systems and the practice rather seem to be oriented the other way round, with PTD being the preferred solution if there are risks needed to be controlled. This, for instance, becomes apparent with the little attention paid to the substantiations of why alternatives to PTD are not employed in many jurisdictions (Hammerschick et al., 2020, p. 35). Taking the ultima ratio principle seriously actually asks for substantiations of denials of alternatives elaborated as thoroughly as the grounds for detention. Formulaic substantiations not sufficiently considering the individual case do not fulfil this requirement. Background to the prevalent Irish position is the importance paid to the presumption of innocence and to the negative effects PTD may have on defendants like expressed in a central judgement of the Irish Supreme Court (People vs O'Callaghan, 1966): damaging effects on private life, on family life, employment as well as adverse effects on the chance of the defendant to be acquitted (Murphy and Perry, 2016).

6.4. Strict and restrictive time limits for PTD

It is a rather widespread problem that the duration of PTD is often too long. This is also expressed by rulings of the European Court on Human Rights who regularly confirms violations of Art. 5 of the European Convention on Human Rights because of durations of PTD, which are not justified and not proportional to the allegations. In Italy, for instance, PTD may last several years.

In complex or difficult cases or those including cross border investigations, time restrictions may indeed be critical for the authorities. This can lead to tension between the procedural needs of the authorities and the fundamental rights of suspects. The criminal codes in most countries allow for rather long periods of PTD. Austria and Germany chose as a general rule that PTD should not exceed 6 months. Both countries, however, allow for prolongations if justified, with a maximum duration depending on the severity of the case. For offences threatened by more than five years prison in Austria this upper limit is defined with 2 years, a limit seldomly reached.

The Bulgarian solution in this respect seems more restrictive and thereby more in favour of the fundamental rights of suspects. According to Article 63 of the Bulgarian Code on Criminal Procedure, the generally defined maximum duration of PTD is 2 months. There are two exceptions:

a.) If a person is suspected of a serious, intentional crime punishable with more than five years of prison, the duration may last up to eight months;
b.) If the suspect is charged with a crime threatened by no less than 15 years or more, the duration may last up to 18 months.

In 2019, a total of 64 Bulgarian pre-trial detainees (2.1% of all detainees) had to be released because the duration reached the maximum time limits.

7. Measures supporting the decision-making process

Research indicates that the decisions on PTD are very often based on rather scarce information (Hammerschick et al., 2018, pp. 22, 54). This is particularly true for information on the person of the suspect, his/her social surrounding and on conditions of living, employment, housing, dependencies, substance abuse and social ties. This kind of information is important to thoroughly assess the grounds for detention. In fact, needs for improvement with respect to the assessment of the risks assumed in PTD cases are often reported (Durnesco, 2020, p. 37). Little information on the suspect, however, also increases the probability that alternatives to detention are not applied, because this information is also needed to select suitable alternatives or to adapt them to the particular needs of a suspect.

The practice in some countries has appreciated the quality of good and thorough information on the person of the suspect for many years.

7.1. Thorough information as a base for bail

For North American bail programmes, for instance, the collection of thorough information about the suspect has been an important base for planning and for the preparation of bail proposals and measures, possibly apt to substitute PTD. In interviews called ‘verification’, trained interviewers collect extensive information on the person,

avoiding questions addressing the offence. Apart from their professional training, these people have sufficient time to dive into relevant information about the suspect and to possibly verify it in subsequent phone calls or other contacts (Morris, 1981, p. 156). In addition to the aspects of inquiries mentioned in the introduction to chapter 7 above, prior records are considered here, prior remands on bail, probation history and possible sureties. Based on their inquiries they give recommendations to the court. The information collected and presented to the court aims to assist the judges in their decisions.[4] In fact, the information provided may even suffice for the suspect to be released without any further measures on his/her own recognisance. See more in-depth discussion on bail programmes and the services and support provided by them in chapter 8 below.

7.2. Manhattan Bail Project (USA)

The Manhattan Bail (MBP) Project was implemented in New York from 1961 to 1965, to "test the relationship of non-monetary bond release and the likelihood of an accused's appearance at trial" (Brown, 2011, p. 1). This project served as a model to subsequent developments, also outside the US. In the scope of this project, funded by the Vera Foundation, probation staff interviewed defendants in custody before the first Court appearance, in order to gather relevant information on their personal circumstances and status in the community. The verification of the information and its delivery to court served to assist the judge in determining the application of PTD or suspension and release. In case the Vera staffers determined (based on a points system of risk factors) that a defendant would voluntarily appear for subsequent Court dates and trial, they would be released on their own recognisance, without financial conditions (Kohler, 2007).

In its first three years, during which 3.505 accused persons were released without any bail requirement, due to Vera recommendations, only 1,6% of the defendants failed to show up for their trials for reasons within their control (Oliva, 2017).

[4] For clarification, it has to be stressed that the objective of the kind of bail programmes addressed here is not to raise money, but to ensure suitable supervision and measures to avoid PTD. If bail is granted based on suggestions provided by the program, as a rule bail is provided in the form of a guarantee of the programme.

7.3. Reports on the suspect by the probation services

Organisational developments in the Netherlands led to the introduction of so-called ZSM[5] desks and ZSM procedures. ZSM can be translated as 'well-considered, fast and tailormade' (EuropaWire, 2017). This means, above all, that all cases entering the prosecution system come in through the same channel, the ZMS desk. There, a representative of the probation service is continuously present. If the public prosecutor needs information on a suspect before the hearing and for a decision on PTD, he/she will ask for pre-trial assistance. A probation officer will then visit the suspect and prepare a concise report, also suggesting alternatives to detention, if suitable. Additionally, the presence of the probation services at the ZMS desk also means easy access to possibly existing files on the suspect. Although no studies are yet available on the effects of the reports of the probation services, the responses of interview partners in the DETOUR project indicate that these reports support the use of alternatives to PTD. The majority of alternatives are applied after reports have been provided by the probation services (Boone et al., 2016).

Focussing on probation, § 15 of the Austrian Probation Act similarly provides for the opportunity of preparatory inquiries to receive more information on the suspect and his/her social situation, before preliminary probation is possibly ordered for a suspect to avoid PTD. In such cases, the court may request an assessment along with a statement of the probation services, concerning the appropriateness of this measure. This option however is hardly used, possibly also because it is not known.

7.4. Court assistance

A supportive measure inquiring into the social surrounding of young people[6] at risk and into the socioeconomic situation to be considered in detention decisions is the so-called Court assistance for juveniles and young adults (*Jugendgerichtshilfe*), carried out by an Austrian state agency which focuses on their resources and needs. Regularly it also points out specific measures which seem to be necessary either to solve specific problems or to reduce risks. The Court assistance is regularly employed and highly valued by the Courts

[5]ZSM stands for "Zo snel mogelijk".
[6] In Austria this encompasses juveniles (14 to 18) and young adults (18 to 21).

in juvenile cases, particularly if PTD might be ordered (Hammerschick, 2019, p. 226). For adults, this option is not available so far in Austria, although some potential to avoid PTD can very well be assumed (Kneil, 2017, p. 32). A similar institution is also provided for in Germany, which could also prove advantageous to adults, but is hardly ever done. An argument often mentioned in discussions questioning this support is the little time available for the decisions. This may be true, but even if the information may not be provided at the time of the initial decision, it definitely can be completed for the first hearing, possibly supporting release then. More and better information provided during the hearings could also 'upgrade' the meaning of the hearings.

Similarly, the Portuguese Directorate-General for Reintegration and Prison Services (DGRSP) is charged with the provision of technical assistance to Courts in criminal and Educational Guardianship processes (for juveniles), supporting the decision-making process (according to Art. 136 of the Code for the Execution of Sentences and Measures of Liberty Deprivation). To this end, the DGRSP offers technical support to the judicial decision, maintaining as priorities the individualisation, the adequacy of the criminal reaction and the social reinsertion of the individual in question. This role is materialised in the preparation and elaboration of relevant social reports (DGRSP, 2018), which aim to (DGRSP, 2019):

1. Gather social information and producing personality assessments, directed at the eventual application of a provisional suspension of the process, at the end of the enquiry stage of the process;
2. Design social reinsertion plans, all in a pre-sentence stage, directed at guaranteeing the correct determination of the eventual sentence, during the trial stage.
3. Justify the application, maintenance, substitution and cessation of enforcement measures; temporarily suspend the process, at the end of the inquiry phase; correctly determine the sentence which may be eventually applied, during the trial phase.

Assessments may be carried out by contracted third parties specialised in criminology, psychology or psychiatry. In order to gather the necessary information, interviews are

conducted with the defendant, their family and any others who are considered relevant (Gomes, 2008).

It is important to note that whenever the judge's decision diverges from the assessment and the reports, they must justify their position. This means that these reports bear an important weigh for the re-examination procedures (Araújo, 2015). The DGRSP self-evaluation reports highlight the importance of directing the technical evaluation towards the risk/necessity and protection factors, according to the criminal problematic presented by the suspect.

7.5. Pre-trial Assessment Tools

While not yet widely used in Europe, pre-trial assessment tools are a quite common part of the procedures towards decisions on PTD in the United States. A 2019 survey stated that two-thirds of all jurisdictions across the US use such tools (APPR, 2020, p. 1). These tools are developed based on large sets of data about people who have come into contact with the justice system. While the tools differ in some details, they regularly include information on (Desmaris & Lowder, 2019, p. 4):

- Criminal history, including violence and failure to appear in court;
- History of supervision;
- Pending/current charge(s);
- Employment stability;
- Education;
- Housing/residential stability;
- Family/peer relationships.

With these factors probabilistic models, called algorithms, are calculated to estimate outcomes for people with similar histories and descriptions in future cases. Pre-trial risk assessment tools are mathematical models to group people into risk categories with respect to the risk of failing to appear or of escape and with respect to the risk of committing new offences if released. While these tools enjoy increasing interest and use the literature on the qualities and effects of such tools remains controversial. On the one hand, there are more and more studies and essays referring to reliable predictions of

future outcomes, improvement of decision making and even potentials to reduce numbers of pre-trial detainees (APPR, 2020, pp. 1-4; Desmarais, S. et al., 2020). On the other hand, these tools are criticised for being "derived from data reflecting structural racism and institutional inequity that impact our Court and law enforcement policies and practices. Use of that data then deepens the inequity" (Pretrial Justice Institute, 2020, pp. 1-2). Despite criticism it can be assumed that these tools will continue to gain attention.

Derived from the literature review, the following factors seem at the core of an appropriate use of assessment tools:

- Before implementing such tools, thorough evaluations have to be carried out;
- No matter what tool is used, a crucial factor for the quality of outcomes is their application. Therefore, thorough training for the practitioners to use the tool is recommended;
- When such tools are used the decision still remains with the decision-makers, who have to make sure that the individual person, the individual situation and conditions are sufficiently considered. Although such tools can be helpful, they are a reduction of reality.

8. Measures directed at organising alternatives and at redirecting offenders from the criminal justice system

Compared to the measures supporting the decision making, the measures directed at organising alternatives and at redirecting offenders from the criminal justice system go one step further. These actively elaborate and refer to concrete, individually tailored support measures and measures that are apt to substitute PTD. There is, however, no clear separation between these two kinds of measures, because many of the first-mentioned ones also include referrals and support.

8.1. Bail Programmes offering support beyond the mere role of a 'bondsperson'

The central initial idea of bail programmes was to identify arrested suspects threatened by PTD because they would not be able to provide bail or to offer appropriate and available sureties, but who were likely to be 'supervisable' in the community. In fact, people living in precarious or difficult social conditions have a considerably higher risk

of being detained than others (Hammerschick et al., 2018, p. 71; Lappi-Seppalla, 2009, p. 8-9; O'Donovan and Redpath, 2006, p. 30; Open Society Foundation, 2011, p. 22). Apart from poor and homeless people, these characteristics regularly apply to foreigners. Bail programmes have to be considered a valuable way to reduce the discriminatory effects of criminal justice systems. Apart from the ultima ratio principle, these programs are in part also driven by concerns that longer periods of PTD for low-risk defendants may lead to unemployment, higher risks of recidivism and more imprisonment or longer sentences compared to defendants who are released earlier. After California also New York State has been reported to have abolished cash bail payments for many misdemeanours and nonviolent offences to be replaced by other measures like a supervised release. According to the Vera Institute of Justice this development has a potential to reduce the number of pre-trial detainees by up to 40% (Penal Reform International, 2020, p. 18)

The two central components of the basic models are the collection of information, called 'verification', like described above, and supervision. In many current programmes, the latter component has been developed beyond mere supervision and control, supporting the clients with respect to individual problems and needs regularly also referring them to other more specialised institutions. Several of the models presented below stress the importance of provisions for housing.

8.1.1. Toronto Bail Programme – TBP (Canada)

Established in 1979, the TBP is a private, not for profit organisation under contract to the Ministry of the Attorney General (Brown, 2011). Programmatic to TBP is the importance of reviewing the grounds for detention, upholding PTD as an ultima ratio measure, (International Detention Coalition, 2015), strengthening principles such as the presumption of innocence and fair treatment of all people, regardless of social and economic background (John Howard Society, n.d.). TBP puts the individual at the centre of the discussion while privileging the application of non-custodial measures: "Without a suitable alternative, the pre-trial system becomes just one more place where the law for the poor is much heavier than the law for the rich" (Morris, 1981, p. 158).

This Bail Verification and Supervision Programme (BVSP) is a transfer payment programme directed at low-risk individuals accused of criminal offences who would

otherwise not qualify for bail. As such, the TBP takes on the role of a 'bondsperson', for those who have no other eligible guarantors to pay the bond and contributes to reducing the financial discrimination usually posed by bail as an alternative measure (International Detention Coalition, 2015).

The screening and assessment processes in place enable the organisation to identify eligible detainees while supporting their application for release on bail. An interview is conducted prior to the accused person appearing in bail Court, including investigations on the availability of a surety for the accused person. TBP-staff interviews the accused persons without a known appropriate surety, verifies the information gathered and reports to the court. The interviews focus entirely on data regarding the person's bail status (Morris, 1981, p. 157):

- "What are their community ties, length of time in community, family support, other potential sureties, general stability in the area.
- Do they have a suitable place to come out to: if so, how appropriate, stable and supporting is it? If there is no other current stable address, can the interviewer and the client agree on a suitable alternative?
- Does the accused have a job or is he/she currently involved in schooling? Can appropriate plans or referrals be made in either of these areas?
- How does the record of the accused relate to bail status, including especially the history of fails to appear and of fails to comply, and the reasons for these as well as the attitude by the accused in this respect?
- Are there identifiable problems of drug abuse or mental illness for which the court will want some suitable recommendations if the accused is to be released?
- Is the accused already on some form of bail release, or on probation or parole?".

Operationally, the programme is structured by activities of case management, support, information and advice, reporting and supervision. The clients are initially subjected to intense supervision with regular reporting. After a period of compliance and trust-building between case managers and participants, these conditions are progressively lessened and reduced (International Detention Coalition, 2015). Moreover, the programme also provides counselling and referral services for people who are released

from custody by the Courts, while advocating, supporting and collaborating with other community agencies (John Howard Society, n.d.). Throughout the programme, case managers also identify and address issues such as substance abuse, drug addiction or mental health needs, acknowledging that these factors may impact compliance. Regularly, also temporary housing is arranged prior to the release of a suspect (Brown, 2011, p. 3). While the reason for a programme referral is the aim to avoid PTD, the programme actually often looks beyond this time frame. "The goal is to provide accused persons with constructive, professional help at the earliest point in the justice process" (Brown, 2011, p. 4), because based on studies, it is assumed that people are especially motivated to make positive changes in their lives during the pre-trial stage.

Considering the fact that, in most countries, foreigners seldom have access to alternatives to PTD, the TBP appears to be a particularly interesting model. TBP is also employed to avoid immigration detention. While criminal cases cannot be compared to problems related to immigration, refugees or asylum seeker, the application of the programme in such cases proves that alternatives to detention definitely can be applied to foreigners as well. A central aspect of the programme application with foreigners is the provision of housing (International Detention Coalition, 2015). Even if foreign suspects have no social ties in the country where they are prosecuted, at least some of them may qualify for release from detention if they have access to suitable housing.

The costs per person and day of the Bail Verification and Supervision Programme were recently reported at C$7, compared to C$235 for detention. In the fiscal year 2017-2018, the programme has maintained an appearance rate of 97,8% (Justice Trends Magazine, 2019, p. 75-78).

8.1.2. Bail Center (UK)

Adhering to a general philosophy similar to the Manhattan Bail Programme (MBP) presented above and the Toronto Bail Programme, similar initiatives were launched in the UK. Inspired by the results of the MBP, the Inner London Probation and After-care Service (ILPAS) and the Vera Foundation started to collect data and verify information in the early 1970s. However, their role was quickly widened to securing accommodation and other resources for people appearing for bail hearings, to following up clients on bail,

etc. In fact, in 1976, a Bail Centre was established, aiming to provide the mentioned services with supervision guaranteed as an alternative to detention. In this same line, England was the first country to institute and make use of Bail Hostels (the first one was established in East London in 1971) to address the issue of a high rate of PTD (Brown, 2011).

Current examples of this strategy include the NAPA (Independent National Approved Premises Association), offering 2000 bed spaces, managed either by the National Probation Service or by independent organisations. However, the latter are no 'Bail Hostels', even if some of the establishments accommodate small numbers of people, for whom intensive bail conditions with a specific requirement to reside at approved premises were set as a condition of bail (NAPA, n.d.). The Nacro BASS (Bail Accommodation and Support) service covering England and Wales provides a suitable address for people who are eligible for prison release. Accommodation support is provided there, so to guarantee that vulnerable individuals are able to live a stable, independent and crime-free live. In 2018/19 the service has impacted the lives of over 3.634 people who left custody with safe and secure permanent accommodation to move on to (Nacro, n.d.).

8.1.3. Pilot Bail Advocacy and Support Services Programme (Australia)

The Pilot Bail Advocacy and Support Services Program, launched in 2001, is a diversionary programme in Melbourne, Australia, intending to redirect offenders from the criminal justice system or correctional services, while avoiding net-widening (Bondy et al., 2003). Both the Melbourne Magistrates' Court and community-based agencies were involved in the Pilot Programme, which was meant to support defendants in remand in their applications for bail at their first and subsequent appearances before a magistrate (Bondy et al., 2003).

The main objectives of the pilot programme were to increase the likelihood of bail being granted and achieve successful completion of bail periods through the provision of several services, ranging from appropriate accommodation, supervision, to access to treatment programmes (Bondy et al., 2003). This way, an increasing trend of low-level offenders in PTD was aimed to be reversed.

The Pilot Programme follows five broad objectives (Bondy et al., 2003):

- "Provide bail advocacy services;
- Provide immediate accommodation services;
- Make linkages between eligible people and support agencies;
- Work towards harm minimisation;
- Facilitate compliance with bail conditions".

Furthermore, the pilot programme also identified links between offending and homelessness, raising the issue of implementing strategies which address these two factors. Simply put, the programme starts by identifying people who are at risk of being homeless or are homeless and would therefore probably have their bail application denied. At that point, the programme provides assistance to help the defendant find accommodation while also contributing to a positive outcome of the bail application. It also broadened to cover associated services and grew to obtain referrals from a variety of sources (Bondy et al., 2003).

The Pilot Programme concluded that the following factors appear to be central for a successful bail advocacy outcome (Bondy et al., 2003):

- the identification of 'at-risk' defendants;
- individual needs assessment and possible referral to accommodation respite services, drug/alcohol counselling and other support measures (through the development and provision of an appropriate individualised 'package' of support and referral);
- the provision of information to the court at the bail hearing that supports the defendant's application, providing evidence against the presumption that the defendant will abscond from bail or offend again during the bail period;
- support for the defendant while on bail to continue to meet the bail conditions, maintain regular attendance at support services (e.g., drug rehabilitation) and attend the next scheduled hearing of the case.

The positive evaluation results of 2003 led to an expansion of the programme. Not least, the data showed that regularly clients were successfully integrated into the programme, who before had been denied bail.

8.1.4. Drug Intervention and Treatment (CREDIT)/Bail Support Programme (BSP) (Australia)

Building on the Bail Advocacy and Support Services Programme, the CREDIT/Bail Support Programme (BSP) was launched in Victoria, specifically targeting offenders with drug and alcohol problems, with the aim of assisting them to complete bail successfully, through an individualised bail based programme that runs for up to four months (Hazmi, 2017). This approach acknowledges the fact that substance abuse and addiction problems carry a high risk of failure for any kind of diversionary measure.

A subsequent evaluation in 2008 provided evidence for the added value of the adapted initiative (Corrections, Prisons & Parole, n.d.). Above all, the evaluation concluded that the programme had contributed to a successful completion of bail by defendants. Furthermore, the programme was identified to have contributed to a reduction of the number of defendants remanded for reasons related to a lack of accommodation or a lack of treatment and support in the community. Last but not least, the evaluation also provided evidence that the programme's design and delivery contribute to a reduction of reoffending and a reduction of homelessness.

Apart from the successes attained through the CREDIT/Bail Support Programme, its evaluation has to be highlighted as promising practice as well. The evaluation looked at the programme from diverse angles, including quantitative and qualitative approaches (Henderson & Associates Pty LDA, 2008).

8.1.5. Court Integrated Services Programme (CISP) (Australia)

Seeking to reduce the risk of reoffending, the Court Integrated Services Programme (CISP) is available to accused people who have been brought before the court on summons or bail. Through a coordinated team-based approach, the programme provides assessment and treatment, linking people with services regarding drug and alcohol treatment, crisis accommodation, disability services and mental health support. In this

regard, it has a broader scope than the CREDIT/BSP. A number of actors may refer the individual to the programme (the police, Magistrate, legal representatives, support services, family members or self-referrals). The programme targets individuals with a physical or mental disability or illness, drug or alcohol dependency, or inadequate social, family and economic support that contributes to their offending.

The CISP was found to be effective in matching the intensity of the intervention to the risks and needs of its clients and has achieved a high rate of referral to treatment and support services. Moreover, the evaluators reported that "CISP clients reported improvements in health and wellbeing and, compared with offenders at other Court venues, CISP completers had a significantly lower rate of reoffending." Moreover, "the benefits were described to be comprised of avoided costs of sentencing, avoided costs of imprisonment, avoided costs of crime and avoided costs of order breach. The program has been estimated to avoid almost $2 million of imprisonment costs per year" (Hazmi, 2017, p. 37-38).

8.2. The so-called social net conference (SONEKO) - Austria

The idea of the SONEKO was derived from family conferencing (MacRae & Zehr, 2004), in the United States, also called Family Group Decision Making (Käfel, 2015, p. 8). In Austria, it is offered to juveniles and young adults[7] who are already detained to possibly elaborate a setting which may allow for release if the judge agrees. It is supposed to empower the juveniles or young adults, while encouraging them to take advantage of supportive people in the social surrounding. Regularly, these are family members but also representatives of support agencies and social institutions who are invited to participate in the conference. Moderated by a staff member of the probation organisation NEUSTART, plans are elaborated at the conferences for the future, aiming to help the youth stay out of trouble. This may concern leisure time activities, learning support, assistance with time management and appointments, regular meetings at specialised support institutions, like for youngsters with drug problems and/or probation supervision. The outcome of the conferences are agreements on plans, in which the participants (the social net) take over tasks and responsibilities to support the youths. A report on the outcomes of the SONEKO

[7] Juveniles (14 to 18) and young adults (18 to 21).

is provided to the judge, who then may decide to terminate PTD. Regularly, contact is sought with the judge prior to the SONEKO, to find out about the chances for release. In a project evaluation carried out between 2012 and 2014, the evaluators highlighted above all the high agreement of all participants with the model and the outcomes. They also recommended to introduce the model into the law for adults as well (Grafl et al., 2016, p. 21).

In a pilot project carried out with (adult) offenders with mental disorders in 2016, positive effects have been observed also with SONEKOs aiming to support release of such clients from PTD. The concept is largely the same than for juveniles. While the SONEKOs with juveniles include much of a pedagogical approach, assuming that chances are good that the youths are still able and open to learn. Often it is assumed that offenders with mental disorders have no or hardly any social networks. Surprisingly, the evaluation of the pilot showed that most often, social nets could be mobilised. All in all, the evaluation revealed a strong support of the SONEKOs for the release of the clients (Hammerschick, 2016). It, however, has to be noted that SONEKOs are a rather time-consuming and complex tool aiming at release from PTD.

8.3. Alternatives to custodial remand for women in the criminal justice system: a multi-sector approach

This model, implemented in three London areas, employed a screening for women threatened by PTD and referring them to suitable specialised programmes, addressing their individual needs, ranging from psychological support to housing programmes. Many of the clients were identified as at risk of self-harm (46%) or had histories of hospital admission for mental disorder (36%), but few were referred either to the liaison and diversion service or specialist mental health services. According to the data provided by the accompanying evaluation, the programme succeeded in regularly keeping women in need for treatment and for support out of PTD (Forester, 2020, p. 1).

9. Individually focused and tailored measures apt to avoid PTD

The measures described in chapter 8 stress the importance of approaches acknowledging and building on the specific problems and requirements concerning the individual client.

Like described, there are obviously advantages on the side of programmes which are able to offer diverse specialised support focussing on specific problems or the option to be referred to such specialists. These programmes also build on networks of institutions. However, this kind of diverse offers is not always at hand, and often this may not be necessary either. In many countries, individual single measures fulfil a great job and neutralise needs for detention. Either they are specialised on one or the other specific problem (e.g., drug dependency) or they offer a broad support open to work on diverse problems (e.g., housing, financial situation, etc.), guidance as well as monitoring.

It is widely acknowledged that people with problems of substance abuse and dependency may be kept out of PTD if they agree to participate in programmes focusing on the treatment of the dependency. The reasoning behind this approach is built on the observation that a successful tackling of the dependency largely excludes the risks possibly recommending PTD. Similarly, it can be assumed that PTD much more often can be substituted, if measures are available and applied, which suitably deal with the problems otherwise often called the reason for PTD. Above we have already learned about the importance of (appropriate) housing in this respect. Combined with opportunities to earn some money and for foreigners to possibly tighten the ties to the host country, important steps out of criminal careers may be initiated. In fact, often it is the social conditions of living tempting people to improve their situation with some kind of property offences. As a consequence, any measure aiming at an improvement of the social conditions of living of offenders and suspects may have the potential to keep them out of PTD and in the long run out of prison in general.

Here we may refer to chapter 5.2 and to risks that the presumption of innocence may be violated by ordering measures which express an assumption of guilt and an expectation of punishment. Like stated there these risks have to be taken seriously and precautionary procedures should ensure that such measures are only applied in suitable cases appropriately observing the presumption of innocence.

9.1. Seattle's Law Enforcement Assisted Diversion (LEAD - USA)

Drug users and dealers frequently cycle through the criminal justice system in what is sometimes referred to as a 'revolving door'. Arrest, incarceration and prosecution do not

deter them from this recidivism. Seattle's Law Enforcement Assisted Diversion (LEAD) program was established to divert such individuals to case management and supportive services instead of jail and prosecution. A nonrandomised, controlled evaluation was conducted to examine LEAD effects on criminal recidivism (i.e., arrests, criminal charges). The sample included 318 people suspected of low-level drug and prostitution activity in downtown Seattle: 203 received LEAD, and 115 experienced the system-as-usual control conditions. Compared to offenders in the control group, LEAD participants had 60% lower odds of arrest during the six months subsequent to evaluation entry; and both 58% lower odds of arrest and 39 % lower odds of being charged with a felony over the longer term. These statistically significant differences in arrests and felony charges for LEAD versus control participants indicated positive effects of the LEAD program on recidivism (Collins et al, 2017).

9.2. Preliminary Probation

Preliminary probation like offered in Austria can be considered a valuable alternative to PTD. It may be applied if the court assumes that the support and monitoring by a probation officer will suffice to control the grounds for detention and may help to stabilise the conditions of life. Probation officers support suspects with respect to all kind of relevant issues (e.g., housing, employment, social circumstances) possibly also making use of 'risk and resources management tools'. In Austrian practice, this measure is regularly applied and valued by judges and prosecutors with juveniles and young adults. With adults, the Courts, however, rarely apply this measure. This may be due to a prevailing view which considers probation above all as a pedagogic tool and, therefore, less likely to succeed with adults. While the pedagogical aspect of probation work cannot be denied, it also can have a strong supportive element, which also can be helpful to stabilise one's conditions of life and to keep adults out of trouble. Preliminary probation actually could also be ordered for suspects already detained in PTD asking the probation officer to carry out inquiries on the person, social conditions, etc. Then this information could be presented during a detention hearing, extending the bases for the decision and possibly grounding release from PTD and alternative measures to be ordered.

9.3. Support programmes to avoid PTD and Probation orders in the Netherlands

In some regions of the Netherlands, the Probation Service runs programmes in which suspects can enrol before the public prosecution may apply for PTD (Boone et al., 2016). Enrolment in such programmes enhances the chances that PTD can be avoided.

Probation orders are also applied in the Netherlands as alternative measures offering social work support to the suspects, not least to help them stay out of further trouble and to adhere to orders vowed to.

10. Electronic monitoring – potential and a reminder of risks of netwidening connected to the use of alternatives to PTD

House arrest with EM is increasingly used in criminal justice in general, and also as a substitute to PTD. In some countries like Austria, EM is actually not considered an alternative to PTD but, instead, a way to execute it. In practical terms, EM in Austria hardly plays a role in the context of PTD. The prevailing perspective among Austrian judges holds that the majority of PTD-cases potentially suitable for EM would also be suitable for release with more lenient measures. Then, the latter would have to be the measure to be chosen. In contrast, house arrest with or without EM is considered an alternative to PTD in all remaining PRE-TRIAD partner countries. The preconditions for this arrest are similar to those for PTD, but it carries the advantage of maintaining the suspect within his/her private space, possibly with his family, while still being arrest. Research proves the integrative potential of EM in comparison to detention and imprisonment (Hammerschick, 2020, p. 248).

Among the partner countries, an increasing use of house arrest with EM is above all reported from Portugal. From 2018 to 2019 an increase of 10% was observed. The number of suspects having been kept in house arrest as an alternative to PTD recently has been reported to equal 20% of the pre-trial detainees (total of 2.196 in PTD on January 31st 2019). Only in April 2019 was house arrest with EM introduced in Bulgaria. Within a year, 137 persons were held in EM house arrest altogether, most of them instead of PTD. By way of estimation, these numbers correspond to about 5% of the number of suspects entering PTD a year. A high interest in EM was also reported from Italy, where it also can be applied besides house arrest (without technical applications). Despite a high

interest of the practitioners in EM, the use is reported to remain very much restricted, because there are not sufficient devices available. Similarly, Romanian practitioners also demonstrate a preference towards this measure, but there EM is not yet put into practice at all, even though the law foresees this measure and practitioners call for its introduction. The central problem reported is the still missing technical equipment. So far, house arrest without any technical devices is sometimes ordered. Regardless, critics point to the application of house arrest in Romania as an advantage only accessible to privileged social groups. Germany, however, remains largely opposed to EM. Only in the federal State of Hessen house arrest with EM is possible as an alternative to PTD, but rarely applied.

Apart from personal advantages for the suspects, there are above all two factors appealing to prison administrations. On the one hand, house arrest with EM is supposed to reduce prison overcrowding, and, on the other, it is much cheaper than detention in prison. It, however, is a measure easily underestimated with respect to the severe infringement of personal rights it imposes on the suspect. As such, house arrest with EM carries a rather high risk of netwidening, meaning that suspects may be subjected to this measure, although PTD would otherwise have been denied. The risk of netwidening became particularly visible in Belgium in recent years when the introduction of EM as an alternative to PTD did not succeed in reducing the numbers of pre-trial detainees. It actually led to an overall worsening of the situation, as several hundred suspects a year became controlled via EM, in addition to the detainees (Hammerschick et al., 2018, p. 38).

This reminds of the fact that, in general, there is a risk that alternatives to PTD can be ordered too often and when there is no real need for such measures either. These measures as well mean restrictions to personal rights and may only be ordered if there is a substantiated need for control. In this same line, the example of Romania indicates that judicial control can also be ordered rather excessively. Once again, it is clear that safeguards cannot exclude all risks. Therefore, it is of utmost importance that legal practitioners working with PTD cases are well and regularly trained, as well as offered opportunities to reflect on the problems related to PTD practice, as well as on those linked to the use of alternatives.

Recent technical improvements have also led to a rise in the interest towards the so-called Global Positioning System (GPS) of EM. After several years with reports of often observed technical problems, GPS technology has been improved. Among the partner countries Austria, Italy, Portugal and also Bulgaria partially use these devices. The mostly used Radio Frequency device can only enforce control if the individual in question remains at the place ordered, a house or an apartment. It, however, cannot control the movements of a person. Apart from an alarm at the control centre, it does not hinder a suspect from leaving the apartment, nor does it provide information about the whereabouts of a suspect outside home to the relevant authorities. GPS devices are more intrusive for clients but present the simultaneous advantage of collecting and storing information about the movements of the clients, when compared to Radio Frequency devices. If the risk of a widening of the net with EM calls for a restrictive application, EM with GPS may be a measure to satisfy specific needs of monitoring or controlling certain suspects who otherwise would be detained. This could be, for instance, needs to make sure suspects do not enter or do not leave certain areas. The potential to avoid offences planned by an EM-client are, however, also much restricted.

The prevalent models of EM with Radio Frequency are mostly combined with house arrest. Like stated before, this model has to be considered much intrusive, even though the restrictions to liberty are usually easier to stand than imprisonment. In the Netherlands, GPS technology is used for the surveillance of suspects, however, without house arrest. There, the GPS technology is used for specific monitoring or control needs which do not require general restrictions to movements. Thereby the restrictions for the clients remain very much focused and mostly rather moderate. Examples are, for instance, needs to keep suspects away from certain areas (location bans) or the other way round, needs to make sure suspects stay in certain areas. Although this model of EM is still not used very often as an alternative to PTD in the Netherlands, the use has increased remarkably since its introduction. In 2012 only 153 cases of EM supervision in PTD cases have been reported while the number of cases close to tripled in 2015 (Boone, van der Kooij & Rap, 2016, p. 14).

Concluding this chapter, it is important to again draw attention to the fact that alternatives are only alternatives if otherwise PTD would be ordered. Any application of

more lenient measures beyond this scope of application has to be considered a widening of the net. German law provides a rule that alternatives are only applicable if PTD has been ordered and substantiated. In cases with alternatives applied, PTD is conditionally suspended. This may be a suitable way to reduce the risk of an extensive application of alternatives, it however also bears a risk that alternatives are not ordered very often.

11. Conclusions and Recommendations

Although only presenting a selection of valuable programs and measures, this report gives an impression of the diversity to be observed. Like stated in the introduction, there is no need to invent the wheel over and over again, because there are many promising programs out there aiming to avoid PTD more often. What was missing so far was in-depth information on interesting and promising practices. This report provides such a collection of promising models and measures, discussing and reflecting on their qualities, potential and on possible problems. It is especially directed at legal professionals practicing in the field of PTD. It provides valuable information and insights on models and ways to avoid PTD more often. The knowledge about such models and ways has a potential to question extensive applications of PTD and to support developments towards avoiding PTD more often.

The structure developed for this report, dividing the possible fields of activity in five approaches to push back the use of PTD, also provides a valuable structure for discussions. There are diverse angles and stages to tackle an overuse of PTD and it seems useful to view such angles and stages also separately from the overall (PTD) system:

1. **Legal procedural models and aspects** are legal and procedural constructions apt to avoid PTD. Examples in this respect are the Irish presumption of bail, but also narrowly defined time limits for PTD. Other examples are restorative justice models or the Italian early suspension of the trial for a 'testing' phase, although it has to be assumed that these legal options will only have effects on PTD in exceptional cases.
2. Considering the fact that PTD decisions are most often based on rather scarce information, particularly on the suspect, **measures providing information and hereby supporting the decision-making process** appear very valuable. Most

North American bail programmes for instance build on the collection of thorough information on the suspect. Inquiries and reports by qualified agencies are also well perceived in the Netherlands, in Portugal and in juvenile cases in Austria as well as in Germany. Additionally, pre-trial assessment tools are increasingly used.

3. Apart from the offence grounds for detention are regularly based on some kind of deficits on the side of the suspect. The aim to possibly avoid PTD therefore asks for a support of the suspects which contributes to largely neutralise the assumed grounds for detention. **Measures directed at organising alternatives and at redirecting offenders from the criminal justice system** offer such broad services. Bail programmes or conferencing models aiming to activate social networks of the suspects are examples in this respect. These models build on broad and diverse support regularly involving several actors or institutions.
4. While broad options of support and networks to cooperate with definitely have advantages, **individually focused and tailored measures in the hand of one institution** also often cover the needs. Either they are specialised in one or the other problem or they offer a broad support themselves. In Austria or in the Netherlands the probation services offer such broad support. With drug abuse being an often-observed problem in pre-trial detention cases institutions offering support in this respect can also be an option to avoid PTD.
5. Combined with house arrest, **electronic monitoring** is a measure quite heavily restricting the liberty of suspects, while they nevertheless can remain in their social surrounding. Apart from the low costs this may be the specific appeal to practitioners. GPS-monitoring in fact also allows for less intrusive models, for instance only controlling the compliance with territorial restrictions like bans to enter or to leave certain areas.

The measures presented show that there is potential to avoid PTD more often in all these stages and approaches. They also reveal the fact that the solution to an overuse of PTD may not only be sought in approaches promoting alternatives to PTD. In fact, there are other steps which should be considered possibly even ahead of alternatives, especially measures supporting the decision-making process. Once more it must be stressed that an alternative may only be called so if without this measure PTD would have been ordered.

Otherwise, it is nothing else but a widening of the nets of control. Alternatives are also infringements of personal rights and should only be applied if suitable, needed, and proportional.

While foreigners represent major parts of the pre-trial detention population in many European countries, it is most striking that they are hardly named a specific target group for measures to avoid PTD more often. In fact, our research only discovered one model especially targeting non-nationals: the Toronto Bail Program, which includes a section to avoid immigration detention. While the target groups clearly must be differentiated, the application of the programme in such cases proves that alternatives to detention definitely can be applied to foreigners as well. A central aspect of the programme application with foreigners is the provision of housing. Even if foreign suspects have no social ties in the country where they are prosecuted, at least some of them may qualify for release from detention if they have access to suitable housing. Such offers not only reduce harm for the suspects, they also save costs. In practice, in many jurisdictions foreigners seem not to be considered for alternatives to PTD almost automatically. It is a fact that an application of alternatives is more difficult with foreigners, but this automatism has a discriminatory touch to it. Measures supporting the decision-making process would apply very well also with foreigners, for instance assessing the suitability of certain alternatives.

This report also reveals a huge gap of information. There is hardly any empirical research, evaluation and data available on the effects of measures aiming to or supposed to avoid PTD. The little available ones are almost exclusively North American. Additionally, judges and prosecutors often have little faith in the qualities of alternative measures to sufficiently neutralise the risks constituting grounds for detention. If there is a lack of information and if practitioners have little experience with alternatives, PTD is the easiest reaction, which makes sure that no risks are taken – apart from the risks for the suspect of course (Fair trials, 2016, p. 27). In view of such a practice, it becomes quite clear that the ultima ratio principle is far from sufficiently adhered to.

If no information and data is available on the use and on the effects of alternatives, there is a high likelihood that people simply may assume effects. If we, for instance, look at the risk of absconding or hiding, in most countries there are no figures available about the

numbers of cases in which suspects violated their orders and did not show up for trial. Especially with foreigners, judges and prosecutors regularly assume high risks of absconding, if suspects cannot refer to a regular place of living in the country of the trial, based on little or even no empirical evidence. Apparently there are myths out there about a generally high likelihood that foreigners will run and hide if they have a chance to (e.g., Henninger, 2006, p. 193). One should not forget about the high price suspects pay if they run and hide. Not least, it needs resources most suspects do not have. Especially, refugees have a high risk to be detained in PTD, if suspected of a crime. The regular assumption of a high risk of absconding does not take into consideration that these people usually do not have a place to go. Risks have to be taken seriously but based on actual assessments and not on beliefs, assumptions and prejudices.

Efforts to promote the use of alternatives need to be supported by objective, empirical information and data. If this kind of information is not available yet, it will last years to achieve improvements in this respect. Therefore, this asks for a long-term strategy. The message about the need for this kind of data and information has to be continuously spread, and campaigning should be initiated for funding for research, data collection and evaluation.

In the meanwhile, the best information available on promising models supporting the use of alternatives has to be distributed, particularly among criminal law practitioners, above all among judges, prosecutors and attorneys. The PRE-TRIAD project takes a step in this direction with this report, and it will continue to follow this path with the national and international workshops and conferences to come as part of the work programme of the project, but also beyond these occasions.

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PRETRIAD

Alternative pre-trial detention measures

D2.2 Pre-trial detention alternatives: Best practices

PARTNERS

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