



PRETRIAD

Alternative pre-trial detention measures

D2.1

Literature review

Legislative analysis and pre-trial detention impacts

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

1.1. Document Properties

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D2.1 – Literature review**2. Contents**

1. Change Control	3
1.1. Document Properties	3
1.2. Revision History	3
2. Contents	4
Index of abbreviations and acronyms	6
3. Executive Summary	7
4. Pre-trial detention, a balancing act between the protection of personal rights and procedural needs and security demands?	9
4.1. Shared principles	9
4.2. PTD under the review of the European Court for Human Rights	12
4.3. Detention rates, risks of discrimination and the duration of PTD	12
4.4. The COVID-19 pandemic	17
5. Problems caused by extensive applications of PTD	18
5.1. Problems and cost on the level of the State and of the society as a whole	18
5.2. Problems and costs on the level of the Prison System	19
5.3. Problems and costs on the level of the individual prisoners	22
6. The preconditions for PTD	24
7. Procedural aspects worthy of attention	28
8. Safeguards	31
9. Alternative measures for securing the aims of PTD	33
9.1. Electronic monitoring, house arrest and risks of netwidening	36
10. European aspects and the European Supervision Order	39
11. Collection of aspects to pay attention to in the discussion of PTD, its alternatives and the ESO	41
12. Bibliography	45
Annexes	<i>i</i>
Annexe 1 – List of tables	<i>i</i>
Annexe 2 – List of graphs	<i>ii</i>
Annexe 3 – Austrian national report	<i>iii</i>
Annexe 4 – Bulgarian national report	<i>iv</i>
Annexe 5 – German national report	<i>v</i>

D2.1 – Literature review

Annexe 6 – Italian national report	vi
Annexe 7 - Portuguese national report	vii
Annexe 8 - Romanian national report	viii

Index of abbreviations and acronyms

CPT – Committee for the Prevention of Torture

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

NGO – Non-governmental organisation

NPM – National Prevention Mechanism

PTD – Pre-trial detention

3. Executive Summary

Pre-trial detention in the law and in the literature – observations and aspects for reflection

The following discussions and presentations are primarily based on the national reports of the partners involved in the PRE-TRIAD project¹, while additionally including selected literature. The focus of this paper is therefore on the partner countries (Austria, Bulgaria, Germany, Italy, Romania and Portugal), even if valuable information and examples from other countries are also included. This paper does not claim to provide final conclusions. The intention of the following chapters is much more to lay the groundwork and offer a well-reasoned basis for the project's future work steps, taking advantage of provided and researched information, established knowledge and available data. While some analyses and conclusions presented here may not be new, others are undoubtedly so, whereas others consist mostly of hypotheses to be checked throughout the project's work process. All in all, the aim of this paper is to sharpen our focus and our angle of vision for the most critical aspects of the upcoming project activities (i.e., expert interviews, as well as in the run of the workshops and conferences to come). Central to our interest is the practice with respect to pre-trial detention (PTD) and its alternatives, as well as any problematic issues related to the application of PTD as well its alternatives, alongside their costs and benefits. Last but not least, the analysis will highlight certain clues on how to make things better. Of course, the European Supervision Order (ESO) will also be a central point of the study. The partnership incurred in a slight delay in the submission of the deliverable, linked to the several unexpected consequences of the COVID-19 pandemic (e.g., virtual Kick-off Meeting, instead of a face-to-face event, therefore creating additional difficulties

¹ Hammerschick, W. (2020). Legal bases and pre-trial detention practice in the literature – Country report Austria, (unpublished research report), Vienna

Markov, D. (2020). Legal bases and pre-trial detention practice in the literature – Country report Bulgaria, (unpublished research report), Sofia.

Matt, E., Aschermann, J. (2020). Legal bases and pre-trial detention practice in the literature – Country report Germany, (unpublished research report), Bremen

Calaminici, F. (2020). Legal bases and pre-trial detention practice in the literature – Country report Italy, (unpublished research report), Milano

Durnesco, I. (2020). Legal bases and pre-trial detention practice in the literature – Country report Romania, (unpublished research report), Bucarest

Apóstolo, J., Liberado, P. (2020). Legal bases and pre-trial detention practice in the literature – Country report Portugal, (unpublished research report), Lisbon, 2020.

D2.1 – Literature review

for a seamless communication flow amongst the partners). The setback (even if small) will inevitably create delays in the development of the upcoming deliverables, which the partnership is already trying to mitigate.

4. Pre-trial detention, a balancing act between procedural needs, security demands and the protection of personal rights?

Based on data of the Council of Europe (2020), we can estimate that, on January 1st, 2019, there were close to 1.6 million individuals arrested in prisons of the Council's Member States. Approximately 22% (~350.000) of these inmates were pre-trial detainees. Regardless of the temporary reductions in these statistics deriving from the measures adopted in response to the COVID-19 pandemic, it is still safe to assume that the current numbers do not fall substantially behind the presented scenario. Although PTD is widely acknowledged as (and supposed to be) the exception and not the rule, these numbers mirror a very different picture.

PTD is a particularly sensitive topic, on the one hand, linked to the efficacy of the criminal prosecution and, thus, to the fulfilment of justice and security for the people. On the other hand, this measure is connected to the most valuable rights and guarantees which are, above all, meant to protect citizens' freedom, along with their physical and psychological integrity.

4.1. Shared principles

The presumption of innocence remains one of the main principles of our criminal law systems, which, particularly in the context of PTD, always has to be kept in mind: any suspect is considered innocent until proven guilty and convicted by the court in charge. Accordingly, no individual for the only fact of being subjected to criminal proceedings may be subjected to deplorable and potentially harmful treatment of his or her physical and mental integrity.

Besides the presumption of innocence, the principle of the right to a fair trial, along with the prohibition of torture and inhuman or degrading treatment or punishment – according to Art. 3 of the European Convention of Human Rights (ECHR) – there are several other principles acknowledged and codified by all countries within the European Union (EU). These principals are supposed to weigh heavily in favour of the pre-trial detainee's rights:

D2.1 – Literature review

- **The principle of legality** requiring strict adherence to the law. Subsequently, and in line with Art. 5 of the ECHR, PTD must respond to a restrictive interpretation, consistent with the ultimate purpose of the rule that no one may be deprived of his/her freedom arbitrarily;
- **The ultima ratio principle**, defining PTD as a measure of last resort, requiring subsidiarity of PTD and that PTD may only be applied if:
 - ✓ a measure is needed to secure the proceedings and to prevent further offences or threats to society;
 - ✓ the aforementioned objectives are not attainable through alternative measures;
 - ✓ taking this principle seriously also requires that suitable alternatives to detention are developed and available.
- **The principle of proportionality**, imposing a cost-benefit calculation, weighing the seriousness of the offence, protective aspects and the possible sentence on the one hand, and the massive violation of personal rights imposed by PTD on the other;
- And finally, the **principle of adequacy**, which requires that any measure restricting personal rights, must be apt to reach the targeted aims.

However, international studies like DETOUR (Hammerschick et al., 2018) or the Fair Trials project "A measure of last resort?" (Fair Trials, 2016) **reveal a relatively strong practical preference by the authorities in the majority of countries for detention, rather than for the alternatives to detention, thus calling into question their effective adherence to these principles.** While this by itself appears to be problematic, an abundance of reports issued by National Prevention Mechanisms (NPMs), the European Committee for the Prevention of Torture (CPT), the Helsinki Committee, the Fundamental Rights Agency, many other international NGOs and last but not least, the Rulings of the European Court of Human Rights **paint a rather unfavourable picture**

regarding the reality of PTD practice, proven too frequent and leading to widespread violations of the named principles, including Art. 3 of the ECHR.

Talking about people who are considered to be innocent, a logical assumption would be that pre-trial detainees should benefit from somewhat better conditions in prison when compared to convicted prisoners serving final sentences. In reality, the contrary often applies. Apart from the difficult situation, anxieties and uncertainties regularly connected to criminal proceedings, pre-trial detainees often find themselves in detention facilities lacking minimum standards, providing poor living conditions, with too little space and access to activities, along with rare chances to leave the cells. This scenario is further aggravated by the fact that PTD can often extend to long periods of time, thus maximising the harmful effects of the previously described conditions.

Coming back to the title of this chapter, a first point worth highlighting is that the danger in the balancing act is not equally distributed. In reality, **the protection of individual rights seems to be under substantially larger threats when compared to the procedural needs and security demands.** In spite of this general statement, national legal contexts under analysis present considerable differences, especially with respect to living conditions in detention and, again, between different detention facilities. Poor or even very poor living conditions in PTD have been reported, particularly from Romania, Italy, Bulgaria, and Portugal. Some room for improvement in this respect has however also been reported from Austria, but also from Germany, even if at lower levels. In turn, this issue is closely connected to the problem of prison overcrowding, which is observed in many countries and very often massively worsens the infringement of the personal rights of the people entrusted to the prison system. Cynically, extensive applications of PTD regularly and considerably contribute to prison overcrowding, further harming already poor prison conditions. Therefore, **a reduction in the numbers of pre-trial detainees often can also be considered a valuable contribution to tackling prison overcrowding and to improving the conditions in prison.**

D2.1 – Literature review

4.2. PTD under the review of the European Court for Human Rights

When it comes to the application of PTD, no country is free of problems (or at least not displaying room for any improvement). The Rulings of the European Court for Human Rights (ECtHR) underline three dominant obstacles in this regard:

- Unjustified resort to PTD².
- Excessive duration of PTD³: while the requirement of a speedy process in detention cases seems to be acknowledged in most jurisdictions, reports from many countries indicate an excessive duration as a significant obstacle.
- Poor conditions of detention⁴: as previously pointed out, a major problem are undignified, sometimes even dreadful conditions of detention - too little available space per inmate, hygienic and health-related problems (e.g., insufficient medical care, lack of ventilation, lack of natural light). In *Rezmives and others v. Romania*, the court held that improvements are recommended with respect to hygiene, medical care and available space in the cells (sometimes only 2 m² for extended periods of time), but also highlighted the need for an increased use of alternatives to PTD⁵.

4.3. Detention rates, risks of discrimination and the duration of PTD

Graph 1 below shows the pre-trial detention rates per 100.000 inhabitants per country, as well as the overall prison population rate. While the differences are remarkable, we must be careful interpreting the differences because – apart from criminal policies the characteristics of each national context with respect to criminality – social conditions, demography, migration, etc., potentially influence the presented rates. But still, some

² E.g. ECtHR (Portugal) 2015 - 69861/11.

³ E.g. ECtHR (Germany), 2012 – 17603/07, with almost 6 years of pre-trial detention preceding, ECtHR (Germany), 2014 – 67522/09, with 5 years and 8 months of pre-trial detention preceding, ECtHR (Italy) 2008 - 63154/00.

⁴ E.g. ECtHR (Romania) 2012 - 35972/05.

ECtHR (Romania) 2016 - C-659/15 (Căldăraru).

ECtHR (Italy) 2013 - 43517/09, 46882/09, 55400/09 (Torregiani and others).

E.g. ECtHR (Romania) 2017 – 61467/12.

⁵ It should be noted that the majority of complaints against Romania concern detentions in police facilities.

D2.1 – Literature review

differences are so big that it is safe to view them as proof of considerable differences with respect to the application of PTD and of detention in general.

Interestingly, the younger EU members and former eastern bloc countries Bulgaria⁶ and Romania present rather lower pre-trial detention rates (8,6 and 9,9 pre-trial detainees per 100.000, respectively) when compared with the other countries represented in the PRE-TRIAD project. These PTD rates are not met with equally low rates of imprisonment in general, leading to possible conclusions that both countries appear quite cautious with respect to PTD but make use of prison sentences rather extensively.

With a rate of 32,6 pre-trial detainees per 100.000, the Italian context contrasts with the aforementioned scenarios. In fact, the situation has improved in recent years, about ten years ago that rate was even much higher with about half of all prisoners being pre-trial detainees. The progress is mainly due to legislative changes, but the numbers are still substantially higher than the European average (median), and long durations also indicate that individuals probably spend often more time in PTD than serving sentences (if convicted).

Above the European average, Portugal stands out with a PTD rate of 24,6 but even much more with a general detention rate of 125,2 per 100.000. This is remarkable since Portugal actually legally defines a rather high threshold for the application of PTD in what concerns eligible offences. In general, PTD is only suitable for application regarding offences punished with sentences of at least five years. Exempted from this rule are offences with respect to terrorism, organised crime and violence. In such cases, the threshold for PTD is lowered to sentences of at least three years. Surprisingly, the number of people entering PTD a year (2.534 in 2019) is rather low. An explanation for this is found in a very long average duration of PTD of 11,3 months.

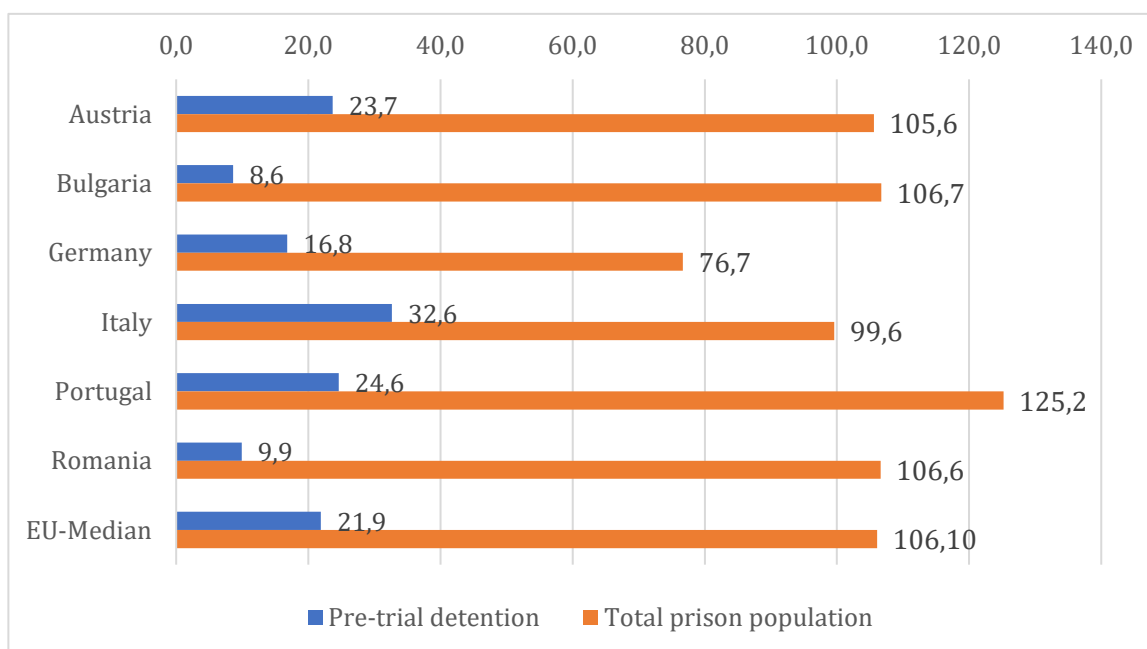
In turn, Austria presents incarceration and PTD rates which are much closer to the European averages (23,7 and 105,6, respectively). Considering that this average for PTD includes countries with rather extreme rates like Albania (103 in 2016) or Turkey (91 in 2016), the Austrian rate as well must be considered quite high. We will see later that this

⁶ It is worth mentioning that the figures for Bulgaria provided in the SPACE report show some inconsistencies.

D2.1 – Literature review

is closely related to high rates of foreigners. Lastly, Germany displays a rather modest rate of PTD (16,8) as well as for the overall prison population (76,7), clearly below the European average. For Germany as well as for Austria, big differences are to be observed between federal states. In the East of Austria, for instance, the likelihood for suspects to be detained is almost three times higher than in the West. Although there are differences with respect to the crime structure, the extent of the differences indicates that this is not least to be explained by a regionally different use of the discretion given to the decision-makers.

Graph 1: Detention rates per 100.000 of the population - PTD and all prisoners



Source: Aebi M.F. and Delgrande N., *SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2019* (Strasbourg, Council of Europe, 2019 and own calculations).

The upcoming paragraphs outline the most relevant points deriving from the undertaken research.

Pre-trial detention rates are not necessarily a consequence of high crime rates. While Portugal, for instance, is generally considered a rather safe country, detention rates are rather high. From a longitudinal perspective, the German pre-trial detention rate has reportedly increased slightly, while the crime rate has actually decreased. Romania, on

D2.1 – Literature review

the other hand, presents rather difficult social conditions also affecting the safety and security context. Nevertheless, the PTD- rate is one of the lowest all over the EU.

People living in precarious or difficult social conditions (e.g., poor and homeless individuals) **have a considerably higher risk of being detained than others**, a reality expressed in many studies (e.g., Hammerschick et al., 2018, p.71; Open Society Foundation, 200, p. 22; Lappi-Seppalla, 2009, p. 8-9; O'Donovan and Redpath, 2006, p.30). Although **foreigners are no homogenous group, these characteristics regularly apply to foreigners in PTD**. Additionally, they most often don't have a regular residency in the country of momentary stay and no or week social ties. If they get in conflict with the law and the authorities, they, therefore, quite easily find themselves in PTD. In fact, in many European countries, foreigners represent major parts of the population in PTD. Among the partner countries, this is particularly true for Austria, where about three-quarters of all pre-trial detainees are foreign nationals, many of them with no ties and no regular place to live in Austria (Aebi et al., 2019, p. 61). In recent years, in Germany, as well the number of foreigners in PTD increased, representing now about 60% of the whole PTD-population (Aebi et al. b., 2019, p. 61). Smaller but not negligible at all is the proportion of foreigners in PTD in Italy, representing about one third and, in Portugal, a quarter of the whole population of pre-trial detainees. It is moreover important to note that, in the partnership countries, the majority of foreign nationals come from non-EU countries. This scenario holds especially true in the Portuguese and Italian context.

Even assuming that most PTD decisions regarding foreign suspects may be grounded, the discrepancy in the numbers may also indicate a certain level of potential discrimination. Accordingly, Member States, along with the EU, are encouraged to continue to search for solutions supporting equal treatment. **The prejudicial consequences of an extensive use of PTD will not subside if the disproportionate percentage of foreign nationals placed under PTD is not taken into consideration**. In fact, the vast majority of suspects conditionally released are national citizens, whereas foreign suspects, and particularly those who do not benefit from regularised visas, rarely benefit from less severe measures. As such, penal policies must stray away from the exclusion of certain categories of people from less severe measures and, in turn, support more inclusive and sensible policies.

D2.1 – Literature review

In this context, the ESO emerges as a valuable tool, even if currently underused. However, even if the ESO may be increasingly implemented and resorted to, non-EU nationals remain largely excluded, and no long-term strategy seems to be in place. While Criminal Justice is not a field able to overcome social inequality and social injustice, Criminal Justice at least should possibly not aggravate it.

Long or excessive durations of PTD in the context of ECtHR-rulings has already been addressed in a previous section of this report. In the several national contexts represented in the partnership, there are considerable differences with respect to the maximum duration of PTD. Generally, the timelines are a function of the alleged offence's severity, as expressed by the possible sentences. Among the partner countries, Romania appears to be the country with the most restrictive regulation, allowing PTD to be applied for a maximum of 6 months. Bulgaria also set rather strict limits with two months for the majority of offences but allowing for up to 18 months with very severe crimes. In Germany and Austria, the regular maximum duration is also 6 months, but there is the possibility of longer prolongations in the case of severe crimes and difficult investigations. While in Austria, the extended maximum duration is defined at 2 years, Germany has no fixed limit determined by the law. The German Federal Court of Constitution, however, ruled that more than 12 months would require very exceptional reasons, thereby introducing a maximum factual duration for 93% of all cases.

On the other side of the continuum, Italy allows for PTD to last up to 6 years for the most serious crimes. Unsurprisingly, PTD often lasts for several years in the Italian context. The report has already highlighted the weight of long durations of PTD in Italy as a central factor for high detention rates. In Portugal, as previously mentioned, PTD also lasts for quite a long time (11.3 months on an average). In comparison, the average duration in Austria seems to be rather moderate, with 2,8 months, followed by Germany, which documents a similar average duration.

A restrictively defined maximum duration of PTD can be viewed as a safeguard against unreasonable long deprivation of the personal freedom of individuals, as well as of the right to trial within a reasonable time, according to Article 5 of the ECHR. In fact, the mandatory respect of maximum timelines for PTD duration, and subsequent release of the suspect or accused, carry also the quality of speeding up the

D2.1 – Literature review

proceedings. **An extensive use of PTD, on the other hand, calls into question the presumption of innocence. Against this background, narrow limits for the possible duration of PTD appear recommendable.** The Romanian approach in this regard seems to be exemplary: during the first phase of the trial, as soon as half the duration of the possible sentence for the offence in question is reached, the defendant is to be released.

4.4. The COVID-19 pandemic

The COVID-19 pandemic further aggravated the already difficult conditions of life in prison and, logically, in PTD – especially in what concerns the inmate's psychological and emotional well-being. Not least visits were suspended for rather extended periods of time. **The pandemic shed a light on pre-existing problems in penitentiary settings in many senses, especially those concerning overcrowding.** The closed and confined nature of typical prisons, along with their living conditions, entails a dramatic danger of high contagion and spread of the disease. Present circumstances further reinforce the need to respect the ultima ratio principle in the application of PTD while turning the authority's attention towards the use of alternatives and associated control measures.

The COVID-19 pandemic has indeed led to a significant decrease in the PTD numbers in many countries. Within the project Consortium, this reality was reported in Austria, Portugal, Germany and also for Italy. While one could assume that the reductions are only due to decreased crime rates, reports and observations indicate that the authorities in charge showed more openness to avoid PTD or to speed up releases⁷, when compared to regular practice. So far, there is no evidence pointing to noteworthy problems in criminal proceedings, or with respect to crime prevention, further offences or threats to society deriving from a more moderate and pondered resort to PTD.

This chapter provided some first impressions on the different use of PTD in the partner countries. Like noted, some national contexts present a tendency towards a rather extensive, possibly even excessive use of PTD, whereas in others the practice appears rather moderate. Nevertheless, the data and information collected in the run of the first phase of this project show that there is room for improvement in all countries, with

⁷ E.g. reports in this respect from Austrian

D2.1 – Literature review

respect to PTD-practices and especially regarding the reduction of the PTD numbers. The next section will explore the vital importance of developments encouraging the application of alternatives to detention. **There are no signs and indicators at all that a moderate PTD practice unseemly endangers societies or the run of criminal procedures.**

5. Problems caused by extensive applications of PTD

Although we may not ignore that there are criminal cases and suspects hardly or not apt at all to avoid PTD, it is a well-established fact that PTD causes many problems on several levels. PTD causes problems and costs on the level of the State and for the society as whole respectively. It causes problems for the prison system and not least for the individuals affected by this measure. Knowing that sometimes this measure cannot be avoided, it is obvious that these costs and problems cannot be abolished as a whole. It is, however, safe to say that there is a big potential to save costs and to avoid many problems caused by an extensive use of PTD. In the following part, we discuss the problems and costs on the three levels mentioned, unavoidably there are overlaps because most problems produce effects on several levels.

5.1. Problems and cost on the level of the State and of the society as a whole

The most evident costs relate to those encountered by the prison system – facility maintenance and infrastructure, guards and general prison staff, food and care provision, as well as security maintenance, etc. The SPACE reports (Aebi et al., 2019, p. 126) present data on these costs per State, mostly not differentiating between serving sentences and PTD. It is also not entirely clear whether these costs per day and detainee include all costs occurring under the prison systems' financial responsibility. Nevertheless, these figures provide a general idea of how much money is spent on the sustenance of the PTD regimes. The reported costs differ considerably between less than €40 (Romania) and €137 per person and day (Germany), amounting to approximately €1.750.000.000 a year for all 6 partner countries. For contextualisation purposes, the annual costs incurred by Austria (€83.795.408,70), for instance, would cover the annual rent of 13.053 apartments (average apartment rent according to Statistics Austria, including operating costs) (Statistik Austria, 2020). Assuming that, on an average, 2,5 persons live in such an

D2.1 – Literature review

apartment, this would mean that the costs equal the annual renting costs for about 33.000 people. Despite admitted weaknesses, the example provides a more pictorial impression of the dimensions of the incurred costs. Without a doubt, **any alternative measure costs only a fraction of imprisonment.**

It is furthermore important to note the **tendency to consider only the most obvious costs, deriving from the sum of direct expenses covering accommodation, feeding, and caring. However, there are many additional hidden costs behind pre-trial detention.** In reality, some of the problems affecting detainees and their families will often lead to the need for public (social) support, as is the case of issues concerning (lost) employment. In this regard, labour market reintegration presupposes the provision of unemployment subsidies, along with loss of tax rent by the State, or even productivity losses due to psychosocial issues.

As previously analysed, PTD causes a large portion of the high numbers of prisoners and is, therefore, part of the reasons responsible for prison overcrowding and for its negative consequences, not least negative effects on the living conditions in prison. Considering that imprisonment – and, particularly, poor prison conditions – have a high potential of harming the released prisoners' perspectives of social reintegration and reduced recidivism, it is also fair to assume the existence of considerable additional costs caused by re-offending for the State as a whole, its people and, particularly, for the individuals affected by crimes committed by repeat offenders (e.g., Markov, 2018). In fact, it is well known that imprisonment is often a central factor in the perpetuation and the worsening of criminal careers (Bundesministerium für Justiz, 2019, p. 202).

5.2. Problems and costs on the level of the Prison System

Pre-trial detainees amount to a large proportion of prisoners in many jurisdictions.

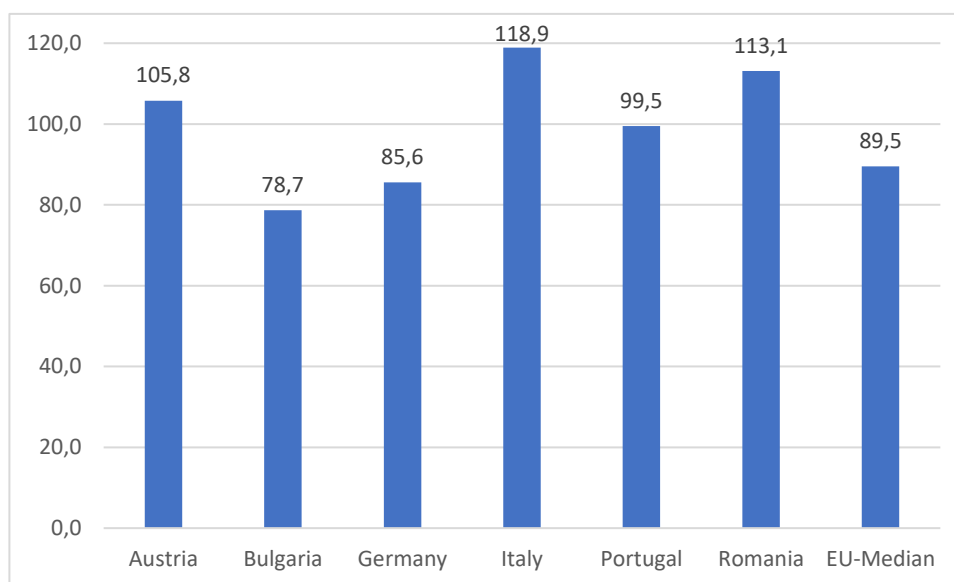
Prison overcrowding brings about substantial problems for the detainees, but also for the prison administration, thus **contributing to endangering the fulfilment of the required standards concerning the quality of imprisonment** (e.g., available space per inmate, hygienic and health-related conditions, lack of ventilation, lack of natural light, lack of care and activities). Graph 2 reveals that three out of the 6 prison systems of the PRE-TRIAD partnership display occupancy rates considerably beyond the level of full

D2.1 – Literature review

occupancy. This scenario is well illustrated by the case of Austria, even more so in Romania, and fundamentally in Italy, where the overall occupancy rate is reported to be almost 20% "overbooked".

Generally, prison practitioners consider occupancy rates beyond 90% too high for regular prison administration, because penitentiary facilities need to be able to continuously maintain available spare space, for the management of the cells and the inmates, for instance, to separate certain groups. In such a light, the Portuguese prison system must be considered overcrowded as well. In fact, the Portuguese national report indicates that many prisons have occupancy rates of 110% or higher (see also Aebi, 2019, p. 71). The Bulgarian occupancy rate for the system as a whole seems to present an exaggeratedly positive view of the factual situation. Apparently, there must be huge differences between the prisons. In particular, the prisons dedicated to the execution of PTD are reported to be regularly overbooked and are often known to suffer from substantial problems with respect to prison conditions. In sum, out of the 6 partner countries, only Germany reports no major problems with respect to prison overcrowding and prison conditions.

Graph 2: Level of occupancy of the prisons in the PRE-TRIAD partner countries (%)



Source: Aebi M.F. and Delgrande N., SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2019 (Strasbourg, Council of Europe, 2019 and own calculations)

In some prisons in Portugal, Romania and Bulgaria, the minimum space per inmate is reported to be not always guaranteed, which additionally aggravates already tense prison

D2.1 – Literature review

condition. **Situations of prison overcrowding create additional difficulties and risks for the sufficient fulfilment of the mandates assigned to prisons, along with its aims.**

Such a scenario often translates into a lack of individual treatment, care and monitoring, as well as a lack of activities available for the detainees, who are, therefore, most often confined to the prison cells for more than 90% of the days. Besides heightened risks of aggression and conflict - frequently neither visible nor reported to the prison administration - inmates experience a deepened sense of isolation and psychological problems, which take up not only a personal dimension but may also be easily transposed into more difficulties for the work of the penitentiary staff.

On top of the previously mentioned issues, PTD creates additional complications for the management of the prison systems as it requires high numbers of available staff, namely due to the high turnover of clients, who need to be frequently escorted by staff. Observations indicate that durable and sustainable solutions are particularly difficult to implement in this sort of situation. In turn, these problems are further aggravated by budgetary shortages and insufficient personnel resources, specifically in caring professions, such as social workers and psychologists. Unsurprisingly, reports also point to the harmful consequences of prison overcrowding on staff members, like indicated by the Portuguese and Austrian reports, which specifically highlight **high numbers of sick leaves among staff members, further worsening the situation in prisons.**

Since the cases Aranyosy and Căldăraru⁸, the implications of poor prison conditions have become increasingly apparent, namely in what concerns cross-border cooperation in criminal cases. Courts asked by other member states authorities to execute a European Arrest Warrant (EAW) are allowed to deny this request if minimum standards of prison conditions are not met. Problems in this regard are unfortunately not scarce, and **violations of minimum standards of prison conditions also affect the mutual trust among the authorities of the Member States.**

⁸ C-404/15 und C-659/15 ECtHR April 2016.

5.3. Problems and costs on the level of the individual prisoners

First-time detention experiences are often reported to be especially traumatic. In fact, **PTD may even be harder for the detainee than serving the actual sentence.** These experiences are partly due to the fact that pre-trial detainees do not benefit from some of the rights granted to convicted prisoners, such as early release, temporary suspension of imprisonment or lighter detention regimes (e.g., Hinov, 2013). Regularly applied are also specific legal restrictions foreseen for pre-trial detainees which provide impressions what PTD may mean for the individual: restrictions regarding activities such as work in prison, visitation rights and contact with the outside world. Consequently, pre-trial detainees are often confronted with little time and opportunities to leave the prison cell and are forced to manage a prevailing monotony.

The potential individual problems related to PTD are often stressed by practitioners working in the field (e.g., social consequences, financial burden, impact on social ties), and are further supported by research exploring the negative psychological effects of PTD. In specific, **the detainee's mental health may suffer tremendously during detention.** Apart from the situation and prison conditions, pre-trial detainees are most often completely unaware of their future perspectives and are frequently threatened by a state of hopelessness (e.g., How will the trial end? What punishment is to be expected? Will relationships endure the separation? What will happen to social contacts and the social standing? What will happen to families and to family relations? What will be their economic future and work perspectives?). In this context, family relationships often deteriorate, and social support progressively dissipates, worsening the mental health of pre-trial detainees (Markov, 2018). Due to overcrowding and lack of human resources, inmates do not benefit from individualised care, treatment and monitoring. This means that, often, structures and resources are lacking to actively support the detainees with their individual struggles and the consequent outcomes (e.g., feelings of deepened isolation and psychological issues). **A stay in prison can also be tremendously stigmatising,** as society typically does not fully differentiate between PTD and a prison sentence. As such, the label of "criminal" sticks to a suspect and can have durable negative impacts for all his or her life. **The negative psychological consequences are dramatically expressed in high numbers**

D2.1 – Literature review

of suicide rates reported from some countries. In Austria, for instance, the suicide rate among pre-trial detainees per 100.000 is much higher than for sentenced prisoners – 254,5 for pre-trial detainees versus 82,8 for sentenced prisoners in 2018 (Bundesministerium für Justiz, 2019, p.181). Even more striking is the comparison with the overall male population with a rate of 22,7. This has to be viewed indicative for the difficult situation of pre-trial detainees, who very often are restricted to the cell for most of the day.

Aggravated are the problems of pre-trial detainees by already mentioned structural problems which are additionally worsened by situations of prison overcrowding. Here again, we have to refer to reports of the European Committee for the Prevention of Torture⁹, of the Fundamental Rights Agency (FRA, 2016, p. 34), of National Prevention Mechanisms, of other international NGOs and not least to rulings of the European Court of Human Rights¹⁰. They regularly report about problematic hygienic and structural conditions of prison buildings and also about problems related to the infrastructure and to the support in some prisons. In many jurisdictions, hardly any activities are provided for pre-trial detainees. Regularly this means that detainees are only allowed to leave the cells for very little time (often hardly beyond one hour a day), despite often very long durations of PTD. At this point, we would like to highlight the role and the importance of the NPMs. **NPMs appear to be in a most favourable position to reveal problematic situations and developments in the prison systems and, to thereby, support improvements.** Moreover, these entities actively contribute to raising awareness of relevant standards by the national authorities¹¹.

Research shows that longer periods in PTD increase the risk that detainees will offend or re-offend after their release, no matter whether the suspect was convicted (e.g., Markov, 2018). Special attention is paid to the impact of detention on the detainees' children,

⁹ www.coe.int/cpt; Living space per prisoner in prison establishments <https://rm.coe.int/16806cc449> d. Council of Europe Annual Penal Statistics (SPACE I - prisons and SPACE II).

¹⁰ See above chapter 4.

¹¹ See in this respect the European funded project „Working towards harmonised detention standards in the EU – the role of National Preventive Mechanisms (NPMs)“ <https://bim.lbg.ac.at/en/project/current-projects-projects-human-dignity-and-public-security/working-towards-harmonised-detention-standards-eu-role-national-preventive-mechanisms-npms>.

D2.1 – Literature review

ranging from difficulties in continuing a normal life and frustration about what will happen to their parent to difficulties in retaining contact.

Among the negative consequences of detention, there is also an increased likelihood of detainees being sentenced to prison sentences (e.g., Schumann, 2012), possibly not least due to undermined capacities to present themselves in a favourable light with respect to integration, employment, accommodation, family and other community ties (e.g., Markov, 2018).

6. The preconditions for PTD

In order to effectively frame this chapter, it is important to review the fundamental principles with respect to PTD discussed in chapter 4. These principles form a common framework for the practice of PTD in the PRE-TRIAD partner countries, further supplemented by a common understanding concerning the degree of suspicion required by the different legal systems to apply PTD. In sum, the legal systems in question establish that there must be a strong suspicion that the suspect carried out the offence of which he/she is accused. At the stage of the pre-trial investigation, **a strong suspicion can be defined as a high likelihood that the suspect carried out the offence, which foresees punishment by the law, substantiated by evidence, which is stronger than the sum of factors possibly exculpating him/her.**

At first glance, the grounds for detention required for the application of PTD in the partner countries seem to be quite different. In the end, the grounds for detention however, can be summed up and categorised in a general fashion, suitable for all legislations. **These grounds and associated risks must be based on evidence, on indications to be deducted from the personality of the suspect, as well as from the offence:**

- The risk of absconding;
- The risk of tampering with evidence and the risk of interfering with witnesses;
- Preventive considerations, such as:
 - ✓ the risk of repeating or continuing an offence of a (relatively) serious nature;

D2.1 – Literature review

- ✓ Serious threats to the "public order", "social harm" or "social threats".
- All countries also consider grounds based on the gravity of the offence(s). In fact, these grounds also appear to have a strong preventive quality. On the one hand it can be assumed that the seriousness of such offences is of a degree so high to ask for a special protection of the society. On the other hand, the social harm derived from such offences may also call for the protection of the public order.

The ground for detention most often applied in Austria is the risk of re-offending. In the neighbouring country of Germany, which generally presents a quite similar legal culture, PTD is mostly grounded on the risk of absconding, while the risk of re-offending appears to be of rather minor relevance. To some extent, the differences between these two countries in this respect are linked to the fact that the most mobilised grounds for detention are the ones more easily substantiated – the risk of re-offending in Austria and the risk of absconding in Germany. The Detour project has indicated that the legal grounds appear to be interchangeable to some extent (Hammerschick et al., 2018, p.20). If decision-makers are convinced that PTD is necessary, they are likely to name the ground which secures detention best, even if the ground stressed may not be the one actually considered most pressing. Against this background, the risk of re-offending may be somewhat underestimated as a ground or motive for pre-trial detention in Germany. Among the other countries represented in this study, preventive considerations also emerge as central to the grounds for detention, although the approach in Italy, Portugal and Romania is relatively different when compared to Austria. In this context, these countries privilege threats to society as a whole in the groundings for PTD (through the application of terms such as "serious threats to the public order", "social harm", or "social threats").

The critique often discussed with respect to the preventive aspects applying as a ground for detention refers to the combination of criminal prosecution and criminal prevention. Ireland, for instance, only introduced this ground for detention in 1997. Up to then it was denied based on a ruling of the Irish Supreme Court. The court stated in 1996, that this ground for detention would allow for a preventive justice which would not be compatible with the key rationale of bail being a measure to secure the proceedings. Despite this legal adaptation, preventive aspects are still of a rather minor importance in pre-trial detention

D2.1 – Literature review

decisions in Ireland. Although preventive aspects also gain importance in Ireland, Ireland seems to be one of the few countries which in PTD practice still and largely don't give much room to preventive aspect. **This example demonstrates the meaning and the persistence of legal traditions and legal culture for the practice of PTD and the use of alternatives.** The very detailed regulation of this ground of detention introduced with an amendment to the Austrian Code on Criminal Proceedings, on the other hand, was supposed to push back its frequent application. In practice, the detailed regulation obviously has worked the other way round. These are **examples of attempts to regulate the application of PTD legally, which did not work the way intended.**

In recent years, preventive aspects seem to gain importance in the EU in the context of PTD, and it seems that preventive aspects increasingly dominate criminal politics in general. There is a *Zeitgeist* (societal spirit of the age) particularly valuing preventive views and security-orientation. **Personal rights thus are at a risk of being subordinated to "higher values concerning societies as a whole", which can easily counteract efforts to reduce pre-trial detention numbers.**

This is a particularly complicated issue, for which no easy or quick answers exist since typically current norms and regulations derive from **historical reasons and specific societal problems, which still influence and coin the practice.** In Italy, for instance, the Mafia-problematic definitely has had and still has a major impact on criminal policies in general and on the situation with respect to PTD in particular. In Austria, increased crime rates caused by so-called "criminal tourists" - especially since the turn of the century - also had a major impact. **Public perceptions and feelings of insecurity easily create public pressure, thus creating tensions in regard to the protection of personal rights.** Being part of society, judges and prosecutors are, therefore, immensely pressured, considering that they are supposed to refrain from reacting to such social demands.

Regular and thorough training, information, and opportunities for reflection are key for achieving professional attitudes largely unaffected by external pressures. An efficient approach must thus include the delivery of standards of ECtHR-jurisprudence to judges, prosecutors and lawyers while ensuring that all stakeholders are aware of what

D2.1 – Literature review

factors may and may not be considered when deciding between liberty, PTD or alternative measures.

The DETOUR-project shed a light on **possibly hidden grounds and motives behind the application of PTD, which are neither legally covered nor legitimate** (Hammerschick et al., 2018, p.22). Although information and data were scarce in what concerns the real weigh of these motives, there were, however, clear indications that they do play a role in influencing decisions. Consequently, it is important to understand the practical relevance of these grounds and motives, to spread knowledge about them and to address and discuss them in training sessions for legal practitioners involved in PTD procedures. In the national reports of the PRE-TRIAD partners, additional observations with respect to these so-called apocryphal grounds for detention were reported.

- **Procedural economics** may prevail in relation to the ultima ratio principle: PTD is the easiest way to secure the proceedings and to promote the investigations:
 - ✓ **A regular place of residency** in a European Member State is supposed to largely exclude the assumption of a risk of absconding. In practice, this principle seems to be frequently ignored;
 - ✓ **Performance metrics** may motivate judges and prosecutors to opt for the easiest resolution of the case in hand (through the application of PTD), even though alternatives more in line with the personal rights of suspects are available.
- **Punitive reasons** can be part of the motivation to order PTD:
 - ✓ The notion that PTD may **teach the suspect a lesson**, for instance, appears at least close to a punitive motivation;
 - ✓ Expecting no prison sentence to be the outcome of the trial, PTD may be instrumentalised as a sort of **substitute to a prison sentence**.
- **Considerations on the suspect's "well-being"**: decisions in favour of PTD may occasionally derive from the perspective of an unavoidable prison

D2.1 – Literature review

sentence as a trial outcome. Since the time in PTD will be deducted from the sentence, this practice is presented as beneficial for the suspect, who would then be able to complete his prison term faster, rather than going back to prison after release. Leaving aside the presumption of innocence, this reasoning ignores the conditions often observed in PTD while also neglecting the particularly difficult situation pre-trial detainees find themselves in.

- **General preventive considerations:** PTD may not be used as a preventing, deterrence warning to others.
- PTD may not be used as a way to **pressure the suspect for a confession**
- **Public perceptions, discussions and media commentaries** may influence the decision-makers. A rigorous PTD practice may be used to calm the general public in cases of close attention to a crime.

7. Procedural aspects worthy of attention

An important aspect worth of reflection is the **time, as well as the information available** to the magistrates regarding the decision on PTD. In fact, reports from most countries demonstrate that regularly there is very little time to prepare the decisions. From one perspective, a speedy decision is important so that suspects are released quickly, if PTD may not be applied. On the other hand, research indicates that the little time available often leads to decisions based on rather scarce information (Hammerschick et al., 2018, p. 22,54). As a rule, the information available to the decision-makers comes from the police and from the public prosecution. While the information on the offence and questions with respect to the responsibility could be more detailed on some occasions, information on the suspect, on personal characteristics and on social aspects offered by the files regularly is insufficient. Yet, this sort of information regarding the suspect is of vital relevance for the assessment of the detention grounds.

If the information available is poor, we have to assume that the assessments of the risks related to the grounds of detention remain "humble". In fact, **several reports from different countries point at the need for improvement with respect to risk assessment** (e.g., Durnesco, 2020, 37). **If court decisions have to be carried out in little**

D2.1 – Literature review

time and based on incomplete information, alternative measures will easily be neglected – because they usually have to be selected and possibly designed on the basis of personal and social information concerning the suspect.

The Austrian Code on Criminal Procedure, for example, allows the deciding judges to carry out investigations independently or to ask the police to investigate on aspects relevant for the assessment of the suspicion, or regarding the grounds for detention, before the first decision on PTD. In practice, this scenario hardly ever materialises, simply because there is not enough time to do so. **In case further information is needed, and authorities are unable to collect it, a recommendable approach seems to be the commission of services experienced in this kind of (social) inquiry.** In Portugal, for instance, the social services of the prison services have been reported to regularly inquire into the social situation of the suspects or to carry out personality assessments (Apostolo & Liberado, 2020, p. 18). In the Netherlands, the probations services are regularly asked to prepare social reports, and these reports frequently lead to suspensions of the application of PTD (Boone et al., 2017, p. 15). In Austria and in Germany, the so-called "Court Aid" prepares social reports in Juvenile Justice cases with PTD, which are highly valued. Often this kind of information may not be provided complete until the first decision on PTD. Regardless, **these inquiries can be assumed to provide improvements to the bases of the decisions, in future reviews and hearings.**

There is also a need for individually tailored, substantiated and well-grounded decisions. While formulaic decisions may be efficient, they carry a high risk of not sufficiently considering the individual qualities of each case, of each offence and of each person. Decision grounds for PTD in the partner countries seem to focus on substantiating the legitimacy of PTD. **However, if PTD is rightly interpreted as the ultima ratio, it would be logical and recommendable to rather focus the substantiations on the reasons why alternatives may not apply.** In practice, substantiation on the insufficiency of alternatives does not receive much attention. In Romania, judges do not have to explain their refusal of alternatives at all, but they do have to justify if they make use of alternatives instead. This scenario indicates a quite apparent subordination of the alternatives, despite the generally acknowledged principle of PTD being an exception. In contrast, in Italy, judges must justify the non-application of house arrest, which makes up

D2.1 – Literature review

a partial exception to the previously described context. Ireland, in turn, could provide orientations and act as an example to the remaining Member States in this regard. Every suspect who would be potentially subjected to PTD is on principle, and first and foremost, entitled to bail, meaning that bail is the default measure. In case bail is declined, detention groundings must, above all, explain in detail why bail and other less restrictive measures are not applicable (Perry & Rogan, 2017, p.6).

Moreover, the filtering role of the prosecution receives rather little attention, excluding cases in which PTD is recommended by the police. The interaction between the prosecution and the judges deciding on PTD is also fairly neglected, namely in what concerns the practitioners' reaction to the suggestion of PTD application. **In practice, the protective effects of these safeguards are questioned in many countries, as judges and prosecutors are considered to be too close to put the safeguards into practice effectively.** Additionally, a denial of a PTD recommendation may increase the judge's workload, when compared to an approval, which often is largely based on the application carried out by the prosecution. Research shows that, in most countries, judges approve PTD-applications issued by the prosecution in the vast majority of cases. Or put it the other way round, judges seldom refuse the approval of the prosecution's PTD recommendation (see, e.g., Fair Trials, 2015, p. 13; Hammerschick, 2019, p. 227; Morgenstern, 2017, p.81). Practitioners explain high percentages of approvals of PTD-proposals by the judges on the basis of well-substantiated applications, based on the knowledge of the prosecution about the practice of the courts. While there may be some truth to this, high rates of acceptance still lead to concerns that this first safeguard may not always work the way it should.

Looking beyond the partner-countries, data from Ireland presents a different picture. Only 44% of the applications for PTD are reported to be approved by the Irish judiciary. This outcome **strongly indicates a different legal culture in Ireland** when compared to the PRE-TRIAD's partner countries. This reality may be related to the fact that public prosecutors most often are attorneys collecting experience on both sides of the bar.

All in all, the power of the public prosecution seems to be often underestimated. Bearing this in mind, the present report recommends always to include the public prosecutions in initiatives dedicated to reflecting on PTD-practice or aiming at

D2.1 – Literature review

developments pushing back an extensive use of PTD. The power of the prosecutors also becomes visible in the case of the application of alternatives to PTD. In most jurisdictions, the public prosecution can initiate alternatives to PTD; in some jurisdictions, they actually can apply some alternatives independently of the judiciary. In practice, however, it seems that the public prosecution hardly initiates alternatives and, in general, rather opts for PTD. Finding suitable alternative measures is time-consuming, and it requires information, like previously underlined. In reality, often both are precious and restricted resources.

Most countries present a rather wide margin of discretion on the side of the decision-makers with respect to PTD. While margins of discretion are necessary for decisions about PTD, it is important to stress that such margins are the **gateway for apocryphal grounds** for detention, which are not in line with the principals discussed in chapter one, contradicting the ultima ratio principle and threatening the rights of suspects. It, therefore, is of an utmost importance that the **safeguards installed and provided by law are not just existent. Safeguards have to be put in practice and activated.** As pointed out, legal provisions with respect to PTD may provide room for improvements at several levels. **There are, however, strong indications that the practices and the leeway available, as well as organisational barriers, tend to favour PTD instead of its alternatives.**

8. Safeguards

The equality of arms between the defence and the prosecution often appears not sufficiently safeguarded. Of particular importance is **early contact** with the suspect, along with **early access of the defence lawyers to the case files.** In times of electronic files, this should soon be a problem of the past. Still, early access to the files seems to be a quite widespread problem, which asks for regulations, leaving little room for denials or practical barriers.

An aspect observed to be highly **relevant for guaranteeing the quality of legal representation is linked to the way legal support and legal aid are organised.** In some countries (e.g., in Austria and Romania), regulations in this respect may lead to the detainees being represented by attorneys which possibly have little experience in

D2.1 – Literature review

criminal law, or specifically in detention cases. In fact, detention cases require experience, fast reactions, initiative and dedication on the side of legal representation. In Austria, for instance, attorneys are often reluctant to file appeals against PTD, fearing that the substantiations of the appeal court may have a negative impact on the verdict. While this risk may be real, this explanation partially disables the defence as the most important safeguard. **As such, an important and valuable safeguard loses important practical value.**

Additionally, **the reviews of PTD are of central importance.** Reviews in the form of hearings are required in all partner countries. The differences primarily relate to whether hearings are carried out in regular intervals during the pre-trial phase (e.g., Austria) or whether reviews mainly have to be applied for by the defendant, his/her attorney or the public prosecution (e.g., Italy, Germany, Bulgaria¹²). The insights gained in the run of this research so far do not favour one or the other solution in this respect, as long as PTD is reviewed in regular intervals, not too far apart.

Another important point concerns the quality of the hearings, meaning a thorough review of all conditions to be fulfilled if PTD is considered to be continued. These conditions must be well-founded, or otherwise, PTD is to be suspended. Regularly this principle will imply the revision of the information on which the decision was initially based on as well as the inclusion of newly collected information, or which came up in the meantime. As a reminder, chapter 7 analysed the qualities social reports may present at the stage of reviewal and hearings, as well as at the first decision on PTD application.

Although the authorities have to consider all information available ex officio, **regularly it is up to the attorneys to find and provide any information on the suspicion, on the offence, and on the grounds for detention in connection with the personality of the suspect.** Not least they are also the ones possibly initiating and even organising the application of alternatives in all countries. By law, in most jurisdictions, prosecutors and judges are also supposed to suggest alternatives. In practice, this is no regular practice.

¹² The courts in Bulgaria may define a period of two months at a maximum, during which no review can be requested by the accused and his/her attorney.

D2.1 – Literature review

There is hardly any information available on the quality of PTD-hearings. In fact, PTD prolongations following review-hearings rather seem to be the rule than the exception, thus suggesting that there may be some room for improvement.

9. Alternative measures for securing the aims of PTD

As previously mentioned, authorities should be prepared to suggest possible alternatives to detention ex officio and suspects themselves may also be able to make suggestions. Regardless, **attorneys are the ones who typically initiate and even propose alternatives apt to substitute PTD.** This task may require a certain level of creativity as well as some effort, which possibly is not covered by regular fees. Attorneys representing detainees must be well informed about the various possible options apt to be grounded as alternatives to detention and which could be suggested to the court. **It is of utmost importance for the protection of the suspect's rights that legal representatives actively search for the organisation and application of alternatives.**

Table 1 below gives an overview of alternative measures to PTD existing in the partner countries. The spectrum of alternatives actually appears quite broad for most countries. Against this background, Austria and Germany probably can be considered as the countries offering the broadest array of options since judges in both countries may introduce individually tailored measures, according to the observed needs. Nevertheless, in practice, alternatives are seldom applied. In Italy, on the other hand, the range of alternatives seems comparatively small. Most striking is the observation that bail is not available in Italy. Practically, this does not mean a big difference compared to the partner countries because in most countries, bail is not applied very often either. The only alternative measures common in all countries correspond to restrictions of movement (such as bans to enter or prohibitions to leave certain locations or districts), as well as supervisory measures of a minor intrusive nature (like obligations to regularly report or to register with authorities, mostly the police).

The national reports indicate that some countries could benefit from broadening the scope of available alternatives. The fact that, in most countries, social work support in connection with supervision does not play a role as an alternative to PTD is particularly worth mentioning. While in adult cases it hardly plays a role in Austria and Germany

D2.1 – Literature review

either, it is often used with juveniles. The described reality is very much coined by the notion that social work in the context of PTD is above all considered a pedagogical approach, which is not deemed useful with adults. Social work, however, can also support individuals in the organisation and management of their present circumstances while fostering law-abiding lifestyles. Good experiences with juveniles could very well serve as arguments for an increased use of this method with adults.

Table 1: Alternatives available in the partner countries¹³

	(Judicial control) with Restriction of movement and contacts	(Judicial control) Duty to report / mandatory registration	Supervision - Social work support	Medical treatment/ Therapies	Bail	House arrest	House arrest with Electronic Monitoring	Suspension of activities and professions	Judge can "design" orders individually
Austria	X	X	X	X	X		X		X
Bulgaria	X	X		(X)	X		X	X	
Germany	X	X	(X)	X	X		(X)		X
Italy	X	X		(X)		X	X	X	
Portugal	X	X		X	X	X	X	X	
Romania	X	X		X	X	X	(X)	X	

Source: National reports of the PRE-TRIAD project and additional research carried out by the author

While there is very little data available on the application of alternatives, **the tenor from most partner countries is that alternatives are rather seldom applied**. Especially in what concerns first court decisions on PTD, alternatives are rarely resorted to. However, this generalisation is somewhat restricted by the increasing use of Electronic Monitoring (EM) as a measure substituting PTD. EM will be further analysed in future sections.

¹³ The marks in brackets indicate that a measure is not available in general, but only for certain groups (e.g., therapies and medical treatment in Bulgaria and Italy primarily for psychiatric clients), in certain regions (e.g., electronic monitoring in Germany only available in the federal state Hessen, however hardly used) or provided by law, however not offered in practice (e.g., in Romania, no technical equipment for EM is available; social work in Germany is available in a few places to support the organisation of alternatives).

D2.1 – Literature review

Although alternative measures seemingly are not applied very often in Romania either, judicial control has been reported to be possibly used too often.

Both the national reports and the literature indicate that **a low use of alternatives is not necessarily due to a lack of options, but rather to a lack of trust in the alternatives, alongside insufficient available information for the selection of suitable measures, to little time to finalise the decision, as well as to organisational hassles and difficulties** (e.g., available entities to enforce and monitor certain measures). All in all, it seems that **additional investments with respect to alternative measures would be able to strengthen alternatives and to foster their more frequent application. Measures in this respect would be improvements concerning the collection of information, as well as qualitative and organisational improvements with alternatives, and of course further available resources to apply such changes.**

A fundamental aspect in which European countries diverge is the possible involvement of the private sector, such as Non-Governmental Organisations (NGOs) in criminal justice matters. In most countries, the private sector (NGOs) is not involved in the support or in the control of measures substituting PTD. **Including the private sector could be a chance to broaden the available alternatives, while mitigating problems reported by some of the partner countries, suffering from a lack of human resources available to control alternative measures.**

Chapter 4 addressed the issues stemming from a disproportionate application of PTD to foreign nationals. Unsurprisingly, this problem stems from concerns regarding the efficiency of alternative measures in the case of foreign suspects. **Foreigners hardly have access to alternative measures, and even more so, if they do not reside in the country in question.** As highlighted in chapter 4, the mitigation of the extensive use of PTD must mandatorily consider solutions with respect to foreigners and PTD. Bearing in mind the regularly observed problems with foreigners (e.g., precarious social conditions, no regular residence in the country in question, little or no social ties there), it becomes apparent that there are no easy solutions. The ESO is a valuable approach once actively and more often implemented. However, it is largely restricted to citizens of EU Member States, while the majority of foreigners in EU-Member States prisons are, in fact, citizens

D2.1 – Literature review

of non-EU-countries. **Approaches to solving this particular issue will require a certain level of creativity as well as open-mindedness to new solutions.**

Apart from electronically monitored house arrest the analysis indicates **a rather widespread, diminished interest in the development of alternative measures.** Especially in times and situations of budgetary shortages, investments in this kind of measure are not very appealing to politics and to administrations. **On the other hand, these investments could easily pay off by promoting a considerable reduction of spendings connected to the maintenance of PTD regimes and detainees, consequently leading to a reduction of the prison population, particularly of prison overcrowding, and contributing to improvements of prison conditions.** In the 2019 Conclusions of the Council of the EU on alternative measures to detention, the importance of alternatives to PTD was also stressed. In fact, in agreements among the Ministers of Justice and Internal Affairs, an increased use of alternatives was mentioned as a common aim (Council of the European Union, 2019 p. 11).

9.1. Electronic monitoring, house arrest and risks of netwidening

House arrest with EM is increasingly used in criminal justice in general and also as a substitute to PTD. Table 1 above shows that this reality also applies to the countries involved in the PRE-TRIAD-project. In Austria, EM is actually not considered an alternative to PTD but, instead, a way to execute PTD. In practical terms, EM however hardly plays a role in the national 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 (alternatives). Then, the latter would have to be the measure to be chosen. In contrast, house arrest with or without EM is considered as an alternative to PTD in all remaining PRE-TRIAD partner countries. The preconditions for this arrest are similar to those for PTD, and **it carries the advantage of maintaining the suspect within his/her private space, possibly with his family, while remaining a form of arrest. 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 a much cheaper alternative than detention in prison.**

D2.1 – Literature review

Among the partner countries, an increasing use of house arrest with EM is above all reported in Portugal. From 2018 to 2019, an increase of 10% was observed, with suspects in electronically monitored house arrest representing about 20% of all pre-trial detainees. 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 in Italy, where it is also applied besides house arrest (without technical assistance). Despite a high interest of the practitioners in EM, its use is reported to remain restricted because there are not sufficient devices available. Romanian practitioners also demonstrate a preference towards this measure, but EM is not yet put into practice at all in that national context, even if 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 as an advantage only accessible to privileged social groups. In Germany, only in the federal State of Hessen is house arrest with EM possible as an alternative to PTD, but it is rarely applied.

In fact, house arrest with EM as an alternative to PTD has some appeal for the pre-trial detainees as well as for the prison systems. **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: Besides the still very high number of pre-trial detainees in prison, several hundred suspects a year are controlled via EM (Hammerschick et Al., 2018, p. 38).

This reminds us of the fact that there is also 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

D2.1 – Literature review

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 the 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 for the so-called GPS-systems (Global Positioning System) applied with EM. 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 would not hinder a suspect from leaving the apartment, nor would it provide information about the whereabouts of a suspect to the relevant authorities. Due to these limitations, the majority of Austrian judges, for instance, rejects the use of EM. On the other hand, 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 control selected suspects to avoid PTD (e.g., for suspects who are not allowed to enter or to leave certain locations).**

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 or “alternatives” 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. On the other hand this model may also be a central reason for the little use of alternatives.

10. European aspects and the European Supervision Order

Transborder contacts and cooperation are regular business to the judicial authorities (including prosecutors), and it is fair to assume that this will not change significantly in the future. In this context, the European Arrest Warrant (EAW) emerges as a central instrument in the field of international judicial cooperation. The latter seems to work rather well, although cases like *Aranyosy and Căldăraru*¹⁴ point to unwavering issues with respect to common standards in prisons.

While the application of the EAW definitely has increased since its implementation, it is generally safe to say that there is still very much need for improvement with respect to cooperations across borders. Such an objective asks for common understandings and continuing efforts towards common standards, an ambitious goal, which will never materialise without the necessary will and associated investment. In fact, the cited cases and similar ones have partially contributed to weakening mutual trust among EU Member States. As a consequence, additional efforts are called for to strengthen this trust.

Chapter 9 illustrated the difficulties faced by foreign nationals in accessing alternative measures to detention. In this respect, the ESO can be considered a step in the right direction, as a means to avoid PTD for residents of other EU States. The ESO, however, still remains very much unknown and unexplored as an alternative to PTD among European legal practitioners. While official data is not readily available, the reports from the partner countries make it quite clear that the ESO is rarely used. In Austria, for instance, not one single ESO request has been documented so far, either going out or coming in. Realistically, the number of potential cases will be quite limited, since the majority of cases involving EU nationals from other countries can be expected to be decided before the organisational and bureaucratic requirements for an application of the ESO would be completed. Nevertheless, it is valid to assume that there is a potential for the application of the ESO not used so far.

In the 2016 report "Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers" the Fundamental Rights Agency stated that "For proper

¹⁴ C-404/15 and C-659/15 ECtHR April 2016.

D2.1 – Literature review

implementation of the Framework Decision [...] the EU and its Member States need to assess the instrument's non-application. This would permit the identification of obstacles to the full use of the instrument (FRA; 2016, p. 34). This view is very much shared by the PRE-TRIAD Consortium, and we will focus on this topic in the research as well as in the workshops and conferences to come in the frame of the PRE-TRIAD project.

Reflecting on the literature (e.g. Hammerschick et al., 2018, p. 78), as well as on the national reports, the following topics have been identified as central with respect to the ESO and will guide the project's next steps:

- Besides the European Judicial Network, what channels are considered useful to spread interest in the ESO among legal practitioners?
- Considering the importance of attorneys with respect to alternatives to PTD in general, we assume that attorneys also have an important role to play regarding the ESO.
 - How can attorneys foster the use of the ESO?
- Which would be the estimation of the duration of pre-trial proceedings allowing for a useful ESO implementation?
- Which are the requirements and recommendations for a fast administration of the ESO?
 - What administrative structures are provided, and what steps are recommended?
 - Is there a need for centralised, specialised organisations in each Member State connected to a homologous organisation in the other countries for the coordination of transborder cases?
- What information do practitioners need concerning alternative measures available in other countries (e.g., which entity enforces control and monitoring)?
- What alternatives are most easily carried out in the scope of the ESO?
- How to promote common standards?

In the Green Paper "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention", the European Commission stated that "It could be difficult to develop closer judicial

D2.1 – Literature review

cooperation between Member States unless further efforts are made to improve detention conditions and to promote alternatives to custody" (European Commission, 2011, p.4). The work steps ahead in the PRE-TRIAD project will aim at fostering common understandings through the provision of information and by promoting possibilities for exchange and common learning. Additionally, the PRE-TRIAD partnership will take advantage of the many contacts with legal professionals, established during the enquiries, to inquire into ways to contribute to a strengthening of trust among the Member States.

11. Collection of aspects to pay attention to in the discussion of PTD, its alternatives and the ESO

Taking into consideration the analysis developed throughout the present report, this final chapter lists several fundamental issues to be considered, while summing up the report's guiding points:

- There is a rather strong practical preference by the authorities in most countries for detention, rather than for its alternatives. This scenario calls into question the adherence to generally acknowledged legal principles. How to deal with this reality and what is needed to initiate a change?
- What are the reasons practitioners consider decisive for an extensive application of PTD?
- There is a big potential to save costs and to avoid many problems caused by an extensive use of PTD. How is this statement perceived by practitioners?
- The problem of extensive use of pre-trial detention will not be solved if the high percentage of suspects with foreign nationality placed under PTD is not taken into consideration. How is this problem perceived by practitioners? What are suitable approaches to tackle this problem? What can be done to have alternatives applied more often to foreign-national suspects?
- A restrictively defined maximum duration of PTD can be viewed as a safeguard against an unreasonably long deprivation of the personal freedom of individuals, while protecting their right to trial within a reasonable time, according to Article 5 of the ECHR. How is this conclusion perceived by practitioners?

D2.1 – Literature review

- There are no signs and indications that a moderate PTD practice unseemly endangers societies or the run of criminal procedures. How do practitioners perceive this statement?
- What role do legal traditions and legal cultures play regarding the practice of PTD and the use of alternatives? How can deeply rooted routines be changed?
- Aiming at reducing the application of PTD, would it be best to focus on legal changes or information and training among legal practitioners?
- If there is a *Zeitgeist* particularly valuing preventive views and security-orientation and if this bears a risk that personal rights may be subordinated to "higher values concerning societies as a whole", is there a realistic chance to reduce PTD-numbers? What has to be done in this respect?
- How to tackle mobilised grounds for detention and motives behind the application of PTD, which are neither legally covered nor legitimate?
- There is a need for more information to build on the decisions on PTD and alternatives.
 - ✓ How do practitioners perceive the suggestion to involve services experienced in this kind of (social) inquiry? What are their suggestions?
- If PTD is supposed to be the ultima ratio, it would be logical and recommendable to rather focus the substantiation of PTD decisions on why alternatives may not apply, instead of the other way around.
 - ✓ How do practitioners react to this suggestion?
- The power of the public prosecution often appears underestimated. Bearing this in mind, we recommend to always include the public prosecution in initiatives reflecting on PTD-practice or aiming at developments pushing back extensive use of PTD.
- For most countries, we observe a rather wide margin of discretion of the decision-makers with respect to PTD.
 - ✓ What are the chances of increasing information-sharing and training opportunities among legal practitioners, in order to avoid an extensive use of PTD, often influenced by apocryphal grounds for detention?
- How can the existing legal safeguards be promoted to gain practical relevance?

D2.1 – Literature review

- Legal representation is central to avoid a frequent application of PTD and to promote the application of suitable alternatives.
 - ✓ How should legal support and legal aid in this respect be organised?
- How is the quality of reviews/hearings perceived by legal practitioners? What are the most important features of high-quality reviews/hearings?
- Investments in the collection of information and in qualitative as well as in organisational improvements concerning alternatives (including the provision of necessary resources) should be able to strengthen alternatives and to foster their application.
 - ✓ How do practitioners view the chances that practitioners react positively on such improvements? How to promote a good reception of these changes by practitioners?
 - ✓ Investments in alternatives can easily pay off, especially if they contribute to reducing the overall prison population, particularly to fighting prison overcrowding and thus to improvements of the prison conditions. How is this hypothesis perceived by practitioners?
- Is EM considered a solution to avoiding PTD more often?
 - ✓ How to avoid the risk of a netwidening?
 - ✓ Is EM with GPS-bracelets the model of the future?
- Besides the European Judicial Network, what channels are considered useful to raise interest towards the ESO among legal practitioners?
- Considering the importance of attorneys concerning alternatives to PTD in general, we assume that attorneys also have an important role to play regarding the ESO.
 - ✓ How can attorneys foster the use of the ESO?
- What would be the estimation of the duration of pre-trial proceedings allowing for a useful application of the ESO?
- Which would be the requirements and recommendations with respect to a fast administration of the ESO?
- What administrative structures are provided, and what steps are recommended?

D2.1 – Literature review

- ✓ Is there a need for centralised, specialised organisations in each member Member State connected to their homologous organisation in other countries?
- What information do practitioners need about available alternative measures in other national contexts (e.g., which entities enforce control)?
- What alternatives are most easily carried out with the ESO?
- How can we best promote common standards?

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Annexes

Annexe 1 – List of tables

Table 1: Alternatives available in the partner countries

Annexe 2 – List of graphs

Graph 1: Detention rates per 100.000 of the population - PTD and all prisoners

Graph 2: Level of occupancy of the prisons in the PRE-TRIAD partner countries (%)

Annexe 3 – Austrian national report



PRE-TRIAD

Alternative pre-trial detention measures

Austrian National Report

Basis for the D2.1 Literature review

PRE-TRIAD Project
Alternative pre-trial detention measures

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2. Content

1.	Change Control	2
1.1.	Document Properties	2
1.2.	Revision History	2
2.	Content	3
3.	Executive summary	5
4.	Introduction	6
4.1.	Fundamental legal principals and developments	6
4.2.	PTD in practice	8
5.	PTD and the competent authorities in the law	11
5.1.	Authorities, procedures, deadlines and decisions	11
5.2.	The prerequisites for PTD	14
5.3.	Procedural rights, defence counselling and detention hearings	15
5.4.	Alternative measures to PTD according to the CCP	17
6.	Measures to avoid PTD – Alternatives in practice	18
6.1.	Preparatory inquiries for Probation Service § 15 PAA (Probation Assistance Act)	18
6.2.	Judicial directives according to § 173 (5) CCP („gelindere Mittel“ – less severe measures)	19
6.3.	Measures for Juveniles –Promising alternative measures to PTD in general	21
6.4.	The organizations offering services employed in the run “less severe measures”	22
7.	Data on PTD	22
7.1.	General information on Pre-trial detention	22
7.2.	Structure of pre-trial prison population	24
7.3.	Data on alternative measures to PTD and misuse of alternatives	28
7.4.	Other detailed data on PTD	29
8.	Observations on the negative impact of PTD	32
8.1.	Negative impact on the national level	32
8.2.	Negative impact on the prison system	32
8.3.	Negative impact on the individual/suspect level	33
9.	Other aspects on PTD and alternative measures in the literature	34

9.1. An overview on outcomes of the DETOUR-project with respect to Austria	37
10. European Aspects and their meaning for national PTD-practice	38
11. Conclusions and Outlook	41
12. Bibliography	42
List of figures	47

3. Executive summary

The present report seeks to offer the groundwork for the development of D2.2 Literature Review, specifically in what concerns the Austrian national context. As such, the report is subdivided into several main sections, which outline the fundamental areas of interest for the associated Deliverable. An introductory chapter is followed by a brief analysis of the PTD application, along with the competent authorities acting in the field. The report then dives into the central measures aiming at avoiding PTD, meaning the available alternatives in practice, before exploring the statistical data concerning PTD. These observations then lead the report to focus on the multi-level impact of PTD. Lastly, the present work presents important information regarding European aspects and their meaning for national PTD practice.

4. Introduction

4.1. Fundamental legal principals and developments

The Austrian legal system is based on the **civil law tradition**. All legal provisions have to comply with the provisions of the constitutional laws. It was the so called “Große Strafrechtsreform” (Big reform of criminal law) of the nineteen seventies which coined today’s criminal law and the criminal procedures in Austria. The two central codes are the Austrian Penal Code (CC), which above all regulates the elements and the definitions of a crime, and the **Austrian Code on Criminal Procedure (CCP)**, which regulates the procedures. The provisions with respect to the preliminary criminal proceedings, the imposition of arrest and Pre-trial-Detention (PTD) are regulated there. Secondary legislation supplements these regulations, like for instance the Juvenile Justice Act (JGG) which provides specific regulations for juveniles and for young adults.

Some **fundamental principles** determining criminal proceedings and the application of criminal law are the following

- In charge of criminal justice are the Criminal Courts and their independent judges.
- Nobody can be punished for any act not prohibited by law
- Every accused remains innocent until proven guilty.
- In dubio pro reo: If doubts persist after weighing all proof an accused person has to be acquitted.

These principles of course also shed their light on PTD. According to §§ 173 pp CCP PTD is the deprivation of liberty of an untried or not yet convicted person following a decision by the court. Literally translated the term “**Untersuchungshaft**” **actually means ‘investigating detention’** and it comprises a longer period than the term expresses, namely any detention during the pre-trial phase up to the end of an appeals procedure.

With respect to PTD the principles of utmost importance are

- the ultima ratio principle prohibiting any deprivation of liberty if more lenient measures are sufficient to achieve the aims and
- the principle of proportionality which according to the Personal Freedom Act of 1988 prohibits PTD if it is disproportionate to the aims pursued

- According to the prevailing Austrian doctrine, pre-trial detention may never be “anticipated punishment”.

The Personal Freedom Act also states the imperative for a speedy procedure, prescribes the need for review of arrest within one week as well as the regular review of detention and guarantees compensation in cases of unlawful arrest or detention.

The fundamental bases for today’s regulations with respect to PTD has been laid out with an amendment to the CCP in 1993. With this amendment the role of the so-called Investigating Judge (Untersuchungsrichter) was strengthened. While his competencies with respect to decisions on detention have been very much restricted before, his new role was defined as the deciding authority also securing legal protection. Connected to this the actions of the involved parties became crucial for the procedures (Parteienprozess). Additionally this amendment introduced fixed periods within which detention hearings have to take place if the suspect is not released. Following the amendment, the numbers of detainees decreased.

With the CCP Reform Act of 2004, which entered into force in 2008, the position of the investigating judge was abolished. Since then the competencies and responsibilities of the public prosecutor have been extended and **all procedures during the pre-trial phase are driven or initiated by the public prosecutor**. All decisions concerning encroachments of rights of suspects today are the responsibility of a now called **detention and legal protection judge** (“Haft- und Rechtsschutzrichter”). This of course includes all decisions concerning detention.

In 2010 the possibility was introduced that Pre-Trial detainees may spend PTD in house arrest monitored by an electronic monitoring device. Up to now **Electronic Monitoring (EM)** has hardly been used for PTD. EM for pre-trial detainees in Austria is not defined as an Alternative the PTD but as a way to serve PTD at one’s own place of living. This means that PTD carried out via EM as well has to be terminated if milder measures secure the aims. In the prevailing view of legal practitioners EM is hardly apt to exclude the reasons for PTD. If it would, milder measures are considered to serve the purpose and PTD has to be suspended.

Austria has ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR)¹ in 1958 and it is party to the European Convention for the Prevention of Torture (CPT). The Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) has been realized by an amendment to the Austrian Constitution in 2011. Since 1981 Austria also has an Ombudsman Board: the “Volksanwaltschaft” (148a BV-G). It is entrusted with the task of examining all alleged or presumed grievances arising in connection with the public administrative system. The Ombudsman Board may also take up matters without a prior complaint, if it has reasons to suspect an administrative irregularity. Since 2012 the Ombudsman Board and committees of experts installed by it also fulfil the task of the National Prevention Mechanism (NPM). The committees of experts regularly visit and control institutions in which people are deprived of their freedom (OPCAT- Committees). **The NPM has to be considered a most important institution with respect to improvements of the situation in prisons.**

4.2. PTD in practice

With a rate of **22,5 pre-trial detainees per 100.000** the Austrian PTD rate is slightly lower than the European average of 23.² This in fact means a rather high rate considering that there are countries included with rates beyond 50 per 100.000. Pre-trial detainees in the run of the years represent on an average more than a fifth of the whole prison population and thereby this group of prisoners is a central source for the prison overcrowding in Austria prevalent in recent years. From 2000 to 2007 the overall prison population in Austria increased heavily from an average level between 6.500 and about 6.900 inmates during most of the nineties up to about 9.000 in 2007. After a decrease in 2008 the average number of prisoners in recent years has been quite constantly on a high level crossing the 9.000 limit in recent years - **9.351 or 105,6 per 100.000 on January 1st 2019**³. The **high numbers of prisoners constitute considerable problems** for the

¹ Becoming part of the constitution

² Aebi M.F. and Delgrande N., SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2016 (Strasbourg, Council of Europe, 2019), p. 77 https://wp.unil.ch/space/files/2020/04/200405_FinalReport_SPACE_I_2016.pdf (accessed on Juni 16th, 2020)

³ Aebi M.F. and Delgrande N., SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2019 (Strasbourg, Council of Europe, 2019), p.30

prison administration not least affecting the conditions of live in prison and the treatment of prisoners. The situation of Pre-Trial detainees often is particularly difficult. On the one hand they are allowed to have private things in their cells and to wear private clothes. On the other hand, they however very often spend up to 23 hours a day in their cells with little or no contacts to the outside world. If there are no substantial reasons (eg. Influencing witnesses) the judge may allow a Pre-Trial detainee to work in prison, but in fact mostly there is no work available to them. Defence lawyers often complain about PTD to be used to often and lasting to long.

A central problem with respect to PTD in Austria is one of the **highest rates of foreigners in PTD all over Europe**. In recent years quite constantly, foreign nationals presented about 70% of all pre-trial detainees in Austria. This fact must be seen in connection with the geographical and the economical position of Austria as well as with the migration movements since the nineteen nineties. Austria is a federal republic with nine federal states landlocked in Central Europe bordering to the former “East”. In January 2020 8.902.600 inhabitants were reported, presenting an increase of the population since January 2019 of about 0,5%.⁴ The growth of the population during the last two decades is primarily due to a continuing migration, while the number of Austrian citizens remained quite stable. 16,2% of the whole population are foreign citizens, about half of them citizens of the European Union, with Germans being the biggest group (13,4% of all foreigners) followed by Serbs and Turks.⁵ With a very central geographical location within Europe, with major transit routes crossing the country and with tourism playing a major economical role the number of people staying in Austria at any point of time is considerably bigger than the registered population.⁶ This is particularly true for the capital Vienna. This becomes also visible when data on suspects of crime is presented, data on the prison population in general or data on pre-trial detainees. The high portion

https://wp.unil.ch/space/files/2020/04/200405_FinalReport_SPACE_I_2019.pdf (accessed on Juni 16th, 2020)

⁴http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/bevoelkerungsst_und_und_veraenderung/bevoelkerung_zu_jahres-_quartalsanfang/index.html (accessed on Juni 16th, 2020)

⁵http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/bevoelkerungsstruktur/bevoelkerung_nach_staatsangehoerigkeit_geburtsland/index.html (accessed on Juni 16th, 2020)

⁶ See for instance Fuchs, W., Öffentliche Sicherheit in Wien, Research Paper, Institute for the Sociology of Law and Criminology, Vienna, 1998, p. 21 https://www.irks.at/assets/irks/wp_oeffsi.pdf (accessed on Juni 16th, 2020)

of foreigners in PTD appears to have effects on the PTD practice. Not least this fact is of course relevant for the application of alternatives.

A critique with respect to the high numbers of foreigners in PTD points at a practice of the courts frequently assuming even minor offences to be part of more extensive criminal activities of foreign suspects directed at **generating a regular income**. With this argument PTD can be applied even in cases with offenses otherwise not apt to justify PTD, like shop lifting or minor drug dealing. With an amendment to the Criminal Code in 2016 and a more restrictive definition of the term “commercial activity” this practice was supposed to be cut back. Supported by some media the police heavily complained about the new law hindering the police to get ‘drug dealers off the streets’. As a consequence a new criminal offence was introduced providing for higher sentences for drug trafficking in public spaces and thereby extending the possibility to detain these suspects. In the end the practice with respect to PTD in this field appears to have not changed much.

After the rape of a 14 year old in pre-trial detention by other inmates in 2013 a heated debate about young offenders’ imprisonment in Austria and the need for alternatives led to **a reform of the Juvenile Justice Act in January 2016. Since then – among other things – individual alternatives to pre-trial detention can be developed within a social net conference**⁷ (“Sozialnetzkonferenz) and sheltered housing will be financed by public money, if needed. The numbers of juveniles and young adults in PTD dropped in the following years.

During the **Covid Pandemic 2020** – until June - the numbers of prisoners decreased. End 2019 about 9.200 prisoners were reported, with about 1.750 pre-trial detainees. First of June a total of 8.560 prisoners was counted, 1.513 in PTD. These reductions were not due to any legal adjustments. On the side of the prisoners serving sentences the reduction was primarily reached by postponements of entries not considered to mean any risk. **PTD numbers declined** not least due to reported (not yet proven) reduced numbers of crime. According to questioned legal defenders the practice to order PTD did not really change, courts however were more willing to release detainees under conditions.

⁷ (Minister) ,Brandstetter wants to prevent judges on imposing pre-trial detention to juveniles‘ *Der Standard* (Vienna, 12 August 2015

5. PTD and the competent authorities in the law

5.1. Authorities, procedures, deadlines and decisions

The Austrian CCP regulates arrest (“Festnahme”) and pre-trial detention (“Untersuchungshaft”) in §§ 170-189 CCP. These sections of the law also contain the provisions for the enforcement of pre-trial detention.

The police are the authority which carries out arrests ordered by the prosecutor and approved by a judge. In cases of “imminent danger” the police however are entitled to arrest a suspect without an order by the public prosecutor, if and when a prosecutor cannot be reached in time. Otherwise the **public prosecutor is always the one who has to initiate a decision which is than the responsibility of a judge**. Each arrest as well as each PTD and each prolongation of PTD has to be based on a request of the prosecutor with the responsible judge (detention and legal protection judge). Without this request a suspect has to be released. The judge issues arrest warrants applied for, carries out the obligatory hearings and is responsible for all decision to (further) detain suspects.

Apart from the case of “imminent danger” detention begins with the actual arrest (“Festnahme” and “Arrest”) based on a warrant issued by the prosecutor and approved by the court (§§ 170(1), 171(1) CCP). The arrest may last up to two times 48 hours. With the arrest legally important periods begin to run.

a) **Arrest at the police** (First 48 hours)

- If apprehended without warrant immediately after arrest:
 - Immediately after arrest written instructions have to be provided on his rights (§ 171(4) CCP). These instructions have to be comprehensive and in a language the suspect is able to understand.
 - Immediately after arrest hearing on the reasons and requirements for pre-trial detention, on the case and the suspicion
 - Delivery of a written and reasoned motivation of the arrest issued by the police (§ 171(3)).
- If the arrest was based on an arrest warrant: delivery of a written arrest warrant issued by the prosecutor and ordered by a judge within 24 hours of arrest (§ 171(3) CCP).

- Within 48 hours transfer of the detained person to the prison or otherwise release (§ 172 CCP). The prosecutor has to be informed about this, if the arrest was carried out by the police without warrant. If he denies to apply for PTD, the suspect has to be released.
- b) **Detention at the prison** (second 48 hours)
 - First bases for the decisions are the reports of the police and the outcomes of their investigations. In his applications for detention the prosecutor just refers to the police reports and applies for detention mentioning the ground for detention applicable in the individual case.
 - **Hearing** of the detained person by a judge right after arrival at the prison on the reasons and requirements for pre-trial detention. In the run of the hearing with the suspect the judge himself investigates into the aspects relevant for the decision.
 - **Decision** to further detain the person or to release him/her:
 - Before deciding the judge may carry out investigations or order the police to do so, if it can be expected that the outcomes will have considerable impact on the judgement. With respect to **juveniles and young adults** the court may take advantage of the “**Gerichtshilfe**” (Court Aid) to learn about relevant aspects with respect to the person of the suspect and his/her social environment. For adults no such service is provided.
 - the decision must be communicated orally immediately
 - The following criterions have to be considered with the decisions and the judge has to substantiate why a criterion applies or why it does not:
 - ✓ Urgent suspicion
 - ✓ One or more grounds for detention substantiated by the outcomes of the investigations
 - ✓ PTD has to be proportionate to the seriousness of the offense, the consequences of the offence and the punishment one may face if convicted
 - ✓ Justification why milder measures are not.

- **Delivery of the written decision** to all parties involved within 24 hours after the decision. The decision on PTD has to contain:
 - the facts on which the suspicion is based on
 - the grounds for the detention and why less restrictive measures are not sufficient
- Without a request by the prosecution and without a decision within 48 hours, the suspect is to be released.

c) Time limits

Every order for detention is linked to a given and **exact time limit**. **If this time has elapsed, the suspect must be released or a detention hearing** (“Haftverhandlung”) has to be carried out prior to the due date (§ 176 CCP). § 175 CCP contains the time limits for PTD (in the narrow sense of the word): a first detention hearing has to take place after fourteen days since the first PTD order has been issued. Detention can then be prolonged by one month, followed by two more months after the second and after each further hearing (and prolongation).

There are however also fixed limits for PTD regulated in § 178 CCP. If the trial does not begin before PTD may not exceed the following time limits:

- ✓ 2 months, if detention is ordered only because of the risk of collusion/obscuring of evidence PTD
- ✓ 6 months with respect to “Vergehen” (offenses with a maximum penalty of three years)
- ✓ 1 year with respect to “Verbrechen” (crimes that carry a maximum penalty of more than three years), which may be punished with a maximum penalty of more than 3 years but not more than 5.
- ✓ 2 years with respect to “Verbrechen” with a maximum penalty of more than 5 years

Extensions beyond a period of six months have to be necessary because of particular complexities or extent of the investigations, and must be limited to situations where ongoing detention seems to be unavoidable, considering the weight of the ground for detention (§ 178 CCP). **Once the bill of indictment has been delivered to the court by the prosecutor, no further explicit time limits apply**, the suspect however can always

apply for release. Once the trial has started a person who had to be released before due to the expiry of the legally allowed period can only be detained again for six weeks (§178 (3) CCP). However, in principle, this could happen several times.

5.2. The prerequisites for PTD

Detention actually begins with the arrest and the grounds for arrest are largely the same than the grounds for detention. Different to PTD a **mere suspicion** is sufficient for an arrest to be ordered or carried out. For PTD to be ordered the **suspicion has to be “urgent”**. The principle of proportionality always has to be considered. Even if grounds for detention may be given detention is not allowed if the objective of PTD can be met otherwise. The Austrian Supreme Court⁸ has developed a three-step argumentation that considers the expected sentence to be the crucial element:

- First, the judge deciding about the detention must consider character and extent of the sentence that can realistically be expected.
- Secondly, the judge has to consider whether a fine or a conditional (or partly conditional) sentence can be expected, i.e., if the suspect or accused will actually be in prison or not.
- Finally, and in particular when it comes to assessing the grounds for extension of detention, the judge has to consider whether or not – and at what point of time – a conditional release would be relevant. “This argumentation is not without risk: The tangible anticipation of the custodial punishment comes close to a violation of the presumption of innocence, and – more concrete – the fact that the judge competent to order pre-trial detention assesses a potential prison sentence, already stipulates the (custodial) outcome of the trial” (Morgenstern, 2009, S 134)

Grounds for detention are (§173 CCP):

- The risk of absconding or hiding (“Fluchtgefahr”).
 - does not apply if a fully integrated person is suspected of a crime that carries a maximum penalty of five years, unless concrete preparations to flee have been made.
- Tampering with evidence (“Verdunklungsgefahr”);

⁸ OGH Erk 14 Os 30/94, decision of 8 March 1994

- The need to prevent new crimes (“Begehungsgefahr”)
 - if the suspect is charged with a crime carrying a penalty of more than six months and
 - there is a substantiated risk of reoffending
 - with respect to an offence with serious consequences or
 - with respect to an offence with more than slight consequences if the suspect was already convicted because of such an offence before or
 - if already convicted because of such an offence twice it is enough that the reoffending is punishable by at least six months
 - if he is charged with repetitive forms of the same offence or
- The need to prevent the continuation of the offence that the suspect is charged with (“Ausführungsgefahr”)

With crimes punishable with a minimum of ten years of imprisonment PTD has to be ordered unless there are substantiated reasons which exclude the ground for PTD (“conditional mandatory” ground for detention). In general, PTD is ordered in such cases.

5.3. Procedural rights, defence counselling and detention hearings

The rules to be followed in connection with the **obligatory questioning after arrest** are always the following: Firstly it has to be checked whether there is a need for translation. The suspect has to be informed about the offence he is charged with, that he has the right to remain silent and that whatever he says may be held against him in a future trial (§164). He has to be told that he can contact a close person and a defence counsel. The questioning has to include facts that refer to the suspicion itself and to the grounds for detention. **If the initial ground for the arrest cannot be validated, the suspect has to be released.** Already at this stage the suspect also has to be **released if the purpose of the arrest can be fulfilled by “milder measures”**.

The suspect has the **right for presence of counselling during first hearings** (§ 164 CCP). Active participation of the counsellor however is restricted at this stage and above all according to § 59 CCP the police may supervise conversations between lawyer and suspect and to restrict this to general legal information if this is deemed necessary to avoid interference with the investigation or with evidence. Supervision may even be

extended for up to two months during detention. Critiques consider this regulation in contradiction to Art 6 (1) ECHR (fair trial).⁹

With the amendment to the CCP of 2004 the suspect and his lawyer have been clearly entitled to see and study all documents in police and court files beginning with PTD. This right however also can be restricted until the end of the pre-trial periods in favour of securing effective investigations which could be obstructed otherwise. This is seen in line with the jurisdiction of the ECHR as long as it does not interfere with the rights of defence to assess the lawfulness of PTD (Morgenstern, 2009, p 133). The procedure for the decision on detention is regulated in §§ 174 pp. The decision to apply detention must contain facts indicating the suspicion and the grounds for detention and why less restrictive measures do not suffice in the case in question. **During the detention hearings, which are held to determine the continuation of PTD, the presence of a defence counsel is obligatory.**

Before the given limits of PTD expire detention hearings (“Haftverhandlungen”) have to be carried out and the judge has to decide on the prosecutor’s request to prolong detention. This means that each time the court has to check if the reasons for detention still exist and to decide whether the detention has to be prolonged or the suspect must be released. After the bill of indictment has been delivered to the court, no regular hearings take place anymore. The detained person however can always apply to be released (§ 175 (5) CCP). These hearings are not public.

Each decision of the court on PTD may be appealed (“Beschwerde”, §§ 87 pp. CCP) to the Court of Appeals (“Oberlandesgericht”) within three days of the decision. Additionally, (after all regular remedies have been used), since 1992, a so called **“Grundrechtsbeschwerde”** (appeal with respect to basic rights) can be addressed **to the Supreme Court** (“Oberster Gerichtshof”) against the decision of the Oberlandesgericht. This appeal has to argue that the decision of the Oberlandesgericht infringed the right to freedom. In practice appeals are used rarely. Attorney say they will only appeal if there is

⁹ E.g. Report on observations of the Austrian chamber of attorneys 2011/ 2012. https://www.rechtsanwaelte.at/fileadmin/user_upload/PDF/02_Kammer/Stellungnahmen/Wahrnehmungsbericht/Wahrnehmungsbericht_2011_2012_ohne_Unterschrift.pdf, p. 23 ff

no threat that the decision of the upper court may have negative impacts on the final verdict.¹⁰

Since 2010 the prosecutor or the suspect can apply that **PTD is executed as a house arrest with Electronic Monitoring (EM)** if the grounds for detention can be prevented this way and if the suspect is well integrated. Since EM is no alternative to PTD but just another way to execute PTD all conditions and procedures have to be fulfilled like for any other PTD. The only exemption is that detention hearings only take place if applied for. A suspect in EM can be allowed to leave the house for work and educational reasons. In practice EM is rarely used to substitute PTD. According to § 38 CPP all time spent in arrest or detention prior to the conviction with respect to the same offence has to be taken into account fully when calculating the prospective time of release.

5.4. Alternative measures to PTD according to the CCP

The principle of proportionality requires PTD only to be applied as a last resort. Therefore, **alternative measures to PTD have to be given priority** (§173/1 CCP). Consequently prosecutor and court have to establish reasons why alternatives are not implemented.

The **list of “milder measures” in the CCP (§173(5)) is exemplary**, which means that the judge is free to order any milder measure which seems adequate and does not infringe personal rights unproportionally:

- formal pledge not to leave the place of residence without permission and to regularly report to the next police station;
- the pledge not to impede the proceedings;
- in cases of domestic violence, the obligation not to contact the victim and/or to leave the house
- compliance with certain orders (e.g. not to drink alcohol);
- compliance with the order to indicate each change of domicile;
- the (preliminary) confiscation of certain documents;
- preliminary probation;

¹⁰ Hammerschick, W., Empirische Forschung zur Praxis der Anordnung von Untersuchungshaft als Reflexionsangebot, in: Journal für Strafrecht, issue 3, 2019, p. 221 ff

- bail (e.g. has to be ordered if the ground for detention is only the risk of absconding. In fact most often however foreign detainees would not be able to offer adequate bail)
- compliance with order to undergo medical or other treatment (consent).

It is the responsibility of the **public prosecution in charge to supervise** the compliance of suspects with the orders given.

6. Measures to avoid PTD – Alternatives in practice

This chapter focuses on alternatives to PTD in practice and particularly on the ones taking advantage of institutional support. The law provides for the judges to develop individual orders open to all kinds of specific needs. We therefore present above all measures that appear to be most important as well as examples of measures that are restricted to juveniles so far however having some potential to also be applied in general.

If orders in Austria require suspects to get in contact with certain institutions, to participate in counselling, in therapy or similar measures it is most often up to the client to organize those things him-/herself. Then it is also up to them to provide proof to the court that they did follow the order. Regularly this is done by providing confirmations issued by the respective institutions.

6.1. Preparatory inquiries for Probation Service § 15 PAA (Probation Assistance Act)

Preparatory inquiries for probation service may be used if the court wants 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. In practice this option is hardly used. There is no information available about underlying reasons. One reason could be that this legal option is hardly known among practitioners or it may be due to the fact that there is little time available for the decisions on PTD.

6.2. Judicial directives according to § 173 (5) CCP („gelindere Mittel“ – less severe measures)

Preliminary Probation according to § 179 CCP

Today preliminary probation can be considered a traditional alternative to pre-trial detention. It may be applied if the court assumes that the support and control by a probation officer will suffice to secure proceedings. Probation officers support suspects with respect to all relevant issues (e.g. housing, employment, social circumstances, etc.) also applying a ‘risk and resources management tool’. In practice this measure is regularly applied with juveniles, while the courts rarely apply this measure with adults. This may be due to a prevailing view which considers probation above all a pedagogic tool and therefore less likely to succeed with adults.

Orders with respect to residency

In order to secure proceedings, the court needs to know where and how to get a hold of suspects not detained. Orders with respect to residency may just mean to regularly report to the next police station. Additionally, orders to take up residency at a certain place may be directed at stabilizing the live of otherwise rather “unstable” or socially vulnerable suspects. This may on the one hand include homeless people, on the other hand this may also apply to suspects e.g. in cases of domestic violence (mainly men), who have been and will be ordered to stay away from certain places like the home up to then shared with the victim. Basically, social services (e.g. for homeless people) provide shelter for those in need (e.g. in Vienna the ‘Service of Viennese Assistance to the Homeless’). With respect to PTD this however often may not suffice, e.g. because most of these shelters are restricted to short periods of time often not long enough to secure the proceedings. Foreign suspects often lack a place of living in Austria. A place to stay however often does not suffice to avoid PTD. Very often the reasoning in PTD orders against foreigners stresses a lack of social integration, which may justify an assumption of both a risk of absconding as well as a risk of reoffending.

For suspects ordered to stay away from (former) home there is an accompanying counselling available at the so called “Men’s counselling Center” (‘Männerberatung’)

which as well may be ordered by the judge for the suspect to stabilize but also to avoid further offenses in this respect (includes psychotherapy and specific trainings for the prevention of violence).

Order, to abstain from alcohol or addictive substances

With respect to offences that are linked to alcohol or substance abuse (e.g. acquisitive crime, violent offences) the court may apply an order to abstain from alcohol or addictive substances. Social institutions relevant for this specific order may not only control the abstinence by offering blood and urine tests as well as written confirmations about their results. They regularly also assist with therapies and counselling.

Order for medical treatment, drug dependency treatment, psychotherapy, etc.

Drug dependency treatment is for instance offered by 'Grüner Kreis' which supports addicts in their rehabilitation in a broad sense. Part of their treatment (which can be inpatient and outpatient care) covers also the development of a work structure and leisure activities with their clients.¹¹ For health-related measures and therapeutic offers, e.g. the so called 'Forensic-therapeutic Centre' ('forensisch-therapeutisches Zentrum') in Vienna combines psychiatric (including pharmacological treatment) and psychotherapeutic support. After an assessment of the psycho-social situation of the client/patient, they may offer quick support in either way. Psychotherapeutic/psychiatric treatment is however not limited to social institutions and can be consumed in private practices as well.

Order, to take up stable employment/to work regularly

The aim of a judicial order to look for a job or to regularly work will often be directed at maintaining or introducing daily routines that may help the suspect to stay out of problems. It is regular practice that suspects or their counsellors provide confirmations of employers at detention hearings. On principle such orders may also be fulfilled by employment-programmes.

¹¹ <https://www.gruenerkreis.at/>

6.3. Measures for Juveniles –Promising alternative measures to PTD in general

Traditionally in Austria Juvenile Justice serves as a pioneering field for innovative approaches within the criminal law system.

In general decisions on PTD for juveniles and young adults also have to consider the personal development as well as future perspectives of the youth (§ 35 JGG). Along with an amendment to the Juvenile Justice Act, which came into force on 1st of January 2016 new measures have been introduced to avoid PTD with juveniles and young adults more often.

A supportive measure inquiring into the social surrounding of young people at risk and into the socio-economic situation to be considered in detention decision is the so-called **court assistance** for juveniles and young adults (“Jugendgerichtshilfe”), which focuses on their resources and needs. It regularly 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 valued by the courts in juvenile cases, particularly if PTD might be ordered. In the run of the DETOUR project questioned judges and prosecutors were asked whether this kind of assistance might also be valuable in adult cases. Despite qualities assumed with the court assistance the responses often were nevertheless hesitant. The argument most often brought forward referred to the little time available in PTD proceedings.¹² While this may be true for the first hearing it is hardly convincing with respect to the following hearings.

The so-called social net conference (“SONEKO”) is supposed to empower the juveniles or young adults and to take advantage of supportive people in the social surrounding (family but also social institutions). At the conferences plans are elaborated for the future that may help the youths to stay out of problems, with the other participants (the social net) taking over tasks and responsibilities in this respect. A report on the outcomes of the SONEKO is provided to the judge who then may decide to terminate PTD.

¹² Hammerschick, W., Reidinger V., Towards Pre-trial Detention as Ultima Ratio - 2nd Austrian National Report, Forschungsbericht des IRKS, Wien, 2017. Abrufbar unter www.irks.at/detour/Uploads/2nd%20Nat%20Report%20AT_Fin%20for%20Web.pdf

6.4. The organizations offering services employed in the run “less severe measures”

Most of the organizations providing support in matters that can also be employed as a way to avoid PTD are **non-profit-organizations**. Most often the finances or parts of the finances of these institutions are provided by the state, by federal stated or regional authorities. The biggest and in many respects most important institution is the non-profit society “NEUSTART” which provides diverse social work services for (young and older) suspects and offenders all over Austria. NEUSTART is mainly funded by the Austrian Ministry of Justice. Many of the other institutions offering support in the ways mentioned above are smaller often only active on a regional level.

A problem often observed with the treatment of dependencies or of (psychological) health problems is the coverage of the costs. The Cover by the general health insurance is restricted and so is access to the few organisations in this field funded by the Justice system.

7. Data on PTD

7.1. General information on Pre-trial detention

Austrian national data define pre-trial detainees as detainees who have not yet received their final sentence as well as those who have been sentenced and have appealed.¹³

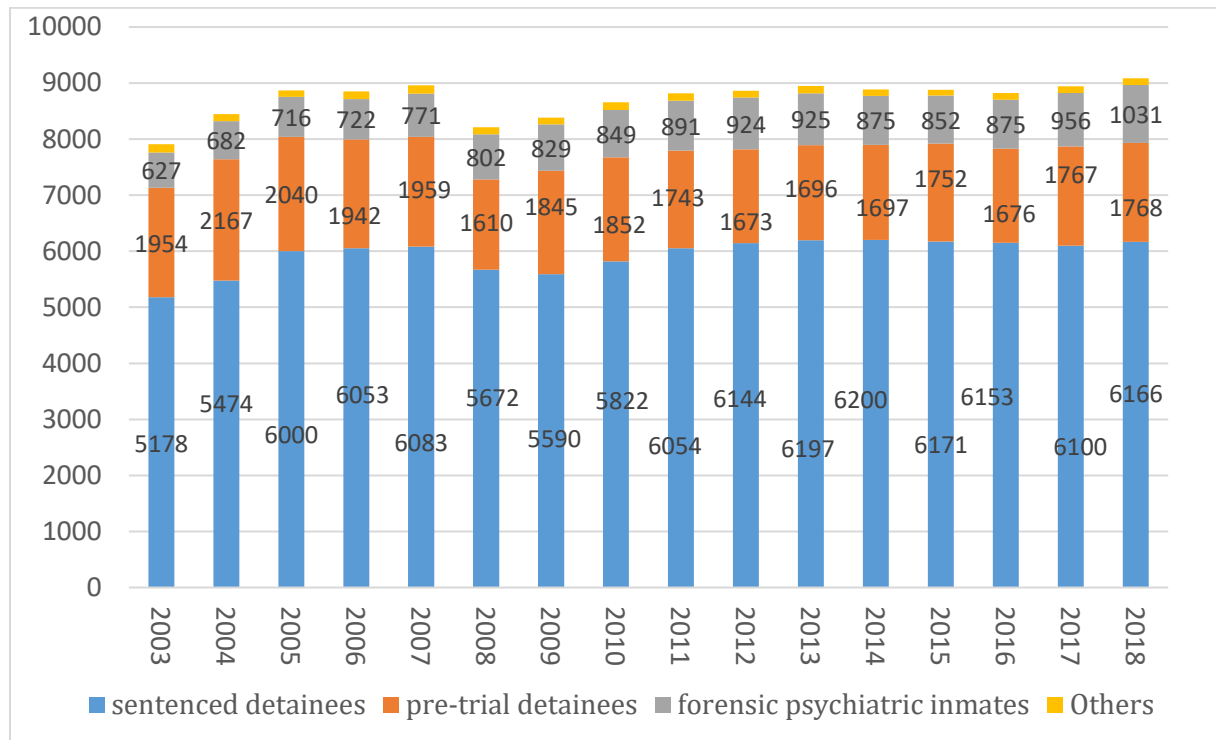
In chapter 4 we already referred to the problem of prison overcrowding in Austria, a rate of prisoners per 100.000 of the population of about 106 and an also rather high rate of 22,5 pre-trial detainees per 100.000.

In the 1990ies, the prison population was rather stable between about 6.500 and 6.900. Since 2001, the total number as well as the prisoners’ rate was on a constant rise until 2007 with a peak of 8.957 detainees then (see Figure 1). After a significant drop in 2008,

¹³ Including those who are within the statutory time limit for an appeal and also those who are under arrest awaiting the decision of the judge on PTD. Persons held in police detention and foreigners held for administrative reasons (‘Schubhaft’) are not included.

which appears to be likely linked to temporary effects of the major legal reform which came into force this year¹⁴, the numbers rose again.

Figure 1: Development of the annual average number of prisoners – different kinds of Imprisonment¹⁵



In recent years, the total prison population has been on a rather constant high level and crossed the limit of 9.000 in 2018. Graph 1 also gives an overview on the developments with respect to the numbers of the different kinds of prisoners. The proportions of different the kinds of imprisonment (in the justice system) stay rather stable in the run of the years. The ratio of pre-trial detainees has been quite constant with about a fifth of the overall prison population during the last decade. Between 2001 and 2004 the number of pre-trial detainees however had actually increased by 41%.¹⁶

Figure 2 shows that the PTD rates vary considerably in different regions. In particular an east (Vienna) – west (Innsbruck) divide has to be stressed, which has already been

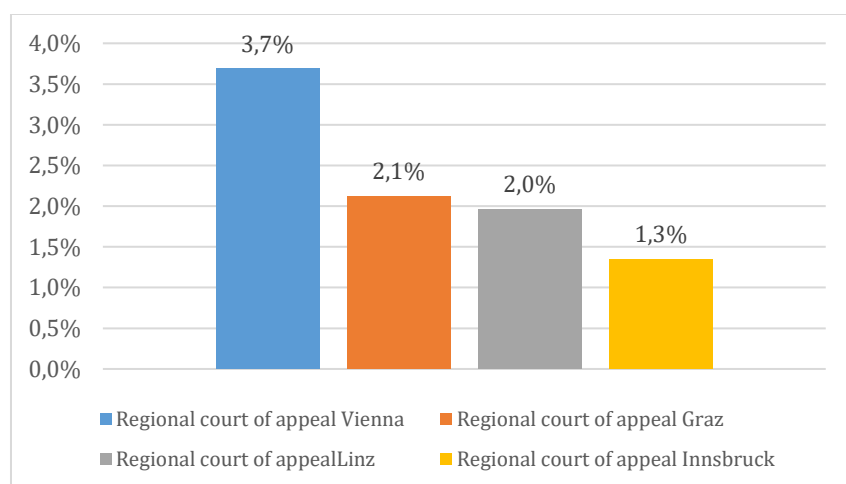
¹⁴ see Christine Morgenstern, ‘Austria’ in A.M. Kalmthout and M.M. Knapen and C. Morgenstern (eds), *Pre-trial detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Ground for Regular Review in the Member States of the EU* (Wolf Legal Publishers, 2009) 115-147

¹⁵ Based on the Security Report 2018 (Ministry of Justice, 2020)

¹⁶ Hammerschick, W. Reidinger, V., *Towards Pre-trial Detention as Ultima Ratio - 1st Austrian National Report*, Researchreport, Wien 2016. Access via www.irks.at/detour/1st%20Austrian%20National%20Report_141216.pdf

observed in the 1990ies (Hanak et. al, 1998). In the years 2016 to 2018 an offender in Vienna had a likelihood to be ordered PTD almost three times as high as an offender in Innsbruck. It however has to be considered that the population and the crime structure also show regional differences. In Vienna region, slightly more severe crimes¹⁷ are committed. The proportion of foreign suspects altogether does not show major differences. In the district of the court of appeal of Innsbruck a slightly higher portion of suspects from third countries is observed, while in the Eastern-Austrian region slightly more citizens from “new” EU member states are detained because of suspicions with respect to crimes. These differences however cannot explain the considerable differences with respect to the detention rate. The differences indicate a rather wide margin of discretion and a differing use of it. The regional patterns of PTD practice appear to be also coined by differing approaches of the regional courts of appeal.¹⁸

Figure 2: Regional distribution of PTD-rates - entries 2016 to 2018¹⁹



7.2. Structure of pre-trial prison population

Figure 3 shows the development of the entries into PTD differentiating between adults on one side and juveniles and young adults on the other side. Since 2009 the number of adults

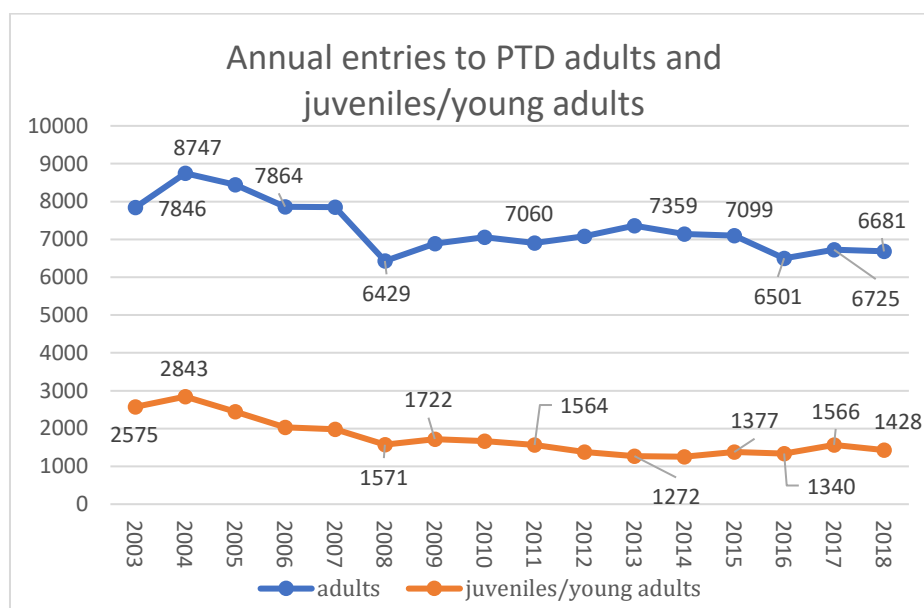
¹⁷ Severe crimes (‘Verbrechen’) in Austria are considered offences with a possible penalty of more than 3 years

¹⁸ See Hammerschick, W., Zur Praxis der Untersuchungshaft in Österreich – Ermessensspielräume und Kontrolle, in: Neue Zeitschrift für Kriminologie und Kriminalpolitik, issue 1, 2020, p,39ff

¹⁹ Based on calculations (number of entries/number of suspects in 2018) from data of the IVV database, provided by the General-Directorate of the penal system in Austria in 2020 and on the Crime Statistics 2016-2018 (Ministry of Interior, 2019). Calculations carried out in the run of the project PRE-TRIAD

entering PTD was rather stable on a level lower than in the early years of the new millennium. Considering the rather small group juveniles and young adults (14 to 21) represent they were still to be found in PTD quite often, particularly in the early years of the millennium.²⁰ It was only with the last amendment to the JGG (Juvenile Justice Act), which came into force in January 2016, that major parts of the specific regulations for juveniles are also applied with young adults (§ 19 JGG). The decreasing number of juveniles and young adults in PTD in the long run indicate increased efforts to keep young people out of detention. In fact, there are broader options for alternatives and accompanying measures for juveniles and young adults than for adults, but the options available for adults are also used less often. Despite of these efforts in recent years the numbers of young detainees remain on a rather high level.

Figure 3: Annual entries into PTD – adults vs. juveniles and young adults

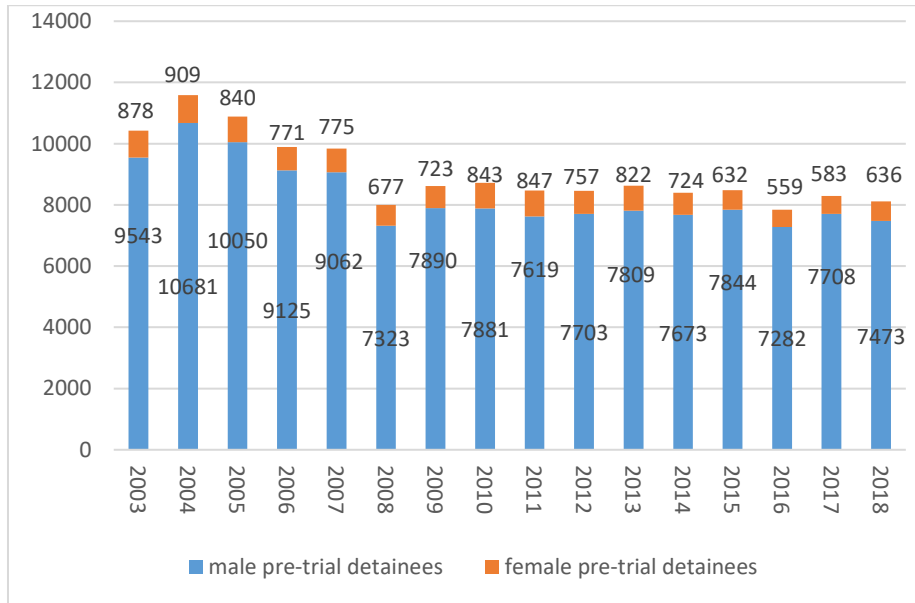


The development of the gender ratio shown in Figure 4²¹ illustrates that female suspects constantly represent a rather small share of all entries into pre-trial detention. While the rate of female suspects in PTD was rather high between 2010 and 2015 (Average of 10%) in recent years it dropped again to 7 to 8%.

²⁰ Data provided by the General-directorate of the penal system in Austria (2020)

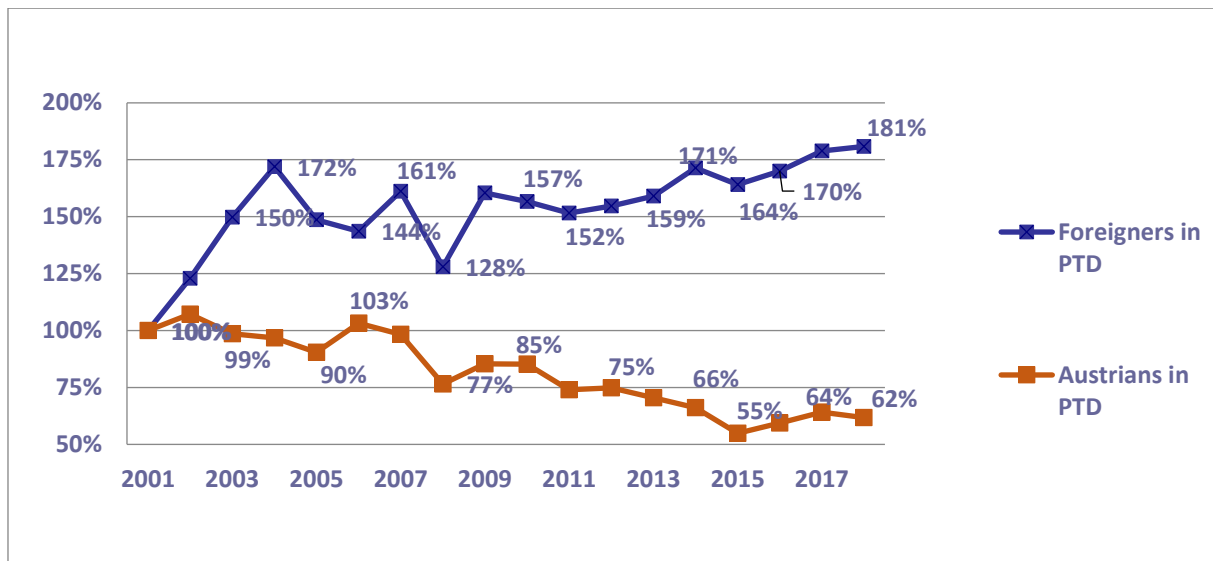
²¹ Data provided by the General-directorate of the penal system in Austria (2020)

Figure 4: Annual entries into PTD – female and male suspects



The increase of the prison population since the early 2000 was primarily due to increased numbers of foreigners in Austrian prisons. The number of detainees with Austrian citizenship on the other hand has been constantly decreasing. This is true for sentenced prisoners as well as for pre-trial detainees. Figure 5 shows that this is particularly true for pre-trial detainees. In 2018 the number auf Austrians in PTD represented only 62% of the number in 2001. The number of persons without Austrian citizenship in PTD on the contrary increased dramatically by 81%.

Figure 5: Prisoners in PTD - Austrians and foreigners - annual date of data collection 1.9., startout point 2001 = 100 till 2018

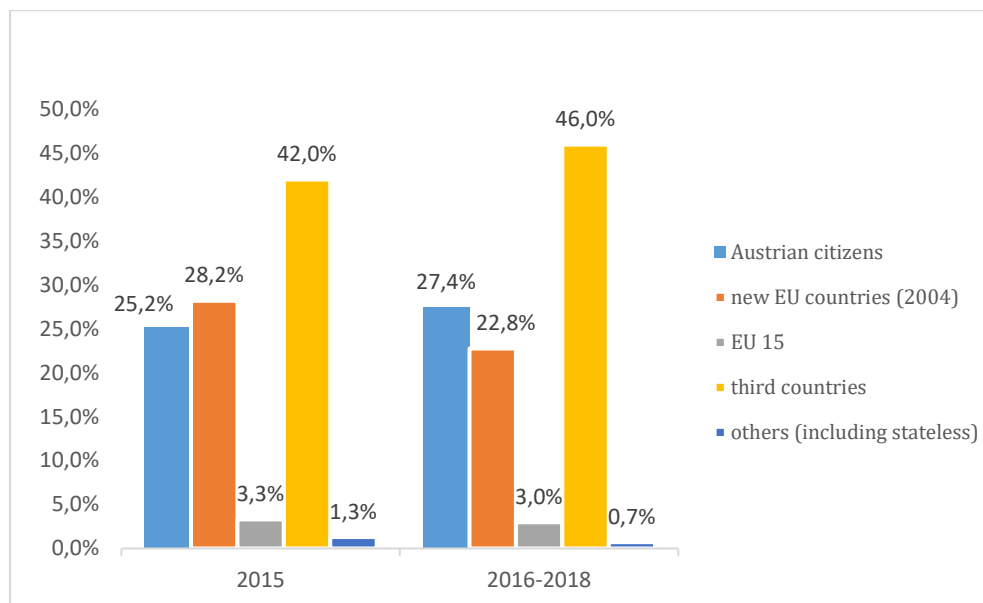


It does not seem likely that Austrian nationals “improved” that much with respect to offending behaviours. In the context of the project “DETOUR – Towards Pre-Trial Detention as ultima ratio” practitioners confirmed that the practice has become more lenient with Austrians but rather harsh with foreign nationals. It however has to be considered that the number of foreign national suspects has also increased considerably. Austrian judges and prosecutors explain that the risk of absconding as well as the risk of reoffending is higher with foreign nationals than with Austrians.²² A research in Vienna indicates a polarised practice of legal sanctions: while 10% of Austrian nationals without a criminal record received a partial or unconditional prison sentence in 2015, the share of foreigners without a criminal record who received the same sanctions has been stated with 46%, which is even slightly higher than for Austrian citizens with a criminal record (40%).²³

²² Hammerschick, W., Empirische Forschung zur Praxis der Anordnung von Untersuchungshaft als Reflexionsangebot, in: Journal für Strafrecht, issue 3, 2019, p. 221 ff

²³ A. Pilgram and W. Fuchs and C. Schwarzl, ‘Vorarbeiten für eine fortlaufende Beobachtung der Delinquenz ausländischer Staatsangehöriger in Wien und Pilotbeobachtung für das Jahr 2015’ (‘Preliminary work for a continuous observation regarding the delinquency of foreign nationals in Vienna and pilot observation for 2015’, Research Report, Institute for the Sociology of Law and Criminology, July 2016), http://www.irks.at/assets/irks/Publikationen/Forschungsbericht/Ausl%C3%A4nderkriminalit%C3%A4t%202015_Abschlussbericht.pdf, last accessed June 29th October 2020

Figure 6: Nationality of pre-trial detainees 2015 and between 2016 and 2018 (percentages of entries)²⁴



The blue columns in figure 6 show that only about quarter of all entries into PTD in 2015 and in the years 2016 to 2018 were Austrian citizens. In 2015 close to one third of all entries were European citizens (orange and grey), however only 3% of the EU 15, most of them Germans (186 in total). Within the group of the new EU Member States (EU 16-28), Romanians are the nationality most often taken into custody in Austria (645), followed by Hungarians (314) and Slovakian citizens (309). During the more recent years 2016 to 2018 the proportion of European citizens in PTD decreased to about one fourth. Citizens of third countries represented 42 % of all entries into PTD in Austria in 2015 and their share continued to increase. Most entries of this group were Serbian citizens (736), followed by Afghan nationals ((583) and Nigerian (445).²⁵ It has to be assumed that the refugee movements of the recent years have added to the high rate of suspects from third countries.

7.3. Data on alternative measures to PTD and misuse of alternatives

Unfortunately, no data is available on the use of alternative measures and neither on the misuse of alternatives. There are neither official data collected by the authorities, nor data

²⁴ Based on data provided by the General-Directorate of the penal system in Austria (2020). The group 'others' includes stateless persons

²⁵ Security Report 2018 (Ministry of Justice, 2019) p. 126-127 and Data provided by the General-directorate of the penal system in Austria (2020)

by the institutions supporting alternative measures, nor data collected in the run of research projects.

It however is a known fact that alternatives to PTD (“gelindere Mittel” or literally translated “more lenient measures”) are rarely used with adults. In the run of the already cited project DETOUR practitioners estimated alternative measures to be used in 10 to 15% of all PTD cases at a maximum.²⁶ There is also no data available for juveniles and young adults, but it is widely known that alternatives are much important in PTD practice concerning this group.

Unfortunately, no data is collected and available on the misuse of alternatives.

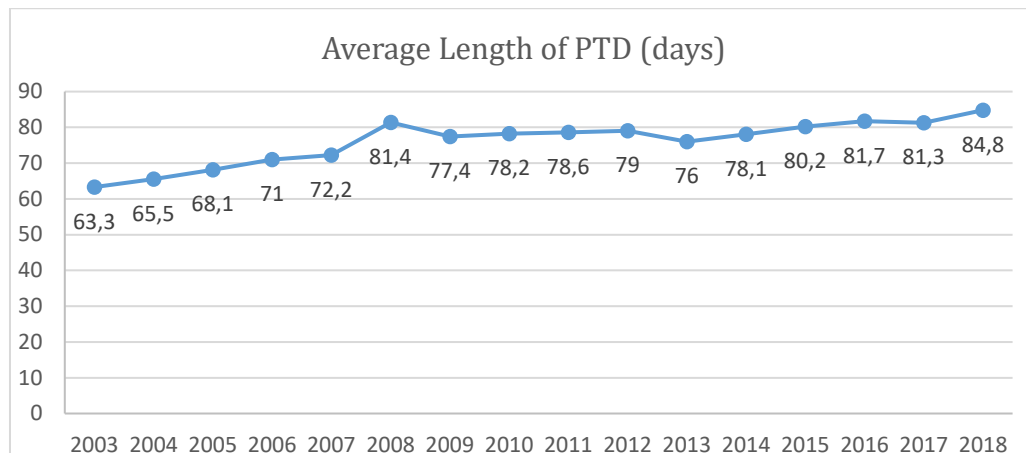
7.4. Other detailed data on PTD

Figure 7 shows that since 2003 the average length of PTD increased quite constantly. With an average of almost 85 day at the end of PTD the average length of PTD in 2018 was more than 20 days longer than in 2003. On 1st of September 2014 there were 1.902 people in PTD in Austria. Among them 258 pre-trial detainees or about 14% have been detained for more than 6 months.²⁷ The fact that the number of entries into PTD has increased in recent years while the average population in PTD remains rather stable also points at an increasing duration of PTD.

²⁶ Hammerschick, W., Zur Praxis der Untersuchungshaft in Österreich – Ermessensspielräume und Kontrolle, in: Neue Zeitschrift für Kriminologie und Kriminalpolitik, issue 1, 2020, p. 44

²⁷ Based on data of the Ministry of Justice, *Query response* (2252/AB XXV. GP, 03.11.2014, 2364/J) p.6.

Figure 7: Average Length of PTD (days)²⁸



Average daily duration detainees spend in their cells²⁹

Many pre-trial detainees spend 23 hours a day on their cells, only being allowed to go for a walk for one hour. There are however considerable differences between the individual prisons. The range varies between 9 and 23 hours, the first being reported for juveniles. It also depends on the pre-trial detainees' employment status or the employment and leisure opportunities the institution is able to offer.

Main offences to be observed with pre-trial detainees

Most often suspects are held in PTD connected to property offences (e.g. theft), followed by drug offences, both of these offences are most often observed with foreigners.³⁰ For Austrian citizens sexual offences and offences against health and life are predominant.

House arrest with electronic monitoring

²⁸ Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016 and 2020)

²⁹ Based on data of the Ministry of Justice, *Query response* (2252/AB XXV. GP, 03.11.2014, 2364/J) p. 9 ff.

³⁰ Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)

Electronic monitored curfew does not play a significant role as a specific form of pre-trial detention in Austria as this measure is restricted to only a few individual cases each year. Since the start of EM in 2010 only 51 cases were counted till the end of 2018.³¹

Suicide rate

In comparison to sentenced prisoners the suicide rate among pre-trial detainees per 100.000 is much higher – 254,5 for pre-trial detainees versus 82,8 for sentenced prisoners in 2018.³² Striking is the comparison with the overall male population with a rate of 22,7. This has to be viewed indicative for the difficult situation of pre-trial detainees who very often are restricted to the cell for most of the day and who suffer from many uncertainties connected to PTD. The suicide rates among prisoners have been rising since 2015. Considering the increased prison population and the prison conditions aggravated thereby a connection may be assumed.

Compensation

People who have been in custody may be entitled to compensation if they can prove that their detention was contra legem or that it was not justified (Strafrechtliches Entschädigungsgesetz – StEG 2005 – Compensation law for criminal cases). In 2018 altogether 151 people claimed for compensation with the Ministry of Justice. The claims of 124 people have been acknowledged fully or at least partially.³³ Considering the numbers of PTD these numbers appear very low. In comparisons between Germany and Austria Killinger (2015) calls the Austrian legal model of compensation exemplary. The remaining question is whether the number of compensations is a valid indicator for the number of wrongfully detentions a year.

³¹ Security report of the Ministry of Justice 2018, published in 2020, p. 115

³² Security report of the Ministry of Justice 2018, published in 2020, p. 181 ff

³³ Security report of the Ministry of Justice 2018, published in 2020, p. 53 ff

8. Observations on the negative impact of PTD

8.1. Negative impact on the national level

According to the SPACE I Statistics of the council of Europe the cost per day and prisoner are € 129,70. In 2018 altogether 646.071 days have been spent in PTD in Austrian prisons.³⁴ This sums up to € 83.795.408 a quite huge sum, representing about one sixth of the whole budget of the prison system. Experts like a recent Minister of Justice actually stress that the recent available budgets for the justice system in general and for the prison system in particular do not suffice.³⁵ This of course is also due to the high numbers of prisoners. PTD causes a big portion of the high numbers of prisoner and is therefore part of the reasons responsible for prison overcrowding and for its negative consequences, not least negative effects on the prison conditions. Considering that rather poor prison conditions have a high potential to reduce the chances of released prisoners to find access to a live without offending, we have to assume that there are high hidden costs for the whole nation, its people and particularly for people affected by crimes committed by repeat offenders.

8.2. Negative impact on the prison system

The data presented in chapter 6 proves a problem of prison overcrowding in Austria, with PTD causing a big portion of the high number of prisoners. Prison overcrowding brings about substantial problems for the prison administration endangering the required standards for the quality of imprisonment. Aggravated are these problems by budgetary shortages and insufficient personal resources not least also with the caring professions in prisons like social workers and psychologists. PTD is also particularly difficult for the prison systems because regularly PTD needs a lot of staff e.g. to accompany detainees to hearings, etc.

³⁴ Aebi M.F. and Delgrande N., SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2019 (Strasbourg, Council of Europe, 2019), p.126 https://wp.unil.ch/space/files/2020/04/200405_FinalReport_SPACE_I_2019.pdf, accessed on Juni 16th, 2020

³⁵ <https://kurier.at/politik/inland/jabloner-bericht-sucht-wege-aus-der-justiz-krise/400676240> accessed june 19th, 2020

8.3. Negative impact on the individual/suspect level

In the annual reports of the ombudsman board, conditions of detention during Pre-Trial Detention regularly have been subject to complaints. Above all conditions arising with an overcrowding of prisons have been criticized: „Cells occupied by too many people and a small size of cells have to be considered especially disturbing considering the fact that the majority of inmates is not working and hence is restricted to the cells 23 hours a day”.³⁶ In 2019 the hygienic and the structural conditions of the buildings and the infra-structure of some prisons have been heavily criticized.³⁷ The report of the European Committee for the Prevention of Torture (CBT) 2014 also describes rather problematic observations with PTD in some prisons: hardly any activities provided for pre-trial detainees, duration often very long and much to little times to leave the cells. ³⁸ Similar are the outcomes of a recent national report on Austria of the Fundamental rights Agency. ³⁹

The potential problems related to PTD are often stressed by social workers working in the field, e.g. social consequences, financial burden, impact on social ties, etc. Research and scientific literature however have not been published in Austria. German research e.g. proves the negative psychological effects of PTD.⁴⁰ The negative psychological consequences are dramatically expressed in the high numbers of suicides, reported in a previous section.

The specific legal restrictions often foreseen for pretrial detainees also provide impressions what PTD may mean for the individual, eg. restrictions to work, restrictions with respect to visits and contacts to the outside world and as a consequence very little time to escape the prison cell and monotony.

³⁶ Annual Report of the Volksanwaltschaft, 2015, Wien, p. 113

³⁷ Press information along the presentation of the annual report 2019, p.4, online https://volksanwaltschaft.gv.at/downloads/ebpek/PK_Pressetext_PB%202019.pdf

³⁸<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680653ec4>

³⁹ Fundamental rights Agency, Country Report Austria Criminal Detention in the EU – Conditions and Monitoring, 2018, online https://fra.europa.eu/sites/default/files/fra_uploads/austria-criminal-detention-country-study_en.pdf.pdf

⁴⁰ Köhler et al., Zur psychischen Bealstung von jugendlichen und heranwachsenden Häftlingen, Recht & Psychiatrie, 2006, issue 3, p.138-142

A dreadful picture of PTD was drawn by a former pre-trial detainee in 2013.⁴¹ In his published diary he described PTD being harder to cope with than with a prison sentence. He reported about regular confrontations with sex and rape, about practical withdrawal of fundamental rights, the destruction of his economical existence, restricted access to medical treatment and deprivation of hygiene as well as about burdens for relationships.

9. Other aspects on PTD and alternative measures in the literature

Based on an extensive study already in 1999 Venier⁴² has shown that the assumed connection between social integration and the risk of absconding may lead to discrimination with regard to poorer persons and to foreigners. The Austrian Upper court has decided in 2008⁴³ that regular residency in a European member state excludes the assumption of the risk of absconding. With the numbers of EU citizens in PTD in Austrian prisons some doubt arises whether this is put into practice consequently as do some outcomes of the DETOUR project. Particularly with suspects not fully integrated e.g. also the threat of a long prison sentence often is used as a ground for detention despite the prevailing Austrian doctrine holds that an expected prison sentence is no sufficient ground for PTD.⁴⁴

With respect to PTD the already mentioned amendment of the CCP 2008 actually stimulated some criticism of scholars.⁴⁵ The regulation that it may last up to four days till a judge decides on PTD was assumed to be in contradiction to Art. 5 of the ECHR, which requires an immediate hearing and decision by a judge.⁴⁶ Venier (2006) observed “alarming” signals with respect to the new definition of the ground of detention addressing the risk a suspect may commit further crimes of a similar and severe kind.⁴⁷

⁴¹Werther, E., *Tagebuch eines Untersuchungshäftlings: 300 Tage in der Hölle - unschuldig - als Opfer einer starken Justiz*, Green Book, 2013

⁴² A. Venier, *Das Recht der Untersuchungshaft – Tatverdacht, Haftgründe, Verhältnismäßigkeit* (The law of pre-trial detention – suspicion, grounds on detention, proportionality, Springer Verlag Wien, 1999) 58

⁴³ 11 Os31/08f; Feb 27th, 2008

⁴⁴ A. Venier, *Das Recht der Untersuchungshaft – Tatverdacht, Haftgründe, Verhältnismäßigkeit* (The law of pre-trial detention – suspicion, grounds on detention, proportionality, Springer Verlag Wien, 1999) 60-63

⁴⁵ This has to be seen as one of the reasons why it took four years that the amendment was actually put into force

⁴⁶ C. Bertel, *Das Strafprozessreformgesetz, das einmal fair sein wollte* (The reform of the code of criminal procedure, that wanted to be fair for once, 2004) (3) ÖIM-Newsletter 155

⁴⁷ A. Venier, *„Strafprozessreform und Haftrecht“* in Moos R. and Jesionek U. and Müller O.F. (eds), *Strafprozessrecht im Wandel: Festschrift für Roland Miklau zum 65. Geburtstag* (Studienverlag 2006)

Up to then the formulation of the CCP referred to severe offenses, while the new one refers to offenses punishable with more than 6 months and thereby extending the possible use of detention based on this ground. Thereby also the principle of proportionality was said to be threatened. Szabo (2008) expressed little trust in the work of the police and the prosecutor by expecting further declines with respect to PTD, because the judge now has to decide about the grounds for detention based on the investigations of police and prosecutor.⁴⁸ Before the so-called investigating judge himself could take over a more active role with respect to the investigations. Eichseneder (2003) criticized that there is too much discretionary power of the authorities.⁴⁹

An extensive research project was carried out in the years 2009 and 2010 on the effects of the amendment to the CCP 2008.⁵⁰ Although PTD was no focus it was also addressed. Interesting is the observation that 89% of the (representative) number of cases in PTD have been detained for grounds of the risk of reoffending, 70% were detained because of the risk of absconding. The new definition of the different roles brought about that the public prosecutor formally became the leader of the investigations. In practice the police carries out the investigations with little involvement or guidance of the prosecutor. Arrests were reported to be carried out by the police autonomously in 75% of the investigated cases on the grounds of immediate danger. In the specific literature it has been criticized that certain orders (like the order for arrest) may be prepared and reasoned by the prosecutor in his/her application which the judge only approves with a signature and a rubberstamp causing suspicions that judges too easily follow applications of the prosecution.⁵¹ The research only partially proved this allegation: 75% of all arrests and house searches ordered by judges did not use this short solution but elaborated individual reasonings for the cases. The new law brought about that the legal safeguards were somewhat clarified and extended. In practice however the research showed that the

⁴⁸ L. Szabo, ‚Das Vorverfahren im Spannungsfeld zwischen Allgemeininteressen und Grundrechten‘ in Soyer R. (eds), *Strafverteidigung – Neue Schwerpunkte* (6. Österr. StrafverteidigerInnentag, Linz-Wien-Graz 2008) 94

⁴⁹ H. Eichseneder, ‚Verteidigungspraxis im Vorverfahren und Reformvorhaben‘ in R. Soyer (ed.) *Strafverteidigung – Realität und Vision* (1. Österreichischer StrafverteidigerInnentag Wien, 21./22. März 2003, Wien/Graz 2003) 26

⁵⁰ A. Birklbauer et. alii, ‚Projekt zur wissenschaftlichen Evaluation der Umsetzung des Strafprozessreformgesetzes‘ (unpublished Research Report, 2010)

⁵¹ See A. Venier, ‚Probleme der Strafprozessreform‘ (2008) (3) *Juridikum*, p. 139

means to fight decisions of the courts before the trial stage were hardly used. Attorneys responded that it often would be better to talk to the prosecutor than to formally take advantage of legal safeguards.

Critique has been expressed with respect to the possible supervision of contacts between counsellor and suspect if there is a risk that the investigations will be obstructed (§ 164 CCP). In *Lanz vs. Austria* the ECHR stated that there have to be very weighty reasons to justify this kind of restriction of Art. 6 (1) ECHR. Bertel and Venier (2006) stressed that this regulation has to be interpreted very restrictively.⁵²

Ortner (2017) pointed at a disputed practice apparently broadly applied. In cases with the investigations largely completed an application for pre-trial detention is brought in with the judge for the trial together with the indictment. With this approach the trial judge has to provide a decision on PTD also discussing and deciding on the suspicion at this stage. This bears the risk that this decision may influence the later verdict.⁵³ In the run of the DETOUR project practitioners of the prosecution argued in favour of this practice to perfectly realize the imperative of a speedy process in detention cases. Some judges on the other hand pointed at cases not fully investigated at the time of the indictment, causing delays and problems later on.

Schumann (2012) highlighted the importance of legal advice during the pre-trial proceedings as an essential element of the fair trial principle, not least pointing at a ‘widely acknowledged’ observation that the pre-trial proceedings including pre-trial detention often predetermine the outcome of the verdict. He explains the decisive influence of the way and how suspects are informed about their rights, the relevance of the cost and of the provisions with respect to legal aid.

⁵² C. Bertel and A. Venier, *Einführung in die neue Strafprozessordnung* (2nd edition, Vienna-New York, Springer 2006)

⁵³ Before the indictment the decision on PTD is the responsibility of the detention and legal protection judge, who as a rule may not preside the trial.

9.1. An overview on outcomes of the DETOUR-project with respect to Austria⁵⁴

- The legal framework allows for an early involvement of defence attorneys during proceedings in cases involving arrest warrants. After an amendment to the Criminal Code which came into force 2017 more suspects now take advantage of a first legal aid via phone. It however still is a small group who ask for presence of counselling at the first interrogations. Despite information leaflets provided in many different languages also addressing the costs suspects still seem to be afraid risking high costs. The implementation of the EU-Directive on Legal Aid due in May 2019 is supposed to further improve the access to a lawyer.
- The system of legal aid in Austria requires also counsellors usually not practicing in criminal law to take over such legal aid cases. While the questioned experts stressed that these counsellors regularly also do a good job they nevertheless argued for qualities of a representation by specialists.
- The first decisions on PTD are often coined by the need to decide on rather little information particularly with respect to the person of the suspect and to social background information. More information in this respect has a potential to support and widen the scope for decision-making, possibly also allowing alternatives to detention more often. A service similar to the court aid for juveniles in adult cases could be helpful. Preliminary probation could possibly also serve this purpose as well as statements of the probation services.
- Decisions on PTD sometimes appear to be influenced by factors which are not supposed to play a role like punitive aspects, general preventive considerations, efficiency aspects (procedural economic), etc.
- Austrian PTD practice is much coined by preventive aspects. This is not least due to the rather detailed regulations with respect to the risk of reoffending as a ground for detention. These regulations and their practical application mirror societal concerns with respect to security. The domination of this ground for detention however seems

⁵⁴ Based on W., and Reidinger V., Austria, in: W. Hammerschick et al. Towards Pre-trial Detention as Ultima Ratio – Country Briefs, Brussels, Bukarest, Dublin, Greifswald, Utrecht, Vienna, Vilnius, 2017, online <https://www.irks.at/detour/Uploads/Detour%20Country%20Briefs%20fin.pdf> and W., Hammerschick, et al., Towards Pre-trial Detention as Ultima Ratio - Recommendations, Brussels, Bukarest, Dublin, Greifswald, Utrecht, Vienna, Vilnius, 2017, online www.irks.at/detour/Uploads/Recommendations%20fin%20for%20pub.pdf

also grounded in the frequently provided explanation that it is a strong ground rather easily substantiated in many cases. This is not least due to the unfavourable (social) background of many offenders.

- PTD practice in Austria appears rather harmonic. Judges mostly apply detention as requested by the prosecution and attorneys rarely challenge the decisions, most often for strategic reasons. A general increase of “conflict orientation” appears recommendable not least also for the development of the legal system.
- The detention hearings are generally considered important procedural events. Nevertheless, often critique has been expressed pointing at a restriction of many hearings to formal qualities. The time pressure for the first decisions on detention often only allows for little information with respect to the assessment of possible alternative measures. At least at the detention hearings substantial information in this respect should be available, particularly if some assistance is employed. This would upgrade the detention hearings and strengthen the ultima ratio principle particularly if the hearings would focus stronger on a possible release with decisions denying release being obliged to substantiate why alternative measures are not applied.
- Judges and prosecutors often referred to the restricted potential of alternative measures to substitute PTD and to sufficiently exclude risks. Further research particularly focusing on the reasons why these authorities are reluctant to make use of alternative measures would provide additional insights valuable for the assessment of the diverse alternatives and with respect to possible needs for development.
- Most foreigners have a poor social background in common. This aspect appears to be of central importance for the high portion of foreigners in pre-trial detention in Austria. Although pre-trial detention may be legitimized in most of these cases there is a discriminatory quality to many cases with foreign suspects.

10. European Aspects and their meaning for national PTD-practice

For Austria European cooperation is an urgent matter not least also because of the high number of foreigners in Austrian prisons, with about a third of all prisoners coming from other EU member states. Cooperation among European member states in criminal

matters requires clear regulations, clear and functional organizational paths and not least mutual trust. Without doubt the huge differences with respect to the standards of detention in the member states are for instance a problem of practical relevance when it comes to extraditions and the execution of sentences in home countries of offenders. The ECHR-decision in the case Aranyosi⁵⁵ has had also effects on decisions of Austrian courts with respect to the execution of European Arrest Warrants (EAW). For the year 2018 the Ministry of Justice reported 109 suspects to have been transferred to other EU-countries based on a European Arrest Warrant (EAW). The number of persons that have been transferred to Austria based on an EAW in 2019 was reported with 319. According to the Austrian Ministry of Justice the EAW considerably simplified and accelerated the transfer of suspects.⁵⁶

Difficulties with respect to the execution of national decisions become for instance visible with requests for the execution of prison sentences in the home countries of offenders. The Framework Decision with respect to such matters (2008/909/JI) was implemented in Austria in 2012. 240 such requests were reported for the year 2018, 224 to other member states. However only 142 requests succeeded (136 in member states). A central reason for this is the fact that procedures in the countries asked regularly consume too much time.⁵⁷

Austria has implemented the ESO in 2013. Up to now however no cases have been reported with Austria asking another member state to take over the supervision of an alternative to PTD and the same is true for the other way round. The research carried out for the DETOUR-project revealed that in 2017 most practitioners did not know about the ESO. The prevalent reactions of the practitioners were sceptical, quickly referring to administrative and bureaucratic burdens and additional hassle if suspects would not appear for trial. Another argument regularly brought forward was the time aspect. The organisational and administrative requirements would restrict the ESO to only a few cases with expectantly rather long times of PTD. Furthermore, different standards within the European Union with respect to the judicial systems as well as with respect to

⁵⁵ ECHR C-404/15, April 5th, 2016: The ECHR decided that conditions of detention violating human rights can be a reason to deny the execution of an European Arrest Warrant.

⁵⁶ Security Report 2018 (2020) p. 263 ff

⁵⁷ Security Report 2018 (2020) p. 266 ff

supporting measures and their availability were among the expressed concerns. Many judges and prosecutors largely questioned the practicability of supervision measures ordered to be carried out in other countries.

11. Conclusions and Outlook

The DETOUR project revealed relevant aspects and problems with respect to the PTD practice in Austria. Still there remains quite some need for research and information. Above all there is a need to learn more about the reasons why alternatives are rarely employed with adult suspects. Of course, the very high proportion of foreign nationals makes it more difficult, but many of them do have a regular place of living in Austria and still with them and with Austrian nationals alternative measures are hardly used either. There is room for developments with respect to alternative measures and we don't have to invent the wheel over and over again. The view to other countries, at alternative measures and at strategies employed to avoid PTD more often has a potential to learn about ways that provide chances to be taken advantage of in Austria and in other member states as well.

If Austrian judges and prosecutors don't apply alternative measures nationally it is not surprising, they are not applying them with the ESO in other member states. There still is a need for awareness raising about the gravity of the intrusiveness of PTD in the lives of men and about the need to strengthen the ultima ratio principle. With respect to the ESO it becomes visible again that there continues to be an urgent need for opportunities for practitioners to meet colleagues from other countries, to exchange, to learn about and with each other and, not least, to aim for the realisation of common standards. In the run of the DETOUR project it proved difficult to convince practitioners about the participation in such events. Concluding from that experience it will be important to come up with good strategies to gain their interest and to succeed in the acquisition of participants.

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List of figures

Figure 1: Development of the annual average number of prisoners – different kinds of Imprisonment

Figure 2: Regional distribution of PTD-rates - entries 2016 to 2018

Figure 3: Annual entries into PTD – adults vs. juveniles and young adults

Figure 4: Annual entries into PTD – female and male suspects

Figure 5: Prisoners in PTD - Austrians and foreigners - annual date of data collection 1.9., startout point 2001 = 100 till 2018

Figure 6: Nationality of pre-trial detainees 2015 and between 2016 and 2018 (percentages of entries)

Figure 7: Average Length of PTD (days)



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PRETRIAD

Alternative pre-trial detention measures

Austrian National Report

PARTNERS



Annexe 4 – Bulgarian national report



PRE-TRIAD

Alternative pre-trial detention measures

Bulgarian National Report

Basis for the D2.1 Literature review

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2. Contents

Change control.....	3
1.1. Document Properties	3
1.2. Revision History	3
2. Contents.....	4
3. Executive summary.....	6
4. Introduction.....	7
4.1. Legal system and general context for PTD in Bulgaria.....	7
4.2. Definition of PTD.....	8
4.3. Important historical developments with respect to PTD.....	8
4.4. Problems and aspects to be addressed in the context of PTD in Bulgaria.....	8
5. Legal basis and fundamental legal aspects with respect to PTD.....	9
5.1. General principles and competent authorities and their roles	9
5.2. Legal prerequisites for pre-trial detention	9
5.3. The suspicion.....	10
5.4. The grounds for detention.....	12
5.5. Proportionality	13
5.6. Duration and prolongation of pre-trial detention.....	13
5.7. The procedures.....	14
5.8. Recent legal developments	15
5.9. Electronic monitored house arrest instead of detention in prison	16
5.10. Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law	17
5.11. Procedural measures to support the decision making.....	18
6. Measures to avoid PTD/Alternatives in practice	19
6.1. Conditional suspension of PTD.....	19
6.2. Social work strategies: providing information (for the decisions) and/or support.....	19
6.3. Conditions and supervision measures.....	19
6.4. Financial surety (bail)	19
6.5. Therapeutic measures.....	20
6.6. Other alternatives and measures.....	20
6.7. Reactions on the COVID-Pandemic.....	23
7. PTD and alternatives in figures and presentations	23
7.1. Statistical data on PTD	23

7.2. Basic data on alternatives available.....	31
8. Negative impact of PTD in Bulgaria: literature review and statistical data.....	32
8.1. National level.....	32
8.2. Organisational level	33
8.3. Individual level	33
9. Other aspects of PTD and alternatives in the national scientific literature	35
10. European aspects and their meaning for national PTD practice in the national scientific literature.....	37
10.1. Cooperation in criminal justice matters in general.....	37
10.2. The European Supervision Order (FD 829) in national practice	38
10.3. Human rights and rulings of the European Court of Human Rights	39
11. Short conclusions and outlook.....	42
12. Literature used.....	43
List of figures	46

3. Executive summary

This report presents an integrated outline of the application of PTD in the Bulgarian context, while aiming at offering the necessary information for carrying out the comparative analysis under D2.1. Literature review.

4. Introduction

4.1. Legal system and general context for PTD in Bulgaria

The Bulgarian criminal process has two stages – pre-trial and trial. The pre-trial proceedings aim to collect, through investigation, evidence to establish if a certain person has committed a certain crime. The investigation is carried out by investigating police officers or, in a limited number of cases, by judicial investigators, under the guidance of a prosecutor. The pre-trial proceedings conclude with a decision of the prosecutor whether the collected evidence prove beyond any doubt that the accused person has committed the crime and whether the case has to go to court for trial. The trial begins with the prosecutor filing charges in court against the accused person, continues with the examination of the collected evidence, and ends with a court judgement, which either convicts and imposes a penalty on the defendant, or declares the defendant not guilty.

The main legal act governing the criminal process in Bulgaria is the Criminal Procedure Code. Other relevant legal acts are the Criminal Code, the Ministry of the Interior Act, the Extradition and European Arrest Warrant Act, the Special Intelligence Means Act, and the Execution of Sentences and Detention in Custody Act.

The main courts of first instance in criminal cases are the regional courts (*районен съд*). They examine all criminal cases except those which are assigned to other courts by law. Decisions of regional courts are subject to appeal before the respective district court. District courts are also examining certain criminal cases acting as first instance courts. A City Court is established in Sofia and has the powers of a district court. The Sofia City Court acts as a court of first instance for cases relating to crimes committed by certain categories of persons (e.g. members of the government). District courts are located in the centres of administrative districts. Within each district court's judicial area there are one or several regional courts. The district courts, acting as courts of second instance, examine acts appealed against in regional court cases, as well as other cases assigned to them by law. As courts of second instance, the appellate courts examine acts appealed against in district court cases, as well as other court cases assigned to them by law. The Supreme Court of Cassation is the supreme judicial instance in all criminal cases and its jurisdiction covers the entire territory of Bulgaria.

4.2. Definition of PTD

In Bulgaria, there is no separate definition of pre-trial detention. The law uses the term ‘detention in custody’ (*задържане под стража*), which is used to denote the detention of the accused person both during the pre-trial and the trial stage of proceedings (including during appeals). Detention is defined as a ‘remand measure’ (*мярка за неотклонение*) in criminal proceedings, which means that it applies only in the framework of instituted criminal proceedings and can be imposed only on accused persons (persons formally charged for a criminal offence).

4.3. Important historical developments with respect to PTD

The legal rules on the prerequisites and procedures for imposing pre-trial detention have not changed significantly in the last 15 years. Historically, the only legislative amendments during this period have been the decrease of the maximum duration of pre-trial detention for some categories of cases, adopted in 2013 (from one year to eight months for cases of serious intentional crime and from two years to one year and six months for cases of crimes punishable by not less than 15 years of imprisonment or another more severe punishment), and the revision of the rules on providing information to third parties about the detention of a person, adopted in 2019 (allowing public authorities to postpone by up to 48 hours the information of third persons about the detained person’s deprivation of liberty and providing detained foreign nationals with the right to have the consular authorities of their country informed about their detention).

4.4. Problems and aspects to be addressed in the context of PTD in Bulgaria

The main problems and aspects to be addressed in the context of pre-trial detention in Bulgaria are the excessive use of pre-trial detention (according to official data, in 2018, almost 10 % of all accused persons have spent some time in pre-trial detention) and the poor living conditions in many of the operating detention facilities (including overcrowding and poor quality of health services).

5. Legal basis and fundamental legal aspects with respect to PTD

5.1. General principles and competent authorities and their roles

According to Article 30 of the Bulgarian Constitution no person can be detained unless the conditions and procedures for such detention are laid down in a law.

In Bulgaria, pre-trial detention is a remand measure imposed in the framework of criminal proceedings and can be applied only to persons, who have been formally charged. Pre-trial detention differs from what is usually referred to as police detention. Police detention is not part of criminal proceedings. It is imposed by the police on persons who have not been formally charged but who are suspected of having committed a crime. The maximum duration of police detention is 24 hours.

The competent authorities in relation to pre-trial detention and their roles are defined in Article 64 of the Criminal Procedure Code. Only the court, upon request by the public prosecutor, can order the pre-trial detention of a person. The court, authorised to impose pre-trial detention, is the first instance court. The decision of first instance courts is subject to judicial review by the respective second instance court. The second instance court can review the decision of the first instance court only if it is appealed either by the accused person or by the public prosecutor. The decision of the second instance court is final and cannot be appealed.

The public authority responsible for the implementation of pre-trial detention is General Directorate Execution of Sentences of the Ministry of Justice, which manages all prisons and pre-trial detention facilities. As of the end of 2019, there were 28 pre-trial detention facilities in the country. In addition to that, regular prisons are also used for accommodating detainees during the pre-trial and trial stage of proceedings. In 2019, about 40 % of all detainees without a final sentence were placed in prisons, while the remaining 60 % were detained in pre-trial detention facilities.

5.2. Legal prerequisites for pre-trial detention

The legal prerequisites for pre-trial detention are defined in Article 63 of the Criminal Procedure Code. Pre-trial detention can be imposed when (a) there are reasonable grounds to suspect that the accused person has committed a crime, which is punishable

by imprisonment or another more severe punishment, and (b) the collected evidence indicates that there is a real danger that the accused person may abscond or commit another crime.

5.3. The suspicion

According to Article 63 of the Criminal Procedure Code, the suspicion, or ‘reasonable grounds to suspect’ that the accused person has committed a crime, which is punishable by imprisonment or another more severe punishment, is one of the two prerequisites for pre-trial detention.

In 2018, the manner, in which Bulgarian courts were interpreting and assessing the suspicion as a prerequisite for pre-trial detention was referred to the Court of Justice of the European Union (CJEU) through a request for preliminary rulings from the Specialised Criminal Court. In its request, the Specialised Criminal Court noted that: (a) national case-law concerning the examination of ‘reasonable grounds’ has been developed, according to which the court hearing the case, at both the pre-trial and trial stages, must rule after having ‘prima facie’, rather than detailed, knowledge of the evidence; (b) decisions as to whether pre-trial detention should continue constitute ‘preliminary decisions of a procedural nature’, within the meaning of the second sentence of Article 4(1) of Directive 2016/343, but that they also display certain characteristics of decisions ‘on guilt’, referred to in the first sentence of that provision; (c) there is uncertainty as to the scope of judicial review of the principal incriminating evidence and the extent to which the court must give a clear and specific reply to the arguments put forward by the accused, in the light of aspects of the rights of the defence referred to in Article 10 of Directive 2016/343 and Article 47(1) of the Charter; and (d) it is not clear whether the fact that recital 16 of that directive states that a preliminary decision of a procedural nature ‘could contain reference’ to incriminating evidence means that that evidence may be the subject of adversarial argument before the court or that the latter may only mention that evidence.

In those circumstances, the Specialised Criminal Court referred two questions to the CJEU:

- (1) Is national case-law according to which the continuation of a coercive measure of “pre-trial detention” (four months after the accused’s arrest) is subject to the existence of “reasonable grounds”, understood as a mere “prima facie” finding that

the accused may have committed the criminal offence in question, compatible with Article 3, the second sentence of Article 4(1), Article 10, the fourth and fifth sentences of recital 16 and recital 48 of Directive 2016/343 and with Articles 47 and 48 of the Charter? Or, if it is not, is national case-law according to which the term “reasonable grounds” means a strong likelihood that the accused committed the criminal offence in question compatible with the abovementioned provisions?

(2) Is national case-law according to which the court determining an application to vary a coercive measure of “pre-trial detention” that has already been adopted required to state the reasons for its decision without comparing the incriminating and exculpatory evidence, even if the accused’s lawyer has submitted arguments to that effect – the only reason for that restriction being that the judge must preserve his impartiality in case that case should be assigned to him for the purposes of the substantive examination – compatible with the second sentence of Article 4(1), Article 10, the fourth and fifth sentences of recital 16 and recital 48 of Directive 2016/343 and with Article 47 of the Charter? Or, if it is not, is national case-law according to which the court is to carry out a more detailed and specific examination of the evidence and to give a clear answer to the arguments put forward by the accused’s lawyer, even if it thus takes the risk that it will be unable to examine the case or deliver a final decision on guilt if the case is assigned to it for the purposes of the substantive examination – which implies that another judge will examine the substance of the case – compatible with the abovementioned provisions?’

In its judgment, the CJEU responded: ‘Article 3 and Article 4(1) of 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 must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in

custody as being guilty. However, that directive does not govern the circumstances in which decisions on pre-trial detention may be adopted.¹

5.4. The grounds for detention

Article 63 defines the grounds for detention as ‘a real danger that the accused person may abscond or commit another crime’.² The presence of such danger is evaluated by the court in each particular case based on the evidence collected so far. As a guidance to the courts, the law lists several cases, in which, unless there is evidence to the contrary, it is presumed that a real danger always exists. These are the cases where: (a) the person is charged for a repeated offence³ or for dangerous recidivism⁴; (b) the person is charged for a serious intentional crime after having been convicted before for another serious intentional crime to imprisonment of not less than one year or another more severe punishment, and that previous sentence was not suspended; (c) the person is charged for a crime punishable by not less than ten years of imprisonment or another more severe punishment; or (d) the person is charged in absentia⁵. These cases do not mean that if one of the listed circumstances is present the accused person is automatically detained or that if none of them is present the person cannot be detained. They are rather introducing a presumption that if one of the circumstances is present, the accused person is more likely to abscond or commit another crime. If none of the circumstances is present, but the court, based on the evidence collected so far, believes that the risk of absconding or re-offending still exists, it can order the detention of the accused. At the same time, if one of these circumstances is present but there is convincing evidence that the accused person will not abscond or re-offend, the court is authorised to impose a noncustodial measure.

¹ Court of Justice of the European Union (2018), [Judgment of the Court \(First Chamber\) of 19 September 2018 in Case C-310/18 PPU](#).

² The risk that the accused person may hamper the investigation (e.g. by influencing witnesses, destroying evidence, etc.) is not defined as a separate ground for detention. In practice, however, it is often considered by the court as part of the assessment of the risk of committing another crime.

³ A repeated offence is an offence committed by a person, who has been convicted before for another such offence.

⁴ Dangerous recidivism is an offence committed by a person, who (a) has been convicted before for a serious intentional crime to imprisonment of at least one year and that previous sentence was not suspended, or (b) has been convicted before, twice or more, for intentional crimes to imprisonment and at least one of those previous sentences was not suspended.

⁵ In Bulgaria, the charging is the moment when the suspect is formally charged and becomes an accused person. In certain cases, listed in the law (e.g. the person could not be found or was summoned but did not show up without a valid reason). In such cases, when the person is finally found, the fact that they were charged in absentia is considered as a circumstance justifying their detention.

The danger of absconding or committing another crime is a dynamic category and can change in the course of the proceedings. This is why the law stipulates that if the danger disappears, the public prosecutor is obliged to discontinue the pre-trial detention by either repealing it or replacing it by a lighter measure.

A separate ground for pre-trial detention is the failure of the accused person to observe their obligations during the proceedings. According to Article 66 of the Criminal Procedure Code, the initially imposed remand measure (mandatory reporting to the police, bail or house arrest) can be replaced by a heavier one, including pre-trial detention, when the accused person: (a) does not appear before the competent authority without a valid reason; (b) changes their residence without notifying the competent authority; or (c) violates the initially imposed remand measure.

5.5. Proportionality

Proportionality is not explicitly listed as a principle of pre-trial detention, but some of the provisions governing the implementation of detention define a certain degree of proportionality. Thus, for example, detention cannot be imposed on persons who are charged for less serious crimes (crimes, for which the law envisages only a non-custodial punishment). Also, the maximum duration of pre-trial detention, as defined by the law, is linked to the gravity of the crime, and for more serious crimes (crimes, for which heavier punishments are envisaged) the maximum duration is higher.

5.6. Duration and prolongation of pre-trial detention

There are clearly defined limits of the maximum duration of pre-trial detention, which depend on the gravity of the crime. According to Article 63 of the Criminal Procedure Code, the maximum duration of pre-trial detention is two months. There are two exceptions to this rule: (a) if the accused person is charged for a serious intentional crime⁶, the maximum duration of pre-trial detention is eight months, and (b) if the accused person is charged for a crime punishable by not less than 15 years of imprisonment or another more severe punishment the maximum duration of pre-trial detention is one year and six months. When the maximum duration of pre-trial detention

⁶ According to Article 93 of the Criminal Code, a serious crime is one that is punishable by more than five years of imprisonment, life imprisonment or life imprisonment without parole.

is reached, the public prosecutor is obliged to immediately order the release of the accused person. The law does not provide for the possibility of extending the maximum period of detention at the request of the prosecutor.

As a safeguard against prolonged pre-trial detention, Article 22 of the Criminal Procedure Code stipulates that the cases, in which the accused person is in pre-trial detention, must be investigated, heard and decided with priority over all other cases.

Unlike pre-trial detention, which has a limited maximum duration, detention during the trial is not limited in time and the defendant can remain in detention until the end of the trial.

5.7. The procedures

The procedure for imposing pre-trial detention is laid down in Article 64 of the Criminal Procedure Code. Pre-trial detention is imposed by the first instance court upon request of the public prosecutor. The public prosecutor is responsible for ensuring the appearance of the accused person before the court. To do that, the public prosecutor is authorised to order the detention of the accused person for a period of up to 72 hours. The court must hold a hearing on the public prosecutor's request immediately. The case is heard by a single judge in the presence of the public prosecutor, the accused person and their lawyer.

During the hearing the court examines the evidence collected so far and assesses the extent to which the prerequisites defined in the law are present. If the court concludes that these prerequisites are not present, it is authorised to impose a lighter remand measure or to decide not to impose any measure. Otherwise, the court issues a ruling for placing the accused person in pre-trial detention.

The ruling of the court is communicated to the parties during the same hearing and is immediately executed. The court is also obliged, when announcing its decision, to schedule a hearing before the second instance court within the next seven days, in case the ruling is appealed by any of the parties involved. The accused person and the public prosecutor can appeal the court's ruling within three days and this is the only available option for contesting the detention decision. The second instance court hears the case in a panel of three judges in the presence of the public prosecutor, the accused person and

their lawyer. The failure of the accused person to participate in the hearing without a valid reason does not prevent the court from holding the hearing and issuing a decision. The ruling of the second instance court is communicated to the parties during the same hearing and is final. The law does not provide for the possibility of appealing the detention decision to the Supreme Court of Cassation.

Once imposed, pre-trial detention is subject to regular judicial review. The procedure for reviewing pre-trial detention is laid down in Article 65 of the Criminal Procedure Code. The review is not automatic and takes place only upon initiative of the accused person or their lawyer, who are authorised to request, at any time during the proceedings, the replacement of pre-trial detention with a lighter measure. The request is filed to the court through the public prosecutor, who is obliged to immediately forward the case to the competent court. The court schedules a hearing within three days of the receipt of the case file. The hearing takes place in the presence of the public prosecutor, the accused person and their lawyer. The hearing takes place in the absence of the accused person, if the accused person has declared that they do not want to participate or if the appearance of the accused person is impossible due to health reasons. The ruling of the court is communicated to the parties during the same hearing and is immediately executed. The court is obliged, when announcing its decision, to schedule a hearing before the second instance court within the next seven days, in case the ruling is appealed by any of the parties involved. The court is also authorised to set a period of time, with a maximum duration of two months, during which the accused person and their lawyer cannot file another request for review of the pre-trial detention. The ban on requesting a new review within the time period specified by the court does not apply when the new request is based on a deterioration of the health of the accused person. The accused person and the public prosecutor can appeal the court's ruling within three days. The rules and procedure for appeal are the same as the ones for appealing the ruling for imposing pre-trial detention.

5.8. Recent legal developments

The rules and procedures for imposing pre-trial detention have not changed significantly in recent years. The only recent legal development was a revision of the rules on providing information to third parties about the detention of a person. These changes were adopted

in 2019 in response to the need to complete the transposition in national law of the provisions of 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. The new rules authorised public authorities to postpone by up to 48 hours the information of third persons about the detained person's deprivation of liberty and provided detained foreign nationals with the right to have the consular authorities of their country informed about their detention.

5.9. Electronic monitored house arrest instead of detention in prison

House arrest is an alternative to pre-trial detention. It is defined as a ban on the accused person to leave their home without permission. Like pre-trial detention, house arrest is imposed only by the court upon request of the public prosecutor. In 2015, the parliament adopted amendments to the Criminal Procedure Code and introduced, for the first time, electronic monitoring as an alternative option for supervising accused persons placed under house arrest. The detailed legal framework for the implementation of electronic monitoring was adopted one year later, in 2016, when the parliament passed the respective set of amendments to the Execution of Penalties and Detention in Custody Act. The legal framework was completed in 2017, when the more technical provisions related to the use of electronic monitoring were adopted through an amendment of the Rules on Implementation of the Execution of Penalties and Detention in Custody Act. In 2018, the Ministry of Justice and the Ministry of the Interior issued a joint instruction laying the rules for interaction between the police and the General Directorate Execution of Sanctions in relation to the supervision of persons under electronic monitoring. The practical implementation of electronic monitoring started in April 2019 and, according to information provided by the Ministry of Justice to the media, until May 2020 the measure was applied on a total of 137 persons, of whom the majority was accused persons under house arrest.

The law envisages three different forms of electronic monitoring: (a) voice recognition (applicable only to convicted persons); (b) radio frequency monitoring; and (c) satellite

monitoring (applicable on high-risk offenders and persons located in remote or hard to reach places).

5.10. Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law

Above all, in Bulgaria, the imposition of a remand measure on the accused person is not mandatory and depends on the decision of the public prosecutor. According to Article 57 of the Criminal Procedure Code, a remand measure is imposed with the purpose to prevent the accused person from absconding, from committing another crime or from hindering the execution of the sentence. If the competent authorities believe that there is no risk that the accused person will abscond or re-offend, the criminal case can be investigated and brought to court without the imposition of any remand measure at any point in time during the proceedings.

If the public prosecutor is convinced that a remand measure is necessary, there is a list of four such measures to choose from, including pre-trial detention. The three measures, which can be imposed as an alternative to detention, are mandatory reporting to the police, bail and house arrest.

Mandatory reporting to the police (*ноднуска*) is the lightest measure. It consists of an obligation of the accused person not to leave their place of residence without permission. According to Article 60 of the Criminal Procedure Code, this measure is controlled by the police and for each established violation the police is obliged to inform the public prosecutor and the court.

Bail (*гаранция*) is an amount of money or securities deposited by the accused person or a third party as a guarantee that the accused person will comply with their obligations during the proceedings. According to Article 61 of the Criminal Procedure Code, the amount of the bail must be proportionate to the property status of the accused person.

House arrest (*домашен арест*) consists of a ban on the accused person to leave their home without permission. House arrest is imposed by the court upon request of the public prosecutor under the same rules and procedures, which apply for pre-trial detention. According to Article 62 of the Criminal Procedure Code, this measure is also controlled by the police and for each established violation the police is obliged to inform the public

prosecutor and the court. The address where the accused person must reside is determined by the court and can be changed during the pre-trial stage only with the permission of the public prosecutor. The maximum duration of house arrest is the same as the one of pre-trial detention. Persons in house arrest can be subjected to electronic monitoring.

As a rule, pre-trial detention can be replaced by one of the alternative remand measures only when the grounds justifying detention are no longer present. The only exception, provided for in the legislation, is the replacement of detention due to reasons related to mental health. This exception is laid down in Article 33 of Regulation No 2 of 22 March 2010 on the conditions and procedures for the medical care in the places of deprivation of liberty, according to which in case of established mental disorder, leading to insanity, detention is replaced by another measure and the person placed for treatment in a specialised psychiatric institution.

In practice, when deciding on replacing detention by an alternative measure, the courts are examining a variety of circumstances: work, education, child care, health issues, etc. In all of these cases, however, these circumstances are evaluated in terms of their relation to the risk of absconding or re-offending (e.g. the court can decide that the fact that the accused person has a permanent job or is enrolled in some form of education means that there is a lower risk of absconding).⁷

5.11. Procedural measures to support the decision making

The decision of the court to impose pre-trial detention is based on the information included in the public prosecutor's request, the evidence collected so far, and the statement of the accused person and their lawyer made during the court hearing.

⁷ For a selection of court decisions showing the different manner in which Bulgarian courts interpret these circumstances, see Markov, D. (2019), [Assessing the impact of criminal proceedings on the social situation of suspects and accused: handbook](#), Sofia: Center for the Study of Democracy.

6. Measures to avoid PTD/Alternatives in practice

6.1. Conditional suspension of PTD

In Bulgaria, conditional suspension is not an option when it comes to pre-trial detention. According to Article 66 of the Criminal Code, only prison sentences can be conditionally suspended.

6.2. Social work strategies: providing information (for the decisions) and/or support

In Bulgaria, the decision of the court to impose pre-trial detention is based on the information included in the public prosecutor's request, the evidence collected so far, and the statement of the accused person and their lawyer made during the court hearing.

6.3. Conditions and supervision measures

In Bulgaria, after a person is formally charged, they become obliged not to change their place of residence without informing the competent authority in advance and in writing. According to Article 66 of the Criminal Procedure Code, the failure to comply with this obligation can lead to the imposition of a remand measure (if no such measure has been imposed) or to the replacement of the imposed remand measure with a heavier one.

6.4. Financial surety (bail)

In Bulgaria, the bail is a separate remand measure, which can be imposed as an alternative to pre-trial detention rather than as a condition for conditional suspension of pre-trial detention. The bail is imposed by a decision of the public prosecutor. It can be deposited in money or securities by either the accused person or any third party and cannot be withdrawn. According to Article 61 of the Criminal Procedure Code, the amount of the bail must be proportionate to the property status of the accused person. The accused person and their lawyer can appeal the amount of the bail before the first instance court within three days and the decision of the court is final.

The accused person is given a certain period of time (between three and fifteen days), in which the bail must be deposited. If the accused person fails to deposit the bail within the specified deadline the court can impose a heavier remand measure (house arrest or pre-trial detention).

The bail is released after the end of the proceedings. According to Article 66 of the Criminal Procedure Code, the bail is seized if the accused person (a) does not appear before the competent authority without a valid reason, (b) changes their residence without notifying the competent authority, or (c) violates the initially imposed remand measure. In such cases, the competent authority can also increase the amount of the bail.

6.5. Therapeutic measures

In Bulgaria, according to Article 70 of the Criminal Procedure Code, the court, upon request by the public prosecutor, can order the accommodation of the accused person in a psychiatric institution for examination. This is a specific alternative to detention, which applies only when there is a need of psychiatric examination of the accused person. The court holds a hearing in the presence of the public prosecutor, the accused person and their lawyer and is obliged to hear the accused person, whose accommodation is requested, and a psychiatrist. The court examines the case in a panel of one professional judge and two lay judges. The accused person and the public prosecutor can appeal the court's ruling within three days. The rules and procedure for appeal are the same as the ones for appealing the ruling for imposing pre-trial detention. The maximum duration of the accommodation of the accused person in a psychiatric institution is thirty days. However, if the time for examination, initially determined by the court, turns out to be insufficient, it may be extended once with not more than thirty days. The extension procedure is the same as the one for the initial accommodation of the person. The time spent by the accused person in the psychiatric establishment counts as pre-trial detention.

6.6. Other alternatives and measures

Apart from the remand measures, which are specifically aimed to prevent the accused person from absconding or committing another crime, the Criminal Procedure Code envisages a number of additional procedural measures. These include measures for the protection of the victim, ban to leave the country, temporary suspension from work, temporary revocation of a driving license, accommodation in a psychiatric establishment, coercive escort, and measures for securing the payment of compensation, financial sanctions and judicial expenses.

The measures for protecting the victim are defined in Article 67 of the Criminal Procedure Code and include different restrictions to prevent the accused from getting in contact with the victim. The accused can be banned from getting into immediate proximity with the victim, contacting the victim (including by phone, mail, e-mail or fax) or visiting certain localities, regions or places, in which the victim resides or visits. These measures can be imposed only by the court, either upon request by the victim or upon proposal by the prosecutor with the victim's consent. The court is obliged to hold a hearing and consult the prosecutor, the accused person and the victim. The measures apply until the end of the proceedings unless otherwise requested by the victim. According to Article 68a of the Criminal Procedure Code, if the accused fails to comply with the imposed restrictions, the competent authority can impose a remand measure or replace the already imposed remand measure with a heavier one.

The ban to leave the country is defined in Article 68 of the Criminal Procedure Code and can be imposed only on persons accused of a serious intentional crime or a crime which has resulted in someone's death. The measure is imposed by the public prosecutor who must immediately inform the police. The accused can travel abroad only with the permission of the prosecutor. The prosecutor is obliged to respond to requests for permission within three days. If permission is not granted the accused can appeal against the prosecutor's decision before the court. The accused person can also request the court to repeal the measure in general. According to Article 68a of the Criminal Procedure Code, if the accused violates the travel ban, the competent authority is authorised to impose a remand measure or replace the already imposed remand measure with a heavier one.

According to Article 69 of the Criminal Procedure Code, temporary suspension from work can be imposed only on accused persons, who have been charged with a serious intentional crime, committed in relation with their job, and only when there are sufficient grounds to believe that their position would hamper the performance of a full, objective and comprehensive investigation. Suspension from work is imposed by the court upon request by the prosecutor. The court is obliged to hold a hearing and consult both the prosecutor and the accused. The accused can appeal the imposed measure before the higher court. Temporary suspension from work can last until the end of the proceedings. However, if the circumstances justifying the imposition of the measure cease to exist, the

measure can be repealed earlier by the court upon request of the accused, or by the prosecutor upon their own initiative.

Temporary revocation of a driving license is envisaged in Article 69a of the Criminal Procedure Code and can be imposed only for transport-related crimes, which have resulted in the death or injury of a person, and for the so-called ‘traffic hooliganism’. The measure is imposed by the prosecutor and can be appealed by the accused person before the court. The temporary revocation of a driving license can last until the end of proceedings, but can be repealed earlier by the court upon request of the accused, or by the prosecutor upon their own initiative, if the justifying circumstances cease to exist.

Coercive escort is applied when the accused person does not show up for questioning without a valid reason. According to Article 71 of the Criminal Procedure Code, the measure is applied by the police or the respective services of the Ministry of Justice or the Ministry of Defence.

Finally, the measures for securing the payment of compensation, financial sanctions and judicial expenses are aimed at blocking certain resources belonging to the accused person (usually property or money), so that they could be used after the end of the proceedings if the accused person is sentenced to a financial sanction or measure (fine, confiscation or seizure of assets) and/or sentenced to pay compensation to the victim or cover the judicial expenses related to the case. These measures are always imposed by the court upon request by the prosecutor or the victim and are regulated in detail in Articles 72, 73 and 73a of the Criminal Procedure Code.⁸

Overall, due to the lack of available data, the extent to which non-custodia measures are applied in practice cannot be assessed. Based on the official statistics, it can be estimated that pre-trial detention is imposed on about 10 % of all accused persons. The remaining 90 % of accused persons either receive an alternative measure or no measure at all. However, the exact share of those, on whom an alternative measure has been imposed, cannot be estimated.

⁸ Measures for securing the payment of financial sanctions or measures can be requested by the prosecutor, measures for securing the payment of compensation can be requested by the victim, and measures for securing the payment of judicial expenses can be requested by the prosecutor and/or the victim.

6.7. Reactions on the COVID-Pandemic

In Bulgaria, during the first two months of the COVID-19 pandemic, when the country was in a declared state of emergency (from 13 March to 13 May 2020) access to and from pre-trial detention facilities was restricted. Visitors were not allowed to meet with pre-trial detainees, while court hearings and procedural actions involving detainees were conducted via videoconference. During this period, according to media reports, only one pre-trial detainee tested positive for COVID-19. On 13 May 2020, the state of emergency was replaced by an emergency epidemic situation and the restrictions, including those in pre-trial detention facilities, began to be gradually lifted. The measures, which remained valid until July 2020 include: mandatory medical examination for signs of coronavirus and 14-day active monitoring of the health condition of all newly admitted inmates; daily monitoring of all inmates with flu-like symptoms; availability of separate rooms for quarantine in each pre-trial detention facility; daily medical control over the sanitary regime; and spending time outdoors in smaller groups and in compliance with physical distancing rules.

No measures were introduced to reduce the prison population. As a result, no inmates were released as a preventive measure related to COVID-19. According to the special SPACE I report, which analyses the trends in European prison populations from 1 January to 15 April 2020 (the first month in which the COVID-19 pandemic started spreading in Europe and led most countries to impose lockdowns to their populations), while the vast majority of prison administrations showed decreasing or stable prison population rates, in Bulgaria the total number of inmates (including pre-trial detainees) has actually increased.⁹

7. PTD and alternatives in figures and presentations

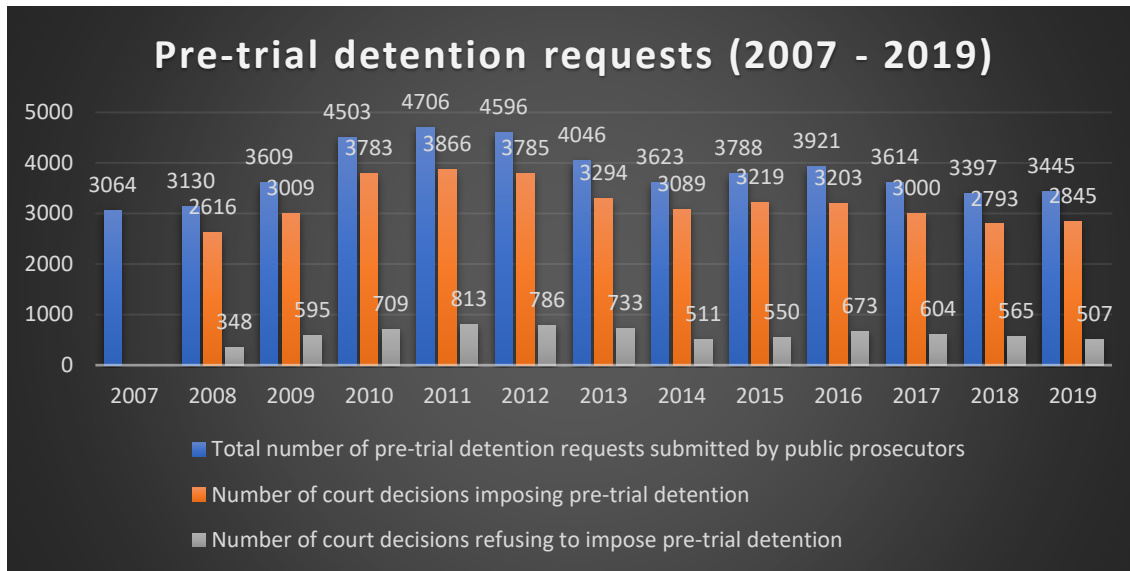
7.1. Statistical data on PTD

In Bulgaria, statistical data on pre-trial detention are published by the Public Prosecutor's Office in its annual activity reports. According to these data, in 2019, public prosecutors

⁹ Aebi, M. and Tiago, M. (2020), [Prisons and prisoners in Europe in pandemic times: an evaluation of the short-term impact of the COVID-19 on prison populations](#), Strasbourg and Lausanne: Council of Europe Annual Penal Statistics (SPACE).

have submitted to the courts 3,445 requests for pre-trial detention. The courts have imposed detention in 2,845 cases (82.6 %) and rejected the requests in 507 cases (14.7 %).

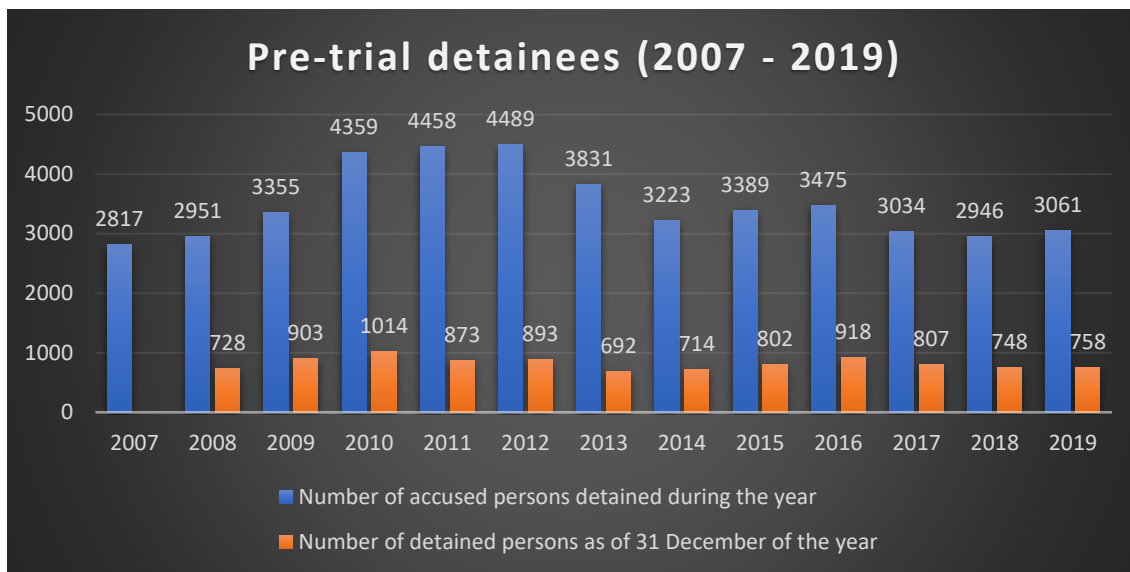
Figure 1: Pre-trial detention requests (2007 – 2019)



Source: Public Prosecutor’s Office of the Republic of Bulgaria

In 2019, pre-trial detention was imposed on 3,061 persons, which marked a slight increase compared to the previous two years. Historically, the period with the highest number of detainees was the one between 2010 and 2012, when more than 4,000 persons were detained each year. At the end of 2019, the number of persons in pre-trial detention was 758.

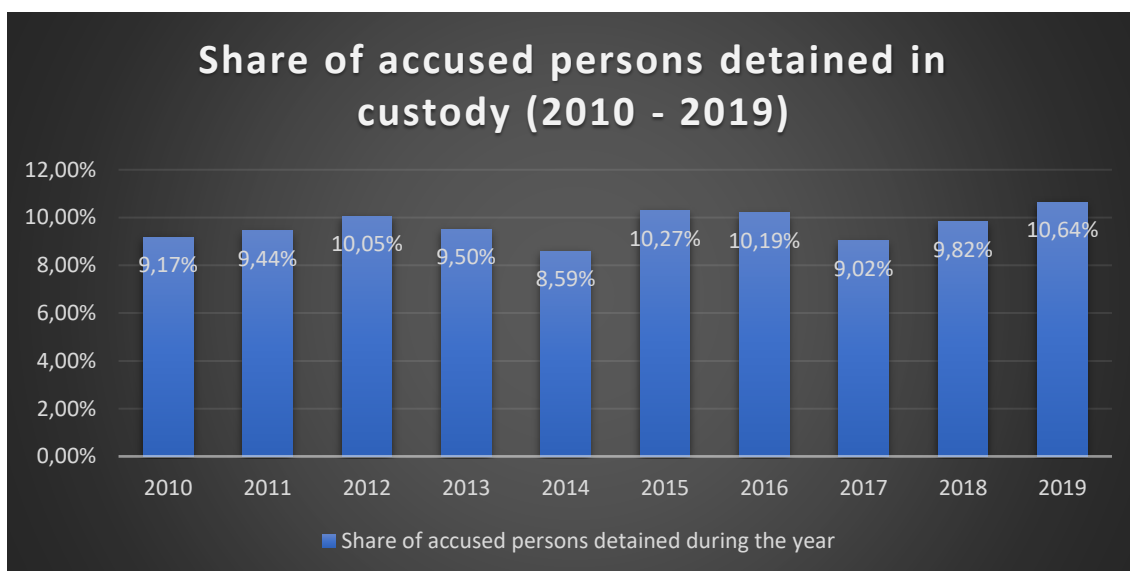
Figure 2: Pre-trial detainees (2007 – 2019)



Source: Public Prosecutor’s Office of the Republic of Bulgaria

The annual number of detainees have changed through the years, but these changes were mostly due to the increase or the decrease in the total number of criminal proceedings. As a share of all accused persons, the number of detainees has not changed significantly remaining at around 10 % each year.

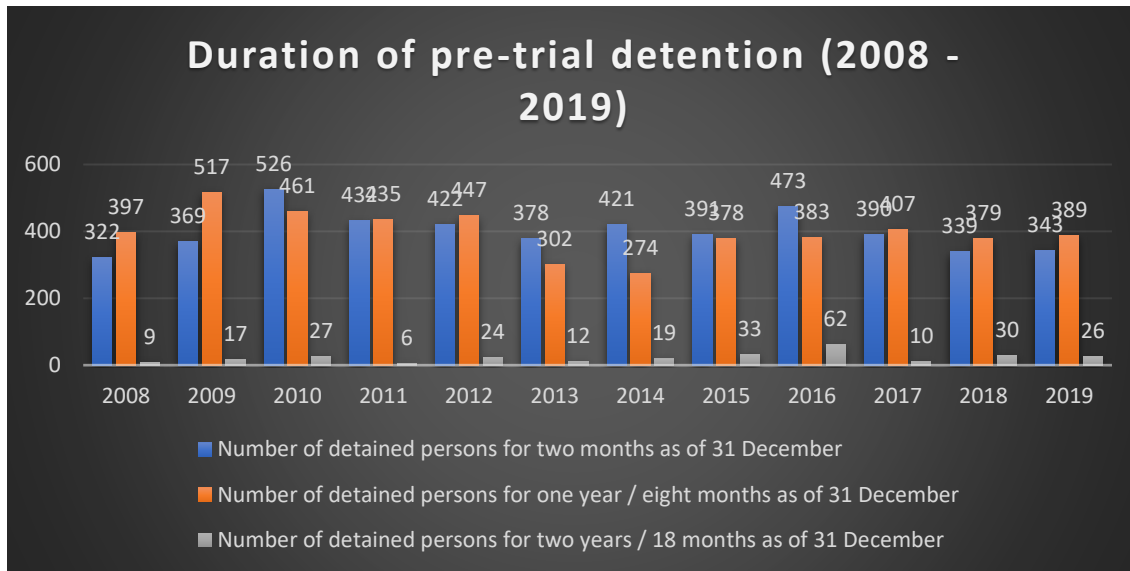
Figure 3: Share of detainees of all accused persons (2010 – 2019)



Source: Public Prosecutor’s Office of the Republic of Bulgaria and National Statistical Institute

The maximum duration of pre-trial detention depends on the crime, for which the accused person is charged. Unless otherwise specified in the law, pre-trial detention can last for a maximum of two months.

Figure 4: Duration of pre-trial detention (2008 – 2019)



Source: Public Prosecutor’s Office of the Republic of Bulgaria

Note: In 2013, the maximum duration of pre-trial detention was decreased from one year to eight months for cases of serious intentional crime and from two years to one year and six months for cases of crimes punishable by not less than 15 years of imprisonment or another more severe punishment. For all other cases, the maximum duration of detention remained two months.

As of 31 December 2019, the number of detainees falling within this category was 343 persons (45.3 % of all detainees). Another 389 pre-trial detainees (51.3 %) were charged for a serious intentional crime, in which case the maximum duration of pre-trial detention is eight months.¹⁰ The remaining number of detainees (26 persons or 3.4 %) were charged for a crime punishable by not less than 15 years of imprisonment or another more severe punishment, in which case the maximum duration of detention is one year and six months.

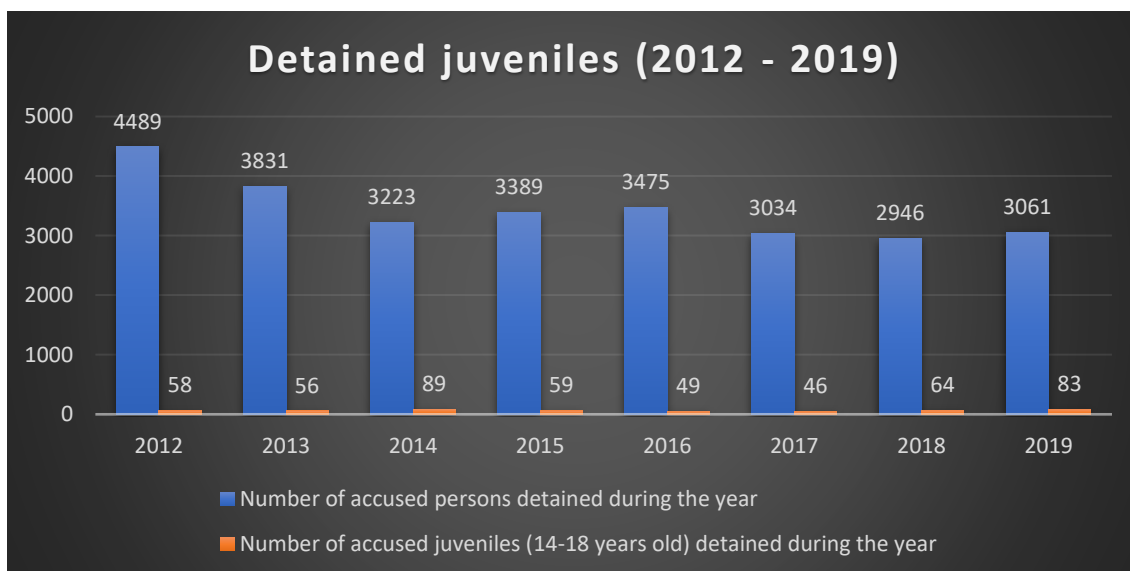
Statistical data also show an increase in the number of juvenile detainees. In Bulgaria, juveniles (persons between 14 and 18 years of age) can be subject of criminal prosecution

¹⁰ A serious crime is a every crime, for which the law envisages a punishment of more than five years of imprisonment, life imprisonment or life imprisonment without parole.

if they were capable of understanding the nature and significance of the act and of directing their actions.

According to Article 386 of the Criminal Procedure Code, pre-trial detention can be imposed on juveniles only in exceptional cases. Nevertheless, in 2019, a total of 83 juveniles were detained, which makes a share of 2.7 % of all persons detained during the year. Historically, since 2012, this is the second highest number of juvenile detainees after 2014, when their number reached 89 persons (2.8 % of all detainees).

Figure 5: Detained juveniles (2012 – 2019)

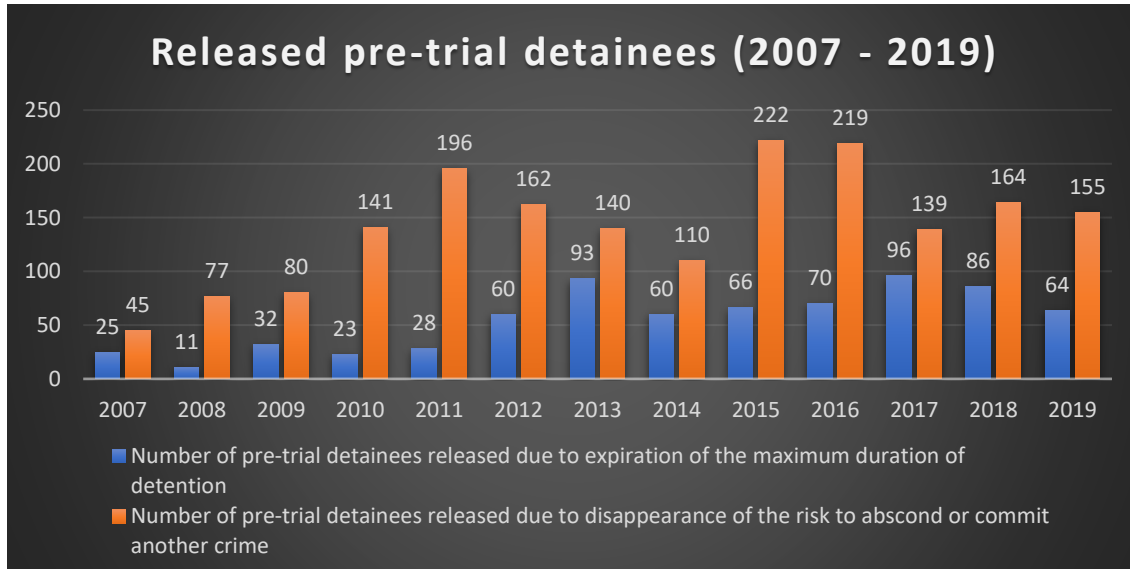


Source: Public Prosecutor's Office of the Republic of Bulgaria

The annual activity reports of the Public Prosecutor's Office also include data on the number of cases, in which pre-trial detention was discontinued before the end of the proceedings. There are two different grounds for such discontinuation: expiration of the maximum duration of detention defined in the law and disappearance of the reasons justifying the detention (the risk to abscond or commit another crime). In 2019, a total of 155 pre-trial detainees (5.1 % of all detainees) were released because the reasons

justifying their detention were no longer present. Another 64 detainees (2.1 %) were released because their detention reached the maximum duration laid down in the law.¹¹

Figure 6: Released pre-trial detainees (2007 – 2019)

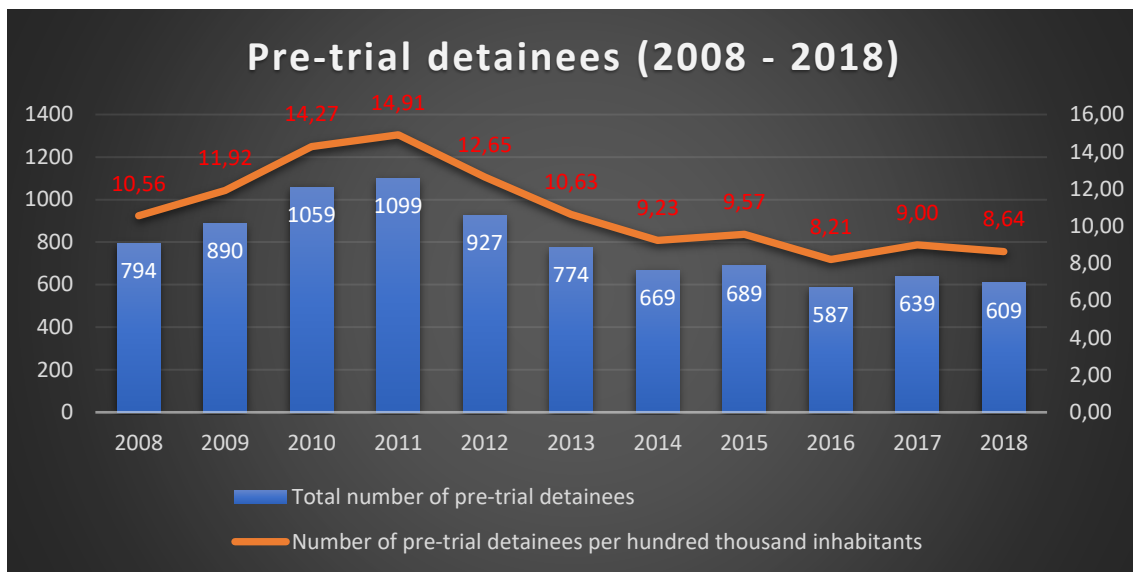


Source: Public Prosecutor’s Office of the Republic of Bulgaria

Data on the number of pre-trial detainees are also available from Eurostat. The figures provided by Eurostat differ from the ones published by the Public Prosecutor’s Office, probably due to the different reference date used for collecting the data. In addition to the total number of detainees, Eurostat also provides data on the number of detainees per 100,000 inhabitants.

¹¹ According to the annual reports of the Public Prosecutor’s Office, pre-trial proceedings usually last up to eight months. In 2019, 70.4 % of all pre-trial proceedings were concluded within eight months, 12.5 % within one year, 11.3 % between one year and two years, and 5.8 % within more than two years.

Figure 7: Pre-trial detainees (2008 – 2018)



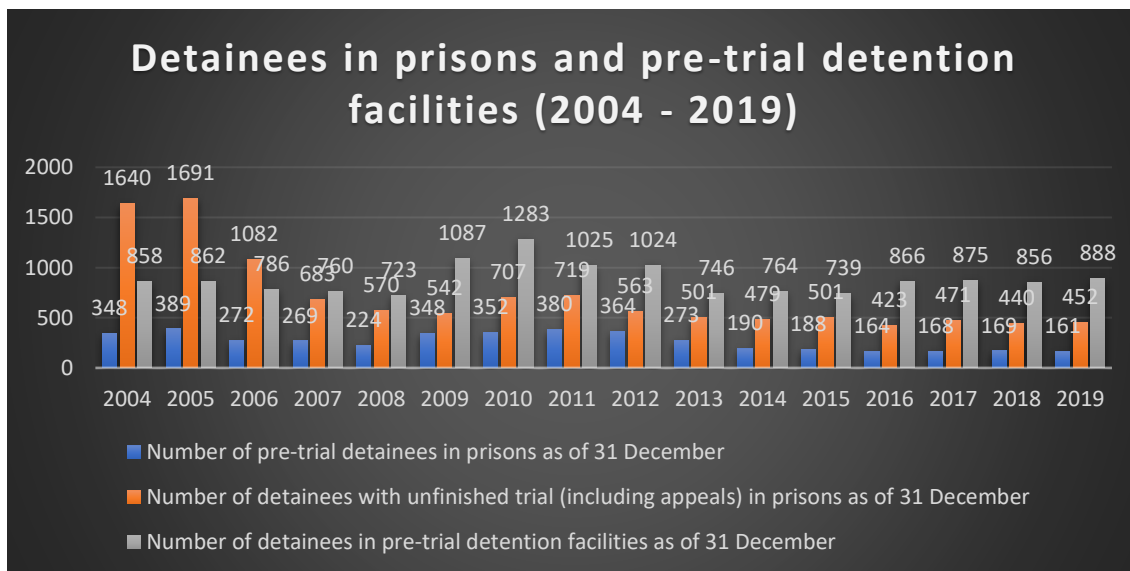
Source: Eurostat

The SPACE project of the Council of Europe provides data on detainees (inmates not serving a final sentence) in its annual SPACE I reports on prison populations and penal institutions. For Bulgaria, the data on detainees are aggregated and, in addition to pre-trial detainees, include persons detained during the trial and sentenced persons who have appealed or are within the statutory limit to do so. According to the 2019 edition of the SPACE I report, on 31 January 2019, in Bulgaria there were a total of 1,424 inmates not serving a final sentence, including 1,393 male inmates, 31 female inmates, 749 Bulgarian nationals, and 66 foreigners.¹² In 2018, inmates not serving a final sentence have spent a total of 347,031 days in penal institutions (an average number of 950.8 detainees per day), the number of admissions before final sentence was 1,627, and the average length of remand in custody was seven months. In terms of expenses, the data for Bulgaria (an average amount of 5.70 Euro spent per day for the detention of one inmate) are not disaggregated by the legal status of inmates and there are no separate figures for detainees not serving a final sentence and for sentenced prisoners.

¹² The 2019 edition of the SPACE I report presents the data in several tables and for Bulgaria there is some discrepancy between the data in the different tables. In the table presenting the prison population by gender (Table 7 on p. 43) the number of detainees not serving a final sentence is 1,424 and the number of sentenced prisoners is 6,042. In the table presenting the prison population by nationality (Table 12 on p. 61) the number detainees not serving a final sentence is 815 and the number of sentenced prisoners is 6,651. The total number of the prison population is the same in both tables (7,466 persons), which means that the discrepancy is related to the manner in which the disaggregation is done between inmates with and without a final sentence.

Data on pre-trial detention, provided by the General Directorate Execution of Sentences, are regularly included in the annual human rights reports published by the Bulgarian Helsinki Committee. According to these data, as of 31 December 2019, a total of 1,501 persons were placed in detention without a final sentence. Of those, 613 persons were placed in prisons (161 pre-trial detainees and 452 detainees with pending trials, including appeal proceedings) and 888 persons were accommodated in pre-trial detention facilities. In Bulgaria, it is a regular practice to accommodate detainees not only in detention facilities, but also in prisons. In 2019, about 40 % of all detainees without a final sentence were placed in prisons.

Figure 8: Detainees in prisons and pre-trial detention facilities (2004 – 2019)



Source: Bulgarian Helsinki Committee (based on data provided by the General Directorate Execution of Sentences)

The majority of detainees in pre-trial detention facilities are Bulgarian nationals. The number of foreign detainees has decreased significantly during the last five years and in 2019 their share accounted to only 8.1 % of all detainees. The share of female (3.4 % in 2019) and juvenile (0.9 % in 2019) detainees is also relatively small.

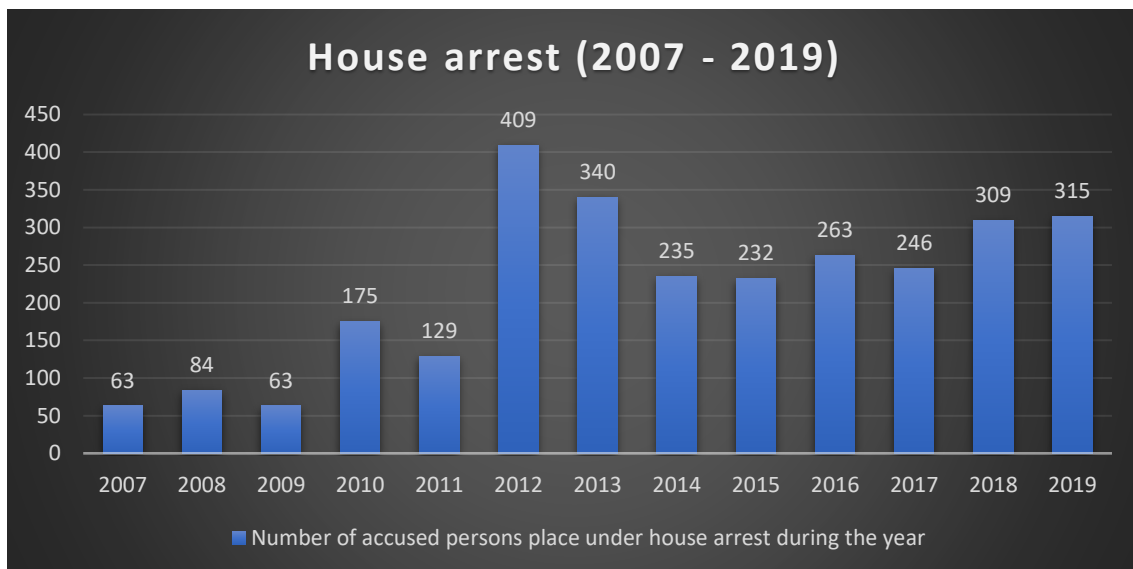
In terms of duration, the statistics show that the vast majority of detainees (79.4 % in 2019) spend less than two months in detention, but the share of those spending more than six months (5.7 % in 2019) is also relatively high.

The data also show that, in 2019, an average of 1,008 detainees per day were staying the pre-trial detention facilities.

7.2. Basic data on alternatives available

The annual activity reports of the Public Prosecutor’s Office include data on the number of cases, in which the accused person was placed under house arrest. The use of house arrest as an alternative to detention is slowly increasing, but overall the measure remains underused compared to detention. In 2019, the total number of persons under house arrest was 315, which is about ten times less compared to the number of detained persons.

Figure 9: House arrest (2007 – 2019)



Source: Public Prosecutor’s Office of the Republic of Bulgaria

Statistical data on the other alternatives to detention (reporting to the police and bail) is not publicly available.

The SPACE project of the Council of Europe provides data on persons under the supervision of probation agencies in its annual SPACE II reports on probation populations and probation agencies. For Bulgaria, however, data on persons under supervision before

the sentence is not available, because, in Bulgaria, according to national legislation, probation can be imposed only as a punishment and not as a pre-trial measure.¹³

8. Negative impact of PTD in Bulgaria: literature review and statistical data

8.1. National level

In Bulgaria, statistical data on the expenses and economic aspects of pre-trial detention are not available. The SPACE project of the Council of Europe provides some data on expenses in its annual SPACE I reports on prison populations and penal institutions. According to the 2019 edition of the SPACE I report, in Bulgaria the average amount spent per day for the detention of one inmate in 2018 was 5.70 Euro, the total number of days spent in penal institutions was 347,031, and the total budget spent by the prison administration was 13,938,764 Euro.¹⁴ The figures for 2018 are aggregate figures which include both detainees not serving a final sentence and sentenced prisoners. Separate figures for pre-trial detainees are not available. Separate figures for pre-trial detainees are available for the years before 2018. However, it should also be noted that, for these years, the average amount spent per day is much higher than the one reported for 2018. Thus, for example, according to the 2018 edition of the SPACE I report, the average amount spent per day for the detention of one inmate in 2017 was 72.30 Euro (51.20 Euro for non-sentenced detainees).¹⁵ Moreover, both figures do not correspond to the average monthly expenses per inmate presented by the public authorities to the media, which over time have ranged between 400 Euro (2013) and 500 Euro (2018).

¹³ As a punishment, probation is relatively broadly applied as an alternative to imprisonment. According to data published by the National Statistical Institute, in 2019, 3,029 persons were sentenced to probation, which accounts to around 13 % of all convicted persons.

¹⁴ According to the report, Bulgaria's definition of costs of imprisonment matches the standard definition used by the report, which is the total budget effectively spent by penal institutions. The total budget should include costs of security, health care (including medical care, psychiatric services, pharmaceuticals, dental care, etc.), services (including maintenance, utilities, maintenance of inmate records, reception, assignment, transportation, etc.), administration (excluding extra-institutional expenditures), support (including food, inmate activities, inmate employment, clothing, etc.), and rehabilitation programmes (including academic education, vocational training, substance abuse programmes, etc.).

¹⁵ The difference is most probably due to the way, in which the total budget spent by the prison administration is calculated. For Bulgaria, the total budget reported for 2018 (13,938,764 Euro) is much less than the one reported for 2017 (53,373,749.76 Euro). However, there is no available information about how these amounts were calculated.

8.2. Organisational level

In Bulgaria, there are a number of problems on organisational level, which have been persistently highlighted by different institutions and organisations monitoring the implementation of pre-trial detention. The 2019 annual report of the Ombudsman acting as National Preventive Mechanism singled out the persisting problem of overcrowding (particularly alarming in the two pre-trial detention facilities in Sofia), the lack of statutory standards for fresh air and day or artificial light, the poor quality of healthcare (due to, among other reasons, the understaffed medical services in prisons and detention facilities), and the lack of adequate social activities for inmates (either because of the lack of designated spaces for such activities or because of the insufficient number of social workers to conduct them).¹⁶

In its annual report on human rights in Bulgaria, the Bulgarian Helsinki Committee also highlighted several problems of pre-trial detention in the country. According to the report, about one third of the pre-trial detention facilities are overcrowded (as of 2 June 2019, in ten out of a total of 28 detention facilities the number of inmates exceeded the capacity of the facility). The living conditions in many facilities are poor and do not comply with the international standards in terms of light, ventilation, access to a toilette, time spent outside cells and outdoors, access to work and education, etc.¹⁷ Similar findings were shared by the EU Fundamental Rights Agency in its report on detention conditions across the EU, published in 2019.¹⁸

8.3. Individual level

In Bulgaria, a comprehensive analysis of the impact of criminal proceedings, including detention, was carried out by the Center for the Study of Democracy under the project ARISA: Assessing the Risk of Isolation of Suspects and Accused. The analysis is based on a review of the claims for compensation of damages filed by accused persons who were not

¹⁶ Ombudsman of the Republic of Bulgaria (2020), [2019 Annual report of the Ombudsman acting as National Preventive Mechanism: summary](#), Sofia: Ombudsman of the Republic of Bulgaria.

¹⁷ Kachaunova, A. et al. (2020), Human Rights in Bulgaria in 2019 (*Правата на човека в България през 2019 г.*), Sofia: Bulgarian Helsinki Committee.

¹⁸ EU Fundamental Rights Agency (2019), [Criminal detention conditions in the European Union: rules and reality](#), Luxembourg, Publications Office of the European Union. For country specific information on Bulgaria, see Markov, D. (2019), [Criminal detention in the EU – conditions and monitoring \(FRANET country report on Bulgaria\)](#), Sofia: Center for the Study of Democracy.

found guilty or who were unlawfully detained in custody. A widespread negative consequence of detention is the loss of income, which may be the result of dismissal from work, taking unpaid leave (sometimes without informing the employer about the reason to avoid dismissal), inability to practice one's profession or missed opportunities to get employed. The relations between the detained person and their family are often affected as well, with negative consequences ranging from emotional estrangement to divorce. In some cases, detained persons' social life and community links are also affected, which usually happens when information about the person's detention is spread within the community. Some accused persons admitted they have become targets of whispering, mockery or open insults by random community members, neighbours or service providers. Health problems, both physical and mental, are also among the negative impacts identified by the research.¹⁹ The comparative report on the factors affecting the social status of suspects and accused, published under the same project, has a separate section on the effects of pre-trial detention, which examines in detail the socio-economic, personal and legal implications of the use of pre-trial detention. Among the negative consequences of detention the report highlights the greater likelihood of detainees being sentenced to prison due to undermined capacities to present themselves in a light favourable to receiving a noncustodial sentence as a result of loss of employment, accommodation, family and other community ties. The report refers to recent studies showing that longer periods in pre-trial detention increase the risk that detainees will offend (or re-offend) after their release and this effect does not depend on conviction. Special attention is paid to the impact of detention on the detainees' children ranging from difficulties in continuing normal life and frustration about what will happen to their parent to difficulties in retaining contact and prolonged parental deprivation. The report also emphasises the disproportionate use of pre-trial detention affecting mostly those living in poverty. In terms of costs of detention, the report notes that traditionally these are calculated solely by adding together the direct expenses of accommodation, feeding and caring while no effort has been made to calculate the larger, indirect costs related to lost productivity, reduced tax payments or diseases transmitted from prison to the

¹⁹ Center for the Study of Democracy (2018), [Country report on the factors affecting the social status of suspects and accused: Bulgaria](#), Sofia: Center for the Study of Democracy.

community. The report also offers a sample analysis of the European Court of Human Rights case law on damages claimed as a result of pre-trial detention.²⁰

9. Other aspects of PTD and alternatives in the national scientific literature

Several studies in Bulgarian scientific literature compare pre-trial detention with imprisonment, arguing that pre-trial detention, as well as house arrest, are much closer to imprisonment than to the other noncustodial remand measures,²¹ and are sometimes characterised as heavier measures than imprisonment itself because pre-trial detainees cannot benefit from some of the rights granted to convicted prisoners such as early release, temporary suspension of imprisonment or lighter regime.²²

A review of the case law related to pre-trial detention and house arrest, produced by the Supreme Court of Cassation, outlines the cases, in which an accused person is more likely to be detained. According to the analysis, circumstances like identification issues (lack of proper identity documents or use of false identity documents), unestablished residence (no established place of residence or not residing at an established place of residence), previous attempts to abscond, previous convictions, other pending criminal proceedings are among the factors often leading to detention.²³

One issue analysed in depth in Bulgarian scientific literature is the duration of pre-trial detention. For some researchers, setting a maximum duration of pre-trial detention is linked to fundamental rights and serves as a safeguard against unlimited restriction of the personal freedom of individuals²⁴ and their right to trial within a reasonable time

²⁰ Markov, D. et al. (2018), [Factors affecting the social status of suspects and accused](#), Sofia: Center for the Study of Democracy.

²¹ Marinova, G. (2005), Pre-trial detention – nature and characteristics ([Същност и особености на мярката за неотклонение задържане под стража](#)), *Pravna misal (Правна мисъл)*, Issue 1/2005, Sofia: Bulgarian Academy of Sciences.

²² Hinov, I. (2013), The role of the right of defence in assessing the justified assumption in the procedure under Article 64 of the Criminal Procedure Code ([Значение на правото на защита при формиране на обоснованото предположение в производството по чл. 64 НПК](#)), *Lawyer's Review (Адвокатски преглед)*, Issue 6/2013, Sofia: Supreme Bar Council.

²³ Danova, A. and Paunova, L. (2016), Report – analysis of the grounds on which the courts impose the remand measure “house arrest” or replace the remand measure “detention in custody” with “house arrest” ([Доклад – анализ на основанията, на които съдилищата взимат мярка за неотклонение „домашен арест“ и на които изменят мярката за неотклонение „задържане под стража“ в „домашен арест“](#)), Sofia: Supreme Court of Cassation.

²⁴ Chinova, M. (1998), Coercion in criminal procedure and the inviolability of the person ([Наказателнопроцесуална принуда и неприкосновеност на личността](#)), Sofia: Sibi.

according to Article 5 of the European Convention on Human Rights,²⁵ while for others it is aimed to motivate criminal justice authorities to complete the investigations in due time.²⁶ The obligation of criminal justice authorities to release the person or bring the case to court after the maximum duration of detention expires is seen also as a guarantee that a person will not remain detained for as long as it is necessary for criminal justice authorities to complete their investigation,²⁷ and that no one will be subjected to unreasonable long deprivation of liberty.²⁸

The Criminal Procedure Code defines the maximum duration of pre-trial detention and this maximum duration applies throughout the pre-trial proceedings irrespective of whether the accused person has been released and then detained again or whether the case has been brought to court but sent back by the court to the prosecutor for additional investigation.²⁹ The calculation of the duration, however, excludes other detentions imposed on the same person, but not related to the criminal proceedings, such as police detention.³⁰

The Criminal Procedure Code considers both pre-trial detention and house arrest as forms of deprivation of liberty, which means that when pre-trial detention reaches its maximum duration it cannot be replaced by house arrest.³¹

²⁵ Ekimdzhiev, M. (1997), Detention in custody following the amendments to the Criminal Procedure Code of 12 August 1997 and its relationship with the "reasonable time" requirements under Art. 5 § 3 of the ECHR and the habeas corpus procedure (*Задържането под стража след промените в НПК от 12 август 1997 г. и неговото съотношение с изискванията за „разумен срок“ по чл. 5 § 3 от ЕКПЧ и процедурата „habeas corpus“*), Human Rights (*Правата на човека*), Issue 4/1997, Sofia: Bulgarian Lawyers for Human Rights.

²⁶ Nenkov, R. (1998), More about detention in custody after the changes in the Criminal Procedure Code of 1997 (*Още за задържането под стража след промените в НПК от 1997 година*), Human Rights (*Правата на човека*), Issue 1/1998, Sofia: Bulgarian Lawyers for Human Rights.

²⁷ Kalaydzhieva, Z. (1997), The situation of detainees in Bulgaria (*Положението на задържаните в България*), Human Rights (*Правата на човека*), Issue 1/1997, Sofia: Bulgarian Lawyers for Human Rights.

²⁸ Balkanska, A. (2000), The amendments to the Criminal Procedure Code concerning the coercive procedural measures (*Измененията на Наказателно-процесуалния кодекс относно мерките за процесуална принуда*), Bulletin of the Association of Prosecutors in Bulgaria (*Бюлетин на Асоциацията на прокурорите в България*), Issue 1/2000, Sofia: Association of Prosecutors in Bulgaria.

²⁹ Trendafilova, E. (2000), The amendments to the Criminal Procedure Code of 1999: theoretical aspects, legislative solutions and trends (*Промените в НПК от 1999 г.: теоретически положения, законодателни решения, тенденции*), Sofia: Ciela.

³⁰ Ivanov, H. (2001), The Situation of detainees (*Положението на задържаните*), Konstantinov, E. and Palikarski, M. (eds.) Current problems of pre-trial detention facilities (*Актуални проблеми на следствените арести*), Sofia: GoreksPres.

³¹ Shekerdzhiev, K. (2014), Remand measures. House arrest and detention in custody (*Мерки за неотклонение. Домашен арест и задържане под стража*), Toneva, G. (ed.) Criminal procedure manual for candidates for junior prosecutors, Part II (*Помагало по наказателен процес за кандидати за младши прокурори, част II*), Sofia: National Institute of Justice.

Since the maximum duration of pre-trial detention depends on the gravity of the crime for which the accused person is charged, if charges are modified during the proceedings, the maximum duration can also change. Thus, if a person is charged for a crime, for which the maximum duration of pre-trial detention is eight months, but the charges are modified and the person becomes accused of a less serious crime, for which the maximum duration is two months, this person must be released from detention if they have already spent two months in custody.³²

When the maximum duration of pre-trial detention expires, the prosecutor is obliged to immediately release the person, but is also authorised to impose another, lighter remand measure, for example bail. However, there are no special rules on what happens if the person fails to comply with the new measure, for example if the bail is not deposited. The general rule, according to which the failure to deposit the bail can lead to its replacement with house arrest or detention, cannot apply, because their maximum duration has already expired. This practically leaves a gap in the legislation and makes the compliance with the remand measure rather voluntary as there is no mechanism for obliging the person to observe it.³³

10. European aspects and their meaning for national PTD practice in the national scientific literature

10.1. Cooperation in criminal justice matters in general

Cooperation in criminal justice matters in Bulgaria is governed by the Criminal Procedure Code and several special laws. The Criminal Procedure Code lays down the rules and procedures for the transfer of convicted persons, recognition and execution of sentences issued by foreign courts, mutual legal assistance in criminal matters, and transfer of criminal proceedings. Special laws have been adopted to regulate the procedures related to the use of cooperation tools developed at EU level. These include the Extradition and European Arrest Warrant Act, the European Investigation Order Act, the European

³² Salkova, E. and Roychev, Y. (2019), Maximum duration of the measures of remand detention in custody and house arrest in criminal cases ([Максималната продължителност на мерките за неотклонение задържане под стража и домашен арест по наказателни дела](#)), De Jure, Issue 2/2019, Veliko Tarnovo: St. Cyril and St. Methodius University of Veliko Tarnovo.

³³ Milev, S. (2016), About the power of the prosecutor to repeal coercive procedural measures during the pre-trial proceedings ([За правомощието на прокурора да отменя мерките за процесуална принуда в досъдебното производство](#)), Norma (Норма), Issue 6/2016, Sofia: Ciela.

Protection Order Act, the Recognition, Execution and Transmission of Confiscation Orders and Financial Penalties Decisions Act, the Recognition, Execution and Forwarding of Judgments and Probation Decisions with a view to the Supervision of Probation Measures and Alternative Sanctions Act, and the Recognition, Execution and Forwarding of Decisions on Supervision Measures, Other than Measures Requiring Detention Act.

Two national networks have been set up to facilitate the international cooperation in criminal justice matters. The National Prosecutorial Network for International Legal Cooperation facilitates the direct contacts between Bulgarian prosecutors and their counterparts abroad and provides assistance to prosecutors working on cases involving international cooperation. The National Judicial Network on International Cooperation in Criminal Matters provides assistance to judges in the preparation, transmission and execution of requests for international legal assistance. In 2016, the two networks signed a cooperation agreement defining the different channels and formats for communication and exchange of information.

According to data published by the Public Prosecutor's Office, the most commonly used instruments for international cooperation in criminal justice matters are mutual legal assistance and the European Investigation Order. In 2019, Bulgarian public prosecutors have issued 602 mutual legal assistance requests, 846 European Investigation Orders, 239 European Arrest Warrants and three extradition requests, and have received for execution 1,636 mutual legal assistance requests, 807 European Investigation Orders, 189 European Arrest Warrants and 39 extradition requests. The data clearly show that Bulgaria participates in international cooperation in criminal matters much more often as an executing state than as a requesting state.³⁴

10.2. The European Supervision Order (FD 829) in national practice

In Bulgaria, 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 is implemented in domestic legislation through a special law – the Recognition,

³⁴ Information about the countries, with which Bulgaria cooperates most often, is not available.

Execution and Forwarding of Decisions on Supervision Measures, Other than Measures Requiring Detention Act, adopted in 2016.

According to the law, the judicial authorities competent to forward decisions on supervision measures are the public prosecutors, while the authorities competent to recognise such decisions are the district courts. In practice, the law is not actively implemented. Bulgarian courts have issued only a few decisions related to requests for recognition of decisions on supervision measures, forwarded by competent judicial authorities of other Member States.³⁵ There is no publicly available information on the number of decisions on supervision measures forwarded by Bulgarian prosecutors to competent judicial authorities of other Member States.

10.3. Human rights and rulings of the European Court of Human Rights

The European Court of Human Rights has issued a number of decisions in cases against Bulgaria related to detention.

In the case of *Dzhabarov and Others v. Bulgaria* the Court found a breach of Article 5 § 5 of the Convention, because the applicants' claims for non-pecuniary damages in respect of the mental suffering that they had allegedly endured as a result of their unlawful detention were dismissed because the Bulgarian administrative courts, adhering strictly to the principle *affirmanti incumbit probatio*, held that that suffering had not been sufficiently made out, in particular through the provision of expert medical evidence, which sits in stark contrast with cases where the same courts have held that the mere fact of unlawful detention must be regarded as giving rise to non-pecuniary damage, which is the correct approach.³⁶

In the case of *Bochev v. Bulgaria* the Court found a breach of Article 5 § 3 of the Convention, because Bulgarian courts had prolonged the detention of the applicant relying chiefly on the gravity of the charges against the applicant, on the presumption that due to the seriousness of the offences of which he stood accused he automatically

³⁵ The national database of court cases includes only two cases of proceedings for recognition of decisions on supervision measures. In both cases, the decisions were forwarded to Bulgaria by courts in The Netherlands.

³⁶ European Court of Human Rights, [Dzhabarov and other v. Bulgaria](#), Nos. 6095/11, 74091/11 and 75583/11, 31 March 2016.

presented a risk of absconding and would commit offences if released, and on the lack of any change in the relevant circumstances. According to the Court, the gravity of the charges cannot by itself serve to justify long periods of pre-trial detention and continued detention can be justified only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. The Court also found a breach of Article 5 § 4 (the applicant did not benefit from the guarantees for having the lawfulness of his detention decided speedily by a court), Article 5 § 5 (the applicant was not provided with an enforceable right to compensation) and Article 8 (systematic interception of the entirety of the pre-trial detainee's non-legal correspondence with no legitimate aim).³⁷

In the case of *Svetoslav Dimitrov v. Bulgaria*, the Court found a breach of Article 5 § 1 of the Convention, because the applicant was detained for a period of eight months and twenty-four days directly as a result of the lack of sufficiently precise provisions in domestic law on how to reconcile the running of periods of detention served for different reasons, which meant that the general principle of legal certainty was not satisfied as the conditions for the applicant's deprivation of liberty under domestic law were not clearly defined and the law itself was not sufficiently foreseeable in its application to meet the standard of "lawfulness" set by the Convention.³⁸

In the case of *Dobrev v. Bulgaria*, the Court found a breach of several provisions of the Convention, including Article 3 (the applicant was detained in inadequate conditions), Article 5 § 1 (part of the applicant's detention was not lawful), Article 5 § 3 (the applicant was not promptly brought before a judge), Article 5 § 4 (the applicant's appeal was not examined speedily), Article 5 § 5 (the applicant did not have available an enforceable right to compensation), and Article 8 (unlawful interference with the applicant's right to respect for his home as a result of the search of the apartment where he was living).³⁹

Similarly, in the case of *Mitev v. Bulgaria*, the Court found a breach Article 5 § 1 (part of the applicant's detention was not lawful because the authorities failed to verify carefully whether or not there were valid legal grounds for the applicant's continued deprivation

³⁷ European Court of Human Rights, [Bochev v. Bulgaria](#), No. 73481/01, 13 February 2009.

³⁸ European Court of Human Rights, [Svetoslav Dimitrov v. Bulgaria](#), No. 55861/00, 7 February 2008.

³⁹ European Court of Human Rights, [Dobrev v. Bulgaria](#), No. 55389/00, 10 August 2006.

of liberty), Article 5 § 3 (the applicant was not promptly brought before a judge due to repeated referrals of the case back to the investigation stage, owing to discrepancies in the indictment and the material prepared by the investigators and the prosecutor), Article 5 § 4 (the applicant's appeal was examined with inordinate delay), and Article 5 § 5 (the applicant was not afforded an enforceable right to compensation) of the Convention.⁴⁰

⁴⁰ European Court of Human Rights, [Mitev v. Bulgaria](#), No. 55389/00, 10 August 2006.

11. Short conclusions and outlook

Pre-trial detention in Bulgaria is the heaviest remand measure at the pre-trial stage of criminal proceedings. It is designated to serve as a measure of last resort and because of that it can only be imposed by a court in the presence of explicitly defined grounds and prerequisites. Nevertheless, it is often used and a significant number of accused persons spend some time of the proceedings in detention.

There are only three alternatives to detention available in Bulgaria: house arrest (which, like detention, is considered a custodial measure, and is the only remand measure which can be combined with electronic monitoring), bail and mandatory reporting to the police. None of the alternatives to detention incorporate probation or other correctional measures.

Pre-trial detainees are placed in prisons and pre-trial detention facilities. As noted by several national and international monitoring institutions and organisations, some of these places are overcrowded, with poor living conditions and inadequate provision of social work and healthcare.

Issues that appeared not sufficiently researched include the practical use and effectiveness of alternatives to pre-trial detention (in particular mandatory reporting to the police and bail), the costs, including indirect costs, of detention, and the impact of detention on detainees, including on the outcome of proceedings.

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List of figures

Figure 1: Pre-trial detention requests (2007 – 2019)

Figure 2: Pre-trial detainees (2007 – 2019)

Figure 3: Share of detainees of all accused persons (2010 – 2019)

Figure 4: Duration of pre-trial detention (2008 – 2019)

Figure 5: Detained juveniles (2012 – 2019)

Figure 6: Released pre-trial detainees (2007 – 2019)

Figure 7: Pre-trial detainees (2008 – 2018)

Figure 8: Detainees in prisons and pre-trial detention facilities (2004 – 2019)

Figure 9: House arrest (2007 – 2019)



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PRETRIAD

Alternative pre-trial detention measures

Bulgarian National Report

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Annexe 5 – German national report



PRE-TRIAD

Alternative pre-trial detention measures

German National Report

Basis for the D2.1 Literature review

PRE-TRIAD Project
Alternative pre-trial detention measures

Project Number 881834
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PRE-TRIAD Project

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

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German National Report – Basis for the D2.1 Literature Review



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2. Contents

1. Change Control.....	2
1.1. Document Properties.....	2
1.2. Revision History.....	2
2. Contents.....	3
3. Executive summary.....	5
4. Introduction.....	6
4.1. The legal system and general context for PTD in Germany.....	6
4.2. Definition of PTD.....	8
4.3. Important historical developments with respect to PTD.....	8
4.4. Problems and aspects to be addressed in the context of PTD in Germany..	9
5. The legal bases and the fundamental legal aspects with respect to PTD.....	10
5.1. General principles and competent authorities and their roles.....	10
5.2. Legal prerequisites for pre-trial detention.....	11
5.3. The suspicion.....	12
5.4. The grounds for detention.....	13
5.5. Proportionality.....	16
5.6. Duration and prolongation of PTD.....	17
5.7. The procedures.....	18
5.8. Recent legal developments.....	20
5.9. Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law	20
6. Measures to avoid PTD – alternatives in practice.....	21
6.1. Conditional suspension of PTD.....	21
6.2. Social work strategies: Providing information (for the decisions) and/or support.....	22
7. PTD and Alternatives in figures and presentations.....	24
7.1. Statistical data on PTD available.....	25
7.2. Duration of PTD.....	30
8. Negative impact of PTD in the partner country – Literature review and statistical data.....	33
8.1. On the national level.....	33
8.2. On the organisational level.....	34

8.3. On the individual level.....	34
9. Other aspects on PTD and its alternatives	35
9.1. Empirical research and legal theoretical literature (also fundamental rulings)	35
10. European Aspects and their meaning for national PTD-practice in the national scientific literature	36
11. Short Conclusions and Outlook	37
12. Bibliography.....	38
List of tables.....	40
List of figures.....	40

3. Executive summary

In this report, you will find a description of the legal bases, regulations und procedures as well as the practice of pre-trial detention (PTD), its alternatives and corresponding problems in Germany. (Un)fortunately, there is a great need for further research regarding most of these topics concerning Germany. In recent years, C. Morgenstern et al. have done a lot of valuable work in this field and we are happy to be able to base this first report in some parts on the findings of her and her colleagues.¹

Data presented is based on official national statistics.

¹ See f.e. Morgenstern / Kromrey 2016, Morgenstern 2018a

4. Introduction

4.1. The legal system and general context for PTD in Germany

The German jurisdiction belongs to the civil law tradition. This means that the basic legal principles regarding criminal proceedings are the principle of individual guilt that is based on the guarantee to respect human dignity and personal autonomy.

Further principles are the court's duty to ascertain the truth and the principle of the rule of law ("Rechtsstaatsprinzip"), including the fair trial principle, the presumption of innocence², and the court's duty to maintain neutrality. Generally speaking the German legal system follows the principle of legality ("Legalitätsprinzip"). There are exceptions allowed though since the prosecution may discontinue proceedings conditionally or unconditionally under certain circumstances (art. 153 and 153a CCP).

While the Anglo-American criminal procedure is characterized by its adversarial nature with two parties ("Parteienprozess"), the German procedure is a combination of elements of accusation and inquisition. The prosecution is in charge of the accusation but at the same time, courts and prosecution are demanded to follow the principle of ex officio investigation. This means that the role of the prosecution is to collect both incriminating and exonerating information during the investigations. The prosecution is in charge of running the preliminary proceedings until an accusation is filed with the court. At the state of preliminary proceedings a judge is only required to be involved if the prosecution applies for certain severe measures, among them orders of surveillance and arrest warrants. Once the opening of the main trial ("Hauptverfahren") has commenced the court is in charge of running the proceedings.

Regarding PTD the Federal Constitutional Court (FCC) has stressed many times that the presumption of innocence and the principle of fair trial weigh heavily in favour of the detainees rights. Derived from the fair trial principle are the right of the suspect to consular support (if wanted), the right to a lawyer in all stages of the remand and the right to observance of certain time limits regarding the detention or proceedings.

² The presumption of innocence follows from the principle of rule of law and is also part of the European Convention of Human Rights (ECHR - Art 6 (2)) that has been ratified by Germany

Consequences of the fair trial principle are the right to consular assistance, the right to a lawyer in the review of a remand in custody, specific rights of the accused concerning excessive length of the proceedings or in case of undercover investigations in remand prisons.

Furthermore, the principle of public care (“Fürsorgeprinzip”) also applies for criminal proceedings meaning that the state will care for vulnerable suspects. This is often the case when the suspect / accused is not speaking German, is a minor, or has health problems.

If a person is detained or in custody, he/she can refer to his/her constitutionally guaranteed basic judicial rights (“Justizgrundrechte”) stated in Art. 104 Basic Law (BL - “Grundgesetz”). The basic judicial rights include nine principles:

1. Any deprivation of liberty has to be ordered by a judge
2. Any deprivation of liberty has to be grounded on and regulated by law and follow the described procedures.
3. Any person in custody may not be subjected to mental or physical mistreatment.
4. If a person is preliminary arrested, the detainee must be brought before a judge as soon as possible, with the absolute time limit being 48 hours.
5. The detainee must be given concrete information why he/she was arrested, at the latest by the judge.
6. The detainee has to be heard and may raise objections with the judge.
7. The judge has to decide if an arrest warrant is issued or not. If no warrant is issued, the detainee must be released immediately.
8. If a warrant is issued it must be in written form and it has to contain the reasons for arrest.
9. The detainee has the right to have relatives or a person of trust to be informed of his or her arrest and detention.

Another important constitutional guarantee in German law regards the presence of the accused during court proceedings. In Germany neither trial nor conviction can be done without the accused present (art. 230 (1) CCP). Absence of the accused will bring the proceedings to a stop. It is also an absolute ground for revision. Exceptions can be made in the case of the prosecution ordering a so called penalty order

(“Strafbefehl”), in which the accused can either accept the order or object to it, in which case the procedure is converted into a normal, oral proceeding with a judge present.

In order to guarantee the presence of the accused in some cases he/she will be placed in PTD.

4.2. Definition of PTD

In German law PTD (“Untersuchungshaft” - literally: 'investigating detention') is the deprivation of liberty of an untried or not yet finally convicted person. The PTD can last up to the end of an appeals procedure meaning that it is not restricted to the pre-trial period.

PTD is a measure of incarceration: It restricts the rights of the accused in the highest manner. No other measure in the criminal proceedings (at least in the investigation and trial stage of a criminal procedure) has such a burden on the rights of the accused, which are protected by the Basic Law. The right to Liberty and the presumption of innocence are heavily affected by PTD.

Disregarding the presumption of innocence³, which is based on the rules of the Basic Law and on art. 6 (2) ECHR, the accused has to accept this very severe intervention in his / her basic right of liberty (based on art. 2 (2) No. 2 BL and art. 104 BL) if PTD is ordered. If there are alternatives (less invasive measures) they have to be taken. PTD is seen as *ultima ratio*.

4.3. Important historical developments with respect to PTD

After World War II the legislator oriented the post-war legislation on the time of the Weimar Republic. There, PTD was introduced into law in the 1870s. In 1950 the law only knew two grounds for detention. One being the risk of absconding and the other one being the risk of tampering with evidence. 1964 the legislator added a third and fourth ground for detention: the risk of repeating or continuing an offence and the gravity of the offence. Back in 1964 the number of offences that could be applied under the ground of risk of repeating or continuing an offence was still very small. In

³ See Jong, Lent (2016) for a discussion of the dilemma, to put someone into prison and still guard the presumption of innocence.

the following years this list of offences has grown quite considerably. In 1981 the first amendments referred to drug offences; in 1988 there has been a further amendment concerning very serious violent offences. Eleven years ago in 2009 a new offence has been added to the reasons for using this ground: the reparation of a serious, violent and seditious offence (art. 89a GCC). Its aim is to prevent and be able to react to acts of preparation of extremist and terrorist acts (art. 112a, 1, 2 CCP).

4.4. Problems and aspects to be addressed in the context of PTD in Germany

PTD is not that much in debate in Germany. Most discussion refers to the prison situation and system in general – not especially to the PTD.⁴ Due to the role of migration in the public discussion there is also some link discussed between the situation of migrants and crime (in the sense that more migrants will lead to higher numbers of PTD inmates).⁵

While the scientific community that works in this field and does research regarding PTD in Germany is rather small, there is however a public discussion concerning the rising numbers of PTD detainees. Some bigger media have reported on the developments on the federal level as well as on the level of single federal states. The NDR (public broadcasting service) reported on the remarkable growth of PTD numbers since 2014 in 2019.⁶ For Berlin, the BZ (Berlin Newspaper) reported on the same phenomenon (rising PTD numbers while crime in general was going down).⁷

Regarding the COVID pandemic there have been also some reports on how the corresponding measures have put additional strain on the prisons and their organization.⁸

⁴ So we find rare discussions on pre-trial detention, f.e.: Forum Strafvollzug 2016; Antholz 2019. For the situation in and off prison (in general): Bereswill, Greve (eds.) 2001; Dünkel et al (eds.) 2008; Maelicke, Suhling (eds.) 2018;

⁵ See under the concept of crimmigration: Graebisch 2019.

⁶ See <https://www.presseportal.de/pm/6561/4252646>

⁷ See <https://www.bz-berlin.de/berlin/zahl-der-untersuchungshaeflinge-in-berliner-gefaengnissen-steigt>

⁸ See f.e. <https://www.ndr.de/nachrichten/schleswig-holstein/coronavirus/Herausforderung-Corona-Alltag-in-der-IVA-Itzehoe.iva514.html>

5. The legal bases and the fundamental legal aspects with respect to PTD

5.1. General principles and competent authorities and their roles

The police are the authority that carries out arrests ordered by the prosecutor and approved by a judge. In cases of “imminent danger” the police however are entitled to arrest a suspect without an order by the public prosecutor, if and when a prosecutor cannot be reached in time. Otherwise, the public prosecutor is always the one who has to initiate a decision, which is then the responsibility of a judge (“Haftrichter”). PTD will be ordered by a judge (administrative responsibility) in form of a written arrest warrant (art. 114 (1) CCP, based on art. 104 (2) No. 1, (3) No. 2 BL).

The arrest warrant is the base for the enforcement of the order as well as for corresponding measures of a search for the person.

The enforcement of the arrest warrant lies in the hand of the public prosecution office. The necessary investigations are done by their own staff (art. 152 CCA) or they ask the police to do it for them (art. 161 CCP).⁹

The grounds for PTD are absconding or risk of absconding (“Flucht” (art. 112 (2) No. 1 CCP), “Fluchtgefahr” (art. 112 (2) No. 2 CCP)), risk of tampering with evidence (“Verdunkelungsgefahr” (art. 112 (2) No. 3 CCP)) and risk of reoffending (“Wiederholungsgefahr” (art. 112 a CCP)).

In art. 112 (3) CCP it is stated, that PTD can also be ordered if there is the “urgent” suspicion that the suspect has committed a (rather) serious crime. In these cases the law does not ask for further reasoning to ground the detention.¹⁰

The arrest warrant has to be reasoned and written. The constitution demands that the issuing judge is independent and has to assess the application for PTD very carefully.¹¹

⁹ In practice it will almost always be the case, that the police is taking care of the investigations on behalf of the prosecutors.

¹⁰ Although in practice the prosecutor might also argue that one of the other grounds is also applicable. The FCC ruled, that in cases where the gravity of the crime is the ground for detention it is only applicable if the other grounds can not be completely ruled out.

¹¹ In practice, it is often seen that the judge will simply confirm the application of the prosecution and the detention warrant will be (for the most part) a copy of the prosecutor’s application for detention.

The decision to order PTD is based on the information of the police about the offence, in some case also on older records, and on the first interview the judge has to do with the suspect. There are no other procedural measures to improve information about the suspect.

In case of the juvenile justice system, the participation of the youth court aid, which has the task to search for alternatives to detention (according to art. 72, 72a, 109 YCA) is mandatory as soon as a detention order is issued.

5.2. Legal prerequisites for pre-trial detention

The ninth section of the CCP (Strafprozessordnung) regulates PTD. Regulations about arrest (“Festnahme”) and temporary arrest (“Vorläufige Festnahme”) are found within the art. 112 CCP to art. 130 CCP. The prerequisites of PTD as well as the grounds for arrest are formulated especially in art. 112 CCP. An urgent suspicion as well as the applicability of a ground for arrest are prerequisites for ordering a warrant. Furtheron there is the obligation to respect the principle of proportionality. Because the presumption of innocence is in work for the suspect or the accused until there is a final sentence, a prior incarceration is only possible under very restrictive conditions. These conditions are formulated in art. 112 CCP et seq. The main objective of PTD is to secure the trial proceedings (“Verfahrenssicherung”). Both the provisions of the Basic Law and those of the CCP, however, required supplementary interpretation by the FCC, whose jurisprudence had and still has a huge impact on the legal and practical situation of pre-trial detention in Germany.

Apart from the principle of proportionality, which we will analyse in the following section, the prerequisites for the order of PTD have to be assessed, after the verification of proportionality. The law demands two basic prerequisites:

- An exigent suspicion (“dringender Tatverdacht” – literally: urgent suspicion), that the suspect committed the alleged offence;
- A ground (Haftgrund) to apply PTD ;

Details on these prerequisites are described in the following.

5.3. The suspicion

Unlike for an arrest, the authorities need not only a suspicion, but an exigent suspicion regarding the suspect (art. 112 (1) CCP). A mere suspicion is not sufficient to order PTD. Exigent suspicion means, that there is a high probability of the individual actually having committed the offence.

This probability is assessed with all the knowledge available to the deciding judge (“Haftrichter”) at the time of decision for or against PTD. The assumption of an urgent suspicion has to be based on existing and already established facts. Sheer suppositions are not enough for the assumption of an urgent suspicion.

Most often the Haftrichter does not have enough information when he / she sees the suspect the first time after his arrest. The judges information is derived from the results of the investigation of the police, an extract from the Federal Central Register and the protocol of the arrest. De jure he is obliged to investigate all relevant information, pro and contra the suspicion for the procedure (art. 244 (2) CCP). De facto this is rarely the case.

Since the judge can only assess a snapshot of the state of investigations and the procedure has to be completed in the given time frame (48 hours max; often other participants of the proceedings have used up some of the time already for their actions), the information that the judge bases his / her decision on is very often lacking essential aspects.

On the other hand, the amount of Information can also be overwhelming for the judge. While it may not be composed of truly relevant results of investigation, according to Morgenstern / Kromrey “reviews of judgments reveal that judges sometimes are confronted with a huge amount of evidentiary material, especially by means of technical surveillance, without the public prosecution having truly considered to what extent this pile of information substantiates the accusation. Some judges seem to refer swiftly and uncritically to these results of the police investigation. Empirical studies suggest that some arrest warrants are grossly flawed because already here on the evidentiary level crucial information is missing”.¹²

¹² Morgenstern, Kromrey 2016, p. 7f.

5.4. The grounds for detention

In addition to the urgent suspicion the law also requires the existence of (at least) one specific ground for detention (art. 112, 112a CCP). The list of grounds can be found in art. 112 CCP. Four grounds to order PTD are listed:

1. flight or the risk of absconding (“Flucht” or “Fluchtgefahr”),
2. the risk of tampering with evidence / the risk of interfering with witnesses (“Verdunkelungsgefahr”),
3. the risk of repeating or continuing a listed offence of a (relatively) serious nature (“Wiederholungsgefahr”),
4. the gravity of the offence (art. 112 (3) CCP).

Art. 113 CCP states, that PTD may also be ordered in cases of minor offences. In those cases special restrictions apply. For example if a PTD order is to be issued on the grounds of the risk of absconding, the mere assumption of the suspect fleeing does not suffice. There has to be evidence, that the suspect has already tried to flee or to hide or already started concrete preparations to do so (art. 113 (2) CCP). Other circumstances that justify PTD in minor cases will be the suspect not having a place of residence or ID / passport.

If a PTD for minor offences is to be issued on the grounds of the risk of tampering with evidence, the alleged offence must be punishable with more than six months jail time or more than 180 daily rates in the case of a fine (art. 113 (1) CCP).

Flight or the risk of absconding (“Fluchtgefahr”)

The risk of absconding is most often cited as a ground for ordering a PTD. To secure the proceeding it is important that the suspect is present in person at the trial. If the suspect has already made preparations to flee or is fleeing at the time of the order of detention, this ground will be cited in the detention order. Regarding the risk of absconding, in practice the following indicators will be used to assess the likelihood of the suspect to abscond:

- The expected outcome of the trial / severity of the punishment

- The expected willingness and or ability of the suspect to attend the trial (i.e. has he / she attended past trials or not?)
- The expected ability and willingness of the suspect to hide from the authorities (or to flee abroad)
- The suspect not having the German nationality will regularly be seen as an indicator that he / she might flee abroad (even if the suspect has been living in Germany for decades)
- Another indicator for the risk of the suspect hiding / fleeing are the non-existence of proper places of work and or residence in Germany

Indicators for a very low risk of absconding are believed to be strong family and work ties, the suspect's willingness to contribute to the criminal procedure (e.g. turning himself in), a high age as well as severe medical conditions.

The risk of tampering with evidence (“Verdunkelungsgefahr”)

If the judge sees a risk that the suspect might try to influence witnesses or tamper with evidence then this ground for detention will be used, since the correct enforcement of the criminal proceedings might otherwise be in danger.

The risk of reoffending (“Wiederholungsgefahr”)

The urgent suspicion regarding the committing of an offence listed in art. 112a (1) No. 1 or No. 2 CCP are prerequisites for the use of this ground for ordering the PTD. Furtheron there must be evidence that the person is under suspicion to do comparable, respective offences and continues offending until the time of the trial. The PTD has to be the only way to avoid this offending. Section 1 number 1 refers to sexual offences¹³, number 2 lists offences committed very often by repeat offenders and other grave crimes.¹⁴

The risk of repeating or continuing an offence (art. 112a CCP) has a strong preventive connotation and is suspected to be often the actual hidden reason for

¹³ F.e.: Sexual abuse (art. 174 GCC), rape (art. 177, 178 GCC), stalking (art. 238 GCC).

¹⁴ F.e.: membership in a terrorist organisation (art.89a GCC), serious violent offences (art. 224 GCC), serious theft (art.243 GCC) and serious drug offences like dealing with drugs in larger amounts (art. 29 CSA).

remanding someone on the grounds of risk of absconding. The risk of repeating or continuing an offence is harder to apply in practice because more legal restrictions exist.

This is true even though this ground has been extended by criminal policy and legislation over the years. While it was first strictly limited on serious sexual offences when it was introduced in 1964, the list of applicable offences has been extended frequently over the years.

Art. 112a CCP (repeat offending) gives judges is the possibility to order PTD without the goal of PTD being the securing of the proceedings. This has brought along a lot of criticism and dispute regarding this paragraph ever since it was put into practice, since for some people it seems to be an evident violation of the principle of proportionality.

According to Morgenstern / Kromrey this development is “reflecting the more preventive and security-oriented zeitgeist in Germany and elsewhere.”¹⁵

The gravity of the offence

A list of especially grave offences can be found in art. 112 (3) CCP. The law states that the ordering of a PTD is possible even if the grounds described above can not be applied. The listed offences are very serious offences especially concerning offences against life, but also concerning terrorism and other offences (art. 211 (murder), art. 212, art. 226 (serious violence), art. 306b (serious arson), art. 306c, art. 308 (1) – (3) (illegal use of explosives), art. 129a (1) or (2) (preparing a terrorist act), art. 129b GCC; art. 6 (1) No. 1 (genocide) International Criminal Law.

It can also be noted, that this law is also applicable in cases, where the offence has only been tried (art. 22 GCC) or the suspect is to be held accountable for the instigation of a crime (art. 26 GCC), the accessory of a crime (art.27 GCC) as well as the try of participation (art. 30 GCC).

The FCC ruled in 1965 that the application of this ground for detention is only constitutional when the court can argue why the goals of PTD would otherwise be at risk.¹⁶ This means that even in the case of Murder it has to be argued why the suspect cannot be free for the time of the trial. In most cases this will be done by way

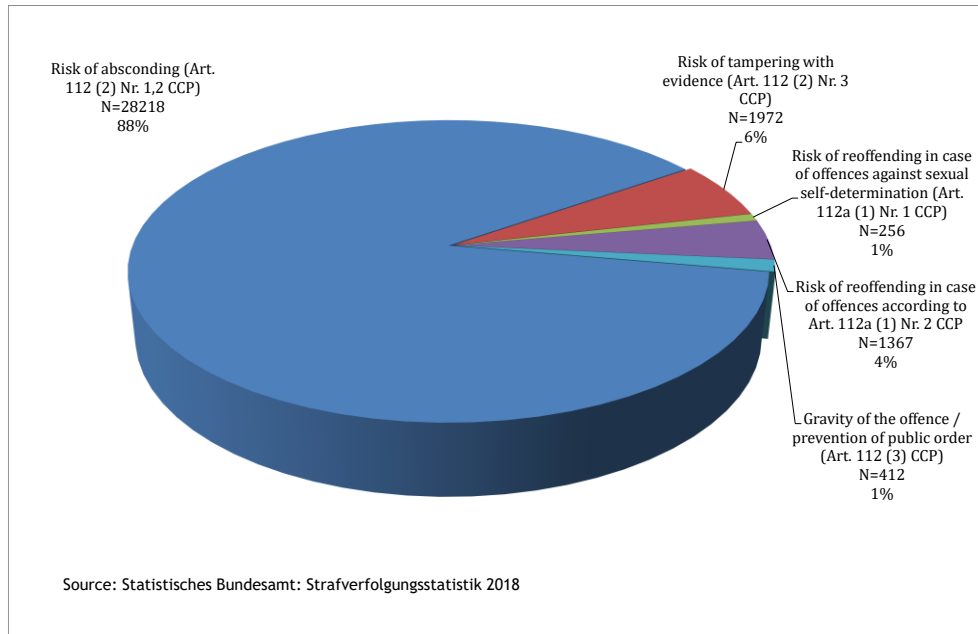
¹⁵ Morgenstern, Kromrey 2016, p. 11

¹⁶ Federal Constitutional Court (FCC), 15 December 1965, official collection: BVerfGE 19, 342 (350).

of arguing that the expected verdict will be a very long time in jail, which in turn maximizes the risk of absconding on the part of the suspect.

Comparison of the frequency of grounds applied in Germany

Figure 1: Grounds for applying pre-trial detention in Germany 2018



The risk of absconding is by far applied the most, accounting for 88% of all orderings of PTD in 2018 (Source: Strafverfolgungsstatistik 2018). It is the dominant ground for the ordering of PTD.¹⁷

This ground for detention is the easiest to justify. Applying the ground of reoffending needs much more argumentation, especially explaining why the specific offence leads to this decision. The ground of risk of obscuring comes in consideration only in very specific condition of the case. The ground of the gravity of the offence plays only a minor role for the ordering of PTD.

5.5. Proportionality

In German law, the principle of proportionality has to be followed at all times. While this principle is not a prerequisite for ordering PTD in a narrower sense, it is still very important, as it forbids excess. In the case of PTD this means, that a warrant

¹⁷ See f.e.: Wolf 2017; Morgenstern 2018b.

can not be issued, if it is disproportionate to the alleged crime committed and its circumstances. Due to the restriction of Human Rights in the PTD, it can only be ordered, if the principle of proportionality is kept.

The ban of excess demands a valued consideration between the concrete disadvantages and risks of imprisonment for the accused and the gravity of the offence, the public interest in the prosecution of the case as well as the predicted outcome of the trial (i.e. severity of the punishment). If there is a disproportion between these dimensions, then there will be no order of PTD.

If the goal of PTD can be achieved with less severe measures, these have to be taken (art. 116 CCP). This is another aspect of the principle of proportionality.

Because PTD is a very invasive measure in the Human Rights of the suspect, the execution of PTD is restricted on grounds of the constitution. In practice this means that the accusation and trial have to be conducted as quickly as possible. This principle of expediency (“Beschleunigungsgebot”) is also derived from the maxim of the ban of excess.

Also the PTD order should be reasoned so carefully, that – ideally – no doubts regarding the why, how and how long of the PTD should arise in the process of the investigation / trial.¹⁸

German law does not allow measures of discipline, punishment or extortion (e.g. towards a confession) to be applied via PTD. This is not fixed in the CCP or in other laws, but is the result of the decisions of the FCC. Their decisions are guiding the interpretation and the framework of the practice of the arrest warrant.¹⁹

5.6. Duration and prolongation of PTD

The German law does not formulate a definitive limit for the duration of PTD. There is a regulation that the detention, in case no verdict has been reached, should not last more than six months. If there are however important reasons (particular difficulties, unusual extent of the investigations, the necessity of gaining records

¹⁸ Of course, it is difficult to evaluate the situation without having all information and the possibility of changes. There should also not be other reasons to order the arrest – with the risk that the reasons of the order are not ‘sustainable’. Further research on this point is needed.

¹⁹ See the grounding decision of the FCC: BVerfG 19, 342 (1 BvR 513/65; date: 15.12.1965). The constitutional grounds for detention are listed in chapter 5.4 Other hidden or extra-legal grounds exist in practice though and are known als *apocryphal grounds* for detention. These are discussed in chapter 9.

from other courts abroad, the need of expert statements etc.) the detention can be prolonged by way of an application of the prosecutor. These reasons must be important enough to legitimize further detention. The decision to confirm the application of the prosecutor to prolong the PTD is in then made by the higher regional court (art. 121 (1) and (2) and art. 122 CCP)

If investigations reveal new offences or the prosecutor introduces new accusations though there is the possibility to keep the detention order in effect respectively to issue a consecutive order, since it says in the law that “for one and the same offence”, PTD must not be applied longer than six months (unless of course the described exceptions apply). In order to meet this six-month-deadline the prosecutor has to apply for a prolongation or the main trial has to have started (art. 121 (3) CCP). In both cases the PTD order will then be executed until either the higher regional court decides on the prolongation or until the trial ends – providing the remand order is not revoked / suspended during trial by the means described above.

Thus, there is no absolute limitation in a narrower sense on the length of a PTD and it can easily last longer than six months in total. Although the FCC ruled in 2014 that a remand detention of more than twelve months “can only be justified in very exceptional cases”, thus coming close to an absolute limit²⁰.

5.7. The procedures

When the arrest order is issued, the suspect has to be brought before the judge. This procedure shall give him/her the chance to rebut the presented evidence supporting the suspicion of the alleged offence and the grounds to remand. Also he/she has the right to (be assisted by) a lawyer at any stage of the proceedings. Since 2010 the law asks for a mandatory defence lawyer to support the suspect if PTD is executed (art. 141 (3) CCP). If the suspect cannot pay for a lawyer, the state will pay. Since law only demands a mandatory defender by the time of execution of the detention order many suspects will not have the support of a defender during the first hearing where the judge decides on the detention application of the prosecutor.

Once the hearing is over, an arrest warrant has to be issued to the suspect. If the suspect is not speaking german (well) the warrant has to be translated orally or in

²⁰ FCC, Neue Zeitschrift für Strafrecht – Rechtsprechungsreport 2014, p. 314.

writing (art. 114a CCP). Further on the suspect has to be informed about his/her rights, especially about the possibility to have relatives or a person of trust notified of the arrest. In the case of foreigners, there is also the right to have embassies or consulates informed of the arrest (art. 114b, 114c CCP).

Procedural rights, defence counselling and detention hearings

In case of the execution of a detention order, the suspect / accused has several procedural means to have the order reviewed by the judge in charge. The most common means are the application for a review of detention (“Haftprüfung” - art. 117 – 118b CCP) and the complaint against a remand decision (“Haftbeschwerde” - art. 304 CCP et seq.) Either aim at either a revocation of the arrest warrant (art. 120 CCP) or the suspension of its execution (art. 116 CCP). A review of remand is possible either in a written or in an oral way (art. 118 CCP). There is a preference to do it face-to-face, but the accused does not have a right on it in some cases (art. 117 (4), 118 (3) et seq.).

The judge and the prosecutor are legally obliged to reassess the necessity to keep up the PTD ex officio at any stage of the criminal procedure (art. 120 (1) CCP). In practice however it will be the suspect / accused respectively his/her defence lawyer, that will try to have the arrest order revoked or suspended using these means.

According to Morgenstern / Kromrey providing more and detailed information might have reverse effects though, since “the decision upon the application or the complaint can lead to an aggravation of the defendant’s situation, for instance by including further offences into the prosecution on application of the prosecutor or by changing the ground to remand”.²¹

The responsibility of carrying out the review is attributed depending on the stage of the proceedings. The investigative judge will do the review of remand if the investigation is not finished and there has been no charge brought up (art. 126 (1) CCP). If the prosecutor has already filed a charge / accusation, the review of remand can be done by the lower regional court, the district court or the higher regional

²¹ Morgenstern, Kromrey 2016, p. 1+2f.

court (art. 126 (2) No. 1 CCP). The court responsible for the proceeding of the case is also responsible for the review of remand.

The oral hearing has to be done promptly when applied (art. 118 V CCP). Formally, the Court hearing should be done within two weeks. There are no limitations on the frequency of applications for hearings and no limits on the number of applications (art. 118 V Hs. 2. CCP).²²

In the review of remand, the suspect can argue against the existence of “urgent” suspicion or the grounds for detention and bring in all information. In addition, he/she can disagree with proportionality of the order or refer to the principle of expediency. If the court accepts one of these reasons, it has to revoke the order. It is also possible that the judge decides that the detention warrant should be in force furtheron, but will be suspended under specific conditions (art. 116 CCP).

The possibility of lodging a complaint against the detention order is another way for the detainee to fight the imprisonment (art. 304ff. CCP). Lodging a complaint can be done at any time of the pre-trial detention. The goal is to verify the ground of the arrest. The complaint is directed to the judge who ordered the arrest. If he/she does not react within 3 days (art. 306 CCP), the complaint will go to the district court (art. 73 CCA).

5.8. Recent legal developments

Not a lot has happened regarding PTD law in the recent years. The most important reform is ten years old. Since 2010 the law asks for a mandatory defence lawyer to be ordered for the suspect from the time the PTD is enforced. After that there have been discussions, if this obligation should already be in place earlier, namely by the time the prosecutor applies for PTD.²³ Until now this idea has not been put into law.

5.9. Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law

Art. 116 CCP lists the measures to avoid PTD at the discretion of the judge. In general these measures can only be applied when PTD has been ordered beforehand. The law states, that the judge has to make use of these measures if they can be expected

²² Of course in the case of excessive applications, the court may not approve of it.

²³ Morgenstern, Kromrey 2016, p. 14

to secure the goal of the initial PTD. If the **ground for detention is the risk of absconding**, the judge may consider to suspend the execution of the detention order with the condition that the suspect:

1. Has to show up at the court, the prosecutors office or another authority at certain times
2. Has to stay in a certain area / place and may only leave with the permission of the judge or prosecutor
3. Has to stay in his place of residence unless he / she is accompanied by a certain person
4. Has to make a financial deposit that will function as bail. The suspect or another person may make the deposit.

If the **ground for detention is the risk of tampering with evidence** the judge may suspend the detention order under the condition that the suspect may not contact other suspects in the same case, Witnesses or experts that are testifying in the trial.

If the ground for detention is the risk of reoffending, the judge may suspend the detention order if it is to expect, that the suspect will follow specific orders, which will secure the goal of the PTD.²⁴

While the law states the measures described above explicitly, the judge may also come up with other measures that are in his discretion.²⁵

The suspension of the detention order will be revoked if the suspect fails to follow the orders given or shows in another manner that the trust placed in him / her was not justified or if the surfacing of new information makes the PTD necessary.

6. Measures to avoid PTD – alternatives in practice

6.1. Conditional suspension of PTD

The only way PTD can be avoided is if the arrest warrant is suspended under certain conditions and obligations. Unfortunately, there is no systematic

²⁴ An example would be to order the suspect to seek medical help / therapy for substance abuse

²⁵ For example there is the possibility of using electronic monitoring in less serious cases to avoid pre-trial detention. In practice it is used very rarely though.

monitoring of PTD avoidance in practice in Germany. While many practitioners believe, that a suspension of an arrest warrant is something very exceptional, there are no recent numbers to (dis)prove this statement. This applies for all alternative measures described above.²⁶

6.2. Social work strategies: Providing information (for the decisions) and/or support

In Germany probation or other social services are not involved in pre-trial decision-making with the exception of the youth court aid (Jugendgerichtshilfe). Although the existing court aid for adults in principle could be asked to gather information about the suspect.²⁷ Apart from this support for the decision-makers, one strategy to reduce PTD could be the involvement of practical social work.²⁸ In Germany there are many independent institutions that will try to provide support to (ex-)offenders and suspects in PTD. Mainly their work focuses on finding places of residence or therapeutic measures for their clients in order to be able to fight the arrest warrant. Often this approach will also include the suspects defence lawyer.²⁹

The *ifs, hows and whens* depend largely on the engagement of the NGO since they follow no systematic rules but operate independently

In Bremen, Germany, there is an offer of the Hoppenbank e.V.³⁰ with the goal to get pre-trial detainees earlier out of the (adult) prison. Every week a staff member goes into the remand prison for those pre-trial detainees in a difficult life situation, who want to get out and need help to organize an early leave, especially regarding the problem of accommodation. The success rate is very low with two PTD suspensions that can be attributed to the NGOs work in 2019.

This is different in the Juvenile Justice System.³¹ To find alternatives to detention and to care for the detained are statutory tasks of the youth court aid. The success of this procedure is also dependent of the existence of alternative possibilities to

²⁶ But see Morgenstern, Tanz 2017 for some results of a qualitative study, based on interviews with judges and prosecutors.

²⁷ About pre-sentence reports, see f.e.: Maquire 2020.

²⁸ See from the perspective of social work: Cornel 2018a,b

²⁹ See for the role of the defence council: Morgenstern 2019.

³⁰ See www.hoppenbank.info/projekte/u-haftvermeidung.html. Some other NGOs in Germany also offer this kind of consulting.

³¹ See f.e.: Tappe 2018; Villmow 2018.

care for the juvenile (stationary institutions). The decision about the placement (at an alternative) lies in the hands of the courts. The judge decides on detention of a juvenile offender. The role of the youth court aid is legally fixed in the Youth Court Act, formulating an obligatory cooperation (art. 72a YCA).

Regional differences

Since legislative duties are split between the federal level (“Bund”) and the federal states (“Länder”), the legal situation in Germany is somewhat complex. From 2006 we have the situation that the Bund is responsible for the Code of Criminal Procedure (based on art. 74 (1) No. 1 BL). The liability for prisons lies exclusively in the hands of the Länder and is legally fixed in their respective laws. So there are 16 different PTD laws (Remand Custodial Acts – “Untersuchungshaftvollzugsgesetze”) one for every Land,³² which define the legal framework for the enforcement of PTD in every single Land.³³ This is one of the reasons, that it is hardly possible to gather data on the PTD situations all over Germany. Again, there is no systematic data collection on the Bund level.

Reactions on the COVID-Pandemic

Due to the Corona Pandemic there have been difficulties in the continuation of criminal proceedings. Many trials that had no suspects in PTD were paused. In some cases also trials with suspects in PTD were affected. This meant a prolongation of the PTD for the suspect.

The law formulates restrictions of breaks of a trial procedure, a break is an exception, and should not last longer than 3 weeks (art. 229 (1) CCP). If the break is longer, the trial has to be adjourned and has to be started again from the beginning (art. 229 (4) 1 CCP).³⁴ The COVID-Pandemic caused a problem regarding this restriction.

The legislator reacted to this situation by formulating the possibility of a longer break of the proceedings (which includes a longer PTD) if the break is based on

³² The last of the (Länder) Remand Custodial Acts was put in force in 2012. It took six years until all of the Länder had developed their own laws.

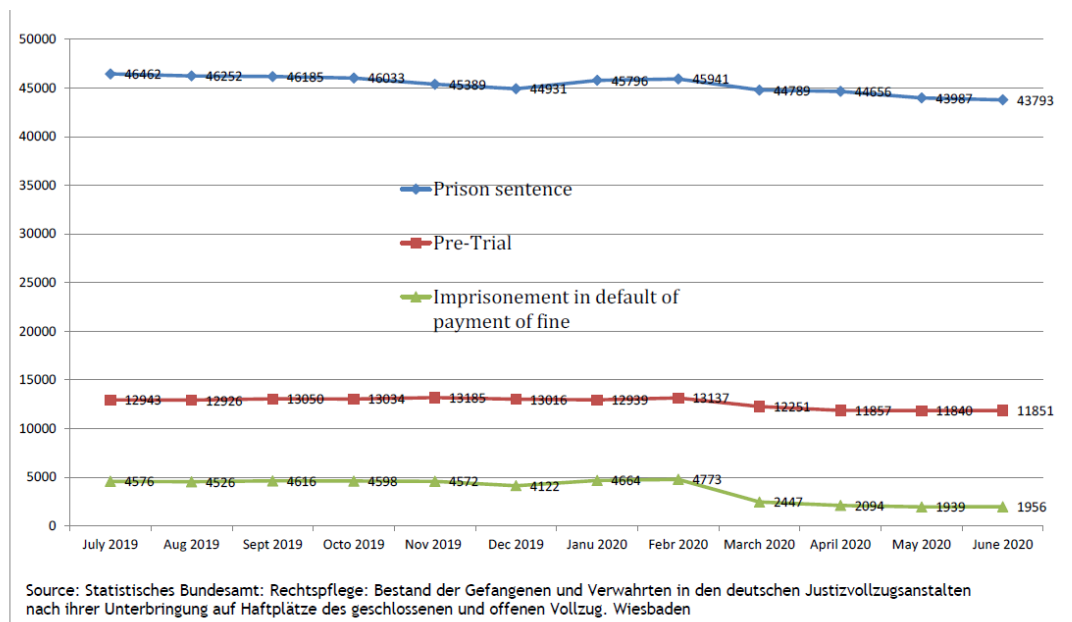
³³ For the legal discussion and comparison see f.e.: Nobis, Schlothauer, Wieder 2016⁵

³⁴ See f.e. Grote, Niehoff 2020.

measures of protection against infection. This norm is in force since March 28 2020 (art.10 IACCP).

If we take a look at the numbers in inmates in prisons, in relation to the form of their imprisonment, we can see some changes in the numbers. So between February to April 2020 there is an decrease in prison sentence (2,8%) and in pre-trial detention (9,7%). It has to be discussed, if this is a 'normal' fluctuation', due to changes in crime in these times or due to other reasons. The decrease in imprisonment in default of payment of fine of 56,1% is a reaction to the covid-pandemic.

Table 1: Prison occupancy in relation to the form of imprisonment: 7/2019 to 6/2020



7. PTD and Alternatives in figures and presentations

In Germany, there is a longstanding complaint about the lack of data on PTD.³⁵ Only very little can be found in the official statistics for Germany overall.

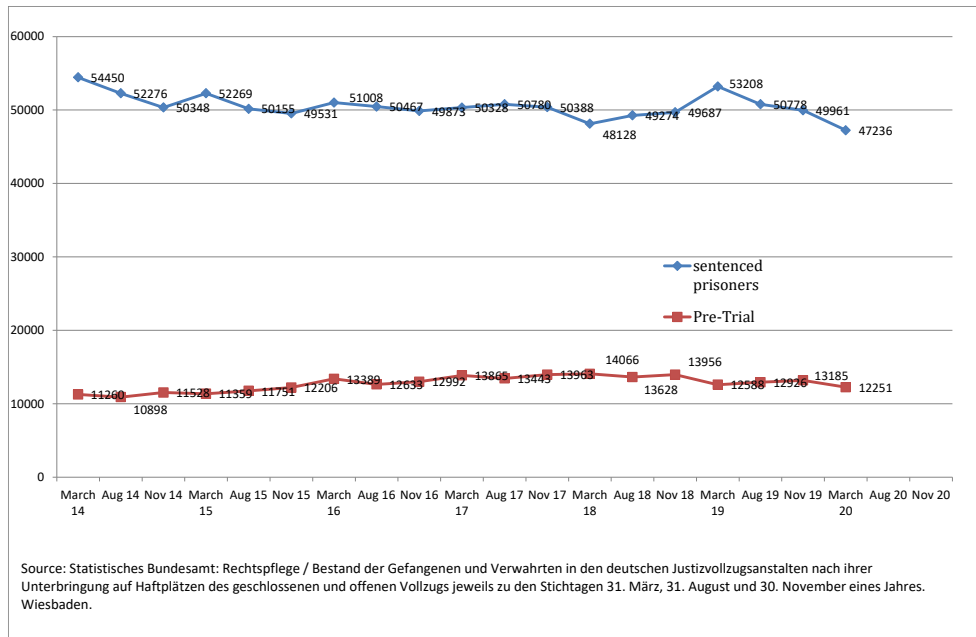
The following tables are based on these official statistics. Data, analysis and descriptions that are more detailed can be found in some (older) research³⁶.

³⁵ F.e.: Zweiter Periodischer Sicherheitsbericht der Bundesregierung. Berlin 2006, S. 550.

³⁶ See for example: Cornel (eds.) 1987; Seebode 1987; Dünkel, Vagg (eds.) 1994

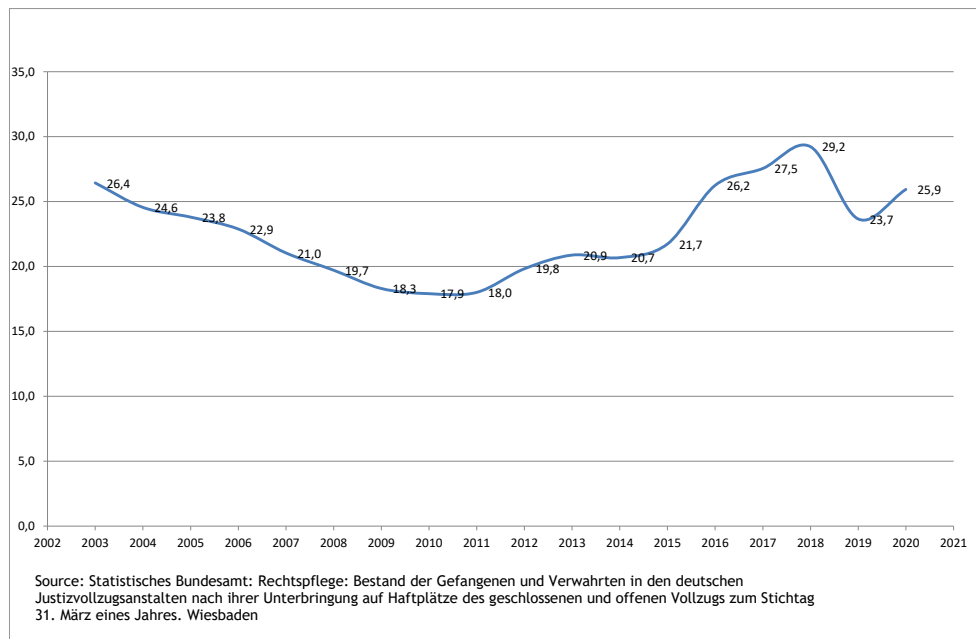
7.1. Statistical data on PTD available

Figure 2: Germany: Total numbers of sentenced prisoners and in pre-trial



In the last 6 years we can see some fluctuation in the absolute numbers of sentenced inmates in prison, even with a decline in numbers. Numbers of PTD inmates are relative stable, with a slight increase.

Figure 3: Germany: Quote (%) of remand prisoners in relation to sentenced prisoners

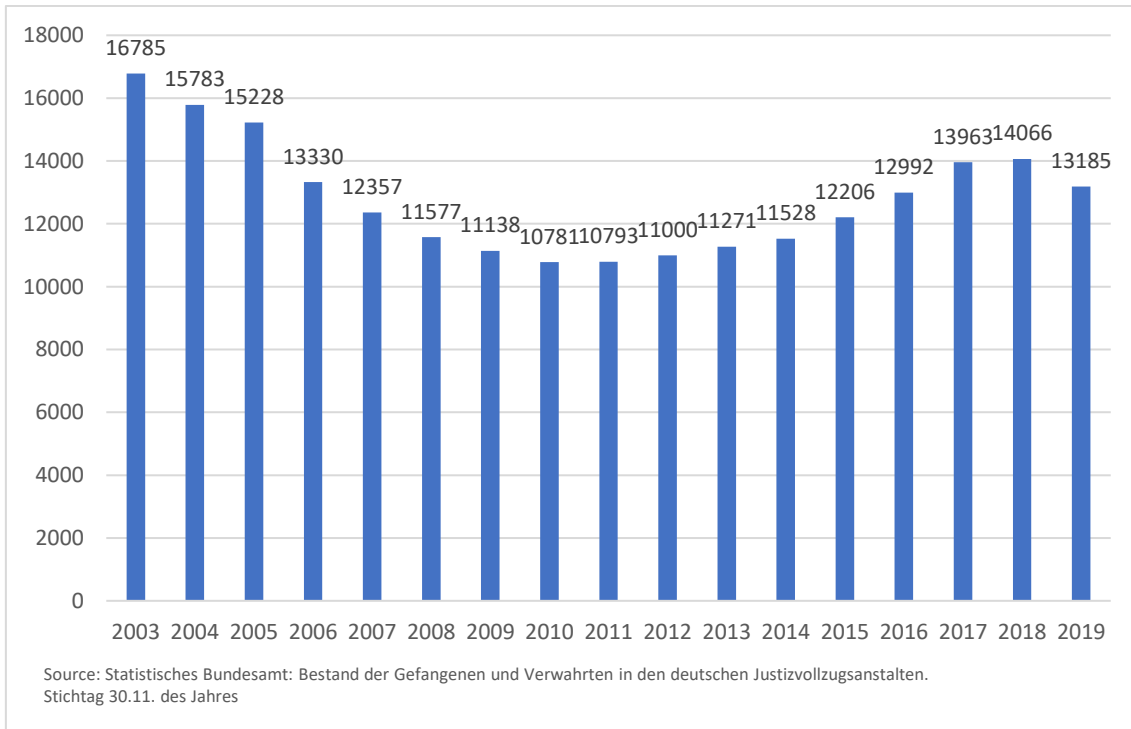


Looking at a broader time line, we can see some developments in the overall numbers for Germany with the numbers reaching a low point in the late 2000s and increasing steadily from the early 2010s.

While research on the reasons for this development is not available in Germany many practitioners are seeing the sharp incline in the last years caused by the big numbers of migrants that arrived in Europe / Germany from 2015 onwards. This seems plausible since it is known that judges will assume high risks of absconding regarding foreigners (no matter if they are EU or non-EU-citizens). Unfortunately, there are no official statistics on the nationality of pre-trial inmates or their biographical background so this assumption cannot be easily checked.³⁷

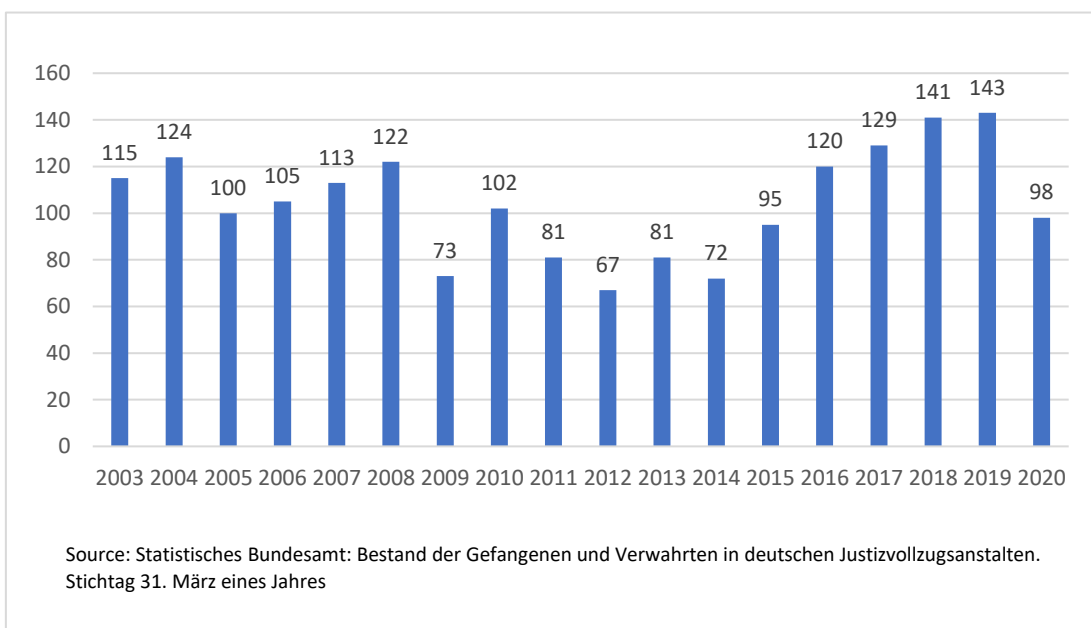
³⁷ We are planning to collect data on this at least for the state of Bremen during the development of the PRETRIAD project though.

Figure 4: Development of PTD Population in Germany (Numbers of pre-trial detainees on November 30 of the year)



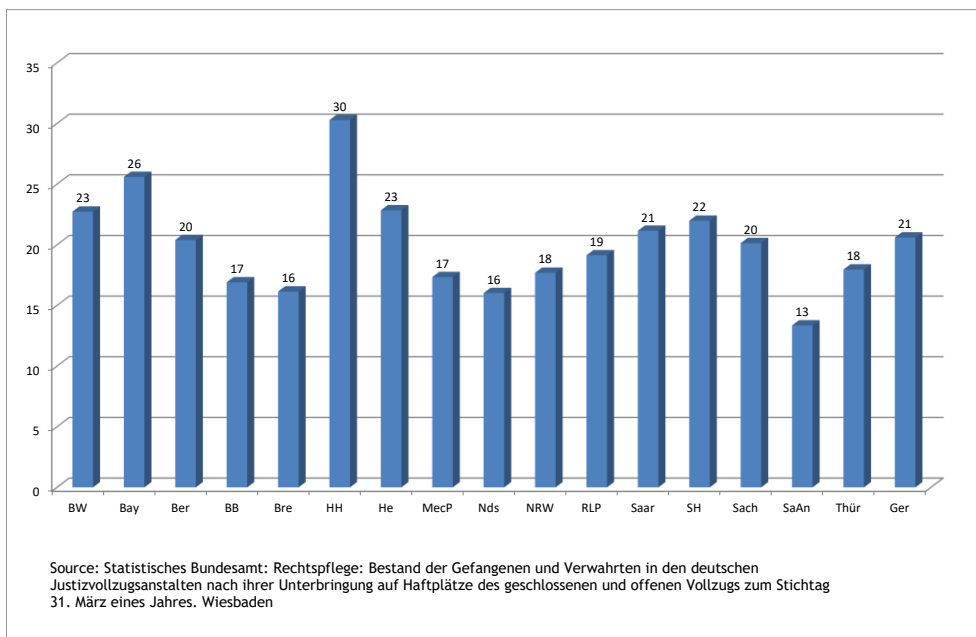
There is, however a remarkable development to be seen in the numbers of pre-trial detainees.

Figure 5: Number of PTD inmates in Bremen (on March 31 each year)



In Bremen the numbers went down from mid 2000s to early 2010s. After 2012 / 2014 we can see a sharp increase of numbers, with the amount of pre-trial inmates doubling in 2018 / 2019 in comparison to 2012 / 2014. Whether the decline in 2020 is caused by effects of the COVID-19 pandemic or is attributed to a bigger development remains to be seen.

Figure 6: Quota of remand prisoners in relation to inmates (in %) in Germany's federal states (on March 31 2020)



In comparison, there are great differences between the rates of remand prisoners in the federal states – from 13% in Sachsen-Anhalt up to 30% in Hamburg.

To see the relationship between trial proceedings and the rate of PTD, we can look at the relation of people that received a final sentence and people that spent at least some of the trial time in PTD. The rate has been growing in the last years.

Table 2: Quota of persons with PTD in relation to all persons sentenced

	Persons with a final decision	Persons with PTD	Pre-trial rate
2007	1.129.790	26.793	2,4%

2008	1.105.719	29.532	2,6%
2009	1.074.909	28.309	2,6%
2010	1.034.868	26.967	2,6%
2011	1.019.467	26.513	2,7%
2012	975.171	26.420	2,7%
2013	950.289	25.135	2,6%
2014	937.034	26.696	2,8%
2015	923.236	27.101	2,9%
2016	911.811	30.027	3,3%
2017	886.490	29.548	3,3%
2018	879.988	30.000	3,4%

Source: Statistisches Bundesamt: Strafverfolgungsstatistik (table 6)

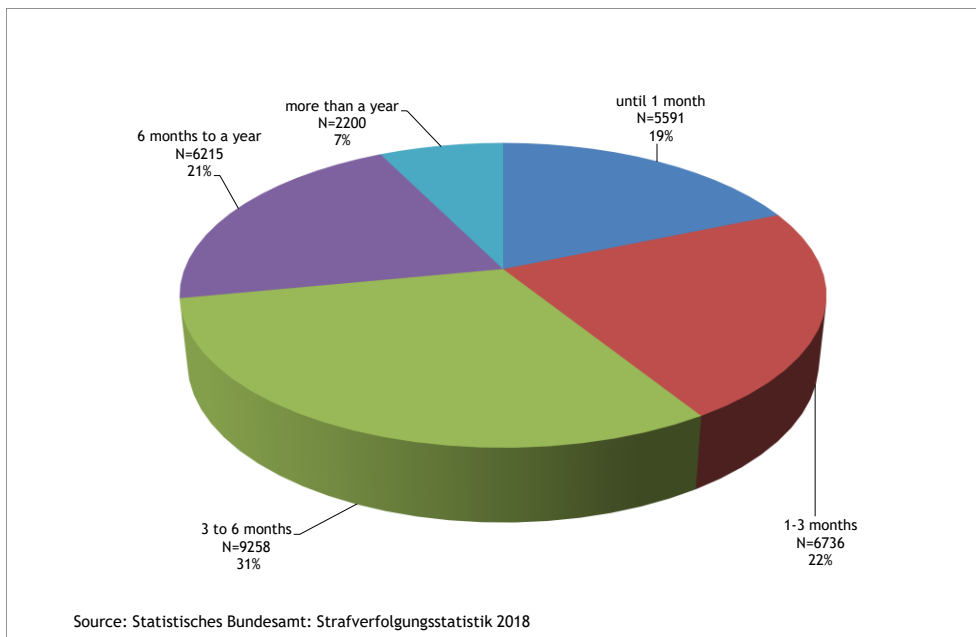
Therefore, we find in the last 10 years a decline of numbers of court decisions while the numbers of people in PTD is growing. The effect of this development is an increase in the rate of persons, who have been in PTD before or during the trial.

The questions are:

- Why is there not a comparable decline in the numbers of persons in PTD? Is this due to a change in offences or in the practice of ordering PTD?
- Are demographic changes (influx of migrants) part of the reasons that PTD numbers are increasing?
- Is this an evidence that securing the trial proceedings has a very important role to play in the decision to order PTD?

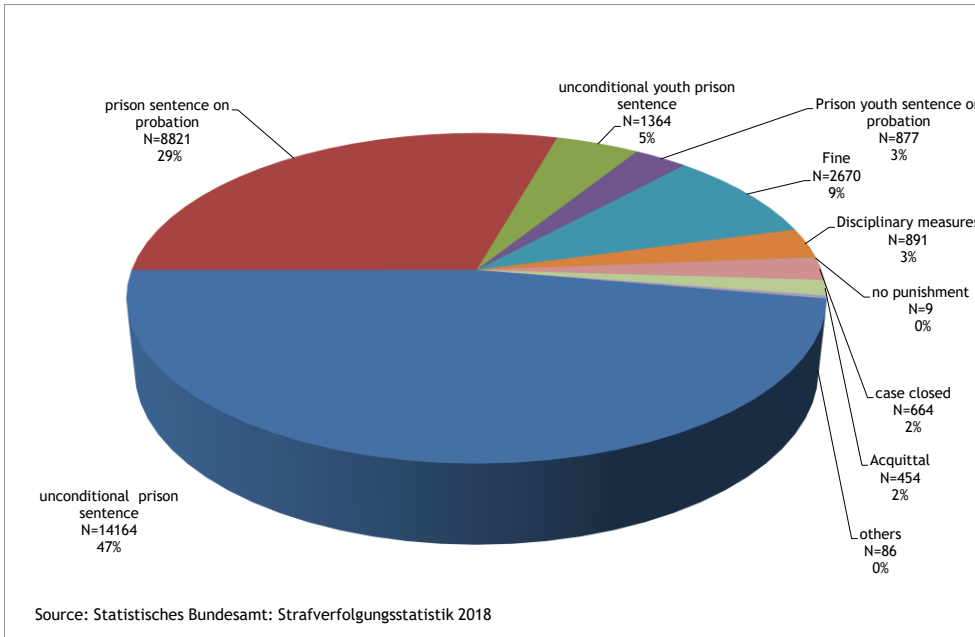
7.2. Duration of PTD

Figure 7: Average duration of incarceration in PTD before trial



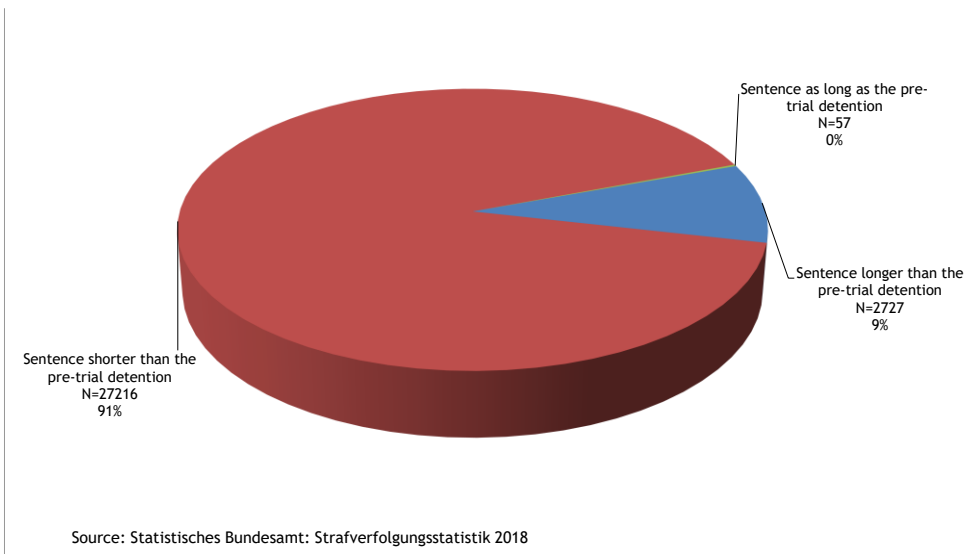
As previously stated, PTD is not supposed to last longer than six months if there are no exceptional circumstances to the case. However, in 28% of all cases in 2018 the duration of PTD was longer than six months. With nearly one third of all PTDs being longer than six months it seems like PTD is not only prolonged in exceptional cases.

Figure 8: Penal outcome of the trial (after PTD) in Germany 2018



The outcome of the trial is in about 93% of all cases a punishment. We find an unconditional prison sentence in 47% of all adult cases and in 5% of the juvenile cases (together 52%). The courts decided a prison sentence on probation in 29% of all cases in the adult sector, in 3% in the juvenile sector (together 32%). Additionally there are 9% of sentences to a fine. But this says also in 9% of all cases, where a person has been in a PTD, there has not been a guilty verdict.

Figure 9: Duration of pre-trial detention in relation to sentence at trial (all sentences for Germany in 2018)



One argument for the ordering of a PTD is the expectation of rather long prison sentences. But the statistics say this is the case only in 9% of all cases. In all other cases, the sentence of the court is shorter than the time spent in PTD.

Occupancy and Gender

Regarding the capacity utilization rate of German prisons it can be said that overcrowding is not an issue in general. In 2018 84,8% of the capacity was used, in 2020 it is 81,3%.³⁸

So there is at the time no overcrowding in prisons in Germany. There is of course the possibility that single prisons have to deal with this problem. And there can be of course overcrowding regarding remand prison section of the prison.

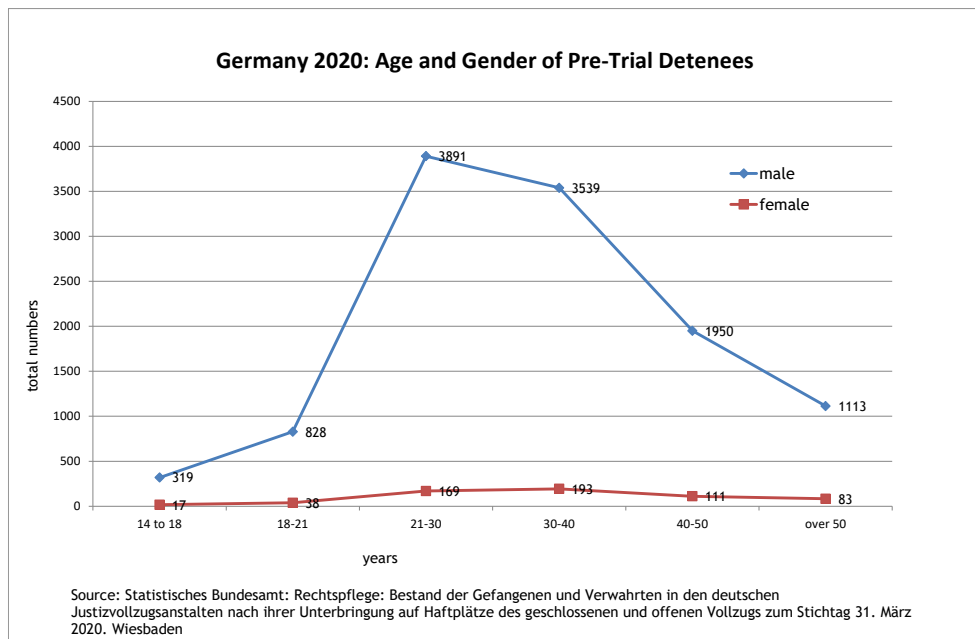
The proportion of female pre-trial detainees in PTD corresponds to the one in regular prison.

Table 3:: Occupancy and Gender

	Gender		
	male	female	all
total	11640	611	12251
in %	95	5	100

³⁸ Statistisches Bundesamt: Bestand der Gefangenen und Verwahrten in deutschen Justizvollzugsanstalten. Wiesbaden 2020; Data referring to March 31 of every year.

Figure 10: Germany 2020: Age and Gender of PRE-TRIAL Detainees



Nationality

There are no numbers of the nationality of prisoners specified for PTD from the official national statistic office for Germany. For regular (post-trial) prisoners there are numbers: about 1/3 of –sentenced- inmates do not have a German nationality.³⁹ This means, that the number of inmates with a migration background is even higher – since some of them will have the German nationality. It is safe to assume, that the proportion of inmates with migration background in PTD is even higher.

8. Negative impact of PTD in the partner country – Literature review and statistical data

8.1. On the national level

According to SPACE I report, the total amount spent on all inmates in Germany was an estimated 3 225 639 542.44 € in 2018.⁴⁰ While it does not give numbers regarding inmates not serving a final sentence we still know that the rate of PTD detainees in Germany was about 20% in 2020. Now this will only give us a very

³⁹ Statistisches Bundesamt: Demographische und kriminologische Merkmale der Strafgefangenen, Date 31.03.2020

⁴⁰ *Space I Report 2019*, p 126

rough estimation of course, but the cost of PTD in Germany will be in the area of 645 127 908 € per year.

Other reliable numbers for the federal level are not available. For the Federal State of Bremen the cost of one inmate in prison per day (“Tageshaftkostensatz”) was 129.21 € in 2018.⁴¹ With on average 140 PTD inmates this amounts to 6 660 263 € of PTD costs in 2018.

8.2. On the organisational level

The situation of PTD is not only based on the legal framework and the justice practice. The prison situation is another important factor. Questions of overcrowding may lead to a bad treatment.⁴² Especially the situation of pre-trial is known as a situation of the danger of increase in suicide.

The situation in PTD is in itself very burdensome. There are more restrictions than in the normal prison. Activities are more restricted than for sentenced prisoners as well as contacts with the outside world. In Germany the basic living conditions such as a sufficient cell size, sanitary conditions or food are generally satisfactory. But it is nevertheless a situation with multiple restrictions.⁴³

8.3. On the individual level

If we do not see PTD as a judicial measure to secure the trial proceedings, but ask for the consequences and social aspects of imprisonment⁴⁴, we get to very different discussions and questions:

- The point of stigmatization: Judicially PTD is ordered despite the presumption of innocence. But in everyday life a stay in prison (and often there is no differentiation between pre-trial and punishment) is often linked to the assumption of being a criminal.
- Being in prison has also (long-term) consequences for the future life:

⁴¹ Not differentiating between post-trial and pre-trial detention. This means that the Tageshaftkostensatz for PTD detainees might be lower or higher.

⁴² See for discussion: Martufi, Peristeridou 2020.

⁴³ See for an overall description of the situation of pre-trial detention in Germany: Morgenstern 2018.

⁴⁴ See f.e. the report of Heard and Fair (2019) for a description of the situation and a critique of an overuse of pre-trial detention – in a worldwide perspective.

- Not being able to go to work. It could mean: loss of job. How long is it possible to guard a job?
- Not being able to pay the rent. It could mean: loss of residence. Who pays for the residence when the person is in PTD? How to get a new residence after release (and even if there is no sentence)?
- Going into prison means: not being able to care about ones children or relatives, of relatives being in need of permanent care. This can put a strong burden on the person. There can be a disruption of family and private life.⁴⁵
- Going into PTD means: restricted possibilities of getting visits from relatives and friends.
- Going into prison for the first time can be a traumatic experience. (see the high numbers of suicides in PTD).

9. Other aspects on PTD and its alternatives

9.1. Empirical research and legal theoretical literature (also fundamental rulings)

Hidden and extra-legal grounds and motivations in the PTD-decisions

As noted above, there are no big discussions on the PTD in Germany.

One 'old and long-lasting' discussion is still going on: the topic of so called apocryphal grounds for detention. In reference to the medial and political discussion on migration as well as on radicalization, this topic gains attention.

Sometimes there is the impression that the ,true' reason for ordering PTD are not the ones listed in art. 112 and 112a CCP. The real ground is another one – and not being fixed in the CCP, that means: it is an illegitimate one. The existence of these so called apocryphal⁴⁶ grounds for detention is accepted and known but not discussed much. Despite the fact, that reason for ordering detention is based on some apocryphal ground, the ground for ordering stated in the arrest warrant for PTD will mostly be risk of absconding.

In the discussion on apocryphal grounds, we find the following reasons that might constitute hidden grounds for detention:

⁴⁵ See f.e.: Kury, Kern 2003; Codd 2008, Kawamura-Reindl, Schneider 2015, S. 303ff.

⁴⁶ See Morgenstern 2018a, S. 433ff.; Gfeller et al. 2018.

- to force the suspect to a confession
- to give a warning to the suspect or as deterrence to others
- knowing that there likely will be no prison punishment as a verdict, it is used as a kind of early punishment by the prosecution
- to try to educate the person, to impress him, to disciplin him
- sometimes even called a „warning shot arrest“ (“Warnschussarrest”) or a „short sharp shock“ as quick reaction to an offence (used mostly in juvenile justice)
- to calm the general population in cases of high attention to a crime (reacting to public or medial pressure)
- and others

10. European Aspects and their meaning for national PTD-practice in the national scientific literature

Alternatives to PTD play a comparably small role in Germany and the European Supervision Order (829/2008) as a means to avoid PTD for residents of other EU states remains relatively unknown and unexplored as an alternative to PTD in Germany.⁴⁷

⁴⁷ See Morgenstern, Tanz 2017: DETOUR Project

11. Short Conclusions and Outlook

It seems that there are different strands of argumentation in the discourse on PTD:

- The situation of inmates in PTD (work, visits and others), the avoidance of putting people into PTD, the securing of their rights in detention, the role of the defendant and others;
- The under-use of alternatives to PTD, the absence of other possibilities of placement;
- The personal situation of the suspect does not play the role in the proceedings they should do. Information on the personal situation of the suspect is often missing in detention hearings.
- The role of the defendant: Defendant often are hesitant to organize measures of therapy or training for their defendant even if this might be a way out of PTD, because they the danger that this could be interpreted a confession of guilt.
- The improper use of the concept of prevention as a legitimation for the arrest on the ground of reoffending;
- Today there is a dominance of the concept of security – alternatives are no more discussed.
- In case of the dominance of the aspect security, persons are assessed under the dimension of risk and danger. It seems that a presumption of innocence gets lost today.
- The use of apocryphal grounds of detention
- The role of medial and political pressure to put persons into PTD

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List of tables

Table 1: Prison occupancy in relation to the form of imprisonment: 7/2019 to 6/2020

Table 2: Quota of persons with PTD in relation to all persons sentenced

Table 3: Occupancy and Gender

List of figures

Figure 1: Grounds for applying pre-trial detention in Germany 2018

Figure 2: Germany: Total numbers of sentenced prisoners and in pre-trial

Figure 3: Germany: Quote (%) of remand prisoners in relation to sentenced prisoners

Figure 4: Development of PTD Population in Germany (Numbers of pre-trial detainees on November 30 of the year)

Figure 5: Number of PTD inmates in Bremen (on March 31 each year)

Figure 6: Quota of remand prisoners in relation to inmates (in %) in Germanys federal states (on March 31 2020)

Figure 7: Average duration of incarceration in PTD before trial

Figure 8: Penal outcome of the trial (after PTD) in Germany 2018

Figure 9: Duration of pre-trial detention in relation to sentence at trial (all sentences for Germany in 2018)

Figure 10: Germany 2020: Age and Gender of PRE-TRIAL Detainees



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PRETRIAD

Alternative pre-trial detention measures

German National Report

PARTNERS



Annexe 6 – Italian national report



PRE-TRIAD
Alternative pre-trial detention measures

Italian National Report

Basis for D2.1 Literature review

PRE-TRIAD Project
Alternative pre-trial detention measures

Project Number 881834
JUST-JCOO-AG-2019

Version 1.1

Date 04.09.2020

PRE-TRIAD Project

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

Project Number: 881834
JUST-JCOO-AG-2019

Italian National Report – Basis for the D2.1 Literature Review



Version 1.1

September, 2020

1. Change Control

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2. Contents

1. Change Control.....	3
1.1. Document Properties.....	3
1.2. Revision History.....	3
2. Contents.....	4
3. Executive summary.....	5
4. Introduction.....	6
4.1. The legal system and general context for PTD in the partner country.....	6
4.2. Definition of PTD.....	7
4.3. Important historical developments with respect to PTD.....	8
5. The legal bases and the fundamental legal aspects with respect to PTD.....	17
5.1. General principles and competent authorities and their roles.....	17
5.1. Legal prerequisites for pre-trial detention.....	21
5.2. The suspicion.....	23
5.3. Proportionality.....	23
5.4. The procedures.....	24
5.5. Duration and prolongation of pre-trial detention.....	26
5.6. Recent legal developments.....	27
5.7. Electronic monitored house arrest instead of detention in prison.....	29
5.8. Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law	31
5.9. Procedural measures to support the decision making (e.g. reports by the probation services; court assistance, etc.).....	31
6. Measures to avoid PTD/Alternatives in practice.....	34
6.1. The conditional suspension of PTD.....	41
6.2. Social work strategies: Providing information (for the decisions) and/or support.....	43
6.3. Financial surety (bail).....	43
6.4. Therapeutic measures.....	43
6.5. Reactions on the COVID-19 pandemic.....	46
7. PTD and Alternatives in figures and presentations.....	50
7.1. Statistical data on PTD available.....	50
7.2. Basic data on alternatives available.....	57
8. Negative impact of PTD in the partner country.....	59
On the national level:.....	59
On the organisational level.....	60
On the individual level.....	62
9. European Aspects and their meaning for national PTD-practice in the national scientific literature.....	63
Cooperation in criminal justice matters in general.....	63
Human rights and rulings of the European Court of Human Rights.....	68
11. Short Conclusions and Outlook.....	74
12. Bibliography.....	76
List of tables.....	79
List of graphs.....	79

3. Executive summary

Please present the deliverable here.

Remember, if your deliverable concerns an event, this document is what the EC will receive, so it must describe and include as much information as possible.

If your deliverable has been delayed (completed after the due date), please give an explanation why it was late and if its lateness had any impact on other deliverables/milestones or project objectives.

4. Introduction

4.1. The legal system and general context for PTD in the partner country

Every year, around 10 million people worldwide are imprisoned in pre-trial detention and remain in prison for months or years before their guilt is proven.

There are many reasons for the constant high number of non-definitive prisoners in Italian prisons. First of all, it should be noted that in the Italian legal system the presumption of innocence, based on article 27 paragraph 2 of the Constitution, extends beyond the first degree of judgment, preventing any anticipation mechanism of the execution of the penalty eventually imposed in the first degree, so that the rules on precautionary measures continue to apply for the second degree (appeal) and the third degree (Cassation judgment) deprivation of personal liberty, can only take place as a result of the application of a personal precautionary measure.

In addition to this theoretical aspect, there is also a practical aspect underlying the high number of restricted non-definitive ones: the excessive duration of the criminal trial.

Based on Article 275 co. 3 of the Italian Criminal Procedure Code and in relation to the principle of gradual precautionary measures, the choice of preventive detention constitutes the *extrema ratio*, which can be used only in the event of inadequacy of the other precautionary measures; for this reason, the order of the judge who orders the precautionary measure in prison must specify the reasons why it is not possible to resort to other suitable measures. In addition to this provision, which specifically concerns pre-trial detention, the general provisions of the first two paragraphs of the aforementioned art. 275 explain that in identifying the measure to be applied in the specific case, the judge must in fact take into consideration the specific suitability of the same in relation to the nature and degree of the precautionary needs (paragraph 1), as well as verifying that it is proportionate to the extent of the offense and the sanction that you know has been or is believed to have been imposed (paragraph 2).

4.2. Definition of PTD

Precautionary measures are provisional and immediately executive measures applied with the aim of preventing the passage of time from impairing the detection of the crime or the execution of the final sentence, or for avoiding the aggravation of the consequences of the crime or the facilitation of other crimes¹.

Personal disqualification precautionary measures are measures adopted by the criminal judge, which temporarily limit the exercise of certain faculties or rights, in whole or in part.

Specifically, pre-trial detention in prison or preventative detention, it is a personal, custodial, and coercive precautionary measure and constitutes the most intense form of deprivation of personal liberty².

As anticipated, art. 275 of the Italian Code of Criminal Procedure, provides that imprisonment can be applied if any other coercive or disqualifying measure is inadequate, according to the principle of last resort precautionary custody.

In Italy, preventive detention is allowed in three cases:

- concrete and current danger of disturbance of the investigations and, in particular, for the acquisition or authenticity of the evidence³;
- escape or concrete and current danger of escape, with consequent absence from the trial and any punishment;⁴
- actual and current danger of recurrence of the crime or of commission of other criminal offense⁵.

¹ art. 272-325 Code of criminal Procedure (c.p.p.); Law n. 332/1995

² Art. 285 c.p.p.

³ Art. 274 comma 1 lett. a) c.p.p.

⁴ Art. 274 comma 1 lett. b) c.p.p.

⁵ Art. 274 comma 1 lett. c) c.p.p.

In addition to the recurrence of one of the three situations mentioned above, pursuant to art. 273 of the Italian Criminal Code, it is also necessary that there are "serious indications of guilt" towards the person to be subjected to the measure (paragraph 1); and that there is no circumstance such as to exclude - abstractly or concretely - the application of a penalty (paragraph 2).

With particular reference to the procedures relating to the crimes of subversive associations, with aim of committing an act of terrorism, including international terrorism, of subversion of the democratic order or, finally, of the mafia offenses, there is a double order of presumptions.⁶

Pursuant to Article 285 of the Italian Criminal Code, with the order that provides for pre-trial detention, the judge orders the officers and judicial police officers to take the accused a custodial institution immediately to remain available to the judicial authority⁷.

However, before the defendant is transferred to an institution, he can be subjected only to the restrictions of freedom strictly necessary for transfer and exclusively for the time necessary for it; his or her freedom cannot be limited in any other way.

Pre-trial detention in prison is subject to maximum terms of duration, which vary according to the stages of the procedure and will be further investigated later.

4.3. Important historical developments with respect to PTD

Public penalties changed over time, the most serious remained capital punishment but exile, flogging, financial penalties, forced labor in mines or circus games were also applied. Prison was never considered as a coercive measure as it served in principle "*ad continendos homines, non ad puniendos*". It was therefore considered

⁶ Cfr. ADORNO R., L'art. 275 c.p.p. a trent' anni dalla "grande riforma", in *Il Foro italiano*, 2020, fasc. 4, pt. 5, pp. 137-147

⁷ Legal journal online "Diritto.it"

only as a means of coercion, arrest or pre-trial detention, in order to bring the offender to justice⁸.

With the fall of the Western Roman Empire, the classic punitive system, based on the public penalty imposed by the state and imposed by trial, no longer applied and the concept of private punishment prevailed of the medieval penal system, based on the criteria of private revenge, was not conducive to the development of the prison regime.

Therefore, detention, at least until the mid-eighteenth century, was not a penalty, to be understood in the modern sense of the term, but represented a means of preventing the accused, pending a conviction (stretches of rope, jail i.e. rowing on Spanish ships for a certain number of years, or death sentence), from evading their sentence.

The prison was therefore not specifically built for the purpose of detention, but rather it was a building, usually adjacent to the court, which was adapted for this purpose and essentially conceived as a place of temporary custody for defendants awaiting trial or execution of the sentence.

Starting from the second half of the eighteenth century, with the emergence of imprisonment as a penalty and not as a means for the exercise of punitive power, various theories developed which all have one particular element in common: the intention of rationalizing the conditions of prisons and trying to abolish the most violent aspects (torture and death penalty) typical of the societies of the ancient regime.

This ferment of ideas generated within the Enlightenment movement led to awareness of the need for penitentiary reforms aimed at transforming prisons from places of infamy and cruelty into places of offender regeneration⁹.

⁸ FESTA R., “Elementi di diritto penitenziario, l’ordinamento penitenziario e l’organizzazione degli istituti di prevenzione e pena”, II ed. Napoli, Simone, 1984, p. 6

⁹ FESTA R., “Elementi di diritto penitenziario, l’ordinamento penitenziario e l’organizzazione degli istituti di prevenzione e pena”, II ed. Napoli, Simone, 1984, p. 7

In the wake of the Enlightenment movement, then, in the early nineteenth century, some scholars founded "science of prisons" in Italy, a school engaged in the search for a correct practical approach to the function of prison sentences¹⁰.

With the unification of Italy there was a need to collect and standardize all current legislation in every area of law in an organic and systematic way.

Therefore, only in the mid-eighteenth century was the prison intended as a place of expiation for prison sentences and acquired social relevance.

In this period, through the work of Cesare Beccaria and Giovanni Howard, in England some innovative principles emerged which then inspired all subsequent penitentiary guidelines:

- the principle of the humanization of the penalty understood as punishment inflicted within the limits of justice in proportion to the crime committed and not according to the arbitrary judgment of the judge;
- the principle of punishment as a means of prevention and social security and not as a public spectacle deterrent for cruelty.

The condemnation of the indiscriminate use of preventive detention and the barbarism connected to it, had created outrage among the Illuminists, which Beccaria himself was also a part of. They said for the first time there was a need for a substantial legality respectful of each man's rights and the condemnation of inhumane criminal practices. Following this approach, the principle of "strict necessity" was born, according to which personal freedom could be sacrificed only because of essential needs.

With the publication of the book "Dei delitti e delle pene" ("Of the crimes and penalties") by Cesare Beccaria, 1764, in the context of radical process of Enlightenment reforms, the debate intensified on the purpose of detention and on the abolition of the death penalty.

¹⁰ ibidem

The work "Of the crimes and penalties" on the one hand recognized the preventive detention of the accused, equating it to an anticipation of the sentence, while on the other hand openly condemned the *modus operandi* of the judicial authorities which, through the use of torture against of the accused, led to his or her confession. According to Beccaria, the limitation of the individual's freedom had to be balanced with respect to the length of time in prison to reduce the suffering suffered as much as possible.

This idea was later taken up by the Liberal School which allowed preventive detention only in cases where there was a danger of the defendant's escape, alteration of the authenticity of the evidence and commission of further crimes. Despite this position, the preventive restriction of liberty remained a "necessary injustice" capable of ensuring the protection of the community to the detriment of the accused. Individual freedoms were subject to the changing discretion of the legislator who was from time to time in the conditions of being able to freely forge the fundamental rights and freedoms of the individual, and a classic example is the Albertine Statute, a flexible Charter which, while regulating personal freedom did not guarantee the defendant any effective guarantee.

Only thanks to the Constitution did personal freedom find recognition as one of the fundamental and inviolable human rights¹¹.

In 1930, with the promulgation of the Code of Criminal Procedure, which took the name of the then Minister Guardasigilli Alfredo Rocco, there was an interest in building a highly inquisitorial criminal system, in accordance with the institutional reality of the time constituted by the dictates of the fascist authoritarian regime.

The defense needs of society became the foundation of preventive custody at the expense of the "criterion of strict procedural necessity" and the principle of the presumption of innocence.

In this regard, the goal was to calm the social alarm for the commission of crimes by transforming preventive custody into a kind of "procedural security measure",

¹¹ F. CARRARA, "Immoralità del carcere preventivo, in *Opuscoli di diritto criminale*", 1870-1874, Firenze.

suitable to allow the anticipation of the penal sanction against a subject deemed dangerous regardless of whether he or she was definitively found guilty.

As for the capture hypotheses, both mandatory and optional, the common assumption was that there were sufficient elements of guilt that allowed the Judicial Authorities to freely order preventive custody with reference to each type of order and mandate. In cases of compulsory capture, the problem of the purposes of preventive custody was absorbed by an absolute legal presumption of danger which, based only on sufficient indications of guilt, was effectively resolved in an anticipation of the sentence. In cases of optional capture, however, an excessive discretion was left in the hands of the magistrate and completely detached from the protection of predetermined needs to protect the suspect-defendant¹².

With the advent of fascism, the new penal code "Rocco Code" was approved and in 1931 the new criminal procedure code.

Then, with royal decree of the 18 June 1931 n. 787 the new "Regulations for Prevention and Penalty Institutes", the three fundamental laws of prison life remain: work, civil education and religious practices, which become mandatory, in the sense that any other activity was not only prohibited but made subject to disciplinary sanctions.

The institution of preventive detention must be framed in the light of the Constitutional Charter, in force since 1948, which has had a strong impact on the Italian legal system, promoting the recognition of a series of rights and principles that cannot be ignored, purposes of the application of substantive and procedural law: the right to individual freedom and the principle of the presumption of innocence until the final judgment has become irrevocable.

In this regard, the Constitutional Court, with judgment No. 64 of 1970, identified the presumption of innocence as a parameter of legitimacy of the rules on the matter: *"the presumption of innocence necessarily implies that preventive detention in no case can have the function of anticipating the penalty to be imposed only after the guilt has*

¹² G. AMATO, "Individuo e autorità nella disciplina della libertà personale", Giuffrè, Milano, 1967

been ascertained: it can therefore only be arranged in order to satisfy needs of a precautionary nature or strictly inherent to the process” and again “when it comes to a reasonable assessment of existence of a danger deriving from the freedom of those suspected of particular crimes, the legislator has the right to order that, within predetermined time limits, he be deprived of them”; in fact “it cannot be excluded that the law may assume that the person accused of a particularly serious crime and affected by sufficient indications of guilt, is in a position to endanger those assets for which preventive detention is ordered”¹³.

Personal freedom increasingly endangered due to socio-political conditions and serious crimes, who again gave up in the face of society's protection needs, as had happened under the force of the Rocco Code.

Therefore, in this emergency situation preventive custody was once again used as an early execution of the sentence, as a criminal policy tool operating on a substantial level for purposes unrelated to the process and related to the need to defend the community.

After the emergency season, especially the terrorist one, work on the new code resumed in 1983 thanks to the initiative of the Minister of Grace and Justice Martinazzoli and Professor Pisapia, and in 1987 the delegated law no. 81.

The Italian Parliament specified three objectives that the Government should have achieved considering the development of the new criminal procedure code:

- 1) fully implement the principles enshrined in the constitutional charter and directly related to the criminal trial;
- 2) adapt the rules of the criminal procedural legislation in force to international conventions ratified by Italy and relating to human rights;
- 3) implement the characteristics of the accusatory system according to the guiding principles set out in the delegation law itself.

¹³ Constitutional Court, judgment n° 64 del 1970.

There was finally talk of an accusatory process, based on the assumption that personal freedom must be the rule and precautionary custody the exception.

The principle of guilt left room for the presumption of innocence - constitutionalized within art. 27 paragraph 2 of the Constitution - which required precautionary measures to perform a function that is only temporary and subordinate to the final sentence.

After the entry into force of the new code of criminal procedure, the need to respond to a new emergency phenomenon, mafia-style organized crime, the 1989-1992 three-year period was characterized by an intense legislative modification work which inevitably also affected the new code. If, with the new code, custody in prison was to be ordered by the judge as an *extrema ratio* between the various coercive and disqualification precautionary measures, in cases of organized crime it was applied on an ordinary basis.

Together with the legislative choices, the Constitutional Court also carried out a concrete counter-reform, which ended up privileging the needs of the communities over the guarantees of the rights of defense and diminishing the accusing characters of the criminal proceeding. Of considerable importance, for example, was the Constitutional Court ruling No. 254/1992 which allowed the use of statements collected unilaterally by the public prosecutor as evidence of accusation, which were not verified in the hearing. This trend of inspiration to the inquisitorial system was pronounced to coincide with the explosion of investigations for cases of political-administrative corruption, the so-called “Mani Pulite” (lit. *clean hands*) investigation, where pre-trial detention in prison was becoming less and less of an instrument of an exceptional and temporary nature, and more of an ordinary measure. Public opinion justified the necessary imbalance between the procedural parties by relying on the idea of a just repression and a correct isolation of the “dangerous subject”, of the enemy to be fought, be it a corrupt politician or a criminal mafia.

Among the other main changes of the law, for the purpose of this research, it is worth analyzing the choice to bring custody back to prison to the role of *extrema ratio* by

valuing the parameters of proportionality and adequacy, "Prison detention in prison can be ordered when any other measure is inadequate"¹⁴.

New interventions on the ground of the precautionary measures were carried out in the 2000s, first for the protection of the safety of citizens with the law n ° 128/2001¹⁵ and subsequently with the decree law n ° 11/2009¹⁶ for the urgent measures on public safety and to combat sexual violence.

Further changes implemented in art. 275 code of Criminal Procedure¹⁷ come then from the decree law n ° 11/2009. With the terrorist attacks, starting from 11 September 2001, the social alarm has spread far beyond the concept of organized crime, faced with the legislation of the 90s, "interfering both in the substantial criminal field, through the anticipation of thresholds punishable, and in court cases, through the use of precautionary tools to neutralize the hazard".

The Legislator, to quell the growing increase in certain criminal cases, decides to intervene, introducing several crimes within the decree under examination that has nothing to do with mafia-type crimes. This decree provides for the compulsory pre-trial detention in prison for crimes of child prostitution, child pornography, tourist initiatives aimed at exploiting child prostitution, sexual violence, sexual acts with minors, group sexual violence, holding someone against their will for sexual violence and for group sexual violence, with the consequent possibility of proceeding with a very direct rite as well as the introduction of the crime for persecutory acts (so-called stalking). This is a choice once again dictated by the umpteenth situation of social alarm.

Famous in this regard, is the Pantano judgment of November 2003 in which the European Court, faced with an appeal filed for the unreasonable duration of pre-trial detention in the context of a judicial case in Italy, declared that in alarming cases of

¹⁴ Art. 275 c.p.p.

¹⁵ Law 26 marzo 2001 "Interventi legislativi in materia di tutela della sicurezza dei cittadini"

¹⁶ Law Decree legge del 23 febbraio 2009 " Misure urgenti in materia di sicurezza pubblica e di contrasto alla violenza sessuale, nonché in tema di atti persecutori".

¹⁷ Italian Criminal Procedure Code, article 275.

particularly serious crimes, a possible restriction of personal freedom is justified - especially the use of preventive detention - to sever every single link between the members of the criminal organization, in order to avoid or at least minimize the associative relationship between them.

To arrive at more recent times, therefore, the role played by the European Court of Human Rights and Fundamental Freedoms is fundamental, which with the famous "Torreggiani" judgment, mainly underlines the problem of prison overcrowding, reopens Italy's eyes on the possible abuse of prison custody, often used by the various legislative "security packages" to face the alarms coming from the community.

With a view to reduce intramural custody, the work carried out by the Constitutional Court is also remarkable, which through important rulings demolishes many presumptive mechanisms, restoring judges' confidence in relation to the precautionary assessment discretion, which seemed long gone.

If the proposals for intervention on the changes in the matter of precautionary measures are added to these, among which the "Jousting" Commission and the "Canzio" Commission should be mentioned, we find the central theme of Law no. 47/2015, which represents the latest reform of personal precautionary measures. The law defines the scope of pre-trial detention in prison, circumscribing the conditions for applying the measure and changing the procedure for its appeal¹⁸.

Ultimately, with the Legislative Decree no. 15 February 2016 36, published in the Official Journal on 11 March 2016, Italy transposed Council Framework Decision 2009/829 / GAI on the application between the Member States of the European Union of the principle of mutual recognition to decisions on alternative measures to pre-trial detention. The aim pursued is to strengthen judicial cooperation in criminal matters by making a balance possible between the interest of States in security and the effective repression of crimes, with the right to freedom and to the presumption of innocence of the suspects.

¹⁸ www.camera.it

5. The legal bases and the fundamental legal aspects with respect to PTD

5.1. General principles and competent authorities and their roles

The starting point can only be the criminal trial, which has always been the shortest and most direct segment that connects the principle of state authority with individual freedom. Personal freedom and the criminal trial have always been the binomial for which the Italian legal, social, and cultural experience moves.

- Principle of personal freedom:

As per art. 2 of the Constitution, the recognition and guarantee by the Italian State of the inviolable human rights "both as an individual and in the social formations where his personality takes place" is sanctioned first and personal liberty¹⁹ plays a prominent role among inviolable rights, in turn governed by Article 13 of the Constitution. The guarantees that article 13 dictates are linked to the phenomenology of the criminal trial: from the investigative phase of the judicial police and the public prosecutor to that characterized by the intervention of the judge, up to that of the possible sentence to a prison sentence²⁰. Article 13 marks the definitive overcoming of the absurd conception that had hitherto considered the defendant's pre-trial detention as an ordinary measure necessary to ensure efficiency and credibility of the trial system.

This article protects personal freedom understood not only as freedom from physical coercions, but also as moral freedom and social dignity of the individual according to the criterion of the so-called legal degradation, repeatedly supported by the Constitutional Court itself²¹.

¹⁹ Article 2 Costituzione italiana.

²⁰ L. BRESCIANI, "Libertà personale dell'imputato, in *Digesto delle Discipline Penali*", Vol. VII, Torino, 1993, pag. 443 ss.

²¹ In this regard, the jurisprudence of the Constitutional Court has included not only the protection of personal freedom "any form of impairment of moral freedom when such impairment implies a total subjection of the person to the power of others" (sentenza n°30/1962) but also "when a mortification of the dignity or prestige of the person is provoked" (sentenza 68/1964).

Article 13, after sanctioning inviolability, describes, in the two subsequent paragraphs, the limits that derogate from this principle, in the cases strictly required by law.

In fact, the second paragraph provides for the absolute reservation of the law which states that “no form of detention, inspection or personal search, nor any other restriction of personal freedom is allowed, except by reasoned act of the judicial authority and only in cases and ways provided by law”²². Only the law is the source that can define the conditions, the procedure, and the aims of the restrictive measures²³. The statutory reserve of art. 272 of the criminal code establishes that “the freedoms of the person can be limited with precautionary measures only in accordance with the provisions of this title”. Among the measures restricting personal freedom subject to the guarantees governed by art. 13 paragraph 2, those of a preventive nature, disposed both during the investigation phase of the suspect and during the trial against the accused, assume a prominent role.

The third paragraph of art. 13 regulates the jurisdiction reserve that “allows, in exceptional cases of necessity and urgency indicated strictly by law, the public security authority to adopt provisional measures, which must be communicated within forty-eight hours to the judicial authority and, if this it does not validate them in the following forty-eight hours, to revoke them rendering them without effect”. The power to dispose of the restrictive measures is therefore granted by the legislator only to the judicial authority which must issue the provision in writing and with express motivation.

The principle of personal freedom is configured as a prerequisite for all other rights as it precedes them, ensuring their full explanation for each individual²⁴.

- Presumption of innocence

²² Article 13 Constitution.

²³ Article 272 c.p.p.

²⁴ V. GREVI, “Libertà personale dell’imputato e Costituzione”, Giuffrè, Milano, 1976, pag. 2

The purpose of the measures restricting personal freedom can be grasped in the relationship between articles 13 and 27, paragraph 2 of the Constitution.

According to the art. 27 paragraph 2 "the accused is not considered guilty until the final sentence" in the sense that personal freedom can be sacrificed only for the protection of interests that presuppose guilt as already established²⁵.

The presumption of innocence acts on the one hand as a rule of treatment, that is as a useful parameter for the condition to be reserved for the defendant during the trial, and on the other as a rule of judgment, in turn divided into evidentiary rule and decision-making rule on the still unproven offense.

For this purpose, the connection between the presumption of innocence and respect for the inviolable rights enshrined in the Constitution is close: no individual, for the sole fact of being subjected to criminal proceedings, must undergo deplorable and potentially harmful treatment of his physical and mental integrity.

In this regard, the treatment rule also arises from the delicate issue of precautionary measures, especially from preventive detention.

And again, Chapter I of Title I of the Code of Criminal Procedure contains the general provisions, which sanction the common principles and conditions governing their application:

- Principle of legality and taxation

enshrined in art. 272 c.p.p. which reads: "The freedoms of the person can be limited with precautionary measures only in accordance with the provisions of this title". This means that the precautionary measures are only those strictly required by title I, book IV of the Italian Criminal Code and which can be applied by the judicial authority only in cases provided for by law, for the purposes established by the legislator. In this way, the code of procedure fully implements the principles of law and jurisdiction that art. 13 of the Constitution outlines in the event that it is necessary to set limits on the freedom of the person.

²⁵ V. GREVI, "Libertà personale dell'imputato e Costituzione", Milano, 1976.

- Article 273 of the Italian Criminal Code

Existence of the *fumus commissi delicti*, that is, the presence of serious indications of guilt. According to this article "No one can be subjected to precautionary measures if there are no serious indications of guilt against him". Paragraph 2 of art. 273 c.p.p. also provides that: "No measure can be applied if it appears that the offense was committed in the presence of a cause of justification or non-punishment or if there is a cause for extinction of the crime or a cause for extinction of the penalty that is believed to be imposed"²⁶.

The legitimacy of preventive pre-trial detention enshrined in Article 13 of the Constitutional Charter therefore finds its limit in the presumption of innocence which excludes the admissibility of any form of deprivation of personal liberty before the judge issues a final sentence²⁷.

Pursuant to Article 279 of the Code of Criminal Procedure, the measures concerning the precautionary measures are adopted by the judge proceeding with an order, intended as an office that has the material availability of the documents, always behind the necessary request of the Public Prosecutor. More specifically:

- in the preliminary investigation phase, the investigating judge is the judge for preliminary investigations;
- in the course of the preliminary documents for the hearing, the measures concerning the precautionary measures are adopted, according to their respective jurisdiction, by the court in collegial or monochromatic composition, by the court of assembly, by the court of appeal or by the court of assembly of appeal;
- after the pronouncement of the sentence and before the transmission of the documents pursuant to article 590 of the code, that the judge who issued the sentence orders;

²⁶ Absence of reasons for justification, not punishable, or the presence of a cause for extinction of the crime or penalty to be imposed.

²⁷ P. PAULESU, "Presunzione di non colpevolezza", Giappichelli Editore, Torino, 2009.

- during the pending appeal in the Court of Cassation, the judge who issued the contested provision pursuant to art. 91 disp. att. (the implementing provisions) of this code.

5.1. Legal prerequisites for pre-trial detention

The precautionary measures are adopted only in the presence of two requisites: the existence of serious indications of guilt (pursuant to art.273 c. 1 of the criminal code) and the precautionary needs (pursuant to art.274 of the criminal code).

The precautionary requirements as provided for by art. 274 of the Italian Criminal Code are:

a) **danger of loss of tampering** with the evidence or "situations of concrete and current danger for the acquisition or authenticity of the evidence".

b) **escape or danger of the defendant's escape** "provided that the judge believes that a sentence of more than two years' imprisonment can be imposed"²⁸. With respect to the danger of escape, the restriction of personal freedom can be justified, as mentioned above, not by assimilating the accused to the culprit "but by guaranteeing in any case the result of the trial including even the most unfavorable hypotheses for the judge"²⁹.

c) **protection of the community** when "there is a real danger that these commit serious crimes with the use of weapons or other means of personal violence or directed against the constitutional order or organized crime or the same type of crime as the one that the accused is being tried for". In Article 274 c.p.p. alongside the traditional *pericula libertatis* such as the danger of tampering of the evidence and the danger of escape, there is the concrete danger of recidivism³⁰.

²⁸ art. 274 c. 2 c.p.p..

²⁹ V. GREVI, "Libertà personale dell'imputato e Costituzione", pag.56,60.

³⁰ The Constitutional Court also attempted to justify the special prevention purpose pursued by this precautionary requirement through some of its judgments. In this regard, judgment n.64 / 1970 deserves to be mentioned, where it is stated that "if and insofar as it is a reasonable assessment of the existence of a danger deriving from the freedom of those suspected of particular crimes, the legislator has the right to order that, within certain time limits, be deprived of it".

The purposes of pre-trial detention are divided into:

- substantive purposes in the sense that you want to prevent, due to the seriousness of the crime, the social danger of the offender, the social alarm raised by the crime committed, or the commission of further offenses by the suspect;
- procedural purposes that pursue the achievement of objectives strictly related to the purposes of the trial and corresponding to the canons of truth and justice. In these terms, the restriction of personal freedom must put the judge in a position to carry out the investigation of the events in the best possible way, keeping the accused available to the judicial authorities and preventing the risk of escape and tampering of the evidence.

In applying precautionary measures, the judge must comply with the following criteria:

- **adequacy**: as required by paragraph 1 of article 275 of the criminal code "In arranging the measures, the judge takes into account the specific suitability of each in relation to the nature and degree of the precautionary needs that are to be met in the specific case";
- **proportionality**: pursuant to paragraph 2 of art. 275 c.p.p. "Each measure must be proportionate to the extent of the offence and to the sanction that has been or is believed to be imposed";
- **gradualness**: paragraph 3 of art. 275 c.p.p. provides that "Pre-trial detention in prison can only be ordered when all other measures are inadequate";
- **protection of rights**: art. 277 c.p.p. states that "The methods for carrying out the measures must safeguard the rights of the person subject to them, the exercise of which is not incompatible with the precautionary needs of the specific case";
- **determination of the penalty**: as established by art. 278 of the Penal Code "For the purposes of applying the measures, we have regard to the punishment established by law for each crime committed or attempted.

5.2. The suspicion

The suspect is someone who could potentially be responsible for committing a crime and is under observation but is not yet registered in the register of those investigated;

therefore the suspect cannot be given any precautionary custody order.

Instead, the figures of investigated and defendants are different:

- investigated is the person whose name has been formally registered in the register of crime reports kept at each Public Prosecutor's Office (so-called register of suspects). From this moment, the judicial authority will begin to carry out research and gather all the useful elements (people informed about the facts, documents, body of the crime, etc.) to support the accusation in a trial to be held before the judge;
- defendants he is the one against whom he initiates a real trial.

Europe has turned the spotlight on the rights of those arrested on suspicion of committing a crime. The action aims to ensure that there are equal rules for everyone and that everyone has the right to a fair and transparent procedure.

5.3. Proportionality

Analyzing article 275 of the criminal code with regard to the criteria for choosing precautionary measures, shows how the judge takes the suitability of each measure into account in relation to the different precautionary needs to be met³¹. Furthermore, two principles indicated in paragraphs 2 and 3 of the same article must be considered:

- **the principle of adequacy** and

³¹ Article 275 comma 1 c.p.p.

- **the principle of proportionality**, according to which the measure used must be proportionate to the extent of the offence and the sanction that has been or is believed to have been imposed.

The European Court stressed the use of the principle of proportionality in the decision-making process, as the authorities should consider less rigorous alternatives before resorting to detention, and the authorities should also consider whether "continuing the detention of the accused is indispensable" ³².

5.4. The procedures

With the provision ordering the pre-trial detention, the judge orders the officers and judicial police officers for the accused to be seized and immediately taken to a custodial institution to remain available to the judicial authority.

Pre-trial detention can be reviewed by the prosecuting judge usually following a request from the defense, or ex officio when the terms of duration maximum measure are about to expire.

The measure must be revoked immediately when serious indications of guilt and / or precautionary no longer exist.³³

Note that, based on the principle of the so-called "Precautionary question", the judge cannot, in the absence of a specific request by the Public Prosecutor, apply a more afflictive measure or order for the current measure be applied in more demanding ways.

Precautionary custody in prison also loses effectiveness where, in the five days following its application, the restricted person is not brought before the judge to carry out the so-called "Guarantee questioning" (art. 294 cpp): this is, in fact, the first moment in which the subject undergoing the test is put in contact with the judicial body, which has the task of verifying whether the conditions "remain" for the application of the precautionary measure, with consequent possible revocation

³² Ladent v Poland, App 11036/03, 18 March 2008, paragrafo 55.

³³FairTrials Project, Antigone Association.

or replacement - also in this case exclusively - by the judge. It should be noted, then, that the interrogation by the Public Prosecutor can never precede that of the judge: the intent is clearly to prevent pre-trial detention being used by the public prosecutor's body to extort self-accusatory statements.

The decision underlying the precautionary measure must always be adequately motivated by the judge pursuant to art. 292 cpp. The motivation must include, under penalty of nullity detectable even ex officio, the existence and evaluation of both serious indications of guilt (art. 273 cpp) and specific precautionary needs (art. 274 cpp) such as the danger of escape, the loss of evidence, or the recurrence of the crime, which justify the measure applied in the specific case.

According to the new version of art. 274 cpp, moreover, the motivation must be more detailed.

The reform limits the judge's discretion in assessing the inadequacy of precautionary measures other than pre-trial detention that guarantee the precautionary needs pending judgment, both in relation to the requirement of the concreteness of the risk of escape or recurrence of the crime, and of their actuality. In assessing these requirements, not only the seriousness of the offense pursued can be taken into consideration, but a case-by-case analysis must be carried out by the judge himself/herself.

Before being transferred to the prison, the person subjected to pre-trial detention in prison cannot be subject to limitation of freedom, except for the time and in the manner strictly necessary for its translation into this place³⁴.

Furthermore, the precautionary custody suffered, in determining the sentence to be executed if a definitive sentence is reached, is counted as a discounted sentence, even when it is a precautionary custody suffered abroad as a result of an extradition request or in the case of renewal of the judgment pursuant to art. 11 of the Italian Criminal Code.

³⁴ Article 285 c.p.p.

5.5. Duration and prolongation of pre-trial detention

Pre-trial detention in prison is subject to maximum terms, which vary according to the stages of the procedure. From the beginning of the execution, if the provision establishing the judgment or the ordinance with which the judge orders the abbreviated judgment or the sentence of the application of the penalty at the request of the parties has not been issued, the maximum duration is:

- three months - if the legal penalty is up to six years
- six months - if the legal penalty is between six and twenty years
- one year - if the legal penalty is equal to or greater than twenty years (including life imprisonment).

Starting from the ordinance that admits the shortened judgment, the terms are as follows:

- three months - if the legal penalty is up to six years
- six months - if the legal penalty is between six and twenty years
- nine months - if the legal penalty is equal to or greater than twenty years (including life imprisonment).

From the issuance of the provision ordering the judgment or from the supervening execution of the custody without a first degree sentence being pronounced, the terms are as follows:

- six months - if the legal penalty is up to six years
- one year - if the legal penalty is between six and twenty years
- one year and six months - if the legal penalty is equal to or greater than twenty years (including life imprisonment).

Between the first- and second-degree conviction and between the second degree conviction and the judged, for each degree, the terms are as follows:

- nine months - in case of a sentence of up to three years
- one year - in the event of a conviction between more than three years and ten years
- one year and six months - in case of a sentence of more than ten years (including life imprisonment)³⁵.

In all cases in which, instead, an expert opinion on the state of mind of the accused is ordered, the terms of duration of the custody are extended for the period of time assigned for the completion of the assessment. The extension is also possible, during the preliminary investigations, if there are serious precautionary needs that make it indispensable.

5.6. Recent legal developments

Law n. 47/2015

Law 16 April 2015, n. 47, in force since 8 May 2015, has introduced a series of changes of enormous importance regarding personal precautionary measures. The new law arises from the need to face the problem of prison overcrowding, following the ruling of the European Court of Human Rights in the famous Torreggiani controversy against Italy, the well-known sentence that condemned Italy for the overcrowding of prisons and the consequent unacceptable living conditions of prisoners, in order to contain the excessive appeal regarding the application of custodial personal precautionary measures (which exacerbated the overcrowding in prisons).

Further and radical changes are, instead, those made to the incidental proceeding relating to personal precautionary appeals, especially with reference to the review and the referral judgment following the decision to annul the application order by the Court of Cassation.

³⁵ Art. 303 c.p.p. “Termini di durata massima della custodia cautelare”.

The new legislation has rewritten the most important articles of the criminal procedure code, also making important changes, above all, from a strictly practical point of view.

The article that first received a radical reform of its content is art. 274 c.p.p. which in the new formulation provides:

- the limitation on the use of precautionary measures;
- the restriction of the discretion of the judge in reference to the "concrete and current danger that the accused will flee";

In this case the Legislator introduced the requirement of the "actuality" of the danger of escape and recurrence of the crime; therefore, the Judge must carefully assess the existence of a concrete and current (escape) risk for the application of the measure. The Judge's decision must also contain an indication of the specific reasons why he deems the application of other less afflictive measures inappropriate.

Other substantial changes made by Law 47/2015 are:

- the necessary actuality of the precautionary needs "taking into account the time elapsed since the commission of the crime" in addition to that of concreteness, with reference to the danger of escape.
- the non-exclusive impact of the seriousness of the crime in relation to which it will be necessary to take into account the methods and circumstances of the event; the Legislator has in fact introduced at the conclusion of art. 274 c.p.p. that "the situations of concrete and current danger cannot be inferred from the seriousness of the specific crime for which we are proceeding" (in letter c, it is specified that this foreclosure assessment also operates "in relation to the defendant's personality").

- pre-trial detention in prison will be ordered only for crimes for which imprisonment is envisaged for a maximum of at least five years and for the crime of illegal financing of parties.

5.7. Electronic monitored house arrest instead of detention in prison

For many years, the electronic control method had been ignored by the Italian system, only with the decree law 92/2014 and the subsequent law n.47 of 2015 has the use of the electronic bracelet seen wider diffusion.

The debate relating to this issue has always been very heated, as there are two different interests to be protected. On the one hand, the state must guarantee security for its citizens, condemning those guilty of crimes to certain penalties, but on the other hand, the state cannot allow inhuman and degrading treatment in penitentiary structures to occur.

The electronic bracelet offers a way to overcome the problem of overcrowding in prisons, allowing a "remote" form of control to be carried out. The device must be applied to the ankle of the person subject to the measure and a control unit capable of detecting movements within a certain radius of action is installed in his home. Therefore, if the subject moves away or tries to tamper with the device, the control unit triggers an alarm in the law enforcement room, which can thus intervene.

The best known operating protocol adopted in compliance with the ministerial circulars is the one codified by the President of the Court of Turin and by the President of the Court of Rome who have traced the "typical" procedures to be followed in applying the prescriptive ordinance the "electronic monitoring" measures.

This protocol provides the following:

1. The orders for the application of the "electronic monitoring" systems are issued to those already restricted to pre-trial detention in prison and must be implemented no later than the fourth day from the filing date, with the sole exception of postponing the start to the first following working day if the last term falls on a public holiday.

2. The execution must always be preceded by the acquisition of the consent of the interested party, who at the time of the notification in prison must express a declaration of consent to the Prison Police who will draw up a specific notification report. The Penitentiary Police who provides for the notification of the order of the judicial police must return a copy of the report duly notified to the instructing Judicial authority and the police office delegated to the subsequent checks of the precautionary measure (this procedure is applied in the execution of the orders of the Surveillance Court that applies the alternative measure to detention provided for in art. 47 ter paragraph 4 bis penitentiary code.³⁶).

3. The police office delegated to the subsequent checks of the prescriptions, having received proof of the notification, must verify in concrete terms the suitability of the premises where the precautionary measure will take place, the house and the appliances in general, giving inspection the results to the judicial authority and the competent prison police.

4. In the event of a positive outcome, the police force in charge of the monitoring verifies the availability of equipment at the telecom company, taking all the necessary steps as quickly as possible so that it is ascertained that the place where the measure is carried out has and can maintain the technical conditions for starting electronic monitoring. At the same time, a constant connection with the telecom company and with the penitentiary institution is maintained in order to coordinate both installation times and the transfer of the subject into the home that has been authorized for this purpose. The use of the electronic device can only start after the devices have been tested to ensure that were installed successfully. In the absence of the presumed consent of the interested party, of following the the unsuccessful outcomes of the preliminary verification of the designated location for house arrest or the technical testing, the measure is not implemented since the legal conditions necessary for the execution of the order is are not met.

The obligation of the person subjected to the measure to facilitate the relative installation of the device and to faithfully observe the other prescribed conditions

³⁶ Italian penitentiary law, law n. 354/1975.

concerning the remote monitoring means is required by law (and a formal notice must be expressed in the order): in the case that the subject refuses observation, he/she is immediately returned to custody or detention in prison.

5.8. Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law

Alternative measures to pre-trial detention are restrictive solutions used as an alternative to imprisonment to implement the re-educational function of the sentence. They can be adopted either at the preliminary investigation stage or during the trial, or while the penalty is being decided and finalized by sentence, as an alternative to the penalty.

The measures are often decided in response to a specific request by the suspect, or the prisoner, through his legal representatives. Even in extreme cases, when a suspect is under arrest for serious accusations, such as murder, for example, his lawyer can appeal the precautionary measure, to the Court of Review and request the adoption of an alternative measure to prison, if there is no risk of escape or tampering with the evidence. In the same way, the lawyer can request an alternative measure even when the sentenced person is serving the sentence, if he or she meets the necessary prerequisites. In this case, the Supervisory Court decides.

Review Court

The Review Court is a court with external control competence, not only of legitimacy but also of merit, which is entrusted with the task of deciding the restrictive measures of personal freedom. The Review Court expresses itself during preliminary investigations, evaluating the advisability of an alternative measure to prison.

5.9. Procedural measures to support the decision making (e.g. reports by the probation services; court assistance, etc.)

In the Italian legal system, the probation system intervenes in the execution phase of the sentence and not also in the precautionary phase that affects the PTD.

As for the juvenile system, on the other hand, the Office of Social Service for Minors (USSM) takes care of minors subjected to criminal proceedings from the earliest stages and provides the Judiciary with a cognitive overview of their personal, family and social situation, useful for the decisions that it will have to adopt. Accompany minors with support and control activities, in relation to criminal measures (precautionary measures, probation, alternative measures, alternatives to detention and security) that can be adopted against them. At the same time, it clarifies the functioning of the juvenile criminal process and the meaning of social and educational intervention in the criminal field to the minor and his family.

The appointment of the defense lawyer

The defendant has the right to appoint no more than two trusted defense lawyer. The appointment of the lawyer is made with a declaration made to the judicial authority and can be made by a close relative or family member. This appointment ceases to be effective when the suspect / accused person does not confirm it by appointing another defense attorney. The accused who has not appointed a defense attorney or who has remained without him is assisted by an ex officio lawyer, who ceases to function if a trusted defense lawyer is appointed. In addition, if the accused finds himself in financial difficulties, he can ask to receive legal aid. The appointment of a lawyer from prison is made by going to the matriculation office where the register of lawyers is kept, which must be posted so that prisoners can view it. Prison Operators are prohibited from influencing, directly or indirectly, the choice of the defense lawyer.

The defendant has the right to confer with his lawyer defending him from the execution of the measure unless, for specific and exceptional reasons of caution, the judge, at the request of the Public Prosecutor, orders a ban cannot exceeding five days. In the penal institutions there are special rooms for talks with the defense lawyers. These talks can take place for the duration of the stay in prison at the times and in the manner established by the prison institution.

Legal aid

As anticipated, the Italian or foreign citizen in possession of a document certifying his identity can be offered legal aid and thus not to pay the defense lawyer and the costs related to the trial (technical advice and investigations). To be eligible for legal aid, it is necessary to have, with respect to the last tax return, an income lower than the minimum amount reported by the various ministerial protocols. In the case of people living together, the income limit increases by a few hundred euros per person.

To obtain free legal aid, a request must be made containing:

- the details of the applicant and those of all members of the registry family;
- the tax code of all members;
- the self-certification attesting to the existence of the income conditions, with the specific indication of the applicant's overall income and that of any other family members.

The request must be submitted through the prison director who authenticates the signature and passes the request to the competent judge. Any changes in income relevant to the aid must be communicated within thirty days of the expiry of the one-year term from the submission of the application and until the procedure is final.

If the applicant is a foreigner, for the income generated abroad, he must provide a self-certification and a certification from the consular authority, which confirms his declarations. If it is impossible to obtain said consular certification, the same can be replaced by a self-certification. As regards the income produced in Italy, the declaration is sufficient, even if the judge has the right to request documents proving the consistency of such income. Even in this case, if it is impossible to produce such documentation, simple self-certification will suffice. False self-certification is criminally punished.

6. Measures to avoid PTD/Alternatives in practice

Alternative measures to pre-trial detention always fall within the sphere of Personal precautionary measures affect the personal freedom of the suspect and are:

- **Prohibition of expatriation** (art. 281 of the Italian penal code):

When the judge orders a ban on expatriation, he orders the accused not to leave the national territory without the authorization of the prosecuting judge. To ensure that the measure is respected, it also gives the necessary provisions to prevent the use of passports and other identity documents valid for expatriation. This measure is provided each time a precautionary measure is applied.

- **Obligation to submit to the judicial police** (art. 282 c.p.p.):

When the judge orders this measure, he orders the accused to go to a judicial police office, setting the days and hours of presentation, taking into account the place of residence and place of work.

- **Removal from the family home** (art. 282 - bis of the criminal code)

With the provision with which the judge orders the removal from the family home, he/she orders the accused to leave it immediately or not to return and not to access it without the authorization from the ruling judge, who can also prescribe certain means and conditions for visits. If, then, there are needs for the protection of the victim or his / her close relatives, the judge can also order the accused not to approach the places usually frequented by the same (place of work, family home or that of close relatives) unless attendance is necessary for work reasons, in this case, methods and any limits to approaching the place are also established. At the request of the Public Prosecutor, the judge can also order the offender, to make a payment to the cohabiting persons who, as a consequence of the precautionary measure, remain without adequate means, determining the sum, terms and means of payment, taking into account the circumstances and the incomes of the obliged.

If necessary, the judge can also establish a payment order with effective enforcement, which provides that the employer must pay the check directly to the

beneficiary, deducting it from the remuneration of the obliged party. The prohibition to approach the workplace and home of the offended person and the measure of the allowance can be adopted by the judge even after the measure of removal has been ordered, unless this has been revoked or has lost its effectiveness. The check made in favor of the spouse or children loses efficacy even if the presidential order referred to in art. 708 of the Italian Criminal Code at the time of separation or other provisions which regulate the economic-patrimonial relationships between the spouses or relating to the maintenance of children.

- **Prohibition of approaching places frequented by the offended person** (art. 282 ter of the Italian penal code)

With the provision that provides for the prohibition to approach, the judge prescribes the accused not to approach the places usually frequented by the offended person or to maintain a certain distance from them or from the offended person. If further protection needs exist, the judge can prescribe the accused not to even approach the places usually frequented by the close relatives of the offended person, or by subjects living with them or linked to them by an emotional relationship. The prohibition may also include that of communicating with all these subjects. If then their presence at these places is necessary for work reasons or housing needs, the judge prescribes how this should be done, imposing any necessary limits.

- **Prohibition and obligation to stay** (art. 283 of the criminal code)

With the provision that provides for the prohibition of residence, the judge orders the accused not to stay in a certain place and not to access it without the authorization of the proceeding judge, while with the one that establishes the obligation to stay, the accused is ordered not to leave the following without the authorization of the judge:

- ✓ the territory of the municipality of habitual residence;
- ✓ the territory of a neighboring municipality or a part of the latter, when effective control is necessary or when the municipality of habitual residence is not the headquarters of the police office.

If then, due to the individual factors of the subject or to the environmental conditions, remaining in these places does not adequately ensure the precautionary requirements pursuant to art. 274 of the Italian Criminal Code, the residence requirement can be arranged in the territory of another municipality or part of it, preferably included in the province or in any case in the region of the municipality of habitual residence.

In the provision that provides for the obligation to stay, the judge also indicates the police authority to which the accused is required to present himself without delay and indicates the place where the accused has declared to make his home. The judge can also order that the accused declare to the police authority the times and places in which he will be available on a daily basis for the checks, with the obligation to notify the same in advance of any changes in place and time. With another provision, the judge can also order the accused not to leave the house at certain times of the day, so long as these do not affect his working needs.

When establishing the territorial limits, the judge takes into account the accused's accommodation, work and assistance needs. If he is suffering from a drug or alcohol addiction and is following a therapeutic recovery program in an authorized facility, the judge arranges the necessary checks to guarantee the continuation of the recovery program.

- **House arrest** (art. 284 of the criminal code)

House arrest is a personal precautionary measure that can be taken as an alternative to pre-trial detention as a restrictive measure. Unlike home detention, the measure can also be adopted in the preliminary investigation phase, replacing the precautionary measure in prison or while the criminal proceeding is in progress. It is the Court of Review to decide whether, in accepting the suspect's request, it is appropriate to replace detention in prison with house arrest.

The provision that offers house arrest, considered on a par with pre-trial detention in prison, requires the accused not to leave his home, from another place of private residence, from a public place of care or assistance or from a protected family home. In ordering this precautionary measure, the judge establishes the place of house

arrest to ensure the priority protection needs of the offended person. When necessary, the judge can also impose limits or prohibitions on the accused to be able to communicate with people other than those who live with him or who assist him. If the accused cannot provide for his life needs or is in need, the judge can authorize him to absent himself from the place of arrest only for the time strictly necessary to provide for his needs or to work.

The public prosecutor or the judicial police, even on their own initiative, can check at any time that the accused complies with the prescriptions imposed by the judge.

The measure of house arrest cannot be granted to those who have been sentenced for evasion in the five years preceding the alleged offense for which they are being tried, unless the judge, after taking the relevant information in the quickest manner, considers, based on specific facts, that the offense is minor and that the precautionary needs can be met with this measure.

- **Precautionary custody in institution with attenuated custody for detained mothers** (art. 285 bis of the criminal code)

As required by paragraph 4 of art. 275 of the Code of Criminal Procedure, stating that: When the accused are pregnant women, with children no older than six years, or her cohabiting partner, or father, if the mother is deceased or wholly unable to give assistance to the children, the pre-trial detention in prison cannot be ordered, unless there are exceptional precautionary requirements. When the accused is a person over the age of seventy, pre-trial detention in prison cannot be ordered, unless there are exceptional precautionary needs. In these cases, the judge can order that the measure be applied in an institution with attenuated custody for detained mothers, if the exceptionally important precautionary requirements allow it.

- **Precautionary custody in a place of treatment** (Article 286 of the Italian Criminal Code)

In the event that the person to be placed in pre-trial detention is mentally ill or is in a state of infirmity that greatly diminishes or eliminates the ability to understand or want, the judge, in substitution of the measure of pre-trial detention in prison, can opt for temporary hospitalization in a suitable structure of the hospital psychiatric

service, adopting the necessary measures to prevent their escape. This measure does not persist if the accused is no longer mentally ill and the provisions of paragraphs 2 and 3 of art. 285 c.p.p. apply.

The disqualification precautionary measures instead, unlike the coercive ones, which limit the freedom of the person, affect the relational life of the subject by limiting particular activities.

As required by Article 287 of the Italian Criminal Code, the personal protective disqualification measures are applicable for those crimes "for which the law establishes the sentence of life imprisonment or imprisonment exceeding a maximum of three years".

Personal protective disqualification measures are:

- **Suspension from the exercise of parental responsibility** (Article 288 of the Italian Criminal Code);

In this case, the judge, with the provision that allows for this precautionary measure, temporarily deprives the accused, in whole or in part, of the relative powers. The second paragraph of the article also provides that, in the case of a crime against sexual freedom, or for one of the crimes provided for in Articles 530 c.p. (repealed article which provided for the crime of corruption of minors) and 571 of the Italian Criminal Code "Abuse of the means of correction and discipline" to the detriment of close relatives, the precautionary disqualification measure can also be ordered outside the limits of punishment provided for by article 287 paragraph 1.

- **Suspension from the exercise of a public office or service** (Article 289 of the Italian Criminal Code);

When the Judge orders the suspension from the exercise of a public office or service, he or she "temporarily forbids the accused, in whole or in part, from carrying out the activities mandated to them".

In a trial concerning a crime against sexual freedom (ex art. 519-526 of the Italian Criminal Code), or for one of the crimes provided for in articles 530 (now repealed)

and 571 (abuse of the means of correction) of the penal code, committed to the detriment of close relatives, the measure can also be ordered outside the penalty limits provided for by art. 287 paragraph 1.

In a trial concerning a crime against the public administration, the measure of suspension from the exercise of a public office or service can be ordered against the public official or a person in charge of a public service, even outside the established penalty limits from article 287 paragraph.

During the preliminary investigations, before deciding (on the request of the public prosecutor) to proceed with the application of the measure of suspension from the exercise of a public office or service, the judge proceeds to the interrogation of the suspect, as outlined in articles 64 and 65 c.p.p. However, if the measure of suspension from the exercise of a public office or service is ordered by the judge instead of a coercive measure requested by the public prosecutor, the interrogation takes place in the terms referred to in paragraph 1-bis of article 294, i.e. "No later than ten days before the execution of the measure or before its notification".

This measure does not apply to those who hold an elected office by direct popular investiture.

- **Temporary ban on exercising certain professional or entrepreneurial activities** (art. 290 of the Italian Criminal Code).

When the judge issues the order that prohibits the exercise of certain professions, companies or executive offices of legal entities and companies, he or she "temporarily prohibits the accused, in whole or in part, of the activities related to them".

In the event that a proceedings concern a crime against safety or the public economy, industry and trade, or for any of the crimes relating to companies and consortia or for the crimes provided for in articles 353, 355, 373, 380 and 381 cp, the measure can also be ordered outside the penalty limits provided for in article 287 paragraph 1.

According to the research carried out by the Italian Ministry of Justice, as of 30 March 2019, 228 offices (115 investigating judge and 113 trial sectors) replied to 136 courts (equal to 272 offices), equal to 84% of the total, higher than 73% last year. The offices that sent the data include all the most important offices of the District Anti-Mafia Directorates such as those of Milan, Turin, Bologna, Rome, Naples, Bari, Reggio Calabria and Palermo, which is why the sample can be considered exhaustive.

During 2018, 86,697 personal precautionary measures were issued by the offices that responded to the request.

The figure is comparable with 2019 while it is not immediately comparable with that recorded for 2017 (74,705), since for this year the number of offices monitored was significantly lower (equal, as seen, to 73% of the national total).

It is possible, however, to make a comparison in percentage terms between the data collected in the two years. From this point of view, it can first be observed that there is an almost absolute correspondence between the growth recorded in the overall number of measures issued in the last two years (increased from 75 thousand to 87 thousand and, therefore, an increase of 12,000 precautionary measures issued and the greater percentage of offices judicial reports that have been reflected in this monitoring (an increase from 73% to 84% and, therefore, of 11 percentage points).

This means that the global data for the measures for the application of personal precautionary measures can be assumed to be substantially constant between 2017, 2018 and 2019.

As evidenced by the changes shown in the table below, there is a significant reduction in the rate of application of the prison-detention measure, which is applied in 36.9% of cases, compared to 40% recorded in 2017. The negative trend in the data confirms with reference to 2016, where, however, the decrease had been less significant compared to the current one, resulting at the time equal to a decrease of 2%.

Therefore, in highlighting that, in the last two years, the issuing of pre-trial detention measures in prison has decreased by more than 5%, it should be observed that the

consolidation of an overall trend line emerges from available data aimed at limiting its use for the most afflictive of precautionary measures and enhancing the use of alternative forms.

Table 1: Precautionary measures issued on 2018 in Italy

SCHEMA 1 – LE 86.697 MISURE CAUTELARI PERSONALI EMESSE NEL 2018 IN ITALIA

Tipologia misure	N. Misure 2018	%	N. Misure 2017	%	Variazioni %
Art. 281 c.p.p. Divieto espatrio	101	0,1	68	0,1	=
Art. 282 c.p.p. Obbligo presentazione alla Polizia Giudiz.	14.503	16,7	11.846	15,9	+ 0,8
Art. 282-bis c.p.p. Allontanamento casa familiare	3.158	3,6	2.732	3,7	- 0,1
Art. 283 c.p.p. Divieto e obbligo dimora	12.650	14,6	9.675	13,0	+ 1,6
Art. 284 c.p.p. Arresti domiciliari	23.778	27,4	19.980	26,7	+ 0,7
Art. 285 c.p.p. Custodia cautelare in carcere	31.970	36,9	29.907	40,0	- 3,1
Artt. 286 e 286 bis c.p.p. Custodia caut. luogo cura, ricovero in struttura	537	0,6	497	0,7	- 0,1
Totale	86.697		74.705		
<i>Tasso di risposta degli uffici</i>	<i>84%</i>		<i>73%</i>		

6.1. The conditional suspension of PTD

In some cases, the maximum duration of pre-trial detention is suspended, within certain limits set by article 304 of the Italian Criminal Code.

In particular, in the trial phase the suspension operates for the time in which the trial is suspended or postponed due to impediment or request by the accused or the defender, but not for the need to acquire evidence or following the granting of terms for the defense.

The terms are also suspended for the time in which the hearing is suspended or postponed due to the non-presentation, removal or non-participation of one or more lawyers and during the pending of any terms provided for the deferred drafting of the reasons for the sentence.

With reference to some specific crimes for which there are particularly complex debates or abbreviated judgments, the suspension of the terms is possible during the time in which hearings are held or the sentence is passed in the first instance judgment or in the judgment on appeals.

Finally, the maximum terms envisaged for pre-trial detention from the beginning of its execution without the provision that orders the judgment being issued, the order by which the judge orders the abbreviated judgment or the sentence of application of the penalty at the request of the parties may be suspended if the preliminary hearing is suspended or postponed due to an impediment or request by the accused or the defender (but not for the need to acquire evidence or following the granting of terms for the defense) or due to non-presentation, removal or the non-participation of one or more defenders.³⁷

This is not to be confused with the conditional suspension of the sentence as a benefit, as the latter applies in the sentence phase and for non-serious crimes, while the preventive detention applies to serious crimes and in the precautionary phase. More precisely, the conditional suspension implies that in the event of a conviction, the judge in pronouncing the sentence establishes that the sentence must remain suspended for five years in the case of a crime and three years in the case of financial penalties.

The same thing could be said for the suspension of the trial for "probation" of the accused. Trial is an institution used both in favor of adult and underage defendants, but with clear differences. For adults, the institution of probation can be requested for not particularly serious crimes (penalty within 4 years) and whoever requests it must not be a repeat offender and / or declared a habitual, professional or trendy offender. As we have seen, however, the PTD applies to serious crimes, usually with sentences of more than 4 years in prison.

Otherwise, for the underage defendants, the institution of probation does not have the limit of sentence to be requested.

³⁷ Article 304 c.p.p. "Sospensione dei termini di durata massima della custodia cautelare"

The juvenile system deserves a separate research.

6.2. Social work strategies: Providing information (for the decisions) and/or support

As previously mentioned, unfortunately in the precautionary phase in which the PTD intervenes, there are no social work and support strategies for adults; while they are provided for underage suspects / accused persons.

6.3. Financial surety (bail)

In the Italian legal system there is no provision similar to the security.

6.4. Therapeutic measures

Article 275 of the Italian Criminal Code, in paragraph 4 and those following it, provides for some cases in which pre-trial detention in prison cannot be ordered:

1. pregnant women or mothers of children up to 6 years of age with her cohabiting partner, or the father if the mother has died;
2. person over the age of 70;
3. person with a far-developed stage of AIDS, unless admitted to facilities suitable for the specific treatment.

Prohibition of pre-trial detention

By decree of the Minister of Health, to be adopted in consultation with the Minister of Justice, cases of far-developed cases of AIDS or serious immune deficiency are recognized and diagnostic and medico-legal procedures are established for their assessment³⁸.

When diagnostic needs occur in order to ascertain the existence of health conditions for which pre-trial detention in prison cannot be arranged or maintained, pursuant

³⁸ "Altro Diritto", Interuniversity Research Center on prison, deviance, marginality and migration management.

to art. 275, paragraph 4-bis, or therapeutic needs towards a person who is in such conditions, if these needs cannot be met in the penitentiary setting, the judge can order the temporary hospitalization in a suitable structure of the National Health Service for the time necessary, adopting, where necessary, the appropriate measures to avoid the danger of escape. Once the hospitalization needs cease, the judge proceeds according to the ordinary rules.

Furthermore, in order to confront the rise in those suffering from drug addictions in prison and to guarantee their right to treatment, the best way has been to recategorize them once more as people in "particularly serious health conditions", preparing a preferential path that leads these subjects to serve their sentence in an alternative place to prison, which is unprepared to assist a large number of prisoners with drug addiction problems; think of the therapeutic communities where real therapeutic programs can be carried out.

According to the adequacy principle stated in paragraph 1 of art. 275 c.p.p., for which in ordering the measures, the judge takes into account their specific suitability, the subjective status of toxic sanctions, and the suitability of the therapeutic program to avoid custody in prison under the regulatory scheme that connects the precautionary needs to the particular condition of the addict.

In addition to the therapeutic community, the new code of criminal procedure has provided for another specific non-custodial precautionary measure for drug addicts capable of accompanying and promoting their therapeutic path: prohibition and obligation to stay.

This institute is regulated by art. 283, c.p.p., paragraph 5 of which provides that the judge in determining the territorial limits of the prescriptions, must consider, where possible, the assistance needs of the accused and in particular, where the accused is suffering from a drug addiction and already has a recovery program in progress at an authorized therapeutic facility, he must also have the necessary controls to ensure that the recovery program continues.³⁹.

³⁹ "Altro Diritto", Interuniversity Research Center on prison, deviance, marginality and migration management.

With the approval of the Consolidated Act of 1990, paragraph 5 of art. 275 c.p.p., becomes the first paragraph of art. 89 of the same T.U., entitled "Restrictive measures against drug or alcohol addicts who have ongoing therapeutic programs".

The legislator operated a three-part division of the offenses:

1. Mafia crimes, for which there is a presumption of danger, unless otherwise justified, which justifies custody in prison and which prevails over the need to provide therapeutic treatment for those suffering from drug or alcohol addictions;
2. other serious crimes identified by art. 407, paragraph 2, lett. a), numbers from 1) to 6) (16), for which the judge must evaluate the ordinary precautionary needs, which prevail over the therapeutic need, in order to establish the suitable measure;
3. all other crimes for which therapeutic needs prevail over precautionary ones and exclude custody in prison.

The jurisprudence of legitimacy has clarified that to configure a need of "exceptional relevance" one must transcend the normal dangerous situation that leads to the imposition of pre-trial detention in prison in the sense that one has to face a threat of the interests of the community such as to prevail over the right of treatment of the drug addict and the collective interest represented by his recovery⁴⁰.

This approach implies, first of all, that the judge must give an account of the reasons for which he intends to derogate from the rule of prohibition of custody in prison; secondly, he must explain why, in his opinion, precautionary needs of "exceptional relevance" appear which make him consider the danger of the subject at liberty to be so high as to justify his overcoming. Third, as the Court of Cassation has made clear, this approach implies that when a probabilistic evaluation of the recurrence of the crime is made, the criminal background for drug-related offenses, "are useful for a prognosis of criminal recurrence, but not in itself symptomatic of the

⁴⁰ Court of Cassation, penal section., Sez. IV, 16 giugno 2005, n. 34218, previously in a similar sense cfr. Cass., Sez. IV, n. 13302/2004, Fadda, in CED, Rv. 228037.

exceptional relevance of the precautionary needs", since, pursuant to art. 89 T.U., "exposure to danger in the interest of protecting the community" must impose itself "with characteristics of completely extraordinary importance".

Precautionary custody in a place of treatment (Article 286 of the Italian Penal Code)

In the event that the person to be placed in pre-trial detention is mentally ill or is in a state of infirmity that greatly diminishes or eliminates the ability to understand or want, the judge, in substitution of the measure of pre-trial detention in prison, can opt for temporary hospitalization in a suitable structure of the psychiatric hospital service, adopting the necessary measures to prevent their escape. This measure does not persist if the accused is no longer mentally ill, as confirmed by the provisions of paragraphs 2 and 3 of art. 285 c.p.p.

6.5. Reactions on the COVID-19 pandemic

The viral epidemic resulting from COVID-19 has created an emergency for individual and collective health which has led to a reorganization of social life. As for criminal justice, the heads of the judicial offices and the government have made choices defined in the decree law n.18/2020.

The intervention of the Government was specifically concretized in the provision that, except for certain categories of crimes or convicted persons, the custodial sentence of no more than eighteen months (even if it constitutes a residual part of a greater sentence) is carried out, upon request, at the home of the condemned or in another public place of care, assistance or reception.

This decision is justified by the need to safeguard the health of prisoners and prison workers, with obvious attention to the whole community, giving effect to Article 32 of the Constitution. This need for protection cannot fail to be considered of primary importance in light of the overcrowding conditions widespread in Italian prisons,

places where it seems impossible, rather than difficult, to seriously ensure the adoption of the necessary measures to avoid contagion⁴¹.

The situation was also managed through the adoption of extraordinary measures aimed at reducing the prison population through the postponement of the execution of the sentences and the application of alternative measures to detention, also expressly requested by the UN High Commissioner for Human Rights, Michelle Bachelet.

The Council of Europe study on the trend of the population held from the beginning of 2020 to April 15 has in fact recorded a release of 118,000 units by 20 prison administrations out of 43, as a strategy to prevent the spread of the infection.

A specific mention must be reserved for Italy which, with the two outbreaks registered at the end of February in the northern regions of Lombardy and Veneto, which rapidly extended to the whole national territory, was positioned top of the rankings of the European countries affected by the virus. It was immediately clear that the pressing spread of the infection would not spare the citizens confined to prisons and the professionals who serve them, even more so in light of a crowding rate equal to almost 130%⁴² of the available prison places, among the highest in Europe, equal to France and Belgium. Before the outbreak of the pandemic, in fact, there were 63,932 prisoners despite the regulatory capacity of 50,931 places, which today is further reduced due to the damage caused during the riots of the beginning of March, which rendered entire institutions and sections unusable. The danger of contagion in prisons could increase if we think that many restricted people are suffering from at least one disease.

Measures taken by the government⁴³ to deal with the emergency include:

- home detention and surveillance by electronic bracelets for prisoners with a residual sentence of less than 18 months;

⁴¹ Art. 123 co. 1 law decree n. 18/2020.

⁴² Department of Prison Administration - Office of the Head of the Department - Statistics Section - 29 febbraio 2020

⁴³ Law decree n.18 del 17 marzo 2020.

- deferment of the penalty for health reasons;
- licenses for subjects admitted to semi-freedom.

However, since April 2020 the trend has reversed again due to the scandal related to the release of subjects restricted for organized crime offenses, going down to a trend of a reduction of about 77 inmates a day.

Although today the data on the infections in Italian prisons are not of particular concern, the launch of the so-called "Phase 3" represents a possible threat for free society, as well as for the penitentiary world. The resumption of face-to-face conversations, albeit with the precautions taken synergistically between the Penitentiary Administration and the health units involved, and the restart of treatment activities with the external contacts that these imply, do not allow the level of attention to be relaxed.

In addition, during the planning phase of the gradual reactivation of prisons until the system is fully up and running, hopefully in a short time such as to avoid or at least reduce the perception of the prison population of further segregation and detachment from the external community, the phenomenon for which during the month of March a significant decrease in crimes was recorded, equal to 66.6% at national level, with peaks in Veneto and Lombardy⁴⁴, where measures limiting the freedom of circulation have been implemented.

A few weeks after entering Phase 3, this trend already seems to have weakened, causing an increase in the number of arrested prisoners and the consequent difficulty in managing prison spaces; it is sufficient to recall the data for the month of March 2019, when 146,762 crimes had been committed, compared to 52,596 in the same period in 2020.

But how does the increase in arrests affect the administration of prison spaces at present?

In this regard, it should be noted that among the main precautionary health

⁴⁴ Report "Andamento della delittuosità nel mese di marzo 2020" written by Ministero dell'Interno.

measures adopted, 14 days of single room isolation are foreseen for each arrested person who enters from freedom. The aforementioned percentage figure relating to the overcrowding of the structures, combined with the due respect for the parameters provided for by art. 3 CEDU in terms of square meters available to each prisoner in the overnight rooms, allows us to understand how we are faced with a difficult puzzle, which seems to force us to make a harrowing choice between safety and health protection needs.

In almost all the institutions, there was no case of contagion, but where only one case tested positive on the swab, carried out following suspected symptoms, the Regional Health Service intervened promptly by subjecting all detainees and prison and health workers to an investigation within a few hours.

The management of the emergency that broke out in the Verona District House, one of the most exposed institutions on the national territory, with 29 prisoners, 20 prison officers and several health workers testing positive, was exemplary. What could have proven to be a hotbed, died out within a few weeks thanks to the awareness that we were not faced with a simple health emergency, but with an event that required synergic interventions by all actors who animate the penitentiary reality, crystallized in guidelines from time to time updated on the basis of ministerial and regional indications, epidemiological trends and scientific evidence.

Otherwise, the scenario that becomes established, is that of the impossibility, on the part of many institutes, to welcome new arrested persons, making it necessary to assign them elsewhere on the basis of the temporary availability of prison places, or to continue in the suspension of the granting of the prize permits, with the risks that this option may entail.

However, one cannot forget that the prison remains a powder keg which calls for further measures in terms of reducing the number of restricted prisoners, the only ones that would truly allow the system to meet multiple needs, not only in light of the crisis caused by the coronavirus. As stated by the National Guarantor of persons deprived of their liberty, *"a first step, which should have been followed by other more incisive ones, must also deal with a systemic criticality that requires an overall rethinking on the execution of the penalties and on the uniqueness of the prison*

sentence as system of response to the commission of the crime ".

Similarly, one of the curators of the Council of Europe research on⁴⁵ prisons in the 47 countries of the Council of Europe, Professor Marcelo Aebi, highlighted the positive effects of reducing prison sentences on society: *We know that detention has harmful effects in itself, it also makes it difficult to reintegrate into the world of work at a later stage and family and social relationships in general*". On the same front stands the President emeritus of the Constitutional Court Valerio Onida when, thinking about the penitentiary overcrowding, he says that *"the prison sentences should be reserved for the most serious cases of social danger, while extending the use of alternative penalties"*.

As previously seen, any assessment of the adequacy of the precautionary measures, and, among these, the strengthening of house arrest through the use of remote monitoring procedures, must be made "in relation to the nature and degree of the precautionary needs to be satisfied in a concrete case ", while the importance recognized of health conditions presupposes a direct involvement of the accused and not a general emergency situation, such as the one which Italy is experiencing today.⁴⁶

7. PTD and Alternatives in figures and presentations

7.1. Statistical data on PTD available

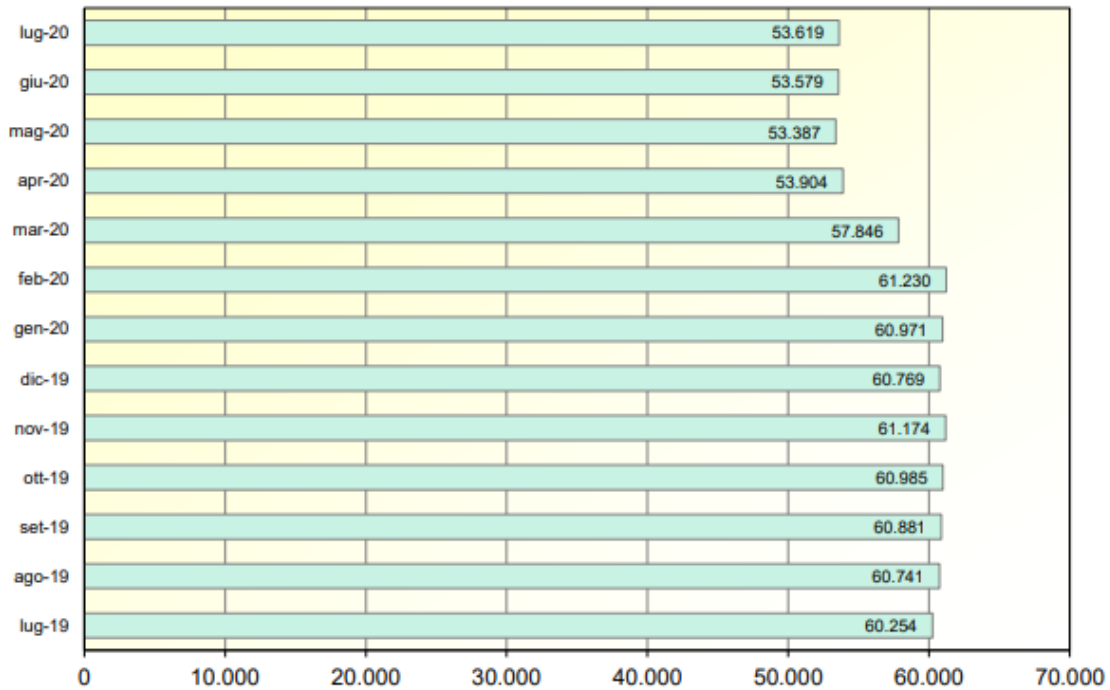
The tables below show the current situation of the detainee population, divided into:

- PRISONERS PRESENT in general, in reference to the year 2019-2020. It can be noted that the number of inmates present in the year 2020 is lower than the number of inmates present in the year 2019.

Graph 1: Total prison population 2019-2020

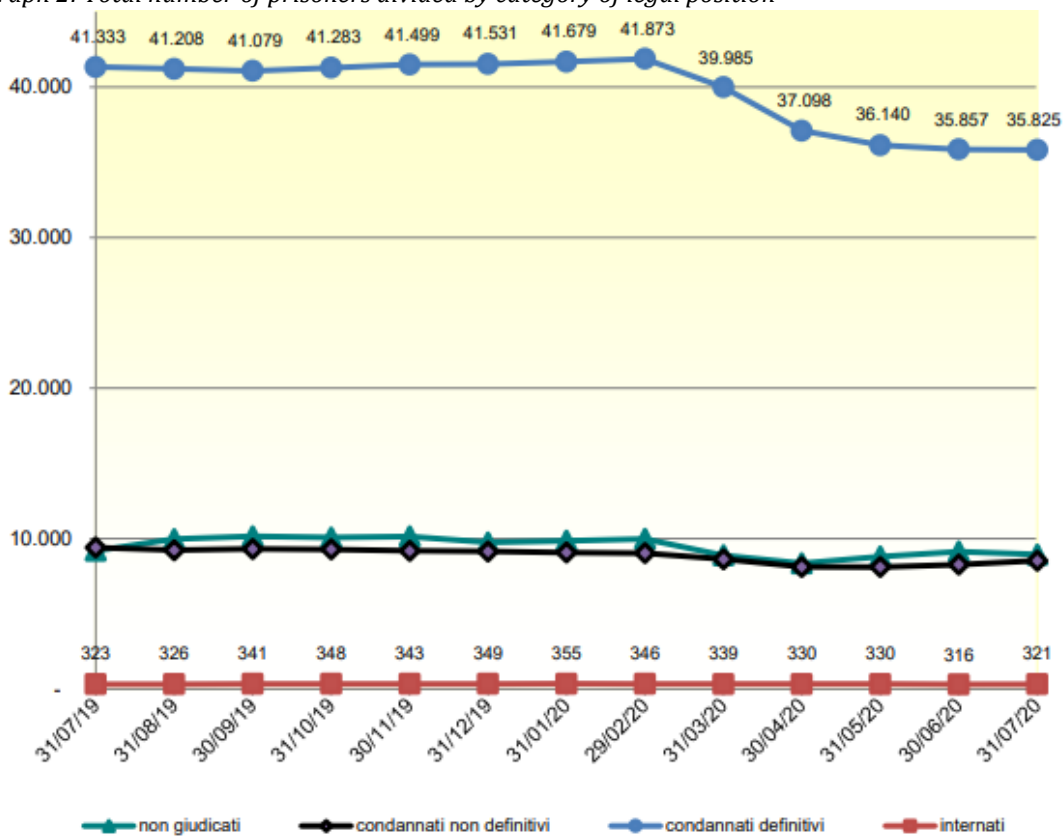
⁴⁵Prisons and Prisoners in Europe in Pandemic Times: An evaluation of the short-term impact of the covid-19 on prison populations

⁴⁶ Law journal "SistemaPenale.it"



The following table indicates the presence of prisoners divided by category of legal position:

Graph 2: Total number of prisoners divided by category of legal position



not judged; non-definitive convicts; definitive convicts; interned

In this regard, it is appropriate to mention the degrees of judgment of the Italian criminal trial.

First of all, the guilt or innocence of a defendant is established through three levels of trial:

- In the first degree of trial, the trials take place before a justice of the peace, or in court: before a single judge or a collegial body made up of three judges if the penalty for the crime is more than 20 years. The most serious criminal cases, such as those for murders and massacres, fall within the jurisdiction of the Assize Court, presided over by two judges assisted by a popular jury made up of six citizens drawn by lot, who are in possession of at least the lower secondary school diploma.
- In the second degree of judgment, against the sentences issued during the first degree trial, one can appeal to the Court of Appeal or the Court of Assizes of Appeal (for cases discussed in the Court of Assizes). This second degree of judgment can even overturn the sentences issued in the first degree.
- In the third degree of judgment, against second degree sentences, if there are elements to believe that the process was conducted not interpreting the laws properly and is therefore illegitimate, one can appeal to the Court of Cassation, which does not judge the accused but the appeal sentence and, if so, its annulment.

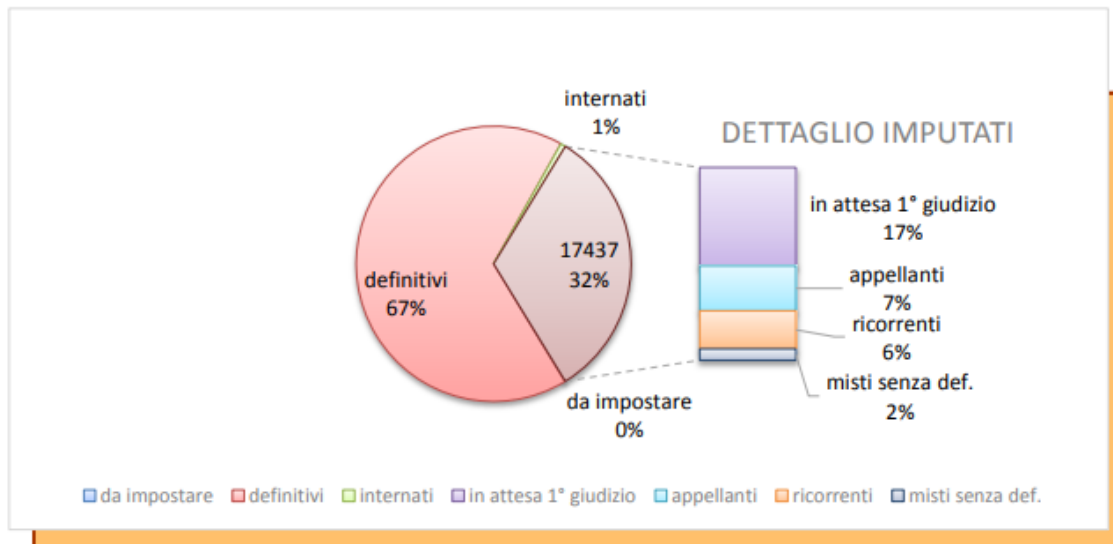
More precisely, the following table contains the data relating to the individual judicial positions and the sex of the inmates present at 31 July 2020.

It can be noted, among non-definitive inmates, a high number of inmates awaiting first trial, therefore in pre-trial detention. The percentage of the male prisoner population is much higher than the female one. Despite this, the highest number is represented by the population in prison with a final sentence.

Table 3: Detainees per legal position and sex

DETENUTI PER POSIZIONE GIURIDICA E SESSO			
	Donne	Uomini	Totale
IMPUTATI	750	16.687	17.437
di cui			
ATTESA 1° GIUDIZIO	426	8.478	8.904
APPELLANTI	168	3.896	4.064
RICORRENTI	136	3.308	3.444
IMPUTATI MISTI	20	1.005	1.025
DEFINITIVI	1.492	34.333	35.825
INTERNATI	5	316	321
POSIZIONE GIURIDICA DA IMPOSTARE (*)	1	35	36
TOTALE	2.248	51.371	53.619

Graph 3: Detainees per legal position



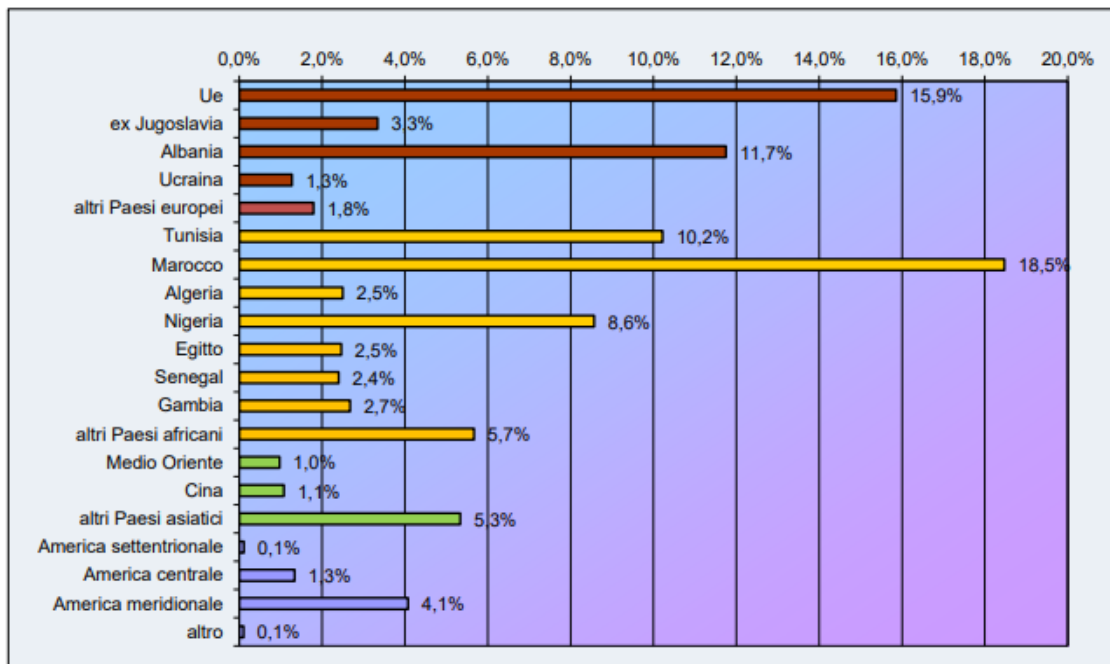
- FOREIGN PRISONERS. The percentage of foreign prisoners on the total prison population is 33%. The following are the foreign prisoners distributed by geographical area of origin.

Table 3: Detainees per continent of origin

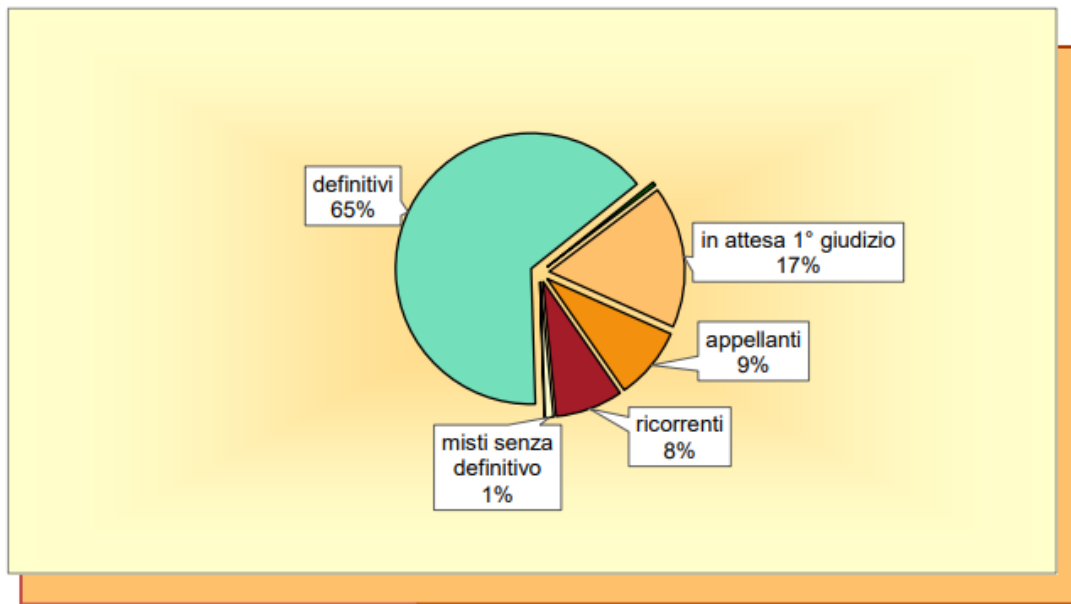
	detenuti stranieri	%
EUROPA	5.935	34,0%
AFRICA	9.242	53,0%
ASIA	1.289	7,4%
AMERICA	964	5,5%
altro/non rilevato	18	0,1%
TOTALE	17.448	100,0%

The highest percentage is entrusted to inmates of North African origin, in particular Morocco (18.5%) and Tunisia (10.2%) followed by the EU countries with a percentage of 15.9%.

Graph 4: Percentages of foreign detainees



Graph 5: Foreign prisoners distributed by legal position:



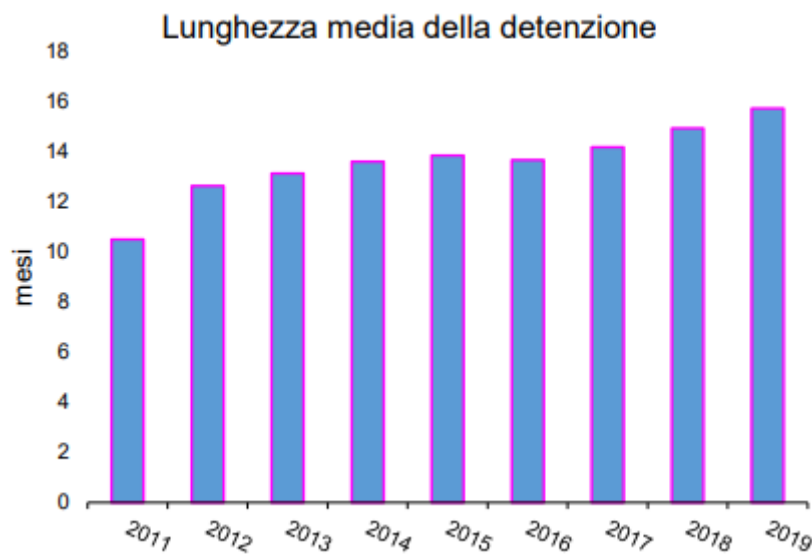
The last graph instead shows the number of the prison population, from 2011 to 2019, divided by:

- - prisoners entered from freedom, note a notable decrease over the years in entrances from freedom;
- - average presence of prisoners over the years;
- - average length of holding in months, calculated by comparing the average presence in prisoners to those who have entered freedom and expressed in months according to the formula indicated in Space I of the Council of Europe;
- detention rate, prisoners present for every 100,000 resident in Italy at the end of the year according to the data reported on the DWH istat

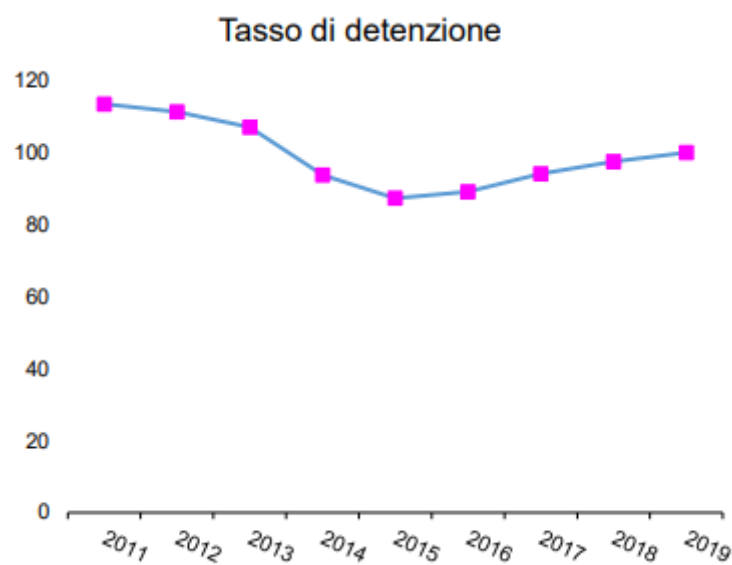
Table 4: Detention rate per 100,000 inhabitants in Italy

ANNI	Entrati dalla libertà nel corso dell'anno	Presenza media detenuti nell'anno	Lunghezza media della detenzione in mesi (*)	Tasso di detenzione (**)
2011	76.982	67.405	10,5	113,5
2012	63.020	66.449	12,7	111,3
2013	59.390	65.070	13,1	107,1
2014	50.217	57.019	13,6	93,8
2015	45.823	52.966	13,9	87,3
2016	47.342	53.984	13,7	89,1
2017	48.144	56.946	14,2	94,2
2018	47.257	58.872	14,9	97,5
2019	46.201	60.610	15,7	100,0

Graph 6: Average length of detention



Graph 7: Holding rate



*Source of reported data: Department of Penitentiary Administration - **Office of the Head of the Department - General Secretariat - Statistics Section**

Regarding the PTD and alternative measures to pre-trial detention, no individual statistics are published. The only sources found in the ministerial systems are those listed below.

To obtain specific data on PTD it would be advisable to carry out a field research, through the Regional Superintendencies of the Penitentiary Administration.

7.2. Basic data on alternatives available

By examining the number of proceedings registered in 2018, still mixed with data from 2019, it is noted that, as regards the 24,565 proceedings in which a measure was issued and a non-definitive sentence was reached, even with conditional suspension of the sentence, the application of pre-trial detention in prison was ordered in 9,200 cases, equal to 37.5% of the total (compared to 38% in 2016 and 2017). In the remaining 62.5%, a less afflictive measure was deemed adequate⁴⁷.

Table 5: Non definitive sentences subdivided per measure

SCHEMA 5 – SENTENZE DI CONDANNA NON DEFINITIVA SUDDIVISE PER MISURA

RIEPILOGO NAZIONALE	MISURE							TOTALI
	art. 281 Divieto espatrio	art. 282 Obbligo presentazione Polizia Giudiz.	art. 282 bis Allontanamento dalla casa familiare	art. 283 Divieto e obbligo dimora	art. 284 Arresti domiciliari	art. 285 Custodia cautelare in carcere	artt. 286 e 286 bis Custodia cautelare in luogo di cura, ricovero struttura servizio sanitario	
Procedimenti con sentenza di condanna non definitiva	13	3.569	205	2.837	6.076	8.482	17	21.199
Procedimenti con sentenza di condanna non definitiva con sospens. condizionale della pena	1	1.063	111	725	747	718	1	3.366
Totale	14	4.632	316	3.562	6.823	9.200	18	24.565

Moving now to the analysis of the above mentioned 24,565 "precautionary" proceedings registered in 2018 that reached a non-definitive sentence, it appears

⁴⁷ Ibidem.

that house arrest was applied in 6,878 cases, equal to almost 28% of the total. They were 28% in both 2017 and 2016 and 29% in 2015.

Table 6: Application of house arrest

SCHEMA 7 – CONDANNA NON DEFINITIVA E ARRESTI DOMICILIARI

Esiti	Procedimenti iscritti nel 2018
Sentenza di condanna NON definitiva	6.076
Sentenza di condanna NON definitiva con sospens. condiz. della pena	747
Totale	6.823

The obligation to submit to the judicial police was applied 4,632 times, equal to about 19% of the 24,565 measures examined. The data is also stable compared to those of 2016 and 2017.

Table 7: Application of the obligation to submit to the judicial police

SCHEMA 8 – CONDANNA NON DEFINITIVA E OBBLIGO DI PRESENTAZ. A POLIZIA GIUDIZIARIA

Esiti	Procedimenti
Sentenza di condanna NON definitiva	3.569
Sentenza di condanna NON definitiva con sospens. condiz. della pena	1.063
Totale	4.632

A similar consideration applies to the measures of the prohibition and the obligation to stay applied in 3,562 cases, equal to 14% of the total (14% in 2017, 13% in 2016).

Table 8: Application of the prohibition and the obligation to stay

SCHEMA 9 - CONDANNA NON DEFINITIVA E DIVIETO E OBBLIGO DI DIMORA

Esiti	Procedimenti
Sentenza di condanna NON definitiva	2.837
Sentenza di condanna NON definitiva con sospens. condiz. della pena	725
Totale	3.562

8. Negative impact of PTD in the partner country

On the national level:

In fact, any pre-trial detention leads to increased expenses, reduced income, and fewer resources for other programs (opportunity costs), as people held pending trial cannot work, earn an income, and often lose work because of detention. And not only that, the risk is not just job loss or long-term unemployment, but it is underemployment after release to freedom due to the inevitable "stigma of detention", combined with the loss of educational opportunities and / or training.

Part of the doctrine states that pre-trial detention performs a function partially contrary to the law, because it runs counter to the presumption of innocence principle widely mentioned: the function of pre-trial detention should in fact reside exclusively in responding to pre-trial needs as indicated in art. 274 c.p.p.

The dramatic consequences of this situation certainly fall upon the prisoners themselves who, as they are not definitive, are the recipients of prison rules and practices that are worse than those dedicated to the convicted inmates (for example, for access to work), although they can spend months and years in prison.

A factor that determines the constant high number of imprisoned prisoners in prison is the scarce application of less afflictive measures, such as house arrest, with or without the use of the electronic bracelet.⁴⁸⁴⁹

According to the latest ministerial statistics, the overcrowding rate, has reached an increase compared to the capacity of regulatory seats. On the other hand, as regards prisoners present in pre-trial detention, analyzing the ministerial data, out of five people "kept" in prisons, at least two are restricted without their criminal liability having been definitively ascertained, and one of whom is awaiting first instance judgment.

Unjust Detention

⁴⁸ given that it does not distinguish between who is the recipient of an execution order for final conviction and who is the recipient of the precautionary measure after the hearing to validate the arrest in the act.

⁴⁹ Antigone Association, "La Legislazione ed i numeri della detenzione cautelare".

The reflection inevitably also leads to the huge number of cases of unjust detention declared and the number of victims continues to increase relentlessly, as well as the money that is paid to them as compensation or indemnification by the State. More than 1,000 people end up in prison unjustly every year and receive, after a very long procedure, money, as compensation for stolen freedom.

In 2017, Italy spent around 35 million euros on false investigations that forced people to deprive themselves of the fundamental right in a civil status⁵⁰.

Law 117/2014 and Law 47/2015 generated a more liberal system, theoretically designed to significantly reduce the number of individuals in pre-trial detention. The specific intention of the Italian Parliament was to reduce the number of prisoners, including those awaiting trial, to comply with the provisions of the well-known judgment of the CEDU in the Torreggiani case against Italy, but legislative interventions alone do not solve the problem of the widespread application of pre-trial detention in prisons towards the most vulnerable subjects.

On the organisational level

The issue of pre-trial detention is worrying, since its excessive use has a negative impact on the organization of the prison system since one of the main causes of prison overcrowding is dictated precisely by the increasing use of PTD. Pre-trial detention thus ends up acting as a catalyst that aggravates many other problems; think of the hygiene of prisons, the ease with which diseases can spread, the tensions and violence that often entails the state of "provisional" detention.

The latest report by the "Antigone" association, an Italian association interested in the protection of rights and guarantees in the criminal and penitentiary system, highlights that the data provided by the Ministry of Justice on the capacity of prisons does not take into account the sections closed for renovation. According to the National Guarantor for persons deprived of liberty, in fact, at least 3 thousand non-usable places must be subtracted from the current capacity of the Italian prison system, many closed for years waiting for work.

⁵⁰ Law journal "Il Foglio".

Furthermore, adequate activities outside the cell are not guaranteed in the absence of sufficient space inside the bars. From north to south, life in prison ends up coinciding with life in the cells of almost half of the structures, which in turn are too crowded to guarantee the possibility of movement. In 44% of the prisons visited by Antigone, not all cells are open at least eight hours a day and in 31% of cases the inmates can never move independently. There are few green spaces where you can meet children and relatives. In over 10% of cases the prison is not reached by public transport. And in 65.6% of prisons it is not even possible to have contact with family members via Skype, although it is the administration itself and the law that provide for this. Furthermore, school activities are now reduced⁵¹.

Nine square meters would be the minimum size of a cell, but three people who have to live there with three beds, a table measuring 80cm by 60cm, three stools, three lockers obviously aren't enough. These nine square meters were designed to allow only one person to live.

Another sore point: the work in prison. The structures that collaborate with private companies are only 1.8%. Although there are fewer new entrants, prisoners continue to grow, especially due to the increase in the duration of the sentences imposed. But more than one in three (31.5%) is in custody in custody, without a final sentence. A figure in decrease compared to a year ago, when the percentage was 33.5%⁵².

Specifically, the research carried out by the Antigone Association is part of a European project coordinated by Fair Trials International and had the objective of comparing judicial practices relating to the application of precautionary measures in 10 EU countries.

The researchers of the Association then participated in the hearings relating to the application of precautionary measures, examined procedural files and presented questionnaires to lawyers, judges and prosecutors.

⁵¹ Research "Pre-trial detention: analysis of alternative measures and decision-making process of the judicial authority in Italy ", by the Antigone Association, <https://www.fairtrials.org/wp-content/uploads/fairtrials.pdf>.

⁵² ibidem.

The most alarming data of the research is the excessive use of the precautionary measure in prison against the most vulnerable subjects, especially non-EU foreigners. If we analyze the demographic data of the recipients of pre-trial detention orders, it clearly emerges a clear difference in treatment between non-EU and EU citizens.

Ultimately, the research shows that vulnerable defendants, especially if they are foreigners from non-EU countries, who do not have a home and a network of social relations, are usually placed in pre-trial detention even when arrests could be met in precautionary needs domiciliary.

The under-use of less painful measures than pre-trial detention in prison, from house arrest to the obligation to present to the judicial police, or even electronic bracelets, the excessive use of pre-trial detention in prison against the most vulnerable subjects and the excessive duration processes are to be considered easily recognizable factors of this dramatic state of the art.

Lawyers

From the research carried out, it emerged that the lawyers have very little time, on average between 10 and 30 minutes, to prepare the defense for the first hearing of discussion (it is usually the same as the validation of the arrest) on the application of the measure and that the reasons for the orders arranging pre-trial detention in prison continue to appear formal, relying excessively on the evidence provided by the prosecution and justifying the application of the custodial measure in prison for the existence of criminal records.

A practical suggestion to the Authorities could be to introduce the notification electronically at the same time as the notice of fixing the first hearing relating to the application of the precautionary measure, as well as of the file of the accusation (or at least of the essential acts), in order to allow the defense lawyer to properly prepare the defense, as is the case in other European countries.

On the individual level

The World Health Organization defines prisoners in pre-trial detention as a "particularly vulnerable group" due not only to problems related to the lack of

communication with the outside world following the arrest, but also to the conditions of the detention facilities.

Consequently, the negative impacts of the PTD fall on the individual sphere of the detainee also in reference to the social aspect and his psychological state. Anger and despair, as well as greed, restlessness and prevarication, find reason to exist in a chaotic path without answers and without interiority.

As already noted, looking at the demographic profile of the recipients of pre-trial detention orders, there is a strong disparity between EU citizens and non-EU citizens. In these specific cases, the role played by the defender is not sufficient to prevent the application of pre-trial detention, which is further due to the lack of full implementation of Directive 64/2010/EU. The full implementation of this directive, in particular as regards the possibility of appointing an interpreter to allow the accused to participate actively in the trial and for the defense lawyer to better organize the defensive strategy, the establishment of a register of authorized interpreters and a specific training for lawyers, judges, interpreters and police forces could help reduce the number of prisoners in pre-trial detention.

9. European Aspects and their meaning for national PTD-practice in the national scientific literature

Cooperation in criminal justice matters in general

The success of many EU strategies depends on the application of EU law by Member States in their national jurisdictions. Cooperation between EU Member States is of paramount importance, also in relation to the large number of foreigners in Italian prisons, which contain a high percentage of inmates from other EU members States. Cooperation between European Member States in criminal matters requires clear rules, clear and functional organizational paths and, last but not least, mutual trust. Without a doubt the huge differences from detention standards in Member States are for example a problem of practical relevance when it comes to extraditions and execution of sentences in countries of origin of the offenders.

The EU has made available the tool of the European arrest warrant (EAW), but still in Italy there is no national statistic that detects the number of subjects transferred using the EAW.

In this regard, a field research should be carried out in the various offices of the Italian prosecutors.

On February 5, 2014, the European Commission's Report on the implementation of three framework decisions on detention was made public. The measures, adopted unanimously by the Member States between 2008 and 2009, respectively the mutual recognition of sentences imposing prison sentences and other measures restricting personal freedom (Framework Decision 2008/909 / JHA), conditional suspension and sentences substitutes (Framework Decision 2008/947 / JHA) and mutual recognition of alternatives to pre-trial detention (Framework Decision 2009/829 / JHA)⁵³. The three framework decisions aim to reduce the use of measures restricting freedom, with the declared purpose of consolidating mutual trust between European judicial systems and guaranteeing the functioning of the principle of mutual recognition of judicial decisions. As the Commission itself has had occasion to underline in the past, in fact, prison overcrowding and the deterioration of the conditions of detention can undermine mutual trust between States and thus eliminate the essential prerequisite for judicial cooperation in the area of freedom, security and justice⁵⁴.

With the LEGISLATIVE DECREE 7 September 2010, n. 161 Italy transposes into its legal system the Framework Decision 2008/909 JHA concerning the application of the principle of mutual recognition to criminal sentences that impose prison sentences or measures depriving personal liberty, for the purpose of their execution in the European Union.

With letters f) to i) of Framework Decision 2008/909 JHA, the guiding principles and criteria for exercising the delegation are provided with reference to the adoption of provisional precautionary measures and the execution of the arrest of the sentenced person. In Italy, the recognition and execution of the sentence. In this way, it is intended to implement the provisions of art. 14 of the Framework Decision

⁵³ European Commission report on the implementation of Framework Decisions 2008/909 / JHA, 2008/947 / JHA and 2009/829 / JHA, (https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation_en).

⁵⁴ "Libro verde dell'UE sulla detenzione in Europa: un banco di prova anche per l'Italia"

(on provisional arrest), according to which if the sentenced person is in the executing State, the latter may, at the request of the issuing State and before receiving the sentence and the certificate or before the decision to recognize the sentence and execute the sentence, arrest the sentenced person or take any other measure to ensure that he remains in his territory, pending a decision recognizing the sentence and executing the sentence. The duration of the sentence is not increased as a result of a detention period served under this provision.

While letter f) generally establishes the possible adoption of such measures, letter g) states that: 1) they can be adopted under the conditions provided for by Italian law and that their duration cannot exceed the limits set; 2) the period of detention for this reason cannot lead to an increase in the sentence imposed by the issuing State; 3) they lose their effectiveness in the event of non-recognition of the sentence transmitted by the issuing State and in any case after 60 days have elapsed from their execution, without prejudice to the possibility of extending the term of thirty days in the event of force majeure.

In order to have data on the application of ESO it would be necessary to do a field search, because national numbers are not found.

With the Legislative Decree 15 February 2016, n. 36, published in the Official Journal on 11 March 2016, Italy transposed Council Framework Decision 2009/826 / GAI on the application between the Member States of the European Union of the principle of mutual recognition of decisions on alternative measures to pre-trial detention. The aim is to strengthen judicial cooperation in criminal matters by facilitating a balance between the interest of States in security and effective repression of crimes, on the one hand, with the right to freedom and to the presumption of innocence of the suspects, on the other.

Therefore, the Framework Decision 2009/829 GAI, grounded in the well-known principle of mutual recognition of criminal decisions, allows the alternative precautionary measure adopted by a court of one Member State to be implemented in the Member State of residence of the suspect, or in the different country as

indicated by the suspect, guaranteeing at the same time the regular course of justice and the appearance of the suspect at the trial⁵⁵.

However, the application of precautionary measures limiting personal freedom towards non-citizen suspects could be excessive for the purpose of being protected, and excessively burdensome for the recipients of the measure, even when the chosen measure should be a simple limitation of personal freedom, such as the obligation to be present during certain hours at the authority designated by the proceeding State, and not custody in prison.

As regards the application area, the framework decision is limited to specifying, in recital no. 13, which concerns all crimes and is not limited to those of a given type or seriousness, while highlighting that the alternative precautionary measures to detention should normally apply to less serious crimes.

Consequently, the assessment of the opportunity and, if necessary, the identification, according to national rules, of the most appropriate precautionary measure remains with the authorities of the Member States, possibly choosing among those for which the framework decision intends to guarantee recognition⁵⁶.

Based on the experience gained from the European arrest warrant, the decision 2009/829/JHA identifies, in art. 14, a catalogue of crimes, for the most part crimes characterized by a particular social disadvantage and subject to a partial harmonization at European level, including, for example:

- participation in a criminal organization, subject of joint action 98/773 / GAI;
- organized crime, subject of joint position 1999/235 / GAI;
- those connected to illicit drug trafficking, subject of joint action 96/699 / GAI;
- Framework Decision 2004/757/GAI and the proposal for a directive amending Council Framework Decision 2004/757/GAI of 25 October 2004 concerning the establishment of minimum standards with regard to the definition of "narcotic

⁵⁵ Article 2, framework decision 2009/829 GAI

⁵⁶ Journal "Eurojus.it"

drugs", the constituent elements of the crimes, and the penalties applicable to illicit drug trafficking, for which the recognition of the precautionary decision by the executing State is independent of the verification of the existence of the punishment of the crime provided that the fact is punishable in the issuing State with a prison sentence or a measure depriving of personal liberty of a maximum duration of no less than three years.

For all the offenses not listed, however, the framework decision recognizes the possibility for the Member States to make the recognition of the precautionary decision subject to the condition that the facts for which the proceeding was initiated in the issuing State also constitute a crime in the execution status⁵⁷.

Although the Framework Decision 2009/829/GAI identifies specific precautionary measures⁵⁸ that are likely to be recognized and carried out in a Member State of the Union, there is a possibility that incompatibilities may arise between the decision adopted by the issuing State and the constitutional principles of the executing State. Just to avoid the possibility that these conflicts could lead the executing State to refuse the recognition of a precautionary decision issued by the authority of another Member State, the framework decision contemplates, in art. 13, the possibility of adapting the precautionary measure with other equivalents applicable in the executing State, with the express prohibition of detrimental changes for the recipient of such measures and without prejudice to the right of the issuing State authority to revoke the measure, provided that surveillance in the executing State has not yet started.

This possibility of adaptation was promptly contemplated by the Italian legislator who, in art. 10, paragraph 2, of Legislative Decree no. 36/2016 expressly attributes to the Court of Appeal (identified as the judicial authority competent to rule on the recognition of a foreign decision) the power to make "the necessary adjustments, with the minimum necessary exceptions compared to what is provided by the

⁵⁷ Journal "Eurojus"

⁵⁸ Art 8 framework decision 2009/829 GAI.

issuing State", subject to prior communication to the competent authorities of the latter.

With the legislative decree n. 36/2016, in addition to making the framework decision 2009/829/GAI applicable in the Italian legal system, the national legislator has taken steps to define certain substantive and procedural aspects⁵⁹.

Human rights and rulings of the European Court of Human Rights

The Convention establishes standard criteria on human rights, but then leaves the space for States to apply these rights in the national context.

In some cases, the CEDU has spoken harshly against the actions of the States. As a consequence, these States have undertaken changes within their legislative system to comply with what is established by the CEDU.

Italy has been repeatedly convicted of violating human rights. It is also true, however, that in recent years the Italian government has intervened by modifying or adopting measures to respond to the judgments of the CEDU.

Starting from a positive example on the various calls made to Italy on the overcrowding of prisons, when the Committee of Ministers of the Council of Europe applauded the reform⁶⁰ call for by Minister Orlando with law no. 103/2017, to remedy the harsh conditions of prisoners after the *Torreggiani v Italy* judgment of 2013, described below, even defining it as a "model to follow".

Before seeing what exactly happened in Italy after the various warnings of the European Court of Human Rights and Fundamental Freedoms, it is necessary to dwell on issue of personal freedom, also specified by art. 5 of the European Convention on Human Rights which states that "everyone has the right to freedom and security".

⁵⁹ Journal "Eurojus"

⁶⁰ The Orlando reform intervened with a decision on alternative measures to imprisonment during the execution of the sentence

The Court of Strasbourg inserts the expression "personal safety" within the concept of freedom to strengthen its content. Security is therefore part of that essential core placed as a guarantee against the arbitrariness of detention against an individual.

Having established the general characteristics of the right to freedom and security, art. 5 in fact continues by stating a series of possible interferences to personal freedom⁶¹.

First of all, the personal freedom can result in a detention, in which a person is forced to live in a well-defined closed place, away from normal family and professional relationships, or it can consist of an arrest, conceived as an "apprehension" of an individual by an other, qualified by its temporary nature with respect to a more stable situation, not necessarily in prison⁶².

It has been repeatedly stated by the Strasbourg bodies that the aim of the rule in question has been to prevent arbitrary or unjustified deprivations of personal freedom.

For this purpose, two different orders of guarantees have been prepared:

- 1) the essential conditions that allow a restriction of freedom;
- 2) the fundamental rights of people arrested or detained⁶³.

First of all, it is necessary to report a series of fundamentally important ECHR judgments, issued for violation of human rights, after which Italy was driven to react:

- **SULEJMANOVIC judgment c. Italy** (appeal no. 22635/03), in which the applicant complained of the conditions of detention in the "Rebibbia prison" in Rome and the Court found the violation of art. 3 of the Convention for prison overcrowding. This

⁶¹ S. BARTOLE- P. CONFORTI, "Commentario breve alla Convenzione europea dei diritti dell'uomo", Cedam, Padova, 2012.

⁶² M. CHIAVARIO, "La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale", Giuffrè, Milano, 1969

⁶³ The choice to identify a limited number of restrictive cases was appreciated with respect to the legal reserve of article 13 of the Constitution.

is the first case of ascertainment of a similar violation against Italy. The case is emblematic and highly topical, despite several years having passed, in consideration of the serious overcrowding situation currently prevalent in Italian prisons.

- **Marturana judgment c. Italy** - Second Chamber - judgment of 4 March 2008 (appeal no. 63154/00). Found the violation of articles 5 par. 4, 8 and 13 of the ECHR, relating to the right to freedom and security respectively, from the point of view of the right to obtain a decision in a short time on the legitimacy of detention, respect for private and family life, from the point of view of freedom of correspondence, and the right to an effective remedy.

- **Rizzotto judgment c. Italy** - Second Chamber - judgment of 24 April 2008 (appeal no. 15349/06). Found the violation of art. 5, par. 4 of the ECHR, relating to the right to liberty and security with reference to the right of every person deprived of their personal freedom to obtain a court ruling on the legitimacy of their detention in a short time.

- **Torreggiani judgment** (appeals nos. 43517/09, 46882/09, 55400/09; 57875/09, 61535/09, 35315/10, 37818/10) - adopted on 8 January 2013 by decision taken unanimously - sentenced Italy for the violation of art. 3 of the European Convention on Human Rights. The case, of fundamental importance, concerns inhuman or degrading treatments suffered by the applicants, seven people detained for many months in the prisons of Busto Arsizio and Piacenza, in triple cells and with less than four square meters per head available.

The ruling of the Strasbourg Court in the Torreggiani case - defined by the judges themselves as a "pilot judgment" which addressed the structural problem of the malfunctioning of the Italian penitentiary system - will apply in the future in relation to the generality of the complaints pending before the Court and not yet communicated to the parts concerning Italy and concerning similar issues of prison overcrowding, as well as those that will be submitted to it in the near future relating to the same problem.

- **Richmond Yaw and others** - First Chamber - judgment of 6 October 2016 (appeals nos. 3342/11, 3391/11, 3408/11 and 3447/11) Right to liberty and security -

Extension of detention at the Identification and Expulsion Center (CIE) in the absence of a cross-examination between the parties, therefore constituting a violation of art. 5 §1 CEDU in terms of the legitimacy of detention.

Following the judgments issued by the CEDU, Italy responded through the following:

Law n. 94/2013

A few months after the sentencing of the CEDU, with the Torreggiani ruling, given the acclaimed emergency situation, the Italian government intervenes with the law decree n ° 78, 1 July 2013, converted into the law 9 August 2013, n ° 94 "Urgent provisions on the execution of the sentence ", known as the "empty prisons" decree.

Among the most significant changes from a procedural point of view, aimed at reducing the entry into prison of both defendants and sentenced prisoners, we note the reduction in cases of applicability of the precautionary measure of custody in prison by raising the penalty limit, for crimes that allow it, , according to the new provision of art. 280, paragraph 2 of the criminal code

This article therefore defines the objective boundaries within which coercive personal precautionary measures can apply.

The short story intervention redesigns the application perimeter by raising the threshold for the execution of the sentence from four to five years, and explicitly inserts the crime of illegal financing of political parties. This last aspect constitutes an element of absolute novelty since in the article in question, for the first time, a qualitative criterion probably used to respond to precise choices of criminal policy is introduced alongside the quantitative fee⁶⁴.

Prison Plan 2009

As far as structural reforms are concerned, Italy, as pointed out in the Torreggiani judgment itself, has already tried to implement some timid intervention aimed at reducing prison overcrowding (starting from 2009). The first step was the

⁶⁴ S. BARTOLE- P .CONFORTI, "Commentario breve alla Convenzione europea dei diritti dell'uomo", Cedam,Padova,2012.

declaration of the state of emergency in 2009 which led to the appointment of an extraordinary Commissioner of the government for the management of the so-called prison plan.

The ambitious project for the construction of new penitentiary buildings has seen only a modest implementation, since the new places created fall far short of the number originally set⁶⁵.

Legislative framework against overcrowding (Law No. 199/2010, Law No. 211/2011, Law No. 94/2013, Law No. 10/2014, Law No. 117/2014)

Subsequently, Law no. 199 of 26 November 2010 introduced, in order to alleviate the situation of overcrowding, the measure of execution of prison sentences of up to 12 months at home, a term which will then be extended to 18 months with Law no. 211/2011 (so-called Severino law), which will also intervene on the phenomenon of "revolving doors", to stem the flow of subjects who enter prison daily after an arrest, only to be released within a few days, following a validation.

This law in particular modified art. 558 of the Criminal Code relating to the procedure carried out before the monocratic judge by reducing the time needed for validation and, above all, by establishing the principle according to which prisoners must be "guarded", usually at home, in the absence of a home, in the "security rooms" made available by the judicial police, and only residually in jail⁶⁶.

To complete the emergency decree to reduce prison overcrowding in recent years, we also find Law No. 94 of 2013, which is discussed above, Legislative Decree No. 146 of 2013, converted with modifications into Law no. No. 10 of 2014, and finally, the legislative decree No. 92 of 2014 converted into Law No. 117 of 2014.

Among the most significant innovations that promote prison deflation and that encourage greater use of alternative measures to imprisonment, it is worth

⁶⁵ A. DELLA BELLA, "Il termine per adempiere alla sentenza Torreggiani si avvicina a scadenza: dalla Corte Costituzionale alcune precise indicazioni da seguire", in www.dirittopenalecontemporaneo.it,

⁶⁶ A. DELLA BELLA, cit.supra

mentioning, for example, the installation of the electronic bracelet accompanied by the measure of house arrest, unless it is deemed necessary for the fragility of the *periculum* (art.275-bis, comma 1 c.p.p)⁶⁷ .

As noted by the European Council, Italy is a country that suffers mainly from two criminal-procedural problems:

- 1) the excessive duration of the procedure;
- 2) prison overcrowding⁶⁸.

As for the first point, the excessive duration of the proceedings has created serious inefficiencies in the judicial system, leading to negative consequences, not only for the national economy but also for the relevance of the rights at stake in the criminal process.

As far as prison overcrowding is concerned, on the other hand, it had a noteworthy echo with the famous Torreggiani and Sulejmanovic ruling that condemned Italy for violating art. 3 ECHR⁶⁹, due to the "inhuman and degrading treatment" to which prisoners are often subjected⁷⁰.

The judges of the Court of Strasbourg never fail to underline the fact that those who are in a state of detention may need greater protection for the vulnerability and delicacy of the situation in which they find themselves: the latter require attention

⁶⁷ According to the new provision of art. 275-bis of the Italian Criminal Code "The judge, in ordering the measure of house arrest also in place of pre-trial detention in prison, unless he deems it unnecessary in relation to the nature and degree of needs to be met in the specific case, prescribes control procedures by electronic means or other means technicians, when it has checked the availability with the judicial police ".

⁶⁸ G. ILLUMINATI, "Le ultime riforme del processo penale: una prima risposta all'Europa", in www.dirittopenalecontemporaneo.it.

⁶⁹ In particular, art. 3 CEDU states that "no one can be subjected to torture or to inhuman or degrading treatment or punishment".

⁷⁰ A. BALSAMO, "Il contenuto dei diritti fondamentali", in *Manuale di procedura penale europea*, a cura di R.E. Kostoris, Giuffrè, Milano, 2014, pag.96 ss. Per una maggiore e approfondita analisi si rimanda anche a M. DE STEFANO, "La lunghezza della durata dei processi in Italia condannata dalla Corte Europea dei Diritti dell'Uomo", in www.dirittiuomo.it.

and a responsibility on the part of the State not only concerning human and social aspects but also those that are strictly procedural.

Despite the indications from the European Court, the problem of prison overcrowding, in more recent years, continues to be the absolute protagonist of the entire Italian criminal justice system, becoming a real pathological phenomenon.

11. Short Conclusions and Outlook

However premature it is to evaluate the practical consequences for the national legal system of the transposition of the Framework Decision 2009/829 / GAI, the positive expectations can instead be externalized. Consider an increase in the protection of the fundamental rights of citizens suspected of having committed a crime in a Member State other than that of their usual residence. Pending the trial, in fact, they could return to their country thereby serving a less drastic precautionary measure than preventive detention.

Furthermore, the application of the framework decision in question could have positive effects even if the offender were to be held responsible for the crime attributed to him at the end of the trial. In fact, the ascertaining of compliance with the provisions imposed with the precautionary order could induce the judicial authority to impose an alternative sanction to imprisonment or to grant the conditional suspension of the penalty with the simultaneous submission to less restrictive measures of personal freedom which, by virtue of the Framework Decision 2008/947 / GAI, which has also been implemented in recent years in our legal system, could be implemented in the State of habitual residence of the sentenced person, where different⁷¹.

Finally, one cannot exclude the fact that the application of the Framework Decision 2009/829 / GAI could also have positive effects on the reduction of overcrowding in prisons, which is now chronic and repeatedly sanctioned by the European Court of Human Rights.

⁷¹ Law journal “Diritto Penale contemporaneo”.

In fact, although the application of the cooperation mechanism referred to in the framework decision in question will certainly not solve the long-standing problem, given that a significant percentage of foreign prisoners present in Italian prisons are third-country nationals, and is therefore removed from the scope of the instrument in question, this does not mean that a reasonable number of prisoners with European citizenship can be transferred to other Member States with the dual advantage of reducing the national prison population, on the one hand, and allowing suspects awaiting a judgment to benefit from alternative measures to detention, on the other hand⁷².

From this brief analysis, the fact emerges that the alternatives to detention are underutilized in the first hearing relating to the application of the measure due to the public prosecutor's distrust of the effectiveness of these measures, because the judges cannot rely on any information source other than the police who carried out the arrest for information on the possibility of implementing a measure other than pre-trial detention, as well as the underutilization of electronic monitoring. Law 47/2015 can effectively reverse this situation and strengthen the implementation of the principle of last resort because it gives the judge the possibility to use several measures jointly, it forces the judge to give a specific reason when pre-trial detention is applied, instead of house arrests with electronic monitoring, and because it has repealed the automatic replacement *in peius* of the measures in case of violation of the obligations imposed⁷³.

At present, the lack of well-structured data on pre-trial detention in prison does not allow for great conclusions to be drawn, if not the hope that our system will continue to preserve the presumption of innocence, by adopting measures to avoid the illegitimate and harmful passage to prison, for those subjected to it and for the community at large.

⁷² Law journal “Eurojus”.

⁷³ Law journal “Studio Cataldi”.

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List of tables

Table 1: Precautionary measures issued on 2018 in Italy

Table 3: Detainees per legal position and sex

Table 3: Detainees per continent of origin

Table 4: Detention rate per 100,000 inhabitants in Italy

Table 5: Non definitive sentences subdivided per measure

Table 6: Application of house arrest

Table 7: Application of the obligation to submit to the judicial police

Table 8: Application of the prohibition and the obligation to stay

List of graphs

Graph 1: Total prison population 2019-2020

Graph 2: Total number of prisoners divided by category of legal position

Graph 3: Detainees per legal position

Graph 4: Percentages of foreign detainees

Graph 5: Foreign prisoners distributed by legal position:

Graph 6: Average length of detention

Graph 7: Holding rate



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PRETRIAD

Alternative pre-trial detention measures

Italian National Report

PARTNERS



Annexe 7 - Portuguese national report



PRETRIAD

Alternative pre-trial detention measures

Portuguese National Report

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2. Contents

1.	Change control	3
1.1.	Document Properties.....	3
1.2.	Revision History.....	3
2.	Contents.....	4
3.	Executive summary	6
4.	Introduction	7
4.1.	The legal system and general context for PTD in Portugal	7
4.2.	Definition of PTD	7
4.3.	Important historical developments with respect to PTD	7
4.4.	Problems and aspects to be addressed in the context of PTD in Portugal	11
5.	The legal bases and the fundamental legal aspects with respect to PTD	13
5.1.	General principles and competent authorities and their roles	13
5.2.	Legal prerequisites for pre-trial detention	15
5.3.	The suspicion	16
5.4.	The grounds for detention	16
5.5.	Proportionality	18
5.6.	Duration and prolongation of pre-trial detention	19
5.7.	The procedures	20
5.8.	Recent legal developments	22
5.9.	Electronic monitored house arrest instead of detention in prison.....	24
5.10.	Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law	25
5.11.	Procedural measures to support the decision making.....	26
6.	Measures to avoid PTD/Alternatives in practice.....	28
6.1.	Conditional suspension of PTD	28
6.2.	Social work strategies: Providing information (for the decisions) and/or support.....	28
6.3.	Conditions and supervision measures	29
6.4.	Financial surety (bail)	30
6.5.	Therapeutic measures	31
6.6.	Other alternatives and measures	31
6.7.	What kind of services are provided by whom (e.g. also public entities and private sector)?.....	33
7.	PTD and Alternatives in figures and presentations.....	34
7.1.	Statistical data on PTD available.....	34
7.2.	Basic data on alternatives available.....	38
8.	Negative impact of PTD in the partner country – Literature review and statistical data	39
8.1.	On the national level:	39
8.2.	On the organisational level:.....	39
8.3.	On the individual level:	41
9.	Other aspects on PTD and Alternatives in the national scientific literature.....	42
9.1.	Empirical research and legal theoretical literature (also fundamental rulings).....	42
10.	European Aspects and their meaning for national PTD-practice in the national scientific literature	44

10.1.	Cooperation in criminal justice matters in general	44
10.2.	The European Supervision Order (FD 829) in national practice	46
10.3.	Human rights and rulings of the European Court of Human Rights	48
11.	Short Conclusions and Outlook	49
12.	Bibliography	50
	List of tables	57

3. Executive summary

The present report seeks to offer a comprehensive outline of the application of enforcement measures in the Portuguese context, with a concrete focus on pre-trial detention. The end goal of the study is to offer the necessary basis for the comparative analysis to be carried out under the scope of D2.1 Literature review.

The report includes a general introduction (section 1), where we highlight the historical evolution of pre-trial detention in the Portuguese national context, as well as current controversial debate topics surrounding enforcement measures. At a second stage (section 3), the document underlines the legal background which frames the application of the different enforcement measures, from legal-prerequisites to grounds for detention, as well as the inherent procedures to the application of enforcement measures. This section gives particular emphasis to the obligation of house permanence as a possibly fruitful alternative to pre-trial detention, before delving into a more practical outlook concerning the application of enforcement measures under section 4. The report goes on to present statistical data concerning the application of preventive detention (section 5), as well as data on its prejudicial consequences (section 6). Lastly, Portugal's interaction in the context of international judicial cooperation is also outlined, with special attention to the application of FD 2009/829.

4. Introduction

4.1. The legal system and general context for PTD in Portugal

The Portuguese legal system lists preventive detention as the gravest enforcement measure. Enforcement measures are dependent on the principle of legality, which means that the freedom of the defendant may only be limited through enforcement measures and patrimonial guarantee. These measures are foreseen in the Law exhaustively, as only the measures codified in the Law may restrict the freedom of individual in the context of a criminal process. A second general condition refers to the mandatory constitution of the individual as a defendant for the application of enforcement measures (Fernandes & Soares, n.d.).

4.2. Definition of PTD

Preventive detention is foreseen in Art. 202 of the Portuguese Criminal Procedure Code (CPP), as a last resort enforcement measure. Along with the obligation of house permanence, both enforcement measures are regulated by the principles of legality, adequacy, proportionality, necessity and precarity, and finally, unlike the remaining enforcement measures, the principle of subsidiarity. In this sense, both preventive detention and the obligation of house permanence are only valid only when no other enforcement measure is applicable (Art. 193, no. 2, CCP). Preventive detention is, in this sense, measure applied under the *ultima ratio* principle.

Moreover, the Code for the Execution of Sentences and Measures of Deprivation of Freedom (Art. 123) specifies that preventive detention is executed so to avoid all non-indispensable restrictions of freedom, in relation to the goal of the enforcement measure and the maintenance of order, security and discipline in the prison establishment.

4.3. Important historical developments with respect to PTD

In the Iberian Peninsula, the concept of preventive detention has existed since the times of the *Reconquista*. It was further developed and adapted to national customs and Laws over time, and only applied with the order of a magistrate (Fernandes,

2014). Moreover, depending on the graveness of the offence, alternative measures were also foreseen (Silva, 2004).

Constitutional evolution

The different Portuguese Constitutions from 1822 onwards all recognized the right to the presumption of innocence and the application of preventive detention as a result of proven guilt, while foreseeing the potential application of alternative measures (Fernandes, 2014). The Criminal Code of 1929 (Decree 16489) frames these issues further, now including exceptions to the principle of proven guilt in more grave cases, while elaborating on possible alternative measures entailing provisional release from prison (e.g., bail; Statement of Identity) (CCP 1929). The Constitutional revision of 1971, on the other hand, carries important shifts in the Criminal Code. The focus of this measure becomes thus clearly directed at ensuring the fulfilling of the defendant's obligations. The new legislation, therefore, imposes a number of obligations to the defendant, the non-respect of which now constitute a basis for preventive detention. In parallel, more grave offences would also entail preventive detention as an appropriate response, even without proven guilt. The application of pre-trial detention in these sorts of cases is thus considered to be an exceptional measure, only to be used when no other measures were considered to be able to ensure the same effect – such as provisional release (Fernandes, 2014).

Pre-Revolution alterations

According to Law-Decree no. 185/72, provisional release would not suffice in cases where there is a proven risk of flight, disturbance of the instruction process, and when there was a risk of continued criminal offence or disturbance of public order. On the other hand, provisional release would not be considered in cases of offences punishable by sentences longer than eight years, when committed by recidivists, vagrants or comparable. Besides reiterating the Lawful application of preventive detention as a consequence of the breach of the defendant's obligations, the diploma also included a reference to the application of preventive detention without proven guilt in cases of *flagrante delicto*, and when the offence would be punishable with a sentence longer than one year. Moreover, the diploma mentioned the maximum duration of preventive detention without proven guilt, while specifying that it would

only be applicable according to the existence of strong suspicion regarding the practice of the crime by the defendant. On the other hand, when there was proven guilt, the latter must be consubstantiated by a judge.

After 1974

The 1974 Portuguese revolution brought changes to the Criminal Procedure Code, but the principles regarding pre-trial detention implemented by the 1971 revision were maintained. In the same line, the Law-Decree 377/77 of 1997 sought to adapt the criminal procedural legislation to meet minimum standards regarding rights, freedoms and guarantees, whilst reinforcing preventive detention as a last resort measure. It also reformulated the application of preventive detention as a response to offences punishable with criminal frames superior to two years. It is also important to note that during this period, a list of crimes considered to be “incaucionáveis” in Portuguese. This notion corresponds to crimes which would never entail the application of alternative measures to preventive detention.

Criminal procedure code of 1987 – still in force today

Finally, the new Criminal Procedure Code of 1987, replacing the one from 1929, extinguishes the category crimes considered as “incaucionáveis”, and lays down the admissible enforcement measures which guarantee due process, still in its majority in force today, after due adaptations:

- Identity and Residence Term (the only mandatory measure);
- Pecuniary measure (bail);
- The obligation to periodically appear before the competent authority;
- Suspension of an activity, profession or rights;
- Prohibition of permanence, absence and contacts;
- Obligation of house permanence
- Preventive detention.

On the other hand, vestiges of the former regime still remained, specifically regarding crimes punishable by a sentence longer than eight years, where, bizarrely, the judge would have to justify their decision *not to apply* preventive arrest. In parallel, the new Criminal Procedure Code also raises the limit for application of pre-

trial detention to an offence punishable with at least three years in prison. Through this brief overview of the evolution of preventive detention in the Portuguese context, it is possible to identify the progressively dominant ambition of guaranteeing the rights and guarantees of the defendant and their defence. In this sense, the defendant must be informed of the indictable facts or strongly indictable facts, as well as the possible dangers upon which the enforcement measure proposed by the Public Prosecution intends to act. The defendant should also be able to consult the process elements which justified the application of the enforcement measure in question. In this sense, the original Law 78/87 which approved the CCP has been altered by a subsequent set of Laws (no. 59/98; no. 48/2007; no. 26/2010, no. 20/2013 and no. 30/2017), in order to safeguard the principles contained in CCP Art. 194 (on the defendant's hearing and application of the judicial decision). These changes are of particular relevance when we consider that enforcement measures (including preventive detention) could previously be applied without the defendant's hearing since they would only be heard if it was possible and convenient, and that the mere allegation of impossibility or inconvenience would suffice to avoid the defendant's hearing. Besides the motives already pointed which justify the application of preventive detention, these changes also entail the inclusion of the certain elements in line with the globalisation phenomenon, as we will see in the following section regarding Legal Prerequisites for pre-trial detention (Fernandes, 2014).

In 2007, another great revision of the Criminal Procedure Code was put forward, enacting important changes in the application of preventive detention. One of the most important changes lies in the restriction of the potential cases for the application of pretrial detention, which now include criminal frames superior to five years. However, this raise was not universal, as the minimum of three years sentences were maintained for terror crimes, violent or highly organised criminality. These measures were deeply contested in the domestic context, conducing to another legislative alteration in the CCP in 2010.

The result was a sort of mixt regime, which maintained a prison sentence of a maximum of more than five years as the basis for the application of pre-trial detention, but which also extended the possibility of application of preventive detention to a new range of crimes whose criminal frame was superior to three years – through the enlargement of the concept of violent criminality, highly organised criminality, as well as the inclusion of references to the juridical regime of weapons and their ammunition (Law 17/2009 of May 6th, or the Arms Law). In specific, the concept of violent criminality was extended from crimes against life, physical integrity and personal freedom to also include crimes against the sexual freedom and self-determination or against public authorities, punishable with a criminal frame of a maximum of (or more than) five years. In the same line, highly organised criminality now comprises crimes such as corruption, white-collar crimes or drug trafficking, along with trafficking of human beings. As such, the decision regarding the applicability of preventive detention to sentences entailing a criminal frame of maximum 5 years in prison was maintained (Law 26/2010), whilst creating exceptions for specific categories of crimes which would normally not include the possibility for preventive arrest (Fernandes, 2014).

The 2010 revision also comprised an extension of the applicability of preventive detention in case of breach of any sentenced precautionary measure. Moreover, this reform also foresees that preventive detention be applicable upon breach of the precautionary measures, even if the first offence did not foresee it as a possible measure *ab initio*.

4.4. Problems and aspects to be addressed in the context of PTD in Portugal

The problematic of enforcement measures and specifically preventive detention is a historically sensitive question in the Portuguese criminal process, as it finds itself in the centre of a discussion involving the efficacy of the criminal prosecution on the one hand, and the assurance of citizens freedoms and guarantees, on the other (Fernandes, 2014). The following examples are particularly useful in order to demonstrate the domestic positions concerning the application of preventive detention as well as the connection between its application and deeper political

motives which may influence the decision process and that widely surpass its juridical definition and intention.

Preventive arrest was very much debated in Portugal during the investigative process and judgment of Portuguese former Prime-Minister José Socrates. The mediatisation and extreme politicisation of the context contributed to this convoluted case which remains up to this day unresolved. The sentence, initially based on the risk of disturbance of the investigation, as well as the continuity of criminal activity and the risk of flight was then transformed into the obligation of house arrest, which has recently reached its end.

More recently, in late 2019, a scandal brought the application of preventive detention to the public debate, as the dramatic nature of the case stirred the discussion regarding the true necessity for such a measure. A woman was accused of disposing of her new-born child in a dumpster and was therefore sentenced to preventive detention. The public debate heightened and there were efforts to resort to a Habeas Corpus, based on the mental and emotional conditions of the defendant, who was partly considered by Portuguese society as not having criminal intent. Regardless, the Habeas Corpus was denied, as the judicial system considered the risk of flight to be nonnegligible.

One final case, which still stirs the debate in the Portuguese civil society revolves around the case of Rui Pinto, a nationally known hacker who uncovered crimes of corruption, influence peddling, as well as other criminal activity in the “football-economic” complex, summarized as the “Football Leaks”. Rui Pinto is accused of 90 crimes of illegitimate access, violation of correspondence, informatic sabotage and extortion attempts. The application of preventive detention and its extension in early 2020 was decided based on the risk of flight, risk of continuity of the criminal activity as well as disturbance of the investigation. Many of his supporters pointed to the importance of his leaks regarding the criminal activity of the financial and sports elites in the country, considering him as a relevant whistle-blower. On the other hand, many have also argued that the application of preventive detention was not proportional to the hacker’s crimes, and that the decision was merely based on

a previous breach of the principle of presumption of innocence (Pedroso, 2020). The hacker is also connected to the recent Luanda Leaks scandal, which clarifies the politicised nature of the case in question and the complex conditions which may have led to the decision on preventive detention, potentially distanced from judicial motives (Agência Lusa, 2020). It is, however, worth noticing that the offender has been placed under house arrest since April 2020, so to collaborate further with the Portuguese authorities.

Besides these mediatic episodes, the overarching issue of prison overcrowding is also an important point for discussion in the Portuguese agenda. The Portuguese Ombudsman has recently highlighted that Portugal presents one of the highest rates of incarceration in Europe, which in and out of itself leads to the pressing need to rethink the application of alternative measures to detention. This phenomenon is granted further relevance when one realises the inherent paradox between the incarceration rate and the classification of Portugal as one of the safest countries in the continent. In this sense, the Ombudsman called for a profound reflection on the roots causes of this issue (SL, 2019). On the other hand, while in 2016 the country found its prisons to be generally overcrowded, this situation has improved. However, it is still clear that the average length of Portuguese sentences is also much longer than in other European countries (Cordeiro, 2020), which could be potentially linked with the issue of overcrowding.

5. The legal bases and the fundamental legal aspects with respect to PTD

5.1. General principles and competent authorities and their roles

Institutionally speaking, the following agents exert primary competences in what regards the criminal process (Fernandes, 2014):

- Criminal police organs (whose activity is centred on the functions of criminal prevention and investigation, supporting the judiciary authorities in the pursuance of the criminal process' goals, acting under the direct orientation of the Public Prosecution, whilst also taking on necessary and urgent acts destined to ensure evidence means);

- Public Prosecution (an organ of justice, charged with exercising criminal action, guided by the principles of legality, along with the direction of the inquiry);
- Instruction judge (responsible for supervising the legality of the inquiry acts, which may potentially violate any rights and constitutionally granted freedoms, as well as the judicial control of the Public Prosecutions' decision, which closes the inquiry phase; the instruction judge's actions are moreover dependent on the request of the adjacent agents, in order to preserve independence and impartiality of justice.

Preventive arrest, along with any other enforcement measures (except the term of residency and identity) is applicable by an instruction judge, in the context of an inquiry which must have been previously called for by the Public Prosecution. It is also applicable after the inquiry officiously, the Public Prosecution having been heard (Art. 194^o no. 1 CCP). As such, the “principle of request” is a primary characteristic of the Portuguese regime. In this context, the Public Prosecution is considered to be the best-positioned judiciary authority to assess the repercussions of preventive detention in the investigation (Fernandes, 2014).

The instruction judge is thus responsible for carrying out all jurisdictional functions during the course of the inquiry (Art. 17.^o of the CCP), namely the application of enforcement measures (Art. 268.^o, no. 1, al. b of the CCP). Additionally, Art. 268, no. 1, al. b) describes that, during the inquiry phase, the instruction judge holds exclusive responsibility to apply an enforcement measure (except the term of residence and identity). The criminal procedural reform of 2007 further confirms the “principle of request”, as, during the inquiry phase, the judge could never apply a graver measure which exceeds the measure preconised by the Public Prosecution (Art. 194, no. 1 CCP). However, with the alterations to the CCP introduced by Law no. 20/2013 of 21st February, these limitations to the instruction judge were reduced.

In this new format, the primary position of the Public Prosecution is maintained, concretely when there is a risk of disturbance of the inquiry or instruction process.

In this case, the judge may not apply a graver measure than the one required by the Public Prosecution. Regardless, when the reason behind the application of an enforcement measure is connected to flight or risk of flight, or to the danger of continuity of criminal activity or grave disturbance of public order and tranquillity, the judge may apply a different (and even more grave) measure than the one called for by the Public Prosecution (Art. 194. no. 2 CCP). In this sense, the formal competence to call for the application of a specific enforcement measure varies slightly according to the root causes which legitimate the enforcement measure (Correia, 2017).

5.2. Legal prerequisites for pre-trial detention

Pre-trial detention is an enforcement measure applicable to crimes (Art. 202, Law no. 26/2010):

- a) Whose criminal frame corresponds to a prison sentence whose maximum is more than five years;
- b) which corresponds to violent criminality;
- c) related to terrorism or which corresponds to highly organised criminality, whose criminal frame corresponds to a prison sentence whose maximum is more than three years;
- d) regarding aggravated offences against the physical integrity, aggravated theft, aggravated damage, informatic fraud, communications, reception, falsification or forgery of documents, attack against the security of railway transport – whose criminal frame corresponds to a prison sentence whose maximum is more than three years.
- e) of possession of a forbidden weapon, possession of weapons and other devices, products or substances in forbidden locations or a crime committed with a weapon, according to the terms of the juridical regime of weaponry and ammunition, whose criminal frame corresponds to a prison sentence whose maximum is more than three years.

5.3. The suspicion

An individual subject to preventive detention must have been previously constituted as a defendant in an initiated criminal process. In turn, the constitution as defendant is dependent on the principle of *fumus comissi delicti*, or the existence of a founded suspicion of criminal practice. Simultaneously, there must also be a strong probability that the individual in question committed said criminal practice. In sum, for an individual to be constituted as a defendant, there must exist material proof and evidence regarding the individual's authorship of the crime in question (Vieira, 2014).

Suspicion is also a very important concept for determining several risks – whose intensity will inform the grounds for detention, and the consequent application of preventive detention, as we will see in the following section.

5.4. The grounds for detention

As laid out by the Portuguese Criminal Procedure Code, is an enforcement measure. Thus, it may only be applied according to Art. 204 regarding the general requisites for the application of enforcement measures. Said article mentions: clear risk of flight (or flight itself); danger of disturbance of the investigation or of the instruction process, as well as dangers involving the acquisition, conservation and veracity of evidence; danger of continuity of the criminal activity which gravely disturbs public order and tranquillity, linked to the circumstances of the case or the defendant's personality. Besides these criteria, it may also be applied in case of defendants who have penetrated or remained in national territory irregularly, or who were already involved in processes of extradition or expulsion. It is also important to note that the code specifically deems preventive detention as a last resort measure, in accordance with the principle of subsidiarity and exceptionality. It may also be applied when there is strong evidence of the practice of intentional crimes.

In this scenario, it is also worth reflecting on the practical meaning of the above-mentioned criteria, as their conceptual significance effectively informs their practical application.

Flight or risk of flight:

In what concerns the risk of flight, one should bear in mind that Portuguese law never presupposes it, but instead requires strong evidence and elements of fact which concretely indicate said danger. Some factors which may substantiate the determination of the risk of flight include: the defendant's personality, their financial situation, their professional, social and family life, and eventual links to foreign countries. The danger must, therefore, be considered to be real and imminent, as opposed to virtual and hypothetical danger. Thus this specific point is meant to ensure the defendant's presence throughout the proceedings, as well as the effectiveness of the decision itself (Barros, 2019). On the other hand, there are those who defend that this danger in and out of itself, when not accompanied by the other criteria already pointed out, does not constitute sufficient basis for the application of a measure of deprivation of liberty (Albuquerque, 2008).

Danger of disturbance of the investigation or of the instruction process, as well as dangers involving the acquisition, conservation and veracity of evidence.

Much like the previous criterium, Portuguese law does not presuppose this risk. The concrete existence of these risks must thus be determined and not assumed. Certain elements such as the destruction or falsification of evidence, witness intimidation or collusion with other defendants are considered to consubstantiate the determination of the danger of disturbance of the investigation or of the instruction process. In this sense, a reflection must take place regarding the defendant's effective capacity to hinder or disturb the investigation, and especially the collection, conservation and veracity of the evidence. It is also important to highlight that the instruction process gains a fairly comprehensive sense in this context, as it encompasses all procedural activity of production of evidence (Barros, 2019).

Danger of continuity of the criminal activity which gravely disturbs public order and tranquillity

The danger of continuity of the criminal activity is linked to the risk that the defendant continues to practice analogous crimes to the one which led to the application of the enforcement measure. This risk must therefore not be determined when one wishes to halt the practice of other criminal activity which is not close in nature to the crime in question. Moreover, a reflection is again necessary to comprehend the circumstances of the crime, as well as the defendant's personality so to ascertain the risk of continuity (Barros, 2019).

On the other hand, the danger of disturbance of public order and tranquillity merit a separated explanation, as any resulting enforcement measure intends to safeguard future social peace, which was previously affected by the defendant's supposed criminal conduct. In this sense, the determination of this risk must not derive from a context of "social alarm" which does not, in and out of itself, present illicit characteristics. First and foremost, it is again necessary to assess the concrete existence of circumstances which may gravely affect public order and tranquillity. For the latter to be considered under grave risk, there must first occur a reflection concerning the nature of the crime and its circumstances, as well as the defendant's personality, which might eventually harm public order and tranquillity in the future (Barros, 2019).

As highlighted, the conditions for the determination of any of these criteria are context-bound. However, it is fair to say that the danger of disturbance of public order and tranquillity is least determined when compared to the danger of disturbance of the investigation or the instruction process. Simultaneously, it is not possible to state which of these grounds for detention is most commonly mobilised.

5.5. Proportionality

Art. 193^o CCP establishes the principles of necessity, adequacy and proportionality as fundamental when deciding the application of enforcement measures, and consequently, of preventive detention.

It thus states that any enforcement and patrimonial guarantee measures must be necessary and adequate to the enforcement demands of the case, as well as

proportional to the gravity of the crime, and to the eventual future sentences which may predictably be applied at a following stage. Secondly, the article mentions that preventive detention (along with the obligation to house permanence) may only be applied when all other enforcement measures are deemed to be inadequate or insufficient. Moreover, the obligation to house permanence must always be considered before preventive detention, which is ultimately a last resort measure. Finally, the article mentions the importance of safeguarding the defendant's fundamental rights – all those which are not incompatible with the enforcement demands. As such, the proportionality principle stipulates that the acts from the State must be assessed through a cost-benefit logic (Vieira, 2014).

5.6. Duration and prolongation of pre-trial detention

In average, preventive detainees spent 11,3 months under detention in 2019, which drastically contrasts with the European average of 4,5 months (Mecanismo Nacional de Prevenção, 2019). According to Art. 215 (CCP), the maximum duration preventive detention sentences correspond to four months, in case an accusation did not occur; eight months, comprising the period for instruction, in case an instruction decision did not occur; one year and two months provided a sentencing in the first instance did not occur; one year and six months provided there was no final judgement.

These deadlines are further extended to, respectively, six months, ten months, one year and six months and two years regarding the following criminal offences: terror-related cases, violent or highly organized criminality, or when the crime in question is punishable with a prisons sentence of maximum superior to eight years. Moreover, the following crimes are also included in this duration extension: Criminal association (Art. 299 Criminal Code); crimes regarding means of evidence concerning the national interest (Art. 318 Criminal Code); diplomatic infidelity (Art. 319 Criminal Code); incitement to civil war or to a violent alteration of the Rule of Law (Art. 326 Criminal Code); coercion against constitutional organs (Art. 333 Criminal Code); intelligence exchange with foreign countries to constrain the Portuguese State (Art. 30 Military Justice Code); damage to military good or goods

of military interest (Art. 79 Military Justice Code); qualified damage (Art. 80 Military Justice Code); Theft of vehicles or document counterfeiting regarding vehicles; counterfeiting money, credit bonds, sealing values, stamps and alike, and the respective circulation; fraud, insolvency due to misconduct, mismanagement of the public or cooperative sector, counterfeiting, corruption, embezzlement or economic participation in a business; laundering of assets of illicit origin; fraud on obtaining or deviating a subsidy, subvention or credit; any crime considered under an aerial or nautical navigation security convention.

Lastly, the conditions of the proceedings in the crimes mentioned above may also lead to a further extension of the duration of preventive detention, when the proceedings are of exceptional complexity, namely due to the number of defendants or victims, or to the highly organized character of the crime. In this final scenario, the deadlines correspond, respectively, to one year, one year and four months, two years and six months and three years and four months.

5.7. The procedures

The application of any enforcement measure (except the imposition of the Term of Identity and Residence) depends on the decision from the judge and must be preceded by the defendant's hearing, except in cases where the impossibility of a hearing has already been duly proven (in accordance to Art. 4, no. 4 of the CPP). It is furthermore of paramount importance that the defendant may access the files of the case, so that they may assess the justness of the decision and eventually opt to appeal the decision.

The application of preventive detention must be based on a decision which takes into full consideration the information which was communicated during the defendant's hearing. As we will see in the next section, the emphasis on the right of the defendant to express themselves, through the hearing will be progressively more present in the Portuguese legislation. Finally, the judge's decision regarding the application of preventive detention must be duly explained and justified, according to Art. 97 no. 5 of the CCP (stating that all decisive acts are always

substantiated). As such, the facts which consubstantiate and legitimize the choice for an enforcement measure (such as preventive detention), must be pointed out, in order to assess the necessity, adequacy and proportionality of such a measure, as well as indicate the concrete dangers and risks which the enforcement measure intends to avoid. Moreover, if, in case new information arises during the instruction stage, the defendant is entitled to a new hearing. When a decision is reached regarding the application of an enforcement measure (namely preventive detention), the defendant must be immediately informed, and if the defendant wishes it so, any other person may also be informed. Police bodies are then expected to intervene so to detain the defendant.

Both the Public Prosecution and the defendant may appeal the decision which was undertaken by the judge concerning preventive detention. The decision regarding the appeal must be made 30 days after the appeal is launched, considering the importance of these matters (Art. 219 CCP). Additionally, Art. 212 (CCP) lays out the main principles underlying the possibility of revocation and substitution of measures. Accordingly, enforcement measures are immediately revoked, by the decision of the judge, when they have been misapplied considering the hypotheses and conditions foreseen in the Law, or if the circumstances which justified their application no longer exist. In this sense, measures are misapplied whenever the conditions contained in Art. 212 are not respected. Enforcement measures should also be re-examined and substituted when there is a mitigation of the preventive demands which determined the application of the enforcement measure in the first place. On the other hand, enforcement measures may be reinstated if other motives appear which legally justify their application.

Moreover, the revocation or substitution of an enforcement measure occurs officiously or after a requirement from the Public Prosecution or the defendant. Both must be heard, except when the impossibility to hold a hearing for the defendant has been determined and duly justified. It is worth noting that the CCP establishes the mandatory re-examination of the suppositions behind the decision to apply preventive detention. As such, this re-examination is aimed at determining the

necessity to adequate the enforcement measures applied, during the course of the process, according to the circumstances (Duarte, 2016). Said re-examination must occur three months after the start of its application or after the last re-examination; or whenever the process does not determine the end of the applied measure. In this context, the suspension of PTD is possible, whenever the conditions of Art. 213 verify.

In this same line, Portuguese jurisprudence is unanimous in what concerns dependence of enforcement measures to the principle of *rebus sic stantibus* – which corresponds to the obligation on the part of the court to alter the enforcement measure in question whenever there is a substantial change to the circumstances upon which the decision was based. These notions are translated into Art. 212 (CCP) regarding measure substitution or revocation. As such, it is legally possible to revoke the application of preventive detention in favour of a less grave measure, such as electronically monitored house arrest, provided there is an officious re-examination or a request from the Public Prosecutor or from the defendant and a hearing by the victim. In parallel, whenever the circumstances justify the revocation or substitution of enforcement measures, the latter must occur independently of the three month period regarding the mandatory officious re-examination foreseen in Art. 213 (CPP).

5.8. Recent legal developments

We have previously outlined some of the most fundamental moments regarding the evolution of the Portuguese CCP, concretely in what concerns enforcement measures and preventive detention. In line with these changes highlighted before, the decade of 2010 was marked by important alterations as well, which now shape the application of preventive detention in Portugal.

Alterations in 2013 determined that only a judge may apply enforcement measures (except the Term of Identity and Residence). Moreover, the changes imposed that enforcement measures may only be applied after being called for by the Public Prosecution during the investigative phase, and after the defendant's hearing when

the enforcement measure is applied at a later stage. In turn, the revision of 2015 acted upon Art. 212 CCP (concerning the revocation or substitution of enforcement measures). Prior to this change, whenever the judge considered the defendant's requirement concerning revocation or substitution of measures to be manifestly unfounded, the defendant would be sentenced to paying a fine.

In 2017, changes were made to Art. 192 CCP regarding the general application conditions of enforcement measures and enacted changes to Art. 200 CCP, related to the prohibition and imposition of conducts, which would then start to encompass the restriction of contact between parents. The latter must be immediately communicated to the representative of the Public Prosecution, so that a process may be open regarding the regulation or alteration of the regulation of the exercise of parental responsibilities. Lastly, 2017 also brought changes to this article, now encompassing the possibility of applying technological methods to verify that the defendant does not breach the specific prohibition of contacting certain people or frequenting certain contexts. This option of applying remote control techniques through GPS has mostly become a general norm when applying the obligation of house permanence as an enforcement measure (Dias, 2019).

Finally, Law 101/2019 concerning crimes of sexual coercion, rape and sexual abuse of a hospitalised individual amends the Criminal Code and the Code of Criminal Procedure, in what concerns the prohibition and imposition of conducts as an enforcement measure. It allows for the application, in 48 hours, of specific procedural measures (namely, the prohibition of remaining in a certain place; prohibition of contacting certain persons; prohibition to acquire weapons; obligation to be subjected to addiction treatment) where there is strong evidence that a crime of threat, coercion or persecution has been committed. When the protection of the victim so requires, technical means of remote control may be applied, and the suspect's prior hearing may be waived.

5.9. Electronic monitored house arrest instead of detention in prison

The obligation of house permanence (Art. 201 CCP), like preventive detention, is also considered as a measure of true deprivation of freedom (Duarte, 2016). In fact, preventive detention, and the obligation to house permanence are today fairly equated in the CCP. Accordingly, the obligation to house permanence is accompanied by the possibility of electronic surveillance (Art. 201 no. 3). This possibility was introduced in 1998, through Law 59/98, and later framed and regulated by Law 33/2010. It is important to note that the application of electronic surveillance as a method to control the efficacy of the enforcement measure in question is dependent on the defendant's consent, as well as the people who leave with them and might be affected by such a control (Monteiro, 2017).

The former Direção-Geral de Reinserção Social (2011) considers that the objective of electronically monitored obligation of house permanence fundamentally aims to avoid preventive detention, whenever possible, while still maintaining a high level of control of the defendant. It moreover presents as advantages the fact that it completely circumvents the negative consequences associated with prison; it offers a social added-value, as it does not break socio-familiar links; it may allow the continuity of professional activity, and thus enables economic independence; and finally, it is a much more economical enforcement measure when compared to preventive detention. 1In this context, between 2002 and 2019, sensibly more than half (54,42%) of all requests for electronic surveillance corresponded to the application of the enforcement measure of obligation to house permanence (DGRSP, 20192020).

Furthermore, the decisions regarding both measures (preventive detention and electronically monitored house arrest) are both subject to a mandatory re-examination, as laid out by Art. 213 CCP). In the specific case of the obligation of house permanence, the re-examination must be preceded by a hearing from the Public Prosecution Office and the defendant, after which an officious re-examination is carried out every three months.

5.10. Measures to avoid PTD/Alternatives to PTD and their prerequisites in the Law

Law no. 36/2015 establishes the juridical regime in what concerns the emission, recognition and monitoring of enforcement measures, as alternatives to preventive detention.

The alternatives available to preventive detention in the Portuguese regime go as follows:

Art. 196^o CCP - ***Identity and Residence Term*** consists in residence identification and indication, as well as in the availability of the individual towards the authority – applied every time someone is constituted as a defendant (according to Art. 196 CCP). The application of this measure is thus dependant on the previous constitution of the individual as a defendant (Art. 192 CCP), and when there are no causes for exemption of responsibility or extinction of the criminal procedure (Art. 192 CCP). The Identity and Residence Term’s general application conditions are also in force for all other enforcement measures.

Art. 197 CCP - ***Bail*** consists of a patrimonial guarantee in the form of a deposit, attachment, bank mortgage, or bail, which assure the presence of the defendant during procedural acts. It is applied when the crime is punishable by a prison sentence, and there is flight, or risk of flight, risk of disturbance of the inquiry and instruction of the process, namely risk regarding the acquisition, conservation and veracity of the evidence; or in case there is a risk of continuity of the criminal activity or risk of deep disturbance of public order and tranquillity, related to the defendant’s profile or nature and circumstances of the crime.

Art. 198 CCP - ***The obligation to periodically appear before the competent authority*** consists of a duty to present to the authorities’ control, when and where said presentation is determined. It is applicable as a response to crimes whose criminal frame is superior to six months in prison.

Art. 199 CCP – *The Suspension of an activity, profession or rights* consists in the temporary cessation of exercise of any activity, profession, or activity, as well as rights and powers, as a response to crimes whose criminal frame is superior to two years in prison.

Art. 200 CCP – *The Prohibition and imposition of conducts* consists of the limitation of the permanence or absences, prohibition to contact other people, not use or deliver things and the adherence of the defendant to treatment. It is applicable as a measure to intentional crimes whose criminal frame is superior to three years in prison.

The Portuguese CCP also foresees the possibility to cumulate the aforementioned measures, when their collective impact is deemed less restricting than a more serious enforcement measure – namely preventive detention. On the other hand, the above-mentioned enforcement measures are not cumulative with preventive detention nor with the obligation to house permanence.

Art. 201 CCP - *The Obligation of house permanence* (developed on a previous section).

5.11. Procedural measures to support the decision making

The Directorate-General for Reintegration and Prison Services (DGRSP) is charged with the provision of technical assistance to courts in criminal and educational-tutelar processes, 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 through the preparation and elaboration of relevant reports (DGRSP, 2018a), which meet the courts and Public Prosecution's needs to access appropriate procedural means and adequate information for the due course of the criminal procedures. In this sense, the technical consulting teams are responsible for gathering relevant data, such as any subjective aspects of the crime.

The DGRSP is thus charged with the production of social reports, which aim to justify the application, maintenance, substitution and cessation of enforcement measures; gathering 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; and lastly, designing social reinsertion plans, all in a pre-sentence stage, directed at guaranteeing the correct determination of the eventual sentence, during the trial stage (DGRSP, 2018a). In 2018, the DGRSP received 20206 requests for the production of documents and hearings in the pre-sentence phase, which were most common in the area of southern and islands delegation, including the region of Lisbon. Sensibly 90% of all requested and executed documents consisted in social reports, which act as a supporting instrument for the magistrate and judge's decision-making process. These documents must take into consideration (DGRSP, 2018a):

- the organisation of the criminal procedural system;
- the notion of crime, differences between types and forms of crime, as corollaries to the objectives of the sentences.
- the objectives of the sentences and the measure of guilt;
- the criteria for the choice of the applied measures, always privileging measures which do not impose liberty deprivation, as long as they fulfil adequately and sufficiently the objectives of the measure;

Moreover, the role of supporting experts is effectively developed in Art. 159 CCP, which refers to the elaboration of a personality assessment which also includes the participation of the DGRSP. On the other hand, this sort of assessment may be carried out by contracted third parties, who do not present any vested interest in the future decision or any connection with the assistant or the defendant. Moreover, it is also important to note that whenever the judge's decision diverges from the assessment and reports, they must justify their position. Moreover, the social reintegration technicians' reports bear an important weigh for the re-examination procedures which we have previously described (Araújo, 2015).

6. Measures to avoid PTD/Alternatives in practice

6.1. Conditional suspension of PTD

Art. 216 of the CCP also establishes the potential conditional suspension of PTD timelines in the case of profound illness, which demands hospitalisation, if the presence of the defendant is indispensable to the continuity of the investigation. Additionally, the enforcement measure in force may be suspended, in accordance with Art. 211 CCP in case of grave illness, pregnancy or puerperium. In this case, the judge might also decide on the application of another enforcement measure, for example, the obligation to house permanence or even hospitalization. As such, the judge must reassess the circumstances of the situation in case of its effective suspension.

6.2. Social work strategies: Providing information (for the decisions) and/or support

Social reinsertion technicians have supported the judicial system since 1995 in their capacity to write social reports, along with forensic expertise reports. This work is of special relevance in the context of re-examination procedures concerning preventive detention as an enforcement measure (Araújo, 2015), in accordance with Art. 213.

In this scenario, the evaluation of the preventive detainee upon arrival to the penitentiary establishment must be concluded within 60 days, while seeking to collect the necessary information to the appropriate allocation of the inmate, choice of the regime of execution and, with the consent of the preventive detainee, their inclusion in activities and programmes of treatment, as per the Code for the Execution of Sentences and Measures of Liberty Deprivation (Law no. 115/2009). Art. 20, no. 5. This evaluation may be taken into account during the mandatory re-examination of the circumstance, as previously described (Araújo, 2015).

In Portuguese penitentiary establishments, social service workers take on an important presence, specifically in their role as Re-education Superior Technicians,

while integrating the Education and Teaching Services. In the context of preventive detention, these technicians support the individual in their adaptation and integration, in order to identify and prevent risks, as well as problematic situations. They follow the evolution of the juridical-criminal and detention situation from a close perspective while monitoring the individual's behaviour, outside support network, health and free time occupation. Moreover, the technicians play an important role to support especially vulnerable groups (young adults, elders, substance abusers, foreigners, individuals with special needs and dealing with mental health problems, and individuals with grave health problems. In this context, they also develop support activities directed at these specific groups (Martins, 2010).

6.3. Conditions and supervision measures

Art. 196^o CCP - ***Identity and Residence Term*** is mandatorily applied to all defendants, as an enforcement measure which may be imposed by the public prosecution. The noncompliance towards this measure then justifies a trial in the absence of the defendant. Portuguese courts do not maintain statistical records concerning the number of defendants under this enforcement measure.

Art. 198 CCP - ***The obligation to periodically appear before the competent authority.*** The judge determines that the defendant must present themselves before a judiciary body or a certain criminal police organ, as well as the time and date for the rapport, which corresponds to the supervision conditions regarding this measure. This enforcement measure may be applied when preventive detention or house permanence temporal limits have been reached. It is the most applied measure at the stage of the first judicial questioning, in the context of criminal frames which do not merit the application of more grave measures. Portuguese courts do not maintain statistical records concerning the number of defendants under this enforcement measure (Monteiro, 2017).

Art. 199 CCP – ***The Suspension of an activity, profession or rights*** as enforcement measure fundamentally seeks to prevent the continuity of criminal activity and

safeguard the evidence, either already obtained at the date of the application of this enforcement measure, or whichever evidence which is expected to be obtained afterwards. It is especially productive in cases when the criminality is related to the professional activity of the defendant. Portuguese courts do not maintain statistical records concerning the number of defendants under this enforcement measure, or in what regards the most commonly restricted activities, professions or rights.

Art. 200 CCP – *The Prohibition and imposition of conducts*. This enforcement measure seeks to limit the defendant's contact with certain people, certain places and certain means which might disturb public order and tranquillity. This measure is especially applied in cases of drug trafficking, whenever the defendant agrees to a specific treatment to drug addiction; as well as in the cases of sexual crimes and domestic violence situations. As long as the defendant shows up at court whenever notified, delivers all weapons, objects or utensils which might facilitate the practice of other crimes, as well as their passport, there is no direct supervision and monitoring of the defendant's other obligations under this enforcement measure. Portuguese courts do not maintain statistical records concerning the number of defendants under this enforcement measure, or in what regards the most commonly restricted or imposed conducts (Monteiro, 2017).

Art. 201 CCP - *The Obligation of house permanence*. (see p. 16).

6.4. Financial surety (bail)

While assuming a somewhat secondary role, bail as an enforcement measure might be applied whenever the maximum deadlines have been reached in the application of preventive detention or the obligation to house permanence, and specifically, since bail is not framed with a limit for its application (Art. 217 and Art. 218 CCP).

Bail might also be officiously substituted by the judge or by request of the defendant, based on the latter's financial impossibility, or grave difficulties to assure it. In these cases, the judge might decide to substitute bail for another enforcement measure, but never with preventive detention or house permanence (Art. 197 CCP), since they

are not cumulative. Portuguese courts do not maintain statistical records concerning the number of defendants under this enforcement measure.

6.5. Therapeutic measures

As an enforcement measure, the prohibition or imposition of conducts may impose the participation in medical treatment programmes destined namely to treating drug or alcohol addiction, according to Art. 200 CCP.

6.6. Other alternatives and measures

Art. 196^o CCP - ***Identity and Residence Term*** is automatically imposed whenever an individual is constituted as a defendant, either by the judge, Public Prosecution or by the organs of criminal police. Other than being obligated to provide their identification and indication of residence, the defendant must also appear before competent authorities whenever the Law requires or whenever they are notified. Moreover, the individual may not change residences, nor be away from the residence for more than 5 days without previously communicating relevant details to the competent authorities. Accordingly, the competent authority previously determined is the one which monitors the successful application of this measure. The defendant is thus held accountable for providing the aforementioned information, and there is no other form of monitoring the fulfilment of the measure other than the eventual periodic appearances of the defendant before competent authorities.

Art. 198 CCP - ***The obligation to periodically appear before the competent authority*** imposes that the defendant be available to appear before a judiciary entity or a police organ at a certain time and place. Accordingly, the competent authority previously determined (usually a police body) is the one which monitors the successful application of this measure. If the defendant fails to comply with their obligations to periodically present themselves, the competent authority will then inform the court, which would reconvene and, if deemed fit, order the application of a more severe enforcement measure or a combination of enforcement measures.

Art. 199 CCP – *The Suspension of an activity, profession or rights* is imposed by court. The latter may eventually ask that police bodies verify that the defendant is complying with the imposed measure, for example, by contacting neighbours or any other relevant individuals who may testify about the defendant’s behaviour. But these monitoring efforts are inconstant and may not always prove entirely successful, as police bodies do not have the means, nor the competence, to continuously follow the defendant or make sure the measure is being respected and followed.

Art. 200 CCP – *The Prohibition and imposition of conducts* is imposed by court. The latter may eventually ask that police bodies verify that the defendant is complying with the imposed measure, for example, by contacting neighbours or any other relevant individuals who may testify about the defendant’s behaviour. The monitoring and control of this measure is nowadays generally insufficient and does not allow for the optimal application of this measure (Monteiro, 2017). On the other hand, if the imposed conduct entails the participation in a specific program (for drug rehabilitation, for example), the institution at hand has the responsibility to inform the court on the non-compliance of the defendant. The latter would then have to prove before the court that they are indeed participating in the programme if that is the case.

Art. 201 CCP - *The Obligation of house permanence* is generally monitored through electronic surveillance means, for which the DGRSP is responsible. Answering to the Directorate of Services of Electronic Surveillance, there are currently 10 Electronic Monitoring (DSVE) specialised teams, organised around 1 National Center for Surveillance of Operations (Monteiro, 2018). This particular organ is responsible for determining the appropriate methodologies for the execution of sentences and monitoring measures through electronic surveillance means, as well as to emit orientations and guidelines regarding the electronic surveillance system. The aforementioned agency acts in close cooperation with the Directorate of Services of Technical Consulting and of the Execution of Sentences in the Community (DSATEPC), which in turn maintains an essential role in its

interaction with the courts, through the provision of assistance (according to Portaria n.º 300/2019).

Alternatively, if this measure is imposed without recourse to electronic monitoring, the court may ask that a police body verifies whether the defendant is complying with the measure. Police bodies may then verify that the defendant is complying with the imposed measure, for example, by contacting neighbours or any other relevant individuals who may testify about the defendant's behaviour. But these monitoring efforts are inconstant and may not always prove entirely successful, as police bodies do not have the means, nor the competence, to continuously follow the defendant or make sure the measure is being respected and followed.

6.7. What kind of services are provided by whom (e.g. also public entities and private sector)?

The private sector is not involved in the application of any of the enforcement measures, namely those which might pose an alternative to preventive detention.

Some detail on how the alternatives are initiated and how they are put into practice

Attorneys play a fundamental role in the criminal judicial process, as their assistance materialises one of the most fundamental rights of defendants. Moreover, they are also central to appealing the court's decision with respect to enforcement measures (Gago, 2017). Thus, the role of the lawyers is particularly important to safeguard the principle of presumption of innocence, and eventually call into question the judicial decision on the application of enforcement measures. In this sense, the downgrading of measures, from preventive detention to the obligation of house permanence, for example, usually originates from the defendant's assistance.

Regional differences

The Portuguese context does not present regional differences in what regards the application of the Criminal Code and the Code of Criminal Procedure. Regardless, it is fair to state that there is a larger application of preventive detention in the most populated areas, namely the metropolitan area of Lisbon (DGRSP, 2019b).

Reactions on the COVID-Pandemic

The Portuguese Parliament issued Law 9/2020, on the 10th of April 2020, as a response to the COVID-19 pandemic. The Law is thus summarised as a “Exceptional regime of flexibilisation in sentence execution and grace measures, in the context of the disease COVID-19 pandemic”.

The new law does not foresee the application of grace measures to preventive detainees. However, it does state that judges must proceed to re-examine the basis for the application of preventive detention. Art. 213 of the CCP already foresaw this re-examination after three months of its application. However, the new Law states that said re-examination must take place regardless of the three months regime and especially when the defendants find themselves in the situations described in Art. 3 no. 1 (CCP), which regards less serious crimes. As such, judges must ponder once again the necessity for such a measure, namely, the prevalence of the general requisites foreseen in Art. 204 (CCP), regarding the application of all enforcement measures. These principles were further advanced by Directive no. 03/2020.

7. PTD and Alternatives in figures and presentations

7.1. Statistical data on PTD available

- Number of PTD detainees on an average in longitudinal observations: 2271 in 2019; 3.854 in 2000; 1583 in 1980; 807 in 1960 (PORDATA, 2019) 2128 in average. (data collected in December of each year).

2019 PTD rate per 100 000 inhabitants: 24.6

2016 PTD rates per 100 000 inhabitants (2016 SPACE I Report): 20.5

Table 1: Entries per year as pre-trial detainees

Year	Total	Female	Male	16 ¹ -18 ² year olds (already included in the total)
2002	6393	590	5803	N/A
2003	6393	590	5803	N/A
2004	3039	324	2715	N/A
2005	3148	286	2862	N/A
2006	3091	313	2778	N/A
2007	2674	260	2414	N/A
2008	2116	168	1948	N/A
2009	2370	213	2157	N/A
2010	2482	201	2281	N/A
2011	2677	226	2451	N/A
2012	2835	251	2584	0
2013	2524	250	2274	77
2014	2332	203	2129	88
2015	2448	233	2215	82
2016	2158	192	1966	83
2017	2135	202	1933	72
2018	2252	227	2025	58
2019	2534	232	2302	59

Source: DGRSP

Since the year 2000, PORDATA (2019) has been recording the variation of PTD detainees yearly:

Table 2: Yearly variation of detainees in PTD

From 2002 to 2003	- 727 detainees
From 2003 to 2004	- 492 detainees
From 2004 to 2005	+ 44 detainees
From 2005 to 2006	- 123 detainees
From 2006 to 2007	- 594 detainees
From 2007 to 2008	- 219 detainees
From 2008 to 2009	+ 33 detainees

¹ Age of criminal responsibility.

² Age of legal majority.

From 2009 to 2010	+ 166 detainees
From 2010 to 2011	+ 163 detainees
From 2011 to 2012	+191 detainees
From 2012 to 2013	- 69 detainees
From 2013 to 2014	- 262 detainees
From 2014 to 2015	- 27 detainees
From 2015 to 2016	- 186 detainees
From 2016 to 2017	- 12 detainees
From 2017 to 2018	+ 91 detainees

Source: PORDATA (2019)

On average, the number of PTD detainees over these 18 years indicates a decrease of about minus 92 detainees a year.

- information on the detainees - age, sex, nationality, if available indicators with respect to social conditions, duration of PTD, regional differences, PTD in electronically monitored house arrest:

Most preventive detainees in Portugal are male (2054 individuals when compared to 217 female preventive detainees in 2019) (DGRSP, 2019b). Moreover, by analysing the available data, we are also able to understand that the number of minors subjected to preventive detention has been gradually reducing over the years. It is important to note that before 2013, DGRSP aggregated data regarding pre-trial detainees between the ages of 16 and 20, therefore already encompassing individuals who are no longer considered legal minors.

Table 3: Yearly data on PTD detainees concerning nationality and sex

Pre-trial inmates						
Year	Total	National Female	National Male	Foreign Female	Foreign male	% pre-trial foreign detainees
2009	2141	96	1273	81	691	36,1
2010	2304	120	1384	56	747	34.9
2011	2470	113	1500	86	771	34.7
2012	2661	127	1647	77	810	33,3
2013	2592	166	1598	90	738	31,9
2014	2330	134	1513	77	606	29,3
2015	2303	119	1517	90	577	28.9

2016	2117	117	1407	83	510	28
2017	2105	149	1381	71	504	27,3
2018	2196	135	1463	76	522	27,2
2019	2271	121	1500	96	554	28,6

Source: DGRSP

It is also worth noting that typically, foreign offenders tend to be sentenced to preventive detention more frequently than nationals. In proportion, Portuguese PTD detainees amounted to 13,8% of all Portuguese detainees. On the other hand, foreign PTD detainees amounted to 25,8% of all foreign detainees, thus demonstrating that foreign nationals are more frequently sentenced to preventive detention, when compared to Portuguese nationals. The tendency was carried on to the year of 2017 and, in 2018, the proportion of foreign nationals in preventive detention had further risen to 30,6% of all foreign detainees (in comparison to 14,6% of Portuguese PTD detainees out of all Portuguese detainees) (Oliveira & Gomes, 2019). The year of 2019 also followed this disproportionate trend, as 650 foreign nationals were under preventive detention (out of which 554 were men, and 96 were women) (DGRSP, 2019b). Regarding gender, 1500 national preventive detainees are male, and 121 are women). In what concerns the nationalities of the foreign PTD detainees, the DGRSP (2019) highlights the following: Cape Vert (104), Guinea-Bissau (40), Morocco (22) and Angola (22), as well as Brazil (190) and finally, Romania (39), Spain (24) (DGRSP, 2019c).

In what concerns the average duration of pre-trial detention, Portugal was called out at the turn of the century due to the long periods defendants were subjected to preventive detention. Van Dunen (2004), explains that in 1992, 54,2% of pre-trial detainees had not been under this measure for more than 6 months, and that only 2,7% of pre-trial detainees had suffered the measure for more than 18 months. On the other hand, in 2001, the average duration of pre-trial detention had risen to 8 months. At the time, about 20% of pre-trial detainees had spent more than one year in prison. In 2005, Leal (2005) states that pre-trial inmates would be subjected to this measure for about 24 months, a figure which bears a striking difference to the European average of 8 months at the time. No further information was available at

the time in what concerns more recent data, especially since the DGRSP no longer provides these data. However, according to the National Prevention Mechanism's 2019 report, the situation had dramatically improved in 2019, as the report determined the average duration of detainment for pre-trial detainees to be of 11,3 months when compared to the 4,5 months in the European average (Mecanismo Nacional de Prevenção, 2019).

In what concerns the practical implementation of the obligation of house permanence – the second gravest measure after preventive detention, and thus a potentially fruitful alternative, the Directorate-General for Reintegration and Prison Services (DGRSP) states that, in May 2020, there were 463 individuals under the obligation of house permanence monitored by electronic surveillance, thus displaying an increase of 10,24% on the application of this enforcement measure when compared to the previous year. Moreover, between January and June 2020, 250 new requests for electronic surveillance for the application of the obligation to house permanence. As of June 2020, the regions of Porto and Mirandela accounted for the highest percentage of the application of this enforcement measure under electronic surveillance (35,44%), followed by Lisbon and Setubal, (which covered 25,53%) (DGRSP, 2020). As of 2020, this measure was mostly applied to defendants between 22-30 years old (143 cases). It is also worth noticing that home permanence based on electronic surveillance was substantially less resorted to when the defendant is of foreign nationality (42 cases, when compared to the 464 national defendants who benefited from the measure). In 2019, it was mostly applied to cases of crimes against people, and especially to serious voluntary offences against the physical integrity of others. Its usage is also very high as a response to drug trafficking (including precursors) (DGRSP, 2019a).

7.2. Basic data on alternatives available

No information was found on this topic in the available data and literature.

8. Negative impact of PTD in the partner country – Literature review and statistical data

8.1. On the national level:

According to the Space I Report of 2019, regarding data pertaining to the year of 2018, the average amount spent per day for detention of one inmate corresponds to €44.9 (no distinction is made between the costs of detainee not serving a final sentence and a sentenced prisoner). Additionally, the Space I 2019 Report also presents the number of days spent in penal institutions by inmates nor serving a final sentence: 776 355 days (Aebi & Tiago, 2019).

An estimate of the national cost for PTD is thus attainable by the multiplication of these two figures, thus accounting for: €34 858 339,5.

8.2. On the organisational level:

The Portuguese National Prevention Mechanism 2019 report clarifies that, in 2019, the occupancy rate of penitentiary institutions was of 98%. It is worth noting that, even if the global prison population figure does not surpass the total occupancy range, it does not mean Penitentiary Establishments are not individually overcrowded (Mecanismo Nacional de Prevenção, 2019), especially when considering that practitioners in prisons consider occupancy rates beyond 90 % overcrowding. In fact, according to Campos (2015), one of the major issues in the Portuguese system is linked to overcrowding in prisons, along with the lack of financial and technical resources.

This is especially true for prisons of minor dimension, and of intermediate management complexity: in 2019, 22 out of the 28 prisons in this scope presented occupancy rates of over 100% (in average, 114%; the prison of Torres Novas in specific reached an occupancy rate of 160%) (Mecanismo Nacional de Prevenção, 2019). On the other hand, one-third of the prisons considered to be of high management complexity were overcrowded. The case of Porto's penitentiary establishment is of special relevance, as it presented an occupancy rate of 145%.

These conditions deeply impact the normal operation of the prison establishment. Effectively, the Portuguese National Prevention Mechanism points out the general overcrowding in the Portuguese penitentiary establishments, which are characterized by collective housing. Moreover, it highlights that some Portuguese prisons do not guarantee the personal space which would be allocated to an individual inmate, which further contributes to the insecurity of the inmates (Mecanismo Nacional de Prevenção, 2019). Interviews carried out by Ferreira (2016), highlight the sense of solidarity which prevails amongst inmates who elaborate on the need to defend their friends and close ones given the continuous risk of aggression or violation of their physical integrity. A specific expression is illustrative of the general perception of pre-trial detainees regarding this situation: “This is how it goes, it is the law of prison”³.

Deficiencies in the total number of human resources in service in the penitentiary establishments are equally underlined in the National Preventive 2019 report, which points out a rather high number in medical leaves as a major issue in human resources management, as well as the high shift rotativity, and the low number of guards in management positions. In parallel, inmates, the penitentiary staff, along with the Directorate-General all express their discontent regarding the insufficient number of prison staff members, considering the necessities of the several Portuguese prisons. An insufficient number of prison staff carries repercussions also in what concerns the security inside the prison. In fact, the accumulation of functions derived from this situation leads to surveillance constraints and security. Insufficient staff numbers translate into several problematic day-to-day episodes while depriving inmates of certain valences and activities (Mecanismo Nacional de Prevenção, 2019). As an example, the penitentiary establishment of Alcoentre recently had its canteen remodelled, now presenting good conditions. Regardless, the low number of prison officers does not allow for its usage, and inmates are thus forced to have lunch in their cells, therefore reducing the time possibly spent outside the cells. The prison of Sintra, likewise, also presents a dire need for additional staff,

³ In the original “E é assim, é a lei da cadeia”. Translated by the author.

a situation which prevents inmates from benefiting from additional activities or other areas in the compound. In Caldas da Rainha, on the other hand, the NPM concluded it would be possible to place a substantially higher number of inmates under an open regime if there were enough human resources (Mecanismo Nacional de Prevenção, 2019).

8.3. On the individual level:

In parallel, due to overcrowding and lack of human resources, inmates do not benefit from individualized treatment and monitoring, which then lead to feelings of deepened isolation and lack of support, therefore durably harming the social reintegration and reinsertion of the inmate (Mecanismo Nacional de Prevenção, 2019). The case of *Petrescu v. Portugal* (23190/17) is important in this regard, as the European Court of Human Rights condemned Portugal for the impact of overcrowding in hygiene and salubrity conditions.

As most penitentiary establishments assemble both sentenced and preventive detainees, PTD detainees are equally subjected to the conditions described above. On the other hand, testimonies gathered by Ferreira (2016) recount that the penitentiary establishments' conditions are lacking and that the regime is inhumane. Mental health suffers tremendously during detention, especially as detainees are not aware of their trial date. On the other hand, and even though they are entitled to visitation on a daily basis, poor management leads to diminished visiting times, due to long lines. In this context, family relationships deteriorate, and social support progressively dissipates, worsening the mental health of pre-trial detainees. Some of the detainees interviewed by Ferreira also manifested their lack of hope in the future, considering the impact of pre-trial detention in their future trial, considering the existing Halo effect, as well as in their employment prospects.

9. Other aspects on PTD and Alternatives in the national scientific literature

9.1. Empirical research and legal theoretical literature (also fundamental rulings)

- *on topics relevant to the practice of PTD and alternative measures in the country (here of course only the topics have to be addressed on which there is relevant literature available), e.g.*
 - ✓ On the procedures and the on the decision making process - See p. 14; 18 & p. 20.
 - ✓ On the grounds - See p. 11
 - ✓ on the proportionality of PTD - See p. 12
 - ✓ on the realization of the ultima ratio principle - See p. 4.
 - ✓ on legal safe guards and the role of attorneys - See p. 23
 - ✓ on the use of alternatives – See p. 21
 - ✓ on problems and barriers with respect to the use of alternatives

Even though Portugal has invested strong efforts in reforming its criminal justice system, namely by attempting to privilege alternatives to preventive detention (especially the obligation of house arrest with electronic bracelet), several difficulties arise in their actual implementation due to lack of appropriate conditions. As such, the defendant's social circumstances play a central role in the application of enforcement measures. Many defendants do not benefit from a sustainable family network which allows them to provide a valid residence, a situation which often corresponds with foreign nationals and migrants. Foreign defendants are therefore less likely to be granted alternative measures as they are considered more likely to pose a danger of flight, for example (Oliveira & Gomes, 2018).

National particularities in the use of PTD

According to Ventura (2017), the Portuguese criminal system still relies heavily on the application of preventive detention as an enforcement measure. To some extent,

this situation may be justified by preventive detention's juridical frame in the Portuguese context, which, in line with the historical evolution and the introduction of the "Arms Law" (Law 17/2009 of May 6th), allows for a more widespread application of preventive detention. The author further elaborates and explains that in this case, the application of the measure is not dependent on the graveness of the crime, flight risk or continuity of the criminal activity. Conversely, under the above-cited law, its application is related to the employed means during the practice of the crime. These precepts open up the way to a larger application of the measure, namely to lesser grave crimes or when the suspect's dangerousness would not justify it.

On the other hand, the Law also stipulates that pre-trial detainees be held in different penitentiary establishments, so to separate them from convicted detainees (Code of Execution of Sentences and Measures of Liberty Deprivation, Art. 9), a reality which does not materialise in Portuguese reality. In fact, most prisons hold both preventive and convicted detainees, directly subverting the precepts laid out in the Law. As an attempt to mitigate the consequences from the non-fulfilment of the Law, the justice system foresees that pre-trial detainees be maintained at regional prisons, where are also held individuals serving lesser sentences (Ferreira, 2016). Regardless, the data indicates that pre-trial detainees are often held in central penitentiary establishment, cohabitating with individuals serving heavier sentences.

The meaning of preventive aspects in PTD decisions.

As an enforcement measure, the decision to apply preventive detention is above all rooted in the willingness to protect the criminal process, as a well as avoid the continuity of criminal activity, when there is a strong belief that the application of less grave measures would not be sufficient.

Hidden and extra-legal grounds and motivations in the PTD-decisions

The politicisation of certain mediatic cases may lead to the application of preventive detention based in extra-legal reasons, as pointed out in the section concerning recent debates in the Portuguese national context.

Discretion in the PTD decisions

No information was found on this topic in the available data and literature.

10. European Aspects and their meaning for national PTD-practice in the national scientific literature

10.1. Cooperation in criminal justice matters in general

Law 144/99 frames Portuguese judiciary cooperation in criminal matters while specifying the formats of this interaction: extradition, transmission of criminal processes, criminal sentence execution, transfer of sentenced individuals to sentences and measures of freedom deprivation; surveillance of sentenced individuals or individuals who were conditionally released; mutual legal assistance in criminal matters.

Portuguese interaction in criminal justice matters with foreign States and judicial entities is codified in the CCP. Art. 229 stipulates that all rogatories, extraditions, delegations concerning criminal procedures and other interactions with foreign authorities in criminal administration matters are generally regulated by the international treaties and conventions. These same principles therefore regulate Portuguese cooperation with international judiciary entities. Art. 234 adds that, when a foreign criminal sentence must enter into force in Portugal, due to a Law, a treaty or convention, the latter must be reviewed and confirmed.

On the other hand, Art. 237 develops on the requisites for the confirmation of the foreign criminal sentence, which enter into force when the following conditions are verified:

- when the sentence may have executive validity in Portuguese territory, due to a law, treaty, or convention.
- when the fact that motivated the sentencing is also punishable by Portuguese Law.
- when then sentence does not apply a punishment or measure which is forbidden under Portuguese Law.
- when the defendant has been supported by a counsellor and by an interpreter (if they ignore the language used in the criminal process).
- when the crime in question is not related to a crime against the security of the State, both according to Portuguese Law and to the Law of the country where the sentence was emitted, unless there are specific treaties and conventions that state the contrary.

Additionally, Portugal adheres to the United Nations General Assembly resolution 2200A (XXI) concerning the International Covenant for Civil Rights of 1966, as well as the European Convention of Human Rights and the Council of Europe's Committee of Ministers Recommendations, which all reiterate the strictly exceptional nature of preventive detention while underlining its non-mandatory and subsidiary character (Fernandes, 2014).

From an operational standpoint, it is worth to note that Portugal actively acts on the European Arrest Warrant, according to the following information provided by European Justice Portal (2020):

Table 4: European Arrest Warrant: the Portuguese case

European Arrest Warrant: the Portuguese case		
	Issued	Executed
2005	6 894	836
2006	6 889	1 223
2007	10 883	2 221
2008	14 910	3 078
2009	15 827	4 431
2010	13 891	4 293
2011	9 784	3 153

2012	10 665	3 652
2013	13 142	3 467
2014	14 948	5 535
2015	16 144	5 304
2016	16 636	5 812
2017	17 491	6 317

Source: European Justice Portal (2020)

On the other hand, in what concerns the implication of Portugal in the European Investigation Order, the European Judicial Network 2017-2018 Report on activities and management states that in the studied period, Portugal was involved in circa 200 cases. The same report also highlights that, during the reported period, Portugal was most involved in cases regarding FD 2008/909. Overall, the report also points out that most EU MS interact with almost all other MS in judicial cooperation matters. Portuguese contact points are most frequently in contact with French and Spanish authorities.

An EJN national meeting in Aveiro, Portugal in May 2018 also points to the lack of knowledge and know-how from Portuguese judicial authorities in what concerns Joint Investigation Teams, in the scope of cooperation with other EU networks. The need to further develop and consolidate the Portuguese network of regional contact points was also discussed, along with the benefits of further training for local authorities (European Justice Network, 2018).

10.2. The European Supervision Order (FD 829) in national practice

Law no. 36/2015 transposed the European Union's Framework Decision 2008/829 into national legislation. This recent law thus establishes the juridical regime concerning the emission, recognition and monitoring of decisions on enforcement measures as an alternative to preventive detention, as well as the surrender of a singular person between EU Member States in the case of breach of the imposed measures.

In this context, the European Supervision Order foresees the application of several enforcement measures as a substitution of preventive detention, such as:

- The obligation to communicate any residence changes to the competent authorities, so that notifications regarding upcoming hearings or trial sessions may be correctly transmitted;
- The prohibition to enter in certain places in the emission or execution State;
- The obligation to remain in a certain place during certain period;
- Mobility restrictions concerning the exit from the execution State's territory;
- The obligation to appear before a specified authority at certain occasions;
- The obligation to avoid contact with certain people related to the allegedly committed criminal activity.
- Suspension of the exercise of a certain profession, activity and rights;
- The obligation to deposit a certain amount or offer another sort of guarantee;
- The obligation to commit to therapeutic programmes linked to substance addiction (Law 36/2015).

This Law also foresees the application of electronic surveillance to monitor the application of the enforcement measures in question. We can therefore confirm the proximity between the proposed alternative measures to preventive detention and the pre-existing enforcement measures in the Portuguese legal context.

The application of this Framework Decision is still rather meagre in all EU countries, and Portugal is no exception. In fact, according to the European Judicial Network 2017-2018 Report on activities and management, Portugal has dealt with the European Supervision Order less than 50 times in the considered period (European Judicial Network Secretariat, 2019). Unfortunately, lack of information regarding the application of this instrument in Portugal creates further barriers to grasping its operationalisation in Portugal.

10.3. Human rights and rulings of the European Court of Human Rights

Two cases come to mind when considering the intervention of the European Court of Human Rights in the Portuguese legal context, specifically regarding the application of preventive detention. The case of *Qing v. Portugal* was brought to the European Court of Human Rights in 2011. The defendant had launched an appeal against the application of preventive detention, as well as a complaint against the length of the application of the measure. A final decision was reached in November 2015 by the ECHR, which determined that there had been a violation of Art. 5 no. 3, as the Portuguese authorities did not properly justify the need for the application of preventive detention for one year and seven months. Moreover, the decision to replace preventive detention with the obligation of house permanence under electronic surveillance was only adopted one month before the delivery of the judgement. This factor is very relevant to the extent that the authorities did in fact apply an alternative measure, which suggests the consequent inadequacy of preventive detention, but did not do so in a meaningful way. Effectively, the defendant complained that the order to detain her on remand had been based on her foreign nationality and was thus discriminatory. The case of *Martins O’Neill Pedrosa v. Portugal* was brought to the European Court of Human Rights in 2015. The defendant had launched an appeal against the decision regarding the application of preventive detention. The Lisbon Court of Appeal exceeded the thirty-day time-limit established in the Code of Criminal Procedure for accepting the appeal. No justification was given for the delays in the appeal proceedings, which caused grave harm to the defendant, thus exemplifying one of the several prejudicial aspects of the application of preventive detention. A final decision was reached in February 2017, as the ECHR determined that there a violation of Art. 5 no. 4 of the Convention had effectively taken place since the defendant was not granted a speedy judicial decision concerning the lawfulness of the detention and the ordering of its termination if it proves unlawful.

11. Short Conclusions and Outlook

This brief report has enabled us to better understand the underlying narrative, as well as the functional and operational aspects of enforcement measures in the Portuguese context. According to Silva (2004), the Portuguese criminal system would substantially benefit from the diversification of the existing enforcement measures, which would then be cumulatively applied in accordance to the case in question. This strategy would guarantee a larger availability of options and alternative solutions to the application of more grave measures, namely preventive detention. In some ways, the European Supervision Order intends to act on this same issue and expand the possibility for the application of alternative measures, with a special focus on foreign defendants, while upscaling the current state of judiciary cooperation between EU Member States. By reinforcing mutual trust and mutual recognition in criminal matters, this decision would improve the situation of many foreign defendants throughout the EU. On the other hand, the Portuguese context is in need of further reformulation and diversification of the available enforcement measures.

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List of tables

Table 1: Entries per year as pre-trial detainees

Table 2: Yearly variation of detainees in PTD

Table 3: Yearly data on PTD detainees concerning nationality and sex

Table 4: European Arrest Warrant: the Portuguese case



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PRETRIAD

Alternative pre-trial detention measures

Portuguese National Report

PARTNERS



Annexe 8 - Romanian national report



PRE-TRIAD

Alternative pre-trial detention measures

Romanian National Report

Basis for the D2.1 Literature review

PRE-TRIAD Project
Alternative pre-trial detention measures

Project Number 881834
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PRE-TRIAD Project

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

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2. Content

1.	Change Control	3
1.1.	Document Properties	3
1.2.	Revision History	3
2.	Content	4
3.	Executive Summary.....	6
4.	Introduction.....	7
4.1	The legal system and general context for PTD in Germany	7
	Relevant constitutional provisions on individual freedom.....	8
	Criminal law.....	9
5.	The legal bases and the fundamental legal aspects with respect to PTD.....	10
5.1	General principles and competent authorities and their roles.....	10
5.2	Grounds for detention. Legal pre-requisites. Suspicion and proportionality.....	12
5.3	Procedures	14
	a. Ruling on the pre-trial detention proposal.....	14
	b. Information on the ruling	15
	c. The pre-trial detention warrant	16
	d. Enforcement of the warrant	17
5.4	Duration and prolongation of pre-trial detention	17
	a. Pre-trial detention during criminal investigation.....	17
	b. Pre-trial detention during judgment.....	18
	c. Cessation of pre-trial detention	18
	d. Revocation of pre-trial detention.....	19
	e. Replacement of pre-trial detention	19
5.5	Special provisions on preventive measures enforced against juveniles.....	20
6.	Measures to avoid PTD/Alternatives in practice	21
6.1	Judicial control (ro. controlul judiciar).....	21
	a. Procedure	21
	b. Obligations	22
6.2	Judicial control on bail (ro. control judiciar sub cauțiune)	24
6.3	House arrest (ro. arestul la domiciliu).....	25
	a. Procedure	25
	b. Obligations	26
	c. Content of the measure	27

d. Enforcement.....	27
e. Duration and prolongation	28
7. PTD and Alternatives in figures and presentations.....	29
8. Negative impact of PTD in the partner country – Literature review and statistical data	30
8.1 ECHR case law.....	31
8.2 Reports of the European Convention for the Prevention of Torture	34
8.3 The Romanian Ombudsman	35
8.4 European Union Agency for Fundamental Rights	36
8.5 On the individual level	36
8.6 APADOR-CH	37
9. Other aspects on PTD and Alternatives in the national scientific literature	37
10. European Aspects and their meaning for national PTD-practice in the national scientific literature	39
11. Short Conclusions and Outlook.....	40
12. Bibliography	41
List of graphs	42

3. Executive Summary

The present report seeks to offer an overview of the legal bases, regulations and procedures as well as the practice of pre-trial detention (PTD), its alternatives and corresponding problems in Romania.

4. Introduction

4.1 The legal system and general context for PTD in Germany

General background

Romania is located in the South-Eastern part of Central Europe, and shares borders to the North and the South-Eastern with Ukraine, to the East with the Republic of Moldova, to the South with Bulgaria, South-West with Serbia and to the West with Hungary. From the administrative point of view Romania is organized in 41 counties and the capital city of Bucharest. Each county and the capital city are governed by a county council, respectively the General Council of Bucharest Municipality and a prefect.

In year 2011, the population of Romania was 20.121.641 inhabitants, in comparison with the number registered in the 2002 census, when the number of inhabitants was 21.698.181 (NIS, 2011). According to Eurostat, Romania is facing the steepest demographic decline, mainly two phenomena contributing: an aging population, and the negative migration. Ethnically, the majority is represented by the Romanians (89.9%) followed by the Hungarians (6.6%) and several other communities like Roma, Germans, Ukrainians, Lipovans, Turks and Tatars etc.

According to the Constitution adopted in 1991, Romania is a Republic. The Parliament is the supreme representative body and the sole legislative authority of the state. Romania has a bicameral Parliament consisting of the Chamber of Deputies and the Senate. They are elected by universal, equal, direct, secret, and free, in accordance with the electoral law. Romania is a member of the European Union since 2007 and of the Council of Europe since 1993.

Justice system

Romania is a country regulated by the civil law system. The main provisions regarding Romanian justice system are provided by Law no. 304/2004 regarding judicial administration. According to this law, justice is made in the name of the law and the judicial system is organized as a hierarchical system of courts, organized as follows: High Court of Cassation and Justice (*Înalta Curte de Casație și Justiție*), Courts of Appeal (*curți de apel*); county courts and the Bucharest Municipal Court (*tribunale*) and local county court (*juducătorii*). Many courts are organized in specialized sections for civil and

penal matters. Within the courts of appeal and county courts normally there are sections regarding civil cases, criminal, commercial and family cases, labour conflicts or social insurance matters.

A prosecutor's office (*parchet*) is attached to each court. According to the law, the prosecutors are independent in relation to the courts and to any other public authority and perform their duties according to the principle of legality, impartiality, and hierarchical control, under the authority of Minister of Justice. The control of the Minister of Justice is restrained to the supervision of how the prosecutors fulfil their professional duties in general, but this control may not concern the measures imposed by prosecutors and decisions they adopt in individual cases. The legal framework provides some safeguards for professional independence of prosecutors, as follows: career decision regarding prosecutors are taken by Superior Council of Magistracy (CSM) - Prosecutor Section; objective criteria are set for distribution of cases to prosecutors and special procedural regulations protect the prosecutor's independence during investigation. Prosecutors are considered magistrates and belong to the judiciary in Romania.

Having competences in relation with the professional career of judges and prosecutors, the Supreme Council of Magistracy is the institution that guarantees the independence of the judiciary system. The Council is independent and complies only to the law.

Relevant constitutional provisions on individual freedom

After the Revolution of December 1989, a process of reform began in the Romanian judiciary in order to align its normative framework to the European standards. The Constitution adopted in 1991 provides guarantees for: the right to life, to physical and mental integrity (art. 22), individual freedom (art. 23) and right to defense (art. 24). Thus, regarding individual freedom, art. 23 stipulates that individual freedom and security are inviolable and search, detainment, or arrest of a person shall be permitted only in the cases and under the procedure provided by law. Regarding pre-trial detention, this shall be ordered by a judge and only during criminal proceedings (par. 3). Another relevant constitutional disposition focuses on the length of pre-trial detention during criminal proceedings. This may only be ordered for 30 days at the most and extended for maximum 30 more days, without the overall length to exceed a reasonable term, and no longer than 180 days during the criminal investigation phase (par. 5). After the

proceedings have started in front of the court, the said court is bound, according to the law, to check, on a regular basis and no later than 60 days, the lawfulness and grounds of the pre-trial detention. If the grounds for the pre-trial detention have ceased to exist or if the court finds that there are no new grounds justifying the continuance of the custody, the court shall order at once the release of the defendant. Another relevant constitutional disposition provides that a person under pre-trial detention shall have the right to apply for provisional release, under judicial control or on bail. The presumption of innocence is also guaranteed by the Romanian Constitution.

Article 20 of the Constitution establishes that, in case of conflict, the international regulations regarding human rights prevail over the national law. Thus, constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania has sign up for. Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take priority, unless the Constitution or national laws comprise more favorable provisions.

In this respect, it is to be noted that on 20th of June 1994 Romania ratified the European Convention on Human Rights and this event represented an important step for the alignment process of internal regulations to European standards.

Criminal law

Up until recently, the Romanian penal policy was outlined in the Criminal Code adopted in 1968, into force since 1969. As it had been adopted during the communist regime, that Criminal Code was influenced by that ideology. After 1989, the Criminal Code has been subject to substantial reforms meant to bring the provisions in criminal matters in line to the new socio-political realities in Romania. The modifications have impacted on issues like the way different penalties are implemented, the sanctioning system applicable to juveniles or the preventive measures.

Similarly, the Criminal Procedure Code into force since 1969 was subsequently amended to in line with the changes in the political regime and international instruments signed by Romania. The modification of the Constitution in 2003 also led to major changes in the Code.

With regard to the specific aspect of the system of preventive measures ordered in the criminal process, after 1989 a series of reforms were to be initiated which were mainly aimed at: limiting the role of the prosecutor in imposing these measures and, consequently, increasing the authority judges; guaranteeing rights (for example, the right to defense); establishing objective criteria regarding the reasons that justify taking the measure of pre-trial detention, etc. All these steps have been introduced in the framework of successive amendments to the criminal procedural legislation. Most of the times, the vectors that led to these changes were represented by the ratification by Romania of international conventions on human rights or the jurisprudence of the ECHR in a series of cases brought by Romanian citizens alleging violation of their procedural rights.

A New Criminal Code (Law no. 286/2009) has entered into force on 1st February 2014, together with a new Penal Procedural Code. According to the Explanatory Notes, the objectives of the new regulation are to create a coherent legislative framework by eliminating some overlaps existing among the prior regulations, to simplify the criminal procedures eliminating undesirable disparities between cases, to ensure that the criminal trial fulfils the standards imposed by the Romanian Constitution and international treaties on human rights, to transpose in the internal criminal legislation the European regulations and to harmonize the Romanian criminal law system with others EU member states.

At the same time, the new criminal procedures secure the right to liberty and security in the course of the trial, either for the suspect (Romanian *suspect*, meaning the persons towards whom the criminal investigation is being continued following its opening *in rem*) or for the defendant (Romanian *inculpat*, meaning the person against whom a criminal action is set in motion). The European regulations and the case law of ECHR are also reflected in some articles of the Code.

5. The legal bases and the fundamental legal aspects with respect to PTD

5.1 General principles and competent authorities and their roles

Article 9 of the Romanian Criminal Procedure Code (CPC) stipulates that during the trial the right of every person to freedom and safety is guaranteed. Any measure involving deprivation or restrictive of freedom is exceptional and only in the cases and under the

conditions provided by law. Furthermore, any person arrested has the right to be informed as soon as possible and in a language which he understands on the reasons for his arrest. He has also the right to file an appeal against the disposition of the measure. When a measure involving deprivation or restriction of freedom that has been ordered is found illegal, the judicial authorities have the obligation to order the revocation of the action and, if appropriate, the release of the person detained or arrested. At the same time, any person subject to an unlawful decision of deprivation of liberty has the right to compensation or repair for the damage suffered.

The right to defense is established in article 10 of the new Criminal Procedure Code. It provides that the main parties in court shall have the right to defend themselves or to be assisted by a lawyer. The suspect has the right to be informed before any hearing about his deed for which is being investigated and legal classification of it. In turn, the defendant has the right to be informed as soon as possible about his deed for which he is prosecuted and the legal classification of it. The provisions of the Criminal Procedure Code establish also the right to silence.

Criminal Procedure Code does not provide a definition of pre-trial detention. A possible definition is found in the literature, according to which “pre-trial detention is the strictest measure of deprivation of liberty that can be ordered by a judge or, as the case may be, by the court and consists in detaining the defendant in specific places intended for those deprived of their liberty in criminal cases”.

Another definition, somewhat similar, is that “pre-trial detention is that preventive measure of deprivation of liberty, by which the competent judicial body orders the detention of the defendant for the duration and under the conditions provided by law, in places specially designed for this purpose, in the interest of prosecution. criminal or trial.”(Neagu, 2018).

In a simpler manner, the pre-trial detention is defined as the preventive measures which consists in deprivation of liberty of the defendant accused of a criminal offence, in a detention facility, on a larger period of time than the taking in custody (Tocan in Udriou, 2020).

Pre-trial detention can be order by the Judge for Rights and Liberties, during the criminal investigation, by the Preliminary Chamber Judge¹, in preliminary chamber procedure, or by the Court before which the case is pending, during the trial. From the applicable legal provisions (following several decisions of the ECHR and the modification of the Constitution in 2003), only a judge can decide on the such measure. The prosecutor is not competent in this respect, nor is the police.

5.2 Grounds for detention. Legal pre-requisites. Suspicion and proportionality

Pre-trial detention may be ordered only if evidence generates a reasonable suspicion that the **defendant** committed an offence (art. 223 CPC). Therefore, for the pre-trial detention, it is mandatory that the criminal action is set in motion; the measure cannot be taken towards the suspect.

Unlike the taking in custody and even in comparison to other measures (alternatives to pre-trial detention), the Code uses the term *evidence* (Romanian *probe*) and not only reasonable cause (Romanian *indicii temeinice*). However, as – except for the taking in custody – the other measures can be taken only against the defendant, meaning that there is already evidence concerning the perpetration of a criminal offence (because otherwise the criminal action cannot be started), it results that the condition regarding the evidence it is not in fact specific to pre-trial detention.

From these provisions it also results that the pre-trial detention cannot be ordered if there are causes which prevents the continuation of criminal action (e.g. status of limitation, grace, amnesty, death of the defendant etc.).

The **reasonable suspicion** is interpreted based on ECHR case law and involves data capable of convincing an objective and impartial observatory that a person has committed a criminal offence (Fox, Campbell and Harley vs. United Kingdom, 30 august 1990).

¹ The preliminary chamber judge is responsible for verifying the legality of the prosecution act, the legality of the evidence and is an appeal body for the decision taken by the prosecutor.

Also, other than condition regarding the evidence which generates a reasonable suspicion for the perpetration of a criminal offence, the pre-trial detention may be ordered if one of the following situations exists:

- a) the defendant has run away or went into hiding in order to avoid the criminal investigation or trial, or has made preparations of any nature whatsoever for such acts. Change of domicile does not automatically attracts the preventive measure based on this ground;
- b) a defendant tries to influence another participant in the commission of the offense, or a witness or an expert to destroy, alter or hide or to steal physical evidence or to determine a different person to adopt such behavior;
- c) a defendant exerts pressures on the victim or tries to reach a fraudulent agreement with them;
- d) there is reasonable suspicion that, after the initiation of the criminal action against them, the defendant committed a new offense with intent or is preparing to commit new offense.

These conditions are the same as the ones described in a general manner by art. 202 CPC which regulates the preventive measures. The legal literature (Crisu, 2017) considers that such double regulations may cause problems and to not comply with the requirements on preventing the arbitrary in criminal procedure matters.

Pre-trial detention of the defendant can also be ordered if the evidence generate reasonable suspicion that they committed an intentionally offense against life, an offense having caused bodily harm or death of a person, an offense against national security as under the Criminal Code and other special laws, trafficking in drugs or other products, in the sense of Law no. 143/200 and Law 194/2011, non-compliance with the weapons regime established by the law, trafficking and exploitation of vulnerable persons, acts of terrorism, money laundering, counterfeiting of currency or other securities, blackmail, rape, deprivation of freedom, tax evasion, assault of an official, judicial assault, corruption, an offense committed through informatics systems and electronic communication means or another offense for which the law requires a penalty of no less than 5 years of imprisonment. Furthermore, based on an assessment of the seriousness of facts, of the manner and circumstances under which it was committed, or the entourage and the environment from where the defendant comes, of their criminal

history and other circumstances regarding their person, it is decided that their deprivation of freedom is necessary in order to eliminate a threat to public order. These conditions are presented here not as examples but as all the conditions that can justify the taking of the pretrial measure.

The **threat to public order** is not defined by the law, but can be appreciated taking into consideration the gravity of the criminal offence imputed to the defendant, the means and circumstances of the offence, the background of the defendant, recidivism etc. Other criteria have been added following ECHR case law, such as the risk for the defendant to run or the risk to prevent the criminal justice to be made. A single criterion is not usually sufficient, but some of them may solely justify the pre-trial detention (e.g. recidivism).

In all cases, the pre-trial detention measure must be **proportional** with the gravity of the accusation. As shown above, the proportionality is analyzed both abstractly (based on the criminal offence of which the defendant is being accused and on the penalty he risks) and concretely (based on the concrete circumstances of the criminal offence and on the defendant himself).

5.3 Procedures

The prosecutor, if he/she believes that the requirements set by law are met, shall prepare a justified application for the taking of a pre-trial detention measure against a defendant, by indicating the legal basis for it.

It has to be stated that, depending on the quality of the defendant, some preliminary conditions have to be met sometimes, such as authorization by the Supreme Council of Magistracy in case of magistrates or by the relevant chamber of the Parliament in case of senators or deputies. Other than this, the procedure is similar.

a. Ruling on the pre-trial detention proposal

In case of a defendant held in custody, the term for the resolution of a pre-trial detention application must be set prior to the expiry of the custody term. The date and time shall be communicated to the prosecutor, who is under an obligation to ensure the presence of the defendant before the Judge for Rights and Liberties. Also, the date and time are communicated to the defendant's counsel, who, upon request, shall be provided with the case file for consultation.

A pre-trial detention proposal shall be ruled only in the presence of the defendant, except for situations where they are unjustifiably absent, are missing, are avoiding coming to court or cannot be brought before the judge due to their health condition or to force majeure events or a state of necessity.

In all cases, the legal assistance to the defendant by a retained or court appointed counsel is mandatory. The presence of the prosecutor is also mandatory.

The Judge for Rights and Liberties hears the defendant on issues related to the act of which they are accused and on the grounds on which the pre-trial detention proposal filed by the prosecutor is based.

Prior to proceeding to the hearing of the defendant, the Judge for Rights and Liberties shall inform them of the offense of which they are accused and of their right not to make any statements, by drawing their attention to the fact that anything they declare can be used against them.

If the requirements set by law are met, the Judge for Rights and Liberties shall sustain the prosecutor's application and shall order the pre-trial detention of a defendant through a reasoned court resolution.

b. Information on the ruling

The defendant shall be informed forthwith, in a language they understand, of the reasons why pre-trial detention was ordered. A person against whom a pre-trial detention measure was ordered shall be informed, under signature, in writing, of their processual rights as well as the right to access emergency medical assistance, the right to challenge the measure and the right to request revocation or replacement of detention with another preventive measure; if the defendant is unable or refuses to sign, a report shall be prepared on this. The written model for such information is provided by an Order jointly adopted by the Ministry of Justice, Ministry of Internal Affairs, High Court of Cassation and Justice and Public Ministry.

Immediately after ordering a pre-trial detention measure, the Judge for Rights and Liberties of the first instance court or of the hierarchically superior court having ordered such measure, shall inform the defendant's family member or another person appointed by him/her. After the defendant was placed in a detention facility, they have the right to

inform personally or to ask the management of the relevant facility to inform the family or the person appointed about the location where they are detained.

When pre-trial detention was ordered against a defendant having an underage person under their protection, a person subject to a prohibition, a person subject to guardianship or trusteeship or a person who, due to their age, illness or other cause needs help, the relevant authority shall be informed forthwith, in order to take legal measures for the protection of that person.

c. The pre-trial detention warrant

Based on the court resolution ordering pre-trial detention of a defendant, the Judge for Rights and Liberties of the first instance court or, as applicable, of the hierarchically superior court shall issue forthwith a pre-trial detention warrant.

If the same court resolution ordered the pre-trial detention of several defendants, one warrant shall be issued for each of them.

A pre-trial detention warrant shall indicate:

- a) the court with which the Judge for Rights and Liberties having ordered the pre-trial detention measure works;
- b) the warrant issuance date;
- c) the surname and first name and the capacity of the Judge for Rights and Liberties having issued the warrant;
- d) the defendant's identification data;
- e) the term for which the pre-trial detention of the defendant was ordered, by mentioning the date when it expires;
- f) the charges against the defendant, by indicating the date and place of their commission, their legal classification, the offenses and the penalty set by law;
- g) the actual grounds having caused pre-trial detention.
- h) the order to arrest the defendant;
- i) the location where the defendant placed in pre-trial detention will be detained;
- j) the signature of the Judge for Rights and Liberties;
- k) the signature of the present defendant. If they refuse to sign, this shall be mentioned in the warrant.

When an arrest warrant was issued after hearing the defendant, the judge having issued the warrant shall hand a copy of the warrant to the arrested person and to the law enforcement body. If a victim requests to be informed of the release in any way of the arrested person, the judge who issued the warrant shall mention this in a report, which shall be delivered by them to the law enforcement body.

d. Enforcement of the warrant

For the enforcement of a pre-trial detention warrant, law enforcement bodies may enter the domicile or residence of any person, without their permission, as well as the premises of any legal entity, without permission from its legal representative, if there are reasons generating a reasonable suspicion that the person indicated in the warrant is at that domicile or residence (art. 231 par. 5 CPC).

In the event that the pre-trial detention of a defendant was ordered in absentia due to health condition, to a force majeure event or a state of necessity, the defendant shall be brought, upon cessation of such reasons, before the Judge for Rights and Liberties having ordered the measure or, as applicable, before the Preliminary Chamber Judge or the judicial panel with which the case is pending disposition.

When a person indicated in a pre-trial detention warrant was not found, the law enforcement body in charge of enforcing the warrant shall prepare a report confirming this and shall inform the Judge for Rights and Liberties having ordered such pre-trial detention, as well as the competent bodies, in order for them to put out a wanted order and to place the person the border watch list.

5.4 Duration and prolongation of pre-trial detention

A defendant's pre-trial detention may be ordered for a maximum of 30 days.

a. Pre-trial detention during criminal investigation

The pre-trial detention of a defendant may be extended during the criminal investigation if the grounds having caused the initial arrest further require the detention of the defendant or there are new grounds justifying the extension of such measure.

An extension of pre-trial detention can only be ordered upon a reasoned application submitted by the prosecutor conducting or supervising the criminal investigation.

A proposal to extend pre-trial detention shall be submitted along with the case file with the Judge for Rights and Liberties, at least 5 days before the pre-trial detention term expires.

The defendant is heard by the Judge for Rights and Liberties in respect of all reasons on which the proposal to extend the pre-trial detention term is based in the presence of a retained or court appointed counsel.

If a defendant placed in pre-trial detention is admitted to a hospital and due to health related reasons cannot be brought before the Judge for Rights and Liberties or when, due to force majeure events or a state of necessity, their transfer is not possible, the proposal will be considered in the absence of the defendant, but only in the presence of their counsel, who shall be allowed to argue in court.

The prosecutor's attendance is mandatory.

The Judge for Rights and Liberties shall rule upon an application for extension of the pre-trial detention term before the expiry of such term.

The Judge for Rights and Liberties may also award, during the criminal investigation, further extensions. However, each such extension shall not exceed 30 days

The total duration of the defendant's pre-trial detention during the criminal investigation cannot exceed a reasonable term and can be no longer than 180 days (see the Constitutional provisions).

b. Pre-trial detention during judgment

During the trial in first instance, the total duration of a defendant's pre-trial detention may not exceed a reasonable period of time and cannot exceed half of the special maximum limit provided by law for the offense for which the court was informed. In all cases, the duration of pre-trial detention in first instance may not exceed five years.

c. Cessation of pre-trial detention

Preventive measures shall lawfully cease in the following cases:

a) upon expiry of the term provided by law or established by judicial bodies;

- b) in case the prosecutor decides to drop charges or the court issues a judgment for acquittal, termination of criminal proceedings, waiver of penalty, deferral of penalty or a suspended sentence under supervision, even if this is not final;
- c) on the date when the judgment to convict the defendant remains final;
- d) in other cases specifically provided by law.

A pre-trial detention (and house arrest) lawfully ceases as follows:

- a) during the criminal investigation or during the trial in first instance, upon reaching the maximum term provided by law;
- b) during appeal, if the measure reached the duration of the penalty established by the court sentence ordering conviction.

d. Revocation of pre-trial detention

A preventive measure is revoked ex officio or upon request, if the reasons that caused it ceased or new circumstances confirming the unlawfulness of such measure occurred. The measure can be revoked also when the release of the defendant is ordered, if they are held in custody or are under pre-trial detention, unless arrested in another case.

e. Replacement of pre-trial detention

A preventive measure is replaced, ex officio or upon request, by a less severe preventive measure, if the requirements provided by law for its ordering are met and, after an assessment of the case's specific circumstances and the defendant's conduct in the process, it is deemed that the milder preventive measure is sufficient to achieve the objective laid down by Art. 202 of the CPC.

When the defendant is present, the application is ruled only after the defendant is heard on all grounds on which the application is based, in the presence of a retained or court appointed counsel. Such application may rule on also in the absence of the defendant, when they fail to come before the court, although duly summoned, or when, due to health reasons, force majeure events or a state of necessity they cannot be brought before the court, but only in the presence of the retained or court appointed counsel who is allowed to argue in court. The prosecutor's attendance is mandatory.

5.5 Special provisions on preventive measures enforced against juveniles

Juveniles are considered less than 18 years old. According to Romanian law, children under 14 are not considered responsible. Between 14 to 16 years old they are held responsible if it is proven they were responsible by the time of the deed. Over 16 they are criminally responsible, but they are judged as juveniles.

However, taking in custody and pre-trial detention may be ordered exceptionally against an underage defendant, only if the effects of their deprivation of freedom on their personality and development are not disproportionate to the objective pursued by such measure.

In determining the duration of a pre-trial detention measure, the defendant's age at the date of ordering, extending, or maintaining such measure shall be considered.

When ordering the taking in custody or the pre-trial detention of a juvenile, the minor's legal representative or, where appropriate, the person in whose care or supervision the minor is, must be notified.

The special detention regime of juveniles shall be established by Law on the Service of Penalties and Measures Ordered by Judicial Bodies during the Criminal Trial, based on age particularities, so the preventive measures taken against them should not harm their physical, mental or moral development.

Regarding the existence of procedural measures to support the decision of judges on pre-trial detention and alternatives to it, it should be noted that in Romania there is a probation system but it has no express competence regarding the taking / maintaining a preventive measure. Probation services may draw up assessment reports for defendants (including those remanded in custody) but in terms of their purpose they are subject to general legal provisions, with no specific regulations allowing for their more intensive use of preventive measures. In a previous research conducted by APADOR-CH, the interviewed lawyers appreciated in a very high proportion (73.8%) the fact that judges do not appeal when imposing a preventive measure on risk assessments made by the services. probation. However, the participants emphasized the importance of having a risk assessment in the case file, the conclusions of which could play an important role in the application of alternative measures to pre-trial detention. The study also highlighted the importance of the elaboration by the Superior Council of Magistracy of guidelines for

magistrates that have the role of ensuring a unitary practice regarding the conditions and concrete criteria for the application of each preventive measure. It was also proposed to adopt a normative framework subsequent to the Code of Criminal Procedure, which would contain more concrete information to support magistrates in individualizing the application of preventive measures.

6. Measures to avoid PTD/Alternatives in practice

The main alternatives to the pre-trial detention are the other preventive measures, such as the judicial control, judicial control on bail and house arrest.

Also, it has to be stated that, if, based on medical documents, it is ascertained that a defendant placed in pre-trial detention suffers from a disease that cannot be treated in the medical network of the National Administration of Penitentiaries, the management of the detention facility orders that such defendant be treated in the medical network of the Ministry of Health under constant guardianship. The reasons that led to this measure shall be communicated immediately to the prosecutor, during the criminal investigation, to the Preliminary Chamber Judge, during this procedure, or to the Court, during the trial.

6.1 Judicial control (ro. controlul judiciar)

During the criminal investigation, a prosecutor may order the taking of a judicial control measure against a defendant, if such preventive measure is necessary for the attainment of the purpose set by Art. 202 of the CPC.

a. Procedure

The Preliminary Chamber Judge, in preliminary chamber procedure, or the court, during the trial, may order a judicial control measure against a defendant.

The attending defendant shall be informed forthwith, in a language they understand, of the offense of which they are under suspicion of, and of the reasons for taking a judicial control measure.

A judicial control measure may be ordered only after hearing the defendant, in the presence of a retained or court appointed counsel.

A prosecutorial order through which a judicial control measure was taken can be challenged by a defendant through complaint with the Judge for Rights and Liberties of

the court that would have the competence of jurisdiction to rule on the case in first instance within 48 hours of its communication.

Providing of legal assistance to the defendant and the prosecutor participation are mandatory.

The Judge for Rights and Liberties may revoke such measure, if the legal provisions regulating the requirements for taking it were violated.

The Preliminary Chamber Judge or the court with which the case is pending may order, through a court resolution, the taking of a judicial control measure against a defendant, based on a reasoned application from the prosecutor or ex officio.

b. Obligations

While under judicial control, a defendant shall comply with the following obligations:

- a) to appear before the criminal investigation body, the Preliminary Chamber Judge or the court any time they are called;
- b) to inform forthwith the judicial bodies having ordered the measure or with which their case is pending on any change of domicile;
- c) to appear before the law enforcement body appointed to supervise them by the judicial bodies having ordered the measure, according to the supervision schedule prepared by the law enforcement body or whenever they are called.

Judicial bodies having ordered the measure may require that the defendant, during the judicial control, comply with one or more of the following obligations:

- a) not to exceed a specific territorial boundary, set by the judicial bodies, without their prior approval;
- b) not to travel to places set specifically by the judicial bodies or to travel only to places set by these;
- c) to permanently wear an electronic surveillance system (this monitoring was not however implemented yet in Romania, although it is provided by the CPC).
- d) not to return to their family's dwelling, not to get close to the victim or the members of their family, to other participants in the committed offense, witnesses or experts or to other persons specified by the judicial bodies and not to communicate with these in any way, be it directly or indirectly;

- e) not to practice a profession, craft or activity during the practice or performance of which they committed the act;
- f) to periodically provide information their living means;
- g) to subject themselves to medical examination, care or treatment, in particular for the purpose of detoxification;
- h) not to take part in sports or cultural events or to other public gatherings;
- i) not to drive specific vehicles established by the judicial bodies;
- j) not to hold, use or carry weapons;
- k) not to issue cheques.

Regarding the verification of the fulfillment of obligations, this is usually done by the police. We consider those obligations which impose a control on the freedom of movement of the defendant. In practice, judicial control requires the defendant to report regularly to the police station in accordance with a schedule. Regarding the obligation to undergo a medical treatment, it is performed within the medical units within the public health system. Currently, there is no involvement of private structures (eg. non-governmental organizations) in the execution by the defendant of the obligations established by the court. As regards the imposition of an obligation to carry an electronic surveillance system, it should be noted that this obligation cannot currently be imposed. The reasons for this situation are the lack of technical infrastructure and several differences between the representatives of the various institutions involved in managing this system (Ministry of Home Affairs, National Penitentiary Administration and National Probation Directorate). It should be noted that over time several draft regulations have been developed for the implementation of an electronic monitoring system, recognizing its importance at the level of decision makers. The recent challenges posed by the COVID 19 pandemic reopened the discussion about the need to implement an electronic monitoring system that would have facilitated an adequate surveillance of people who were required to live in solitary confinement at home. However, no progress had been made, although in March 2020, the idea of creating a pilot center within a mayor's office of Bucharest had been advanced based on a partnership between the Ministry of Health and the City Hall of Sector 1.

A document ordering a judicial control measure specifies explicitly the obligations that have to be observed by a defendant during the term of such measure, and they are warned

that, in case of breaching in ill-faith the obligations resting upon them, a judicial control measure can be replaced by a house arrest measure or a pre-trial detention measure.

The observance by the defendant of the obligations resting upon them during a judicial control is supervised by the institution, body or authority appointed by the judicial bodies having ordered the measure, under the law.

The institution, body or authority, periodically checks the observance of obligations by the defendant, and if it finds violations shall immediately notify the prosecutor, during the criminal investigation, the Preliminary Chamber Judge, in preliminary chamber procedure, or the court, during the trial.

If, during the term of a judicial control measure, a defendant breaches in ill-faith their obligations or there is a reasonable suspicion that they intentionally committed a new offense in respect of which initiation of a criminal action against them was ordered, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the court, upon request by the prosecutor or ex officio, may order the replacement of this measure by a house arrest measure or a pre-trial detention measure, under the terms set by the law.

During the criminal investigation, the prosecutor having taken the measure may order, ex officio or upon justified request by the defendant, through an order, the imposition of new obligations for the defendant or the replacement or termination of those ordered initially, if well-grounded reasons justifying this occur, after hearing the defendant.

6.2 Judicial control on bail (ro. control judiciar sub cautiune)

Bail shall be posted in the defendant's name, by depositing a set amount of money with the judicial bodies or by posting a property bond, in securities or real estate, within the limits of the set money amount, in favor of the same judicial bodies.

The value of a bail is of at least RON 1,000 (aprox. EUR 210) and is determined based on the seriousness of the accusation brought against the defendant, their material situation, and their legal obligations.

During such measure, a defendant must comply with the obligations listed at judicial control.

Bail guarantees the participation by the defendant in criminal proceedings and their compliance with the obligations.

The court shall order, by a court decision, confiscation of bail if a judicial control on bail was replaced by a house arrest or pre-trial detention measure.

In other cases, the court shall order restitution of the bail, through a court decision.

In case of a decision to drop charges, the prosecutor shall also order restitution of the bail.

In the event that, during a measure of judicial control on bail, a defendant violates in ill-faith the obligations resting upon them, or there is a reasonable suspicion that they committed a new offense with direct intent in respect of which initiation of a criminal action against them was ordered, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the court, upon justified application by the prosecutor or ex officio, may order replacement of this measure by a house arrest or a pre-trial detention measure, under the law.

6.3 House arrest (ro. arestul la domiciliu)

House arrest – existing only since 2014 in the Romanian legislation - is ordered by the Judge for Rights and Liberties, by the Preliminary Chamber Judge or by the court, if the requirements set by Art. 223 are met and if such measure is necessary and sufficient for the attainment of one of the purposes set by Art. 202 par. (1).

House in the sense of the Criminal Procedure Code is defined by Law no. 254/2013 on the enforcement of penalties and preventive measures involving deprivation of liberty and refers to the place where the defendant lives, the room, the accessory or the yard of such places.

a. Procedure

The fulfilment of the terms set under previous provision is assessed by considering the threat level posed by the offense, the purpose of such measure, the health condition, age, family status and other circumstances related to the person against whom such measure is taken.

Such measure may not be ordered against a defendant in whose respect there is a reasonable suspicion that he committed an offense against a family member and in relation to which the defendant previously received a final conviction for an escape offense.

The Judge for Rights and Liberties of the court that would have the competence of jurisdiction to rule in the case in first instance or of the court of the same level within the territorial jurisdiction of which the location where the committed offense was ascertained or the premises of the prosecutors' office with which the prosecutor conducting or supervising the criminal investigation belongs is located may order a defendant placed under house arrest, based on a reasoned proposal from the prosecutor.

Failure by the defendant to appear shall not prevent the Judge for Rights and Liberties from ruling on the proposal advanced by the prosecutor.

The Judge for Rights and Liberties shall hear the defendant when the latter is present.

The legal assistance of the defendant and the prosecutor's attendance are mandatory.

The Judge for Rights and Liberties sustains or denies an application by the prosecutor through a reasoned court resolution.

The Preliminary Chamber Judge or the court with which the case is pending may order, through a court resolution, a defendant put under house arrest, upon justified application by the prosecutor or ex officio.

A house arrest measure consists of an obligation imposed on a defendant, for a determined time period, not to leave the building where they live, without permission from the judicial bodies having ordered such measure or with which the case is pending, and to observe certain restrictions imposed by those.

b. Obligations

During house arrest, a defendant has the following obligations:

a) to appear before criminal investigation bodies, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the court whenever they are called;

b) not to communicate with the victim or with members of their family, with other participants in the commission of the offense, with witnesses or experts, as well as with other persons established by the judicial bodies.

The Judge for Rights and Liberties, the Preliminary Chamber Judge or the court may order that, during house arrest, a defendant permanently wear an electronic surveillance system (not yet implemented, as stated above).

The court resolution ordering such measure specifies explicitly the obligations that have to be observed by a defendant, and their attention is drawn to the fact that, in case of violation in ill-faith of the measure or of the obligations resting upon them, such house arrest measure may be replaced by a pre-trial detention measure.

c. Content of the measure

During such measure, a defendant may leave the building for the purpose of appearing before judicial bodies, at their call.

Based on a written and justified request from the defendant, the Judge for Rights and Liberties or the Preliminary Chamber Judge or the Court, through a court resolution, may allow them to leave the building in order for them to go to their working place, to education or professional training courses or to other similar activities or for the purpose of procuring their essential living means, as well as in other well-grounded situations, for a limited time period, if this is necessary for the exercise of certain legitimate rights or interests of the defendant.

In emergency cases, for well-grounded reasons, a defendant may leave the building without the permission of the Judge for Rights and Liberties, the Preliminary Chamber Judge or of the court, during a strictly necessary time period, by informing immediately on this the institution, body or authority appointed in charge of their supervision and the judicial bodies having taken the house arrest measure or with which the case is pending.

d. Enforcement

A copy of the court resolution by the Judge for Rights and Liberties, the Preliminary Chamber Judge or of the Court ordering a house arrest measure shall be communicated forthwith to the defendant and to the institution, body or authority appointed in charge

of their supervision, to the law enforcement body within the territorial jurisdiction of which they live, to the public vital statistics service, and to border authorities.

The institution, body or authority appointed in charge of a defendant supervision by the judicial bodies having ordered house arrest regularly checks observance of the measure and of their obligations by the defendant, and if it finds breaches of these, shall immediately notify the prosecutor, during the criminal investigation, the Preliminary Chamber Judge, in preliminary chamber procedure, or the court, during the trial.

In the event that a defendant breaches in ill-faith a house arrest measure or the obligations resting upon them, or there is a reasonable suspicion that they committed a new offense with direct intent in respect of which a criminal action was initiated against them, the Judge for Rights and Liberties, the Preliminary Chamber Judge or the Court, upon justified request by the prosecutor or ex officio, may order the replacement of house arrest by pre-trial detention, under the terms set by the law.

e. Duration and prolongation

During the criminal investigation, house arrest may be ordered for a duration of maximum 30 days.

During the criminal investigation, house arrest may be extended only in case of need, if the reasons having determined the taking of such measure continue to exist or if new reasons have occurred; however, each such extension may not exceed 30 days. Following a decision of the Constitutional Court of 2015, the total duration of house arrest during criminal investigation cannot exceed 180 days.

In the situation when the extension of a house arrest term can be ordered by the Judge for Rights and Liberties of the court that would have the competence of jurisdiction to decide upon the case in first instance or of the court of the same level within the territorial jurisdiction of which the location where the committed offense or the premises of the prosecutors' office with which the prosecutor conducting or supervising the criminal investigation works are located.

The prosecutor's attendance is mandatory.

The Judge for Rights and Liberties sustains or denies a prosecutor's proposal through a reasoned court resolution.

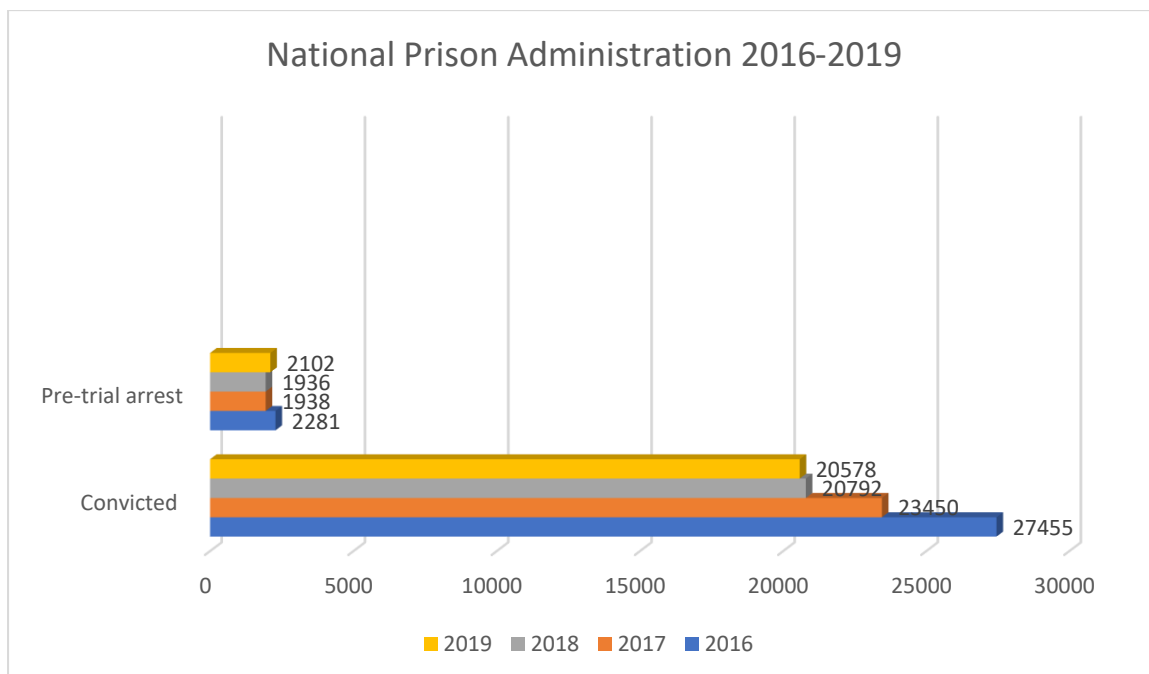
During the criminal investigation, the maximum duration of house arrest is 180 days.

The term for deprivation of freedom established through a house arrest measure is not considered in calculating the maximum duration of the defendant pre-trial detention measure during the criminal investigation.

7. PTD and Alternatives in figures and presentations

The analysis of the statistical information provided by the National Administration of Penitentiaries reveals for the period 2016-2019 the following distribution of pre-trial detention comparing with convicted offenders:

Graph 1: Proportion of pre-trial detainees versus convicted offenders

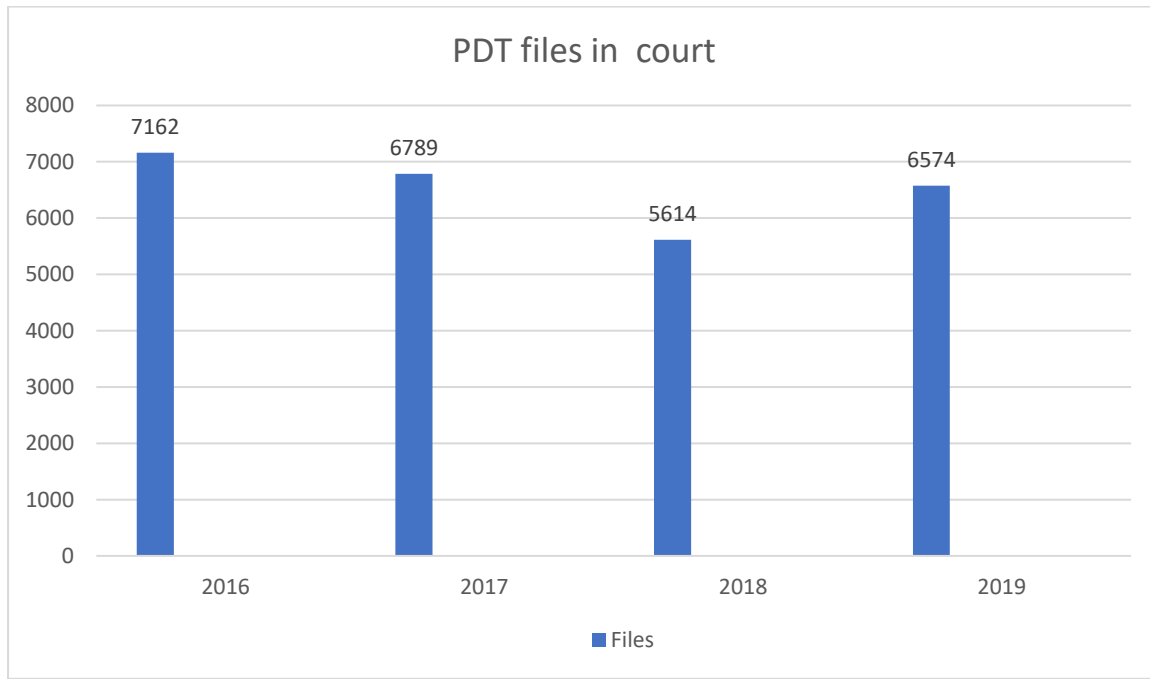


Source: National Administration of Penitentiaries

While the number of people under pre-trial detention remains relatively constant (2.281 persons in 2016 respectively 2.102 in 2019,) there is an obvious trend of reducing the number of convicts. The explanation is related with the policies implemented by the Ministry of Justice during this period aimed to decrease the number of detainees, (in particular as a result of the pilot decision issued by the ECHR in the case of *Rezimes vs. Romania*). Usually, arrested defendants are sent to prisons at the end of prosecution. During the prosecution they are incarcerated in the detention centres of the police stations.

As regards the cases in which the courts were requested to take the measure of pre-trial detention, their number in the reference range is relatively constant. If in 2016 were solved 7.162 cases, in 2019 the number was 6.574.

Graph 2: PTD files in court



Source: National Administration of Penitentiaries

8. Negative impact of PTD in the partner country – Literature review and statistical data

In this moment, we do not have accurate information that would give us a true picture of the costs involved in pre-trial detention in Romania. However, several pieces of information on these costs have been identified. Thus, in the case of detainees, the cost / detainee at the level of 2019 reported by the National Administration of Penitentiaries was 5180 RON (1080 Euro) / month. This amount includes the expenses done by administration with accommodation, food, transport, security, and salaries. It should be noted that in the penitentiary units subordinated to the National Administration of Penitentiaries are the defendants on pre-trial detention who have been sent to trial.

We do not yet have information on the expenses made by the Ministry of Home Affairs with persons under pre-trial detention and detained in police stations.

Regarding the expenses that the Ministry of Justice makes to provide legal assistance *ex officio* during the criminal investigation in a report for the period 2010-2014², we identified the amount of RON 154,481,466 (34,000,000 Euros). Most likely in 2020 the amount is significantly higher given that these fees have suffered over time a series of increases (from 22-90 Euro / case in 2008 to 100-450 Euro / case in 2019)³.

Romania is facing several problems related to the overcrowding of detention facilities, the inadequate conditions within them, aspects that, as we will present, would be the subject of cases before the European Court of Human Rights. Also, a series of findings regarding the conditions of detention were to be made in the reports of some international organizations (for example, the Committee for the Prevention of Torture) or of some organizations or institutions in Romania (APADOR-CH or the People's Advocate).

8.1 ECHR case law

The ratification of the European Convention of Human Rights has created in Romania the possibility for the violations of human rights to be observed also by the European Court of Human Rights. The Court's jurisprudence was a factor that triggered a significant number of changes both at the judicial and legislative level. In the specific case of Romania, it is to be noticed the fact that the majority of the causes before the Court affects the conditions of detention and the preventive arrests.

As a result of numerous complaints made in relation to breaches of the provisions of Article 3 of the Convention relating to the prohibition of torture or penalties and inhuman or degrading treatment or punishment, the ECHR within the framework of *Iacov Stanciu vs. Romania* case adopted a quasi-pilot decision which defined the poor material conditions in prisons and the level of medical care as sub-standard.

Even if *Iacov Stanciu v Romania* is not a pilot decision, it emphasized the systemic nature of the overcrowding and poor material conditions in the penitentiary system in Romania, underlining the fact that their resolution is not the exclusive competence of the National Administration of Penitentiaries.

² <https://www.fairtrials.org/wp-content/uploads/Raport-arestare-preventiva-final.pdf>

³ <http://www.unbr.ro/wp-content/uploads/2019/02/PROTOCOL-OFICII-FINAL-SEMNET-14.02.2019.pdf>

In the pilot judgment *Rezmiveş and others v. Romania*, the court ruled that Romania must take measures to improve conditions of criminal detention. The court indicated that there was a steady increase of cases against Romania concerning conditions of detention, overcrowding. To address those issues, Romania was required to reduce overcrowding (which was in many cases 2 m² per person) and improve material conditions of detention. The court recommended more often using alternatives to detention. In addition, Romania was required to introduce effective remedies available in cases of poor conditions of detention.

The Court jurisprudence regarding preventive measures is focused on three main issues as far as Romania is concerned: poor conditions in detention facilities, prolongation of preventive arrest without a proper analysis of legal criteria and unlawfully held of applicants without being issued a re-mand/preventive arrest warrant.

Regarding poor conditions in detention facilities, the complains are in relation to detention units of the Romanian Police. In many cases, the applicants are placed in this units during penal investigation, being placed in facilities administrated by National Prisons Administration after the procedure of indictment. The problems underlined by applicants are similar: lack of space (under 4 sq. m for each person), lack of ventilation, without enough natural light etc. Some-times these conditions worsen health problems of suspects/defendants. In all cases, the Court concluded that the conditions of detention caused the applicants harm that exceeded the unavoidable level of suffering inherent in detention and have thus reached the minimum level of severity necessary to constitute degrading treatment within the meaning of Article 3 of the Convention. In all decisions the Court was referring to inspections reports in police/prison arrest facilities, reports issued by the European Committee for the Prevention of Torture (CPT), The Association for the Defense of Human Rights in Romania – the Helsinki Committee (APADOR-CH). In the report issued in 2014 by CPT, the Committee underlined the necessity to reduce the period spent in police arrest units by suspects/defendants. The Committee noticed the efforts made to improve the conditions in the police stations arrest facilities. Despite these efforts, general conditions are described as mediocre, especially regarding overcrowding, hygiene and insufficient access to natural light and fresh air.

Relevant jurisprudence in relation to **poor material conditions in the police stations** is:

- *Constantin Aurelian Burlacu vs. Romania (2014)* - regarding poor detention conditions during preventive arrest (Central Arrest – Police General Direction Bucharest and Rahova Prison). The main problems are represented by overcrowding and subsequent problems (lack of ventilation and problems regarding the hygiene of detention facilities). The Court found that art. 3 from European Human Right Convention was violated and decided 8400 Euros moral prejudice.

- *Catană vs. Romania (2013)*- regarding poor detention conditions during preventive arrest (Bacău Police Inspectorate preventive arrest facilities). Main problems are represented by overcrowding, lack of a permanent water supply and of a toilet in detention cell. The applicant revealed some problems regarding medical care during preventive arrest (TB treatment). The Court found that art. 3 from Convention was violated and decided 3900 Euros as moral prejudice.

In relation with the prolongation of preventive arrest without a proper analysis of legal criteria, the Court underlined that extending the pre-trial detention must be examined in correlation with the individual circumstances of the suspect/defendant. In such circumstances the domestic authorities have the obligation to examine the applicant's personal situation in greater detail and to give specific reasons for holding him/her in custody. Even criteria as exist a reasonable suspicion that suspect/defendant had committed a serious offence is not enough to justify a repeated prolongation of pre-trial detention.

Regarding the **unlawful isolation of applicants without being issued a remand/preventive arrest warrant**, the Court reiterated that, in order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5, the starting-point must be his concrete situation. This means that a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question must be taken into account. The Court jurisprudence underlines the obligation of authorities (especially police and prosecutors) to **inform the suspect/defendant regarding his legal status and the guarantees they have access to**.

Relevant jurisprudence in this respect are:

- *Creangă vs. Romania (2012)*. The applicant complained under Article 5 of the Convention that there had been no legal basis for his detention on 16 July 2003. In this

case, no warrant had been issued for the applicant's placement in police custody. Consequently, the Chamber considered that the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 had had no basis in domestic law and that accordingly, there had been a breach of Article 5 § 1 of the Convention. The Court found that art. 5 from Convention was violated and decided Euro 8,000 in compensation for non-pecuniary damage.

- *Valerian Popescu vs. Romania (2014)*. The applicant complained under Article 5 § 1 of the Convention that there had been no legal basis for his detention for almost eleven hours on the premises of the prosecuting authorities. Under Article 3 of the Convention he complained about the conditions of his detention at the Bucharest Police Station detention facility, mainly on account of overcrowding and improper conditions of hygiene (the applicant's personal space turns out to have been less than 4 square meters, the toilet and the shower were not separated from the living area by a real partition). The Court considered that from the applicant's arrival at the National Anticorruption Direction headquarters at 9.20 p.m. on 8 February 2011, the prosecutor had a sufficiently strong suspicion to justify the applicant's deprivation of liberty for the purposes of the investigation, and that Romanian law provided for the measures to be taken in that regard, namely placement in police custody or pre-trial detention. However, the prosecutor decided only at a very late stage, after almost thirteen hours, to place the applicant in custody, which is a violation of art. 5 § 1 of the Convention. The Court found that art. 3 and 5 § 1 from Convention were violated and decided Euro 4,000 in compensation for non-pecuniary damage.

8.2 Reports of the European Convention for the Prevention of Torture

Romania has ratified also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which means the joining the mechanism for verifying the detaining conditions by means of visits to the Committee for the Prevention of Torture (CPT). Reports drawn up on the occasion have been used in the course of time by the European Court of Human Rights in substantiating its decisions.

The report written after the 2015 visit stresses that progress have been made by the Romanian authorities to improve the conditions within the premises of detention of the police or the National Administration of Penitentiaries. The report also mentions that

there has been implemented a series of procedures which would lead to a more transparent medical procedure, so that any cases of ill-treatment or torture can be identified.

However, the report mentions that, despite this progress, the conditions of detention of the police remain mediocre, in particular concerning overcrowding, poor condition of infrastructure, insanity and insufficient access to natural light and ventilation. In prisons CPT has found a large degree of overcrowding, with a maximum of 2 m² of space of person (in the penitentiary of women Targșor, for example), aggravated by the fact that the convicts spend between 20 and 22 hours per day in their cells.

In principle, once the arrested person is prosecuted, he/she is transferred from the Police remand center to the prison.

The CPT observations were duplicated by a series of visits made by the institution of the Ombudsman and by the non-governmental organizations, such as the Association for the Defence of Human Rights in Romania - the Helsinki Committee (APADOR-CH).

These reports were also mentioned in several ECHR decisions.

8.3 The Romanian Ombudsman

A novelty in the Romanian legal system is the appointment of the Romanian Ombudsman, as the institution that fulfils the role of national mechanism to prevent torture in places of detention within the framework of the Optional Protocol, adopted in New York on 18 December 2002, of the Convention against torture and other punishments or cruel, inhuman or degrading treatment. This Protocol was ratified by Romania in 2009 (Law no. 109/2009).

The tasks of Romanian Ombudsman are:

1. Visiting the place of detention to verify the conditions of detention;
2. Formulating recommendations to the management of visited detention places;
3. Formulating proposals to enhance the legislation regarding detention conditions;
4. Liaising with the Subcommittee of Prevention;
5. Organizing and coordinating education and training campaigns to prevent torture and other cruel, inhuman or degrading treatment and punishment.

The Ombudsman's report from 2015⁴ regarding the conditions of imprisonment, for example, makes several recommendations such as:

6. the need to set up a specialized medical body within the centers of detention and preventive arrest of the Romanian Police.
7. The shortening of the period spent in the police arrest by the persons re-manded and transferring them in prison units, in order to ensure a higher degree of safety;
8. Intensification of the role of the judge that supervises the depriving of liberty with regard to persons in police custody;
9. Allocation of financial resources for the improvement of the conditions of detention both at the level of the Romanian Police but also for the National Administration of Penitentiaries

8.4 European Union Agency for Fundamental Rights

The above-mentioned problems regarding detention spaces in Romania were mentioned in a report prepared by the European Union Agency for Fundamental Rights (FRA)⁵. The report drafted in 2019, referred to the impossibility of securing the minimum space in prisons, the lack of regulations on the frequency of hot water showers, the lack of toilets in cells, the absence of a transparent mechanisms for reporting situations involving violence between prisoners or between prison staff and prisoners.

8.5 On the individual level

Regarding the impact of the experience of pre-trial detention on the defendants, we have not identified in Romania the existence of studies/researches to assess the individual impact of the period of detention.

However, several reports of personal experiences associated with the period of pre-trial detention have appeared in the mass-media⁶, mainly from public persons who have

⁴ http://www.avp.ro/mnp/rapoarte_mnp/raport_special_mnp_2015_sinteza.pdf

⁵ https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-criminal-detention-conditions-in-the-eu_en.pdf

⁶ <https://stirileprotv.ro/stiri/politic/elena-udrea-si-povestea-gandacului-de-10-cm-din-celula-ce-a-spus-fostul-ministru-despre-conditiile-din-arest.html>; <https://www.capital.ro/revoltator-ce-a-fost-obligata-sorina-pintea-sa-manance-in-arest-nu-i-au-asigurat-hrana.html>; https://www.romaniatv.net/rudel-obreja-schimba-regulile-in-arestul-preventiv-ce-modificari-majore-trebuie-sa-faca-politia_215811.html;

reported the precarious conditions in the detention spaces. Systematically, the reports refer to improper conditions in these spaces (small area relative to the number of persons; the precariousness of the sanitary infrastructure; the existence of bugs or rats), insufficient attention paid to the separation of persons remanded in custody; inadequate food for people experiencing health problems. It should be noted that these references often concern the detention spaces under the authority of Ministry of Administration and Interior.

8.6 APADOR-CH

APADOR-CH carries out visits to the centers of preventive arrest and in the prisons and publishes periodic reports on the results of these visits. APADOR-CH is the organization with the most active involvement in monitoring the conditions of detention in Romania.

9. Other aspects on PTD and Alternatives in the national scientific literature

This section briefly presents the current situation regarding the literature dedicated to preventive arrest and other preventive measures. As there is a new Criminal Procedure Code in force since 1st February 2014, the literature included was only from this moment onwards.

The literature search was conducted using Romanian versions of key words such as ‘pre-trial detention’, ‘preventive measures’, ‘judicial control’, ‘judicial control on bail’ and ‘home arrest’.

The indexed references have highlighted that pre-trial detention issues and alternatives to it have been almost exclusively the subject of the investigation of some jurists, so far not identifying complementary approaches (e.g. in the field of sociology or psychology) that focus on investigating issues such as the impact of pre-trial detention, assessing the costs of applying preventive measures or its effectiveness.

Most of the literature identified describes the content or the procedure for imposing the pre-trial detention (Diaconu, 2015; Tuculeanu, A. and Sima, C., 2015; Crisu, 2017) and/or the judicial control and the judicial control on bail (Potrivitu, 2015), underlining the ECHR case law in this respect (Udroiu, 2019).

Another important part of the literature addresses important gaps or difficulties in relation to pre-trial detention - Ivan and Ivan (2016), for instance, look into how the pre-trial detention can be imposed when the defendant is abroad. Tomulet (2016) critically analyzes the Romanian practice around the notion of threat to public against the ECHR jurisprudence. Ghigheci (2015) emphasizes the need to align the reasons to impose deprivation of liberty to the judicial practice of the ECHR. The principle of proportionality is the subject of Grigorie (2015) who concludes that individual freedom established in the Constitution should not be an absolute one, but it should be restricted when the public order is at risk. But how the proportionality principle is applied in concrete situations is a different matter. In his opinion, the principle of proportionality should be structured along these two notions: necessity and adequacy. The necessity is measured in a concrete situation and not in a generic one. To be adequate, the measure should be the less intrusive one among those able to reach the legit aim. The author mentioned the *Ploski v. Poland* (2002) to illustrate how the principle of proportionality should be used. He also reminds the readers about the *Calmanovici v. Romania* and *Tarau v. Romania* where the Strasbourg Court decided that Romania should take more in consideration the alternatives to pre-trial detention.

Human rights in case of preventive arrest is also the focus of Tudorascu paper (2015). Issues like overcrowding, material conditions and proportionality are the main challenges for the European Convention of Human Rights. Doseanu (2015) argues that judicial practice lacks uniformity when it comes to hearing the defendant before imposing the preventive arrest. Furthermore, not hearing the defendant before imposing this measure should attract the nullity of the measure. In another paper, Doseanu and Doseanu (2015) stress on multiple contradictions existent in the Criminal Procedure Code in relation to preventive arrest and judicial control on bail. For instance, there is no clear procedure in place for imposing the judicial control on bail. The only procedure provided in the Criminal Procedure Code is when the pre-trial detention is replaced by judicial control on bail.

More recent books try to provide an overview on the legal provisions regulating preventive measures, by analyzing in-depth each article of the Criminal Procedure Code (Udroiu 2020; Volonciu and Uzla, 2017).

Some works also aim to carry out an analysis of how pre-trial detention represents *ultima ratio* in Romanian criminal law. In an approach with a pronounced theoretical character (Diaconu, 2015) it is stated that at the level of the regulatory framework it can be noted the existence of an intention to turn preventive arrest rather into an exception in criminal proceedings.

A broader analysis is carried out in an article (Oancea, Durnescu 2018) summarizing the results of the *DETOUR –Towards Pre-Trial Detention as Ultima Ratio project*. A series of interviews conducted with Romanian magistrates (prosecutors and judges) revealed that, as a rule, the imposition of a preventive measure requires a decision-making approach based primarily on the degree of social danger of the crime. Other considered criteria are relating to the person of the defendant (e.g. criminal record, the existence of addictions, the degree of social integration). It was also pointed out in the investigation that judges pay attention to the resonance that the offence has had among the public. Thus, in the absence of a risk assessment tool, judges shall carry out to a clinical risk assessment. The usefulness in the decision-making process of an report prepared by the probation service has been pointed out, but in practice this is not possible take into account the under-sizing of the service and, therefore, its inability to provide the evaluation within a short period of time.

10. European Aspects and their meaning for national PTD-practice in the national scientific literature

In 2013, the Law no. 302/2004 on international judicial cooperation in criminal matters was amended to transpose the provisions of the Framework Decision 2009/829/JHA on the European Supervision Order. These provisions are severely underused in the judicial practice. Up to now (July 2020) there is only one case of transfer from another EU Member State to Romania (passive case) registered in the official statistics that used this FD (personal communication with Ministry of Justice Romania). According to a judicial high official the reasons behind this practice are associated to the lack of confidence in this tool, the length of time needed to work with this tool and also to the lack of training and awareness among magistrates.

11. Short Conclusions and Outlook

At least, at the legislative level, the current legislation aims to make rather exceptional pre-trial detention in the framework of preventive measures adopted in criminal proceedings. In this way, we may notice the desire of the legislator to circumscribe as precisely as possible the limits within a person can be arrested. The alternative preventive measures adopted have several limitations which may undermine a broader application. In this way, although required by law, electronic monitoring cannot yet be applied. Also, in many cases the conditions of detention are characterized by overcrowding or poor hygiene conditions.

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List of graphs

Graph 1: Proportion of pre-trial detainees versus convicted offenders

Graph 2: PTD files in court



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PRETRIAD

Alternative pre-trial detention measures

Romanian National Report

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PRETRIAD

Alternative pre-trial detention measures

D2.1 Literature Review

Legislative analysis and pre-trial detention impacts

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