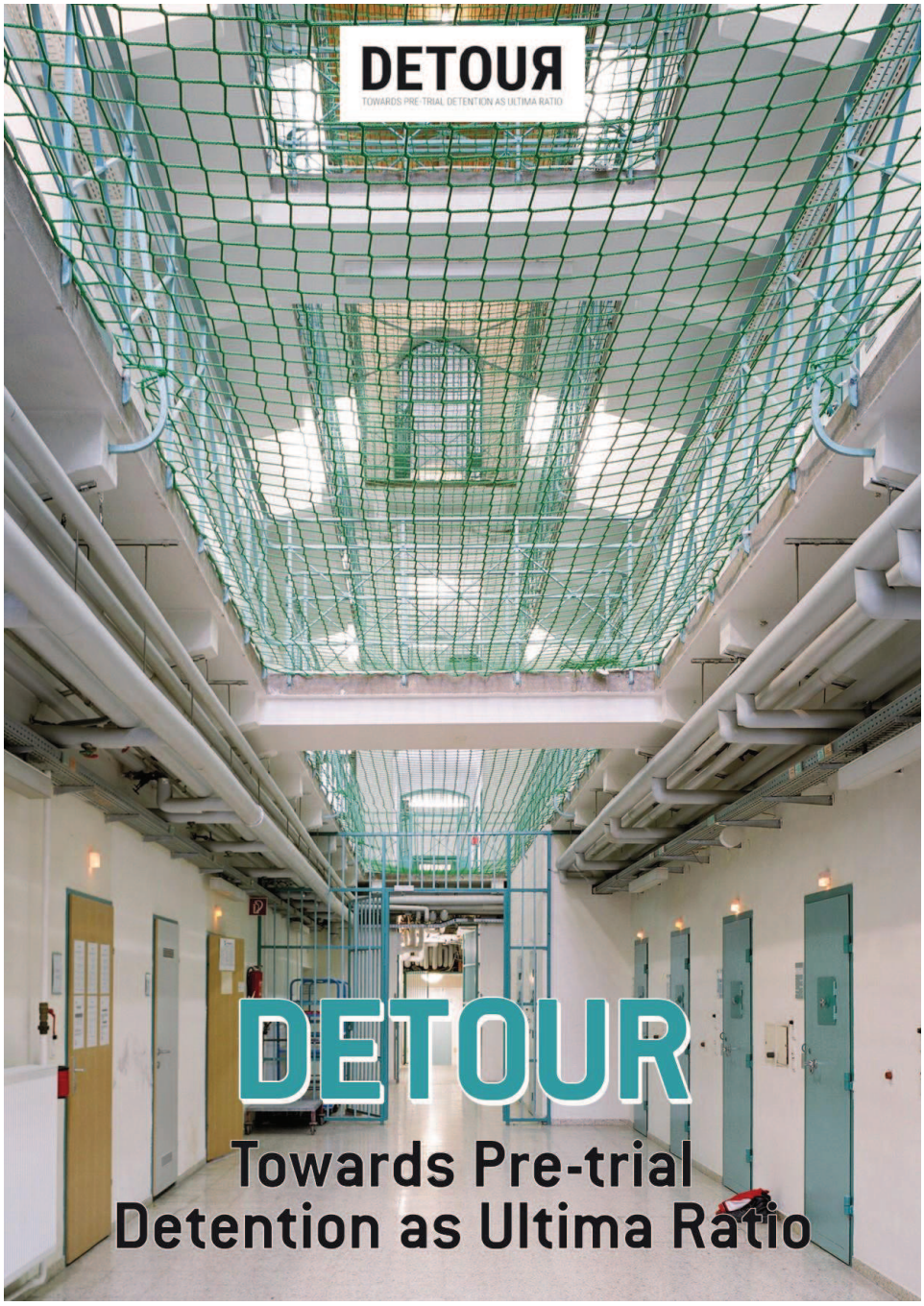


# 2nd *Belgian* National Report on Expert Interviews

Eric Maes, Alexia Jonckheere & Magali Deblock

Brussels, November 2017

Funded by the Justice Programme of the European Union

# Preface

This report is one of the outcomes of the European Union funded project 'Towards Pre-Trial Detention as Ultima Ratio', conducted in 2016-2017 in 7 European countries (Austria, Belgium, Germany, Ireland, Lithuania, the Netherlands and Romania).

This second national (Belgian) report presents the main results of the analyses of interviews that were conducted with national (expert) practitioners.

The document consists of three parts: the first part summarises the main results of expert interviews that were conducted with Dutch-speaking respondents; the second part concerns an analysis of the interviews conducted with practitioners of the French-speaking part of Belgium, and the third part contains some integrated conclusions and recommendations.

The presentation of the analyses carried out both in the north and in the south of Belgium, into two separate parts, can be explained by several reasons:

- Interviews were conducted by different researchers, speaking another language. This also implies that coding and analysing the collected material and reporting on the results in one, completely integrated report would not be feasible within the very strict time limits of the research project.
- Both language communities/regions differ with regard to demography (population density), socio-economic situation, infrastructure, etc. which, to a certain extent, also impacts on crime structure (specific types of crimes) and offender populations (e.g. so-called 'traveling offender groups').
- And last but not least, important aspects of social and health care policy, and even criminal justice policy no longer belong to the competence of the Federal (Belgian) State, but were transferred to the language Communities and/or Regions (e.g. Probation Service).

2nd Belgian National Report on Expert Interviews

# DETOUR –
# Towards Pre-trial Detention as Ultima Ratio

## Part I
## Report on (Dutch-speaking) Expert Interviews (Flanders)

Eric Maes & Magali Deblock

Brussels, November 2017

Funded by the Justice Programme of the European Union

Content

# 1. Introduction

In this second national (Belgian) report[1], we summarise the main results of expert interviews that were conducted with Dutch-speaking respondents within the framework of work stream 2 of the DETOUR-project; for the interviews with French-speaking respondents a separate report has been drafted.

After a short introductory methodological section in which we briefly report on the sample interviewed, the process of selecting and approaching respondents, and the way in which the interviews were conducted, we continue with substantive thematic sections:

- General reflections on the national system and the practice of pre-trial detention (some general reflections that are elaborated in a more detailed way in subsequent sections);
- Basis for decision-making (criteria for the application of pre-trial detention and alternatives);
- Practices of non-custodial or less severe measures;
- Role of the different players;
- Procedural aspects;
- European aspects (in particular, the European Supervision Order);
- Responses to the submitted case vignette(s).

Since one of the most important objectives of the DETOUR-research project concerns the practical use of 'alternatives' to pre-trial detention and related problems, opportunities, needs, most part of this report is focused on this topic (cf. in particular par. 5).

As mentioned above, results from the Dutch- and French-speaking interviews are presented in different reports, and this, for several reasons:

- Interviews were conducted by different researchers, speaking another language. This also implies that coding and analysing the collected material and reporting on the results in one, completely integrated report would not be feasible within the very strict time limits of the research project.
- Both language communities/regions differ with regard to demography (population density), socio-economic situation, infrastructure, etc. which, to a certain extent, also impacts on crime structure (specific types of crimes) and offender populations (e.g. so-called 'travelling offender groups').

[1] The information covered by this report, has been kept up to date till November 30th, 2017.

- And last but not least, important aspects of social and health care policy, and even criminal justice policy no longer belong to the competence of the federal (Belgian) State, but were transferred to the language Communities and/or Regions (e.g. Probation Service).

## 2. Methodology and realisation of the research

Our analysis is based on interviews conducted with 17 (Dutch-speaking) practitioners working in the Flemish and Brussels-Capital Region who are involved in pre-trial detention decisions and/or the supervision of measures: 4 investigating judges (in Dutch: "*onderzoeksrechter*"), 3 judges from investigative courts (2 judges from the judicial council [court in chambers; in Dutch: "*Raadkamer*"], and 1 judge from the chamber of indictment [in Dutch: "*Kamer van Inbeschuldigingstelling*"]), 3 public prosecutors [at different levels: local (2) and appeal (1)], 4 defence lawyers, and 3 staff members of probation offices (2 probation officers and 1 director of a local probation office; in Dutch: "*Justitiehuis*"). All interviews were conducted individually, one local prosecutor being assisted by a member of the 'implementation of sentences'-department of the public prosecutor's office for clarification on some specific topics.

This part of the DETOUR-research took place in 6 (sections of) judicial districts: 2 large and 4 small to medium-sized districts. Respondents are distributed within these districts, as shown in *table 1* [districts with Dutch-speaking respondents highlighted in gray; (d)]. 6 respondents come from one large district where, within the framework of the project's work stream 1, we observed interrogations by an investigating judge and court hearings at the judicial council and where we analysed some case files[2]. In addition to this large district, we approached and selected 1 respondent (defence lawyer) from another large judicial district and 10 respondents from smaller districts, so that as much as possible diversity of regions and functions would be covered.

In total, 25 candidate-respondents were initially *approached*, either directly by the researchers (by e-mail; n=18) or through a first contact by one of the respondents who were already interviewed (n=7). 9 approached candidate-respondents were selected by the researchers themselves (all of the 4 defence lawyers, 2 of the 4 investigating judges, 1 prosecutor at the court of appeal, and 2 of the 3 probation services), other candidate-respondents (n=17) were suggested by some interviewed respondents or contact persons within the criminal justice administration (one possible candidate was suggested, but never contacted). 3 of the 25 approached candidate-respondents did never respond to our request for an interview, 2 refused an interview due to lack of time (workload), 1 respondent referred to another colleague, and 3 others were finally not *selected* by the researcher for an interview – this, in order to maintain an optimal geographical disper-

[2] Eric Maes and Magali Deblock, 'DETOUR - Report on Observations and File Analysis in Flanders (Belgium)' (NICC/INCC 2017) unpublished.

sion and to reach a more or less well-balanced gender distribution (6 out of the 17 interviewed respondents are female; 5 other female candidates were approached/suggested, but did not respond, refused or were finally not selected), or because the proposed (maximum) number of interviews had already been obtained.
When referring to female respondents throughout the text, we use the male personal pronoun 'he' instead of 'she', in order to preserve maximum possible anonymity.

The interviews took place between January 25 and March 30, 2017. Almost all respondents were interviewed at their office (or in a meeting room within their office building). All the interviews were conducted by the senior researcher – in presence and with the assistance of a junior researcher –, in a semi-structured way, following the interview guidelines as developed by the research consortium. The case vignette (see par. 9) has been submitted to the respondents at the end of each interview.

All interviews were recorded on a digital audio recording device, after explicit prior consent for such registration by the interview respondents, to whom absolute anonymity was guaranteed where it concerns reporting on their opinions and concrete cases/names they would mention. Recordings were systematically interrupted when the interviewed person received a phone call or when the interview was interrupted by another person (e.g., when somebody entered the office to ask something or take documents).

The total length of interview time amounts to 1501 minutes (25 hours). The average interview time is 88 minutes (almost 1.5 hours), with a minimum of 56 minutes and a maximum of 120 minutes. The recorded interviews were fully transcribed and the transcribed interviews were encoded and analysed using the software for qualitative data analyses 'QSR NVIVO 8'.

When we refer to opinions and statements of respondents or quote *verbatim*, we use numbers and abbreviations between brackets to identify (anonymously) the corresponding interview respondent. The number represents the sequence number of the interview, the abbreviations refer to the respondent's professional function or setting: DL (defence lawyer), PP (public prosecutor), IJ (investigating judge), JC (judge of the judicial council), CI (judge in the chamber of indictment), PS (probation service). Questions/observations of the interviewer are preceded by 'NICC' (which refers to our research institution: *National Institute of Criminalistics and Criminology*).

Although this (limited) empirical research does not allow for generalisations, it nevertheless offers important insights and reflections on practices around alternatives to pre-trial detention further to explore.

*Table 1. Distribution of the respondents within (sections of) the judicial districts*

| | Large | | | | Small/medium | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | A1(f) | A2(d) | B(f) | C(d) | D(f) | E(f) | F(d) | G(d) | H(d) | I(d) | **TOTAL** | **TOTAL-d** |
| Investigating judge (IJ) | | | 2 | 1 | 1 | 1 | 1 | 1 | 1 | | **8** | **4** |
| Investigating courts (JC-CI) | | | | | | | | | | | | |
| Judicial council (JC) | | | 1 | | | | | | 1 | 1 | **3** | **2** |
| Chamber of indictment (CI) | | | | 1 | 3* | | | | | | **4** | **1** |
| Public prosecution (PP) | | | | | | | | | | | | |
| Local (district) level | 1 | | 1 | | | | 1 | | 1 | | **4** | **2** |
| Regional (appeal) level | | | | 1 | 1 | | | | | | **2** | **1** |
| Defence lawyer (DL) | 2 | 1 | 2 | 2 | | | | 1 | | | **8** | **4** |
| Probation service (PS) | 2 | | | 1 | 2* | | 1 | 1 | | | **7** | **3** |
| **TOTAL** | 5 | 1 | 6 | 6 | 7 | 1 | 3 | 3 | 3 | 1 | **36** | **17** |

*Table 2. Overview of (contacted) interview respondents, setting & recruitment*

| TYPE RESPONDENT | SEQ. NR. | JUD. DISTR. | TYPE RESP.-JUD.DISTR.(language) | DATE | TIME | DURATION | SETTING | Initial selection (suggestion) | First contact | READINESS | REMARKS (non-resp./reasons refusal) |
|---|---|---|---|---|---|---|---|---|---|---|---|
| DEF. LAWYER | 1 | G(d) | DL-G(d) | 25/01/2017 | 17:30 | 120 | Neutral (cafetaria outside) | Researcher | Direct | x | - |
| CH. OF INDICTMENT | 2 | C(d) | CI-C(d) | 26/01/2017 | 10:00 | 76 | Home | DL-G(d) | DL-G(d) | x | - |
| PROB. SERV. | 3 | F(d) | PS-F(d) | 26/01/2017 | 13:00 | 87 | Office (meeting room) | Researcher | Direct | x | - |
| INVESTIG. JUDGE | 4 | G(d) | IJ-G(d) | 2/02/2017 | 8:30 | 92 | Office (cafetaria) | DL-G(d) | DL-G(d) | x | - |
| PROB. SERV. | 5 | G(d) | PS-G(d) | 2/02/2017 | 10:30 | 83 | Office (meeting room) | DL-G(d) | DL-G(d) | x | - |
| PROB. SERV. | 6 | C(d) | PS-C(d) | 7/02/2017 | 9:50 | 87 | Office (meeting room) | Researcher | Direct | x | - |
| INVESTIG. JUDGE | 7 | H(d) | IJ-H(d) | 8/02/2017 | 9:30 | 93 | Office | Researcher | Direct | x | - |
| PUBLIC PROS. (local) | 8 | F(d) | PP(loc.)-F(d) | 15/02/2017 | 9:30 | 70 | Office | PS-F(d) | Direct | x | - |
| DEF. LAWYER | 9 | C(d) | DL-C(d)1 | 15/02/2017 | 14:00 | 76 | Office | Researcher | Direct | x | - |
| DEF. LAWYER | 10 | C(d) | DL-C(d)2 | 22/02/2017 | 16:00 | 99 | Office | Researcher | Direct | x | - |
| INVESTIG. JUDGE | 11 | F(d) | IJ-F(d) | 7/03/2017 | 10:00 | 56 | Office | PS-F(d)/IJ-H(d) | Direct | x | - |
| PUBLIC PROS. (appeal) | 12 | C(d) | PP(app.)-C(d) | 8/03/2017 | 9:30 | 103 | Office (meeting room) | Researcher | Direct | x | - |
| DEF. LAWYER | 13 | A2(d) | DL-A2(d) | 8/03/2017 | 14:30 | 118 | Office | Researcher | Direct | x | - |
| INVESTIG. JUDGE | 14 | C(d) | IJ-C(d) | 17/03/2017 | 10:00 | 118 | Office | Researcher | Direct | x | - |
| JUD. COUNCIL | 15 | H(d) | JC-H(d) | 23/03/2017 | 14:30 | 65 | Office | IJ-H(d) | Direct | x | - |
| JUD. COUNCIL | 16 | I(d) | JC-I(d) | 24/03/2017 | 9:30 | 86 | Office (meeting room) | DL-G(d) | Direct | x | - |
| PUBLIC PROS. (local) | 17 | H(d) | PP(loc.)-H(d) | 30/03/2017 | 14:30 | 72 | Office | DL-G(d) | Direct | x | - |
| *INVESTIG. JUDGE* | - | *F(d)* | *PS-F(d)* | - | - | - | - | *PS-F(d)* | *Direct* | - | *non-respons* |
| *INVESTIG. JUDGE* | - | *G(d)* | *IJ-G(d)* | - | - | - | - | *DL-G(d)* | *DL-G(d)* | - | *non-respons* |
| *JUD. COUNCIL* | - | *F(d)* | *JC-F(d)* | - | - | - | - | *PS-F(d)* | *Direct* | *0* | *refusal (workload)* |
| *JUD. COUNCIL* | - | *G(d)* | *JC-G(d)* | - | - | - | - | *DL-G(d)* | *DL-G(d)* | *0* | *refusal (workload)* |
| *PUBLIC PROS. (local)* | - | *H(d)* | *PP(loc.)-H(d)* | - | - | - | - | *DL-G(d)* | *Direct* | *0* | *referred (expertise)* |
| *INVESTIG. JUDGE* | - | - | *IJ-x(d)* | - | - | - | - | *IJ-G(d)* | *IJ-G(d)* | *x* | *not selected* |
| *JUD. COUNCIL* | - | *F(d)* | *JC-F(d)* | - | - | - | - | *PS-F(d)* | *Direct* | - | *non-respons* |
| *PUBLIC PROS. (local)* | - | - | *PP(loc.)-x(d)* | - | - | - | - | PS-G(d) | - | - | *not selected* |
| *PUBLIC PROS. (local)* | - | *G(d)* | *PP(loc.)-G(d)* | - | - | - | - | *PS-G(d)/IJ-G(d)* | *PS-G(d)/IJ-G(d)* | *x* | *not selected* |

| | |
|---|---|
| Total length interviews | 1501 |
| **Average length** | **88** |
| Maximum | 120 |
| Minimum | 56 |

# 3. Reflections on the national system and on the practice of pre-trial detention and the use of non-custodial alternatives in general

In our first national report on pre-trial detention and alternatives in Belgium[3], we already underlined that 'alternatives' to pre-trial detention, in particular 'release under conditions', strongly increased since its introduction in 1990, while (pre-trial) detention remains 'popular' too. Although, this might be surprising at first sight since no substantial increase of overall crime rates can be observed. In this respect, various statements can be made from the Belgian context.

Shifts in social sensitivity, expectations of the public (together with the rise of social media) and sometimes highly critical reporting by traditional media put pressure on and/or effectively affect public prosecutor's policies. Regular settlement of cases on the level of the public prosecution may become less used, at least where it concerns specific criminal phenomena (e.g. intra-familial violence, hit-and-run), thereby favouring referral for judicial *instruction* with requests for pre-trial detention (e.g. 11-IJ, 12-PP(app), 16-JC). That public prosecutors themselves propose alternatives, remains an exception, in the further course of the criminal proceedings (at judicial review hearings), after an investigating judge has already (initially) decided to issue an arrest warrant (see par. 5.1.2).

Interviewed judges – often very explicitly (e.g. 7-IJ) – state that all their pre-trial decisions are justified by the legally provided criteria, and some of them criticise the fact that the percentage of pre-trial detainees within the overall prison population (i.e. instead of rates, e.g. per 100,000 inhabitants, or absolute numbers) is often used as an indicator of increasing use of pre-trial detention (14-IJ, 7-IJ): however, as we could observe from the statistical data, also the absolute numbers show an upward tendency since the new Pre-trial Detention Act of 1990 (although stabilising from 2003 onwards). As a possible explanation for the (still large) number of arrest warrants, magistrates indicate a potentially greater sensitisation and willingness to report by victims of specific offences (sex offences, intra-familial violence,…; 11-IJ) and increasing social control (16-JC), an increasing degree of illumination through progress in forensic and criminal investigation techniques and modern (communication) technologies (14-IJ, 16-JC), and changes in the nature of crime (e.g. more international and organised character, namely in case of human trafficking, drug production and traffic, property crimes; e.g. 7-IJ). Notwithstanding the strongly criticised policy towards 'short term' prison sentences (non-execution,

[3] Eric Maes and others, 'DETOUR - Towards Pre-tral Detention as Ultima Ratio, 1st Belgian National Report' (NICC/INCC 2016).
See also: http://www.irks.at/detour/publications.html

conversion into electronic monitoring, 'liberal' use of provisional release schemes,…) is and should not be a reason to use pre-trial detention as a kind of 'pre-sentence' or 'short punishment', this can indirectly impact on pre-trial decisions (see e.g. 7-IJ); and, according to some, a short period of pre-trial detention may also have a positive, educational, and dissuasive effect, in particular for young first-offenders (11-IJ).

As will be explained more in detail below (par. 4), lawyers usually argued that pre-trial detention is still used too often. The criterion of absolute necessity for public safety is (often) barely or not motivated at all, the debate on serious indications of guilt is sometimes insufficiently conducted, and/or criteria of risk on recidivism and absconding are being addressed too easily or flexible. On the other hand, defence lawyers themselves also contribute to a certain kind of net-widening effect (which means that 'alternatives' do not substitute pre-trial detention and releases *with* conditions are imposed to suspects who would otherwise have been released *without* conditions). In their defence strategy, they seem not longer to ask for a 'release *without* conditions' but plea for the imposition of 'alternatives', as they also seem to experience that those 'old habits' are '*not done*' anymore at these current times. Often, they use the stricter electronic monitoring-option to convince indecisive, hesitating magistrates and avoid prison for their client, and in some cases this also works.

# 4. The basis for decision making

Legal framework

The 'new' Belgian Law on Pre-trial Detention of 20 July 1990 provides for several grounds for pre-trial detention (and alternatives for it).

A first condition concerns the seriousness of the offence: pre-trial detention (and alternatives) may be ordered only in case of an offence punishable by a prison sentence of at least one year. The investigating judge needs to have serious indications of guilt. And the warrant (and alternatives) is only possible when it is absolutely necessary for public security.

Furthermore, if the maximum sentence for the criminal offence does not exceed 15 years of imprisonment (except terrorist cases: 5 years), remand in custody or alternatives have to be based on additional grounds, that is, a risk of recidivism, absconding, collusion or destroying evidence.

## 4.1. Serious indications of guilt

The aspect of the presumption of innocence or '**serious indications of guilt**' was mostly not spontaneously discussed by the experts during the interviews. Judges and prosecutors indicate that (a) this formal criterion concerns, or at least legislation only requires, (serious) 'indications' of guilt which does not necessarily means 'proof' (4-IJ: "*indications of guilt, these are not evidence. Certainly in the beginning stage it could be very light elements of proof*"), (b) – when it comes to referral to court – it finally belongs to the competence of the sentencing courts to establish guilt of the suspect in a definitive manner, and (c) additional investigating acts during the criminal judicial inquiry may shed more light on the actual indications of guilt (e.g. by hearing other possible suspects, inquiry on telecommunication, home searches, DNA genetic analyses, …) and pre-trial detention therefore is often/sometimes necessary to prevent risk of collusion or tampering with evidence. Nevertheless, some observations were made with regard to this prerequisite. As one of the investigation judges confirmed, sometimes cases with very poor available evidence are referred to criminal investigation (instruction) by public prosecutors (14-IJ). And as some respondents from the judiciary mention, available evidence is not always very clear, especially offences of 'intimate partner violence' or, more broadly, certain sexual offences seem to be 'difficult' cases, due to contradictory declarations (assertion against assertion), questions about the consensual character of the sexual intercourse, or victims of intra-familial violence finally 'regretting' the accusation and the implications of having reported the offence (i.e. that their partner has been locked up).

Certain defence lawyers explicitly complain about their limited or very restricted possibilities to build up an adequate defence. Notwithstanding that they have no **access to case file information** in the initial stage of the procedure, i.e. during police interrogations and at the stage of the interrogation by the investigation judge, they also experience that the rights of the defence are not really or sufficiently guaranteed in review procedures: although legislation provides for consultation of the case file before review hearings by the investigative courts, such as the judicial council, (a) this moment of consultation of case files is restricted to one/two days before the hearing takes place, (b) cases can only be consulted at the court's clerk office during its opening hours (closing time at 4 p.m.), and (c) there are no clear instructions/practices regarding the way in which defence lawyers can collect the needed information from the files. With respect to the latter, significant differences between judicial districts and court levels were mentioned: while lawyers must rely on 'pencil and paper' in some judicial districts or court levels (judicial council for appearances in first instance/chamber of indictment in appeal), in other districts or courts they are allowed to scan/take photographs of case file information (10-DL), or occasionally may have full access to digitalised pdf-documents at the clerk office (16-JC).

> 10-DL
>
> DL: I think one should make the access to the judicial files for lawyers a lot easier. I regret that we have to go to the registry during opening hours, the files are bound together by a little cord and in some registries one is not even allowed to scan. The job of a lawyer: one should get the file, study it at home, go to the jail to discuss it with the client and then go and plead. To go to a registry, scan on the sly until the clerk says: 'Sir, you are not allowed to do that. You should work with pen and paper.' For a lawyer, this is awful, but that is not the core debate. In practice, you sometimes have four to five cases, judicial councils, and if you want to prepare properly, but you need to study four big files a day before the hearing, this is almost impossible. You could call it: a frustration I am confronted with daily.
> NICC: What is the reason for this, why is this not… or does it have to do with the lagging behind of justice when it comes to digitalisation?
> DL: No, no, in [judicial district Z – local/appeal level] it is allowed, there we can scan. But that is easy: we scan it by phone, it is mailed to the office and my secretary prints it. I can also send a colleague to do this. We have a big hearing tomorrow in [judicial district Y], but there we are not allowed to scan.
> NICC: Who decides this?
> DL: The first president of the court. I went to discuss this. For the [case]: really big, it is a battle to be allowed to do so… They allowed me in [judicial district X – local level], but then in [judicial district Y – appeal level] at the KI [chamber of indictment], they didn't. That is horrible. In one judicial district you can, in the other you cannot. They should give us the file, as they do in the Netherlands.
> NICC: So there are no uniform rules around the matter? You do get insight, but the way it can be done…
> DL: Yes, how it is considered is… In [judicial district Z – local and appeal

level] you are allowed to scan and in [judicial district Y – appeal level] at the level of the Court of Appeal, you are not.
NICC: What about the interrogation by the investigating judge? There you can be present, but can you look into the file?
DL: That is something else I regret. You cannot even look at the file on beforehand. Even if it was just… You can formulate your comments, but you still have the story of the client. You cannot check. You just sit there. With the consequence of sometimes advising as a lawyer: 'Sir, here you risk a serious punishment. So in the end: call for your right to remain silent and wait.' But then it is also a waste of time. While if we could have a look at the file on beforehand, we could tell the client: 'That and that is at hand, have courage, confess and that would benefit the investigation.'
NICC: At the level of the police interrogation do you have the possibility to look into the file?
DL: No, not at the level of the police […]. Only at the first review hearing [by the judicial council, i.e. after an arrest warrant has been issued by the investigating judge].

16-JC

NICC: We had an interview with a lawyer who pointed out as one of the problematic themes that it is so diverse. Everything is arranged differently everywhere. They only have one day to look into the file, sometimes there are many. If you have to go and note this all… Is that also a kind of violation of the right of defence?
JC: Here we have a paper at the registry's office: forbidden to scan. It is indeed not workable. Sometimes one asks for postponement at the first hearing: 'So many binders. I could not go through all of it.' Of course I don't make a problem out of it. I have also been a lawyer for [x] years. If you have to go through a file. It is not evident. But meetings are being held to come to a common point of view. In a couple of years we will have clarity about it. In the meantime, we have to do with the tools we have.

Because police officers and public prosecutors often already investigated intensively the case before referring it to the investigating judge for the issuing of an arrest warrant, and thereby were able to compile '**huge files'** (in some cases, thousands of pages) before (police) arrest of the suspect, defence lawyers themselves often feel confronted with what one could consider to a certain extent as an 'inequality of arms'.

14-IJ

NICC: I actually mean complex cases in which the investigation [led by the public prosecutor; in Dutch: "*opsporingsonderzoek*"] has been going on for a while and then one gets arrested to appear before the [investigating] judge. Thus, you are confronted with a big pile.
IJ: It happens.
NICC: That is sometimes a critic of the lawyers: that they are confronted the day before the hearing of the judicial council with a big mass of paper.
IJ: Yes, but it might as well happen… It could be that the pre-investigation has been going on for a while at the prosecutor's office, but we often see it coming to us, because they want to do a house search or telephone tap. With telephone taps, a lot of paper is created. If you have been running a telephone tap for a couple of months, at a certain moment you have enough data to do a house search and arrest someone. Then indeed you get a couple of

binders at the moment a person is arrested. Then it becomes difficult for lawyers to learn a lot from the dossier on the one day they can look into the file.
NICC: What they also say, is that the right to look into the file before the hearing of the judicial council varies greatly between judicial districts. In some districts they can scan or copy nothing from the files, in others they really have to note things down.
IJ: Here it is scanned. Here it is allowed.
NICC: Yes, sometimes it is allowed at the judicial council, but not when the file goes to the KI (chamber of indictment), then it is different again.
IJ: Yes, there is no uniformity.

10-DL

DL: We are confronted with the secrecy of investigation and the fact that, in certain judicial districts in Flanders, it is still not done to scan files. Of course, if you are confronted as a lawyer with a very extensive dossier (and sometimes with multiple lawyers to look into the file) and you need to use a pen and paper, then you can actually not offer any added value in the debate about the existence of serious indications of guilt. *In se*, it becomes impossible to have a founded debate about it, with knowledge at hand. We have the problem that you can only sign for appeal at Cassation after the first decision to maintain in custody [i.e. first review hearing by the judicial council]. With the new 'Potpourri'-law [Law of February 5th, 2016] you have the [first review hearing by the] judicial council, [appeal hearing by the] KI (chamber of indictment), one time Cassation and that's it. Sometimes as a lawyer you are stuck between your client on the one hand saying: 'I am innocent, I didn't do anything wrong' and your agenda on the other hand, because you can only look into the file the day before the first appearance. And when you then have to do it with pen and paper, and a a client who says: 'I don't want a postponement, because every day I am in jail is a day too long'... What they should do, I believe, is to think of a manner for lawyers to very easily consult the whole judicial file and that, when we are to speak, we can do so with knowledge and expertise. *A la limite* by scanning it. Although I think it is really bad that we have to go to the registry as a lawyer during the opening hours. If you cannot even scan, but you have to take notes with pen and paper, I think that is horrible. That is a frustration I am confronted with every day.

As also judges of the (review and appeal) courts receive files for a limited period of time before case hearings, (some) lawyers (e.g. 9-DL, see citation below) are wondering how these **decision-makers** are able to manage reading all these **files** and evaluating thoroughly the supposed serious 'indications' of guilt. Nevertheless, cases handled by the judicial council are quite often not 'new' cases (i.e. first reviews), and a good organisation of work, also with the help of digital instruments (scanned case files), can help a lot – although deciding without reading files is possible, but 'morally' not preferable –, as a president of a judicial council explains (see quotation below, 16-JC).

9-DL

NICC: Is it only during the holidays that there are so many cases?
DL: Usually during the holiday season, but on a good [specific] day [of the week] you sometimes also encounter 36 to 40 cases. Then you can question yourself, how can you get this done? That is the discussion as well, since one has already judged the serious indications of guilt (?)... Oh no, there are new elements through which you could get a new vision. That you can of course notice at the chamber of indictment, that the reports of the attorney-generals that sit there are 100 times more in-depth than the report of most of the investigating judges. It is not always beneficial that they are more in-depth, but then at least you have the feeling he knows the file. At other moments, this is totally gone.

16-JC

NICC: How many dossiers do you have on a day judicial council?
JC: It depends. The maximum I have had was 38 arrested persons. On Monday I start with preparing the hearing, I look at all the files and prepare the hearing. A kind of design of order without decision, but leaving open all possibilities. In the sense for me to know: 'Is that the reason why he is in jail, why he is kept there and is there a solution for it now?' In that way you at least have a framework. On Tuesday there is a hearing. Next week I have 18 to 20 persons. I think about 15 cases. That keeps you busy for a morning. It also depends on the cases. In the afternoon, we make the order and these have to be finished. It is not only arrested people, but also foreigners. That is then based on the Foreignerslaw. That is a special competence of the judicial council when people have to be repatriated and are arrested because there is the danger that they will disappear. I then have to judge whether the arrest is legal. That easily adds up to 2-3 a month.
[...]
NICC: What I sometimes also wonder about, is how the presidents of the judicial council can go through this mass of papers in such a short time?
JC: Yes, they are binders. Eventually, after a while, you know what to search for. It is not the idea to read every paper. You know what is important. Often they also include synthesis PVs (police reports). With Just Scan, it is handy to have the search option available. Important as well as the president of the judicial council: you are involved from the beginning. In the beginning [the file] is often not that big. Afterwards you can easily follow what has been added. You grow with it. If there has been an investigation on beforehand with taps etc., then it is thus classified that you do know what to look for. Lawyers also often point it out to you: 'That is wrong.' But some lawyers also just read certain parts. Then you can get the impression 'it seems as if I have read something else', but I guess that's typical for lawyers. They probably just filter out the good points. The lawyers in the meantime also know I read the files. You could in principal also do the hearing without reading the file, but then you cannot have a debate. Then it doesn't make much sense. Then you just decide on the basis of what you hear. That is not the aim. Such a judicial council should take place in a decent manner.

To defence lawyers' view, substantial **discussions on the indications of guilt** in front of review/appeal courts are often lacking or neglected (9-DL), even in the initial stages (months) when the criminal investigation can still make progress.

9-DL

DL: That to me is the biggest problem: your presumption of innocence is of course totally opposite to your pre-trial detention. Your serious indication of guilt should be judged every time and not just one time at the beginning. Furthermore, in what sense are serious indications of guilt being judged? This creates a continuous field of tension. The bottom-line is: do I get my client freed up or not? The rest doesn't really matter. From time to time during the first [hearing of the] judicial council you really plead about your serious indications of guilt [...] the president who notes down: 'there are no serious indications of guilt', I once saw it happen! What is of course also contradictory in your control mechanism, because actually your judicial council should evaluate 'does the investigating judge indeed have a serious indication of guilt', your KI (chamber of indictment) should evaluate this. I recently had an acquittal where the serious indication of guilt [...]. The whole [hearing session of the] judicial council [I] was pleading that this [...]. [Finally], one has followed. 'President, can you look into your file in-depth, please?!' [X] always double-checks them. You can notice that very well at the registry of the judicial council, you can see some presidents checking the file and that reassures you as well. Others have, according to me, except for during the hearing, never opened the file.

## 4.2. Absolute necessity for public security

One of the major (explicit) critiques of (most) defence lawyers is the fact that the criterion of '**absolute necessity for public security**' is not clearly defined at all, and open to a lot of discretion: according to defence lawyers, it is a simple 'formal'/standard criterion, automatically assumed in case of severe offences (i.e. offences punishable with the requested sentence length, where it legally can be used without considering other additional criteria, such as risk of collusion, recidivism, absconding, ...), and even in less serious cases it is not motivated or considered as a separate ground. In particular, the lack of specification as to why it is "*absolutely necessary*" to deprive a suspect of his liberty (1-DL), is problematic according to the interviewed defence lawyers.

1-DL

DL: [...] One of the continuous concerns in the framework of pre-trial detention is that the law is framed restrictively. [...], as such, the law is not too bad. You get really clear criteria: a first criterion is the absolute necessity for public security and then [for offences punissable with a prison sentence of maximum] 15 years those additional criteria, those three. As such, I think the legal framework of the exceptional character of pre-trial detention is very well described, but it is very differently interpreted in practice. I think there are understandable reasons for this. Some examples that we do see a lot lately, are people without a place of residence in Belgium and that generally can be arrested rather quickly for not too serious facts, let's put it that way. They get caught for stealing some pairs of jeans and then they go to pre-trial detention, for which one can pose the question, 'is this really a threat to public security?!' I do understand that in the framework of the judicial investigation one should investigate whether there is an organisation behind it that e.g. structurally comes and shoplifts. That could be a reason in the framework of

> the investigation. I have the feeling that it is very difficult for people without residence to prevent to be in pre-trial detention for a while. In that sense, the legal prohibition to let pre-trial detention function as a punishment is applied differently in practice.
> […]
> I think the most disregarded criterion is the threat to public security, the public order. Then I actually think, in times of terrorism, about deeds through which our security is damaged. Theft from a parking meter, it could actually never be the reason for a pre-trial detention. But the other criteria: risk of flight, risk of recidivism, … are often used or referred to. As such, they do exist, but one forgets the first criterion, namely public security. The same for the danger of collusion. This is also often referred to. Often rightly so, but one can sometimes pose questions with regard to the proportion between the crime itself and the pre-trial detention.

Most investigating judges admit that this criterion is (quasi-)automatically provided in most justifications of arrest warrants, i.e. by the seriousness of the offence in itself, or by other criteria that the law requires for, especially the risk of recidivism for which many different 'indications' can (easily) be derived from the file (dependent on the specificity of the case file). Therefore, in those cases this criterion is implicitly assumed, and, to their opinion, usually does not need any detailed, additional motivation, next to the already mentioned 'risk(s)'.[4]

> 14-IJ
>
> NICC: The concrete substance of the criteria: what margin exists? You already mentioned that the law accepts a lot. […] how are these criteria concretely implemented? I also think about the absolute necessity with regard to public security. This is not really motivated?
> IJ: That is almost a standard motivation. But it is such a big encompassing concept [in Dutch: "*containerbegrip*"]. You could say: someone who commits a crime, is a danger to public security. I do try and nuance it according to the kind of crime. Someone who commits a theft does not respect another person's properties, this increases the insecurity feelings. Someone who deals drugs, slightly touches upon public health. But someone who commits a violent act, doesn't respect physical integrity. In the end, it all comes down to the same topic, but with slight variations to a different theme. That is also related to the fact that the notion of 'threat to public security' is such a broad notion. It is so wide.

## 4.3. Additional legal grounds

The other criteria, the so-called '**risks**' (risk of collusion, absconding, recidivism, or tampering/spoiling evidence) – for which a specific motivation is required by law, in case of offences punishable with sentences of maximum 15 years of imprisonment –, are very often, if not always, referred to, even in cases where decision-makers are not

[4] See also: Ivo Mennes, 'Van Onderzoeksrechter over Raadkamer Naar Kamer van Inbeschuldigingstelling', *Na rijp beraad. Liber amicorum Michel Rozie* (Intersentia 2014), 333-334.

obliged to do so by the legal provisions (e.g. offences punishable with sentences of more than 15 years).

In this respect, the criteria of risk of collusion and of recidivism seem to be the most predominant, with the former especially present in the beginning of the criminal proceedings when the criminal investigation just started or additional indications of guilt still have to be established. Whereas the risk of tampering with evidence seems to be of less importance (mainly represented in cases of financial fraud, drug offences; 9-DL), the risk of absconding is also frequently used, in particular in cases with foreigners who have no (legal) stay of living/residence in Belgium. However, this criterion is also valid for Belgian citizens, with no (official) residence (14-IJ), or when they have social bounds/connections abroad (4-IJ) and are suspected of (serious) offences that can lead to long terms of imprisonment.

> 4-IJ
>
> IJ: Duty of notification to the police is another classical one as well. This has somehow fallen into disuse. But is it a good one, because nowadays, the suspect is not obliged to anything anymore. […]
> NICC: Is it then often used?
> IJ: Not so often, but it is a useful measure. Also as an alternative to [financaial] bail. A bail is really something for foreigners that should go back to their own country. For other people (who have their residence here, but with contacts abroad), where there is a chance that they could flee, we can order a daily notification obligation. For the police, this is not easy administratively. They are not a demanding party in this regard.

> 14-IJ
>
> IJ: You might as well get a Belgian without a permanent place of residence. This to me doesn't really matter. The danger of them withdrawing from justice remains. When it is a foreigner, he might go back abroad, but when he stays here, without a place of residence, being illegal, he cannot be traced either. But this applies as much for a Belgian without a place of residence. Although this does happen less frequently, that is true.

Most respondents agree that these risks, and in particular the risk of recidivism, can easily be justified/**motivated**. While the presence of a criminal offence/record could be sufficient to conclude to a risk of re-offending, this criterion or condition also can be satisfied even in absence of a criminal record, just by referring to (possible) "*big financial benefits*" generated by the (supposed) committal of the offence(s), or simply by the fact of being suspected of the actual offence (and therefore having some probability of re-offending). Very often, the presence of underlying problems, such as alcohol-related or drug problems, financial or gambling problems, problems of aggressive behaviour, or still, other psychological/psychiatric problems, can motivate a decision towards pre-trial detention, at least in the early stages of the criminal investigation process. When the

criminal investigation process progresses, these risks can usually be countered by ensuring appropriate treatment or guidance in view of, not necessarily completely avoiding, but at least diminishing risks of relapse in antecedent behaviour.

Risks of absconding are quasi-automatically assumed by judicial actors when the suspect has no residence or stay of living in Belgium, and judicial authorities seem to have many difficulties with elaborating or imagining alternative measures for them, except (financial) bail. However, such a measure is most often only granted after the criminal investigation is concluded or at least has progressed in a significant way (in contrast, a defence lawyer states that such assumption of a risk of flight or absconding is "*absurd*" in a contemporary EU-context, as far as agreements based on mutual judicial co-operation are concluded):

> 9-DL
>
> NICC: Is a [financial] bail often applied?
> DL: Only to foreigners. But for someone who lives within Europe, there are extradition treaties everywhere, so a risk of flight with bail seems a bit absurd to me. When you look at how few countries do not extradite. Those are not many. Most of them do extradite.
> [...]
> Risk of absconding, from the moment they live outside of Belgium, it is mentioned. Even though this is long outdated in the context of our European Union.

Although it seems that most respondents – some of them complaining about the "*senseless*" meaning of some of the basic concepts ('public security', 'absolute necessity', 'indications of guilt') – find the **legislative framework** from a general point of view adequate and at least theoretically being able to provide for pre-trial detention as an *ultima ratio*, (almost) all of them agree that much, if not all, depends heavily on the practical use and concrete operationalisation of these underlying key concepts. Thereby, they conclude that it is not so much by changing legislation, but by creating a (new/correct) mind-set (culture) that solutions to the problem of pre-trial detention have to be found (e.g. 4-IJ). Although to one of the respondents it appears very 'strange' that for the use of alternatives the same legal requirements have to be met as for more severe measures such as pre-trial detention in prison (17-PP(loc)).

### 4.4. Other factors

Other factors than the strictly legal criteria that might influence pre-trial detention practice and policy were also discussed by many of the interviewed respondents. A lot of the respondents notice or agree with the observation that **(social) media** has a certain

impact on the questions of pre-trial detention and its alternatives, nowadays much more than it was in the past; as a lawyer stated, we're living in a society of "*instant (up-to-the) minute news*" (9-DL). In the eyes of the public opinion leaving free or releasing suspects from custody is often understood as a kind of acquittal, while detention is considered as being a 'proof of guilt'. Most interviewed judges deny that social and other more traditional media influence their decisions. But, as some lawyers indicate, in concrete cases, it is not unexceptional that decisions take into account expectations of the general public that are co-constructed by simplistic or completely misleading (13-DL) media coverage. Motivations of decisions often refer to such kind of notions: 'increasing public feelings of unsafety', the (negative) 'impact on society', 'threat to public security and order', 'danger for public health'. In particular, public prosecutors seem to adapt their policies - whether or not to refer criminal cases for a judicial criminal investigation to be done by investigating judges and to request or not for an arrest warrant - depending on *inter alia* (shifts in) **public sensitivities**. Some respondents argue for example that in recent years certain types of offences, such as intrafamilial violence or hit-and-run in traffic accidents (often connected with drunken driving and/or excessive speed), are receiving more (media, public and professional actor's) attention than before. Often, priority is also given to such 'phenomena' in local security plans and/or prosecutorial guidelines/directives of the Board of Prosecutors-General. Eventually this could result in more use of pre-trial detention or alternatives, instead of handling those cases by way of dismissal or other diversion measures at the prosecutor's level. As a defence lawyer stated:

> 13-DL
>
> Intra-family violence, that has been a little bit the 'hobbyhorse' of the public prosecutor's office [of a particular judicial district]. We will go and stick our nose a bit in intra-family violence. And, even then, there are quite few pre-trial detentions, but a lot of releases under conditions.

However, another defence lawyer from a different judicial district estimates the risk of incarceration as high:

> 9-DL
>
> I observe that [...] in intra-family violence. Suspects are very easily taken into custody, while very often alternatives could be searched for.

> 12-PP(app)
>
> PP: I personally think: intra-family violence happens quite often, also because the Board [of Prosecutors-General] has worked out a policy to react quickly. I think there are now more dossiers of intra-family violence within pre-trial detention than ten years ago. This awareness around a societal problem. At least when it comes to the actors on the field.
> NICC: Is it a conscious policy of the Board to give it more attention?

> PP: It has indeed been a conscious policy, because intra-family violence is a wide-spread problem, that has far-reaching consequences and happens within the families of society.
> NICC: Do specific guidelines exist: request for judicial investigation or request for an arrest warrant?
> PP: There are certain guidelines. I don't know them all by heart. It is true that one will now more quickly bring the suspect before the investigating judge in a case of intra-family violence and demand an arrest warrant when it turns out there have been 3-4 complaints that the woman is being beaten. It will now more quickly lead to a demand for arrest [pre-trial detention], compared to ten years ago.

Any supposed influence on judges' decisions of **expectations of police officers** (or public prosecutors) who could consider incarceration of a suspect as a 'valorisation' of their investigative police work – a possible factor that was mentioned in previous Belgian qualitative research on pre-trial detention[5] –, was explicitly disaffirmed by investigating judges and judges of the investigative courts. They emphasise that they take their decisions completely independent and, if there would be any reason to do so, they would explain to police officers in a tactful way why suspects were not taken into custody (7-IJ, 15-JC).

Likewise, and in contrast to some findings from previous research[6], according to these respondents, the highly **criticised** (non- or partial) **implementation of ('short'?) prison sentences** of three years or less does not affect their decision-making. As such, one of the investigating judges put it into another perspective (7-IJ): to his opinion, people are sent to prison (in remand custody), *not because* prison sentences are no longer executed or quasi-automatically converted into electronic monitoring (that would be a "*wrong statement*"), *but* because they constantly show up before the investigating judge and *do not stop* committing further offences (thereby making an allusion to possible incapacitating effects of imprisonment). In other words, if they would have been where they belonged to (i.e. in prison, serving their sentences), he as an investigating judge would not have been charged with the case in order to decide on a request for pre-trial detention, for a suspect demonstrating an evident risk of recidivism:

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[5] Carrol Tange, 'La Détention Préventive: Pis-aller Du Système Pénal?' in Alexia Jonckheere and Eric Maes (eds), *La détention préventive et ses alternatives. Chercheurs et acteurs en débat* (Academia Press 2011), 81; Dieter Burssens, 'Voorlopige Hechtenis (z)onder Voorwaarden' in Alexia Jonckheere and Eric Maes (eds), *De voorlopige hechtenis en haar alternatieven. Onderzoekers en actoren in debat* (Academia Press 2011), 60-61.

[6] Caroline De Man and others, 'Toepassingsmogelijkheden van het elektronisch toezicht in het kader van de voorlopige hechtenis. Possibilités d'application de la surveillance électronique dans le cadre de la détention préventive' (NICC 2009) Eindrapport,138 and 164; Tange (n 5), 82; Burssens (n 5).

7-IJ

IJ: When it comes to [cases sent to me with a request for arrest; in Dutch: "*voorleidingen*"], I now get one case after the other in which one has to note that when the effective prison punishment would have been executed, this man would not be in front of me. I think that is really terrible. [...]. Because of a completely wrong execution of punishment, we see people time and time again. When you then have to assess the element: risk of recidivism, you cannot judge me for ensuring that he does get to jail this time.

The observation that there is no *direct* influence of sentence implementation policies on pre-trial decisions, however, does not mean that **repressive or punitive** considerations are totally excluded in investigative criminal justice procedures. As one of investigating judges for example indicated, if all criteria for remand custody are satisfied, it "(...) *sometimes can be useful to get to know prison, as they then can experience what it means and learn better not to continue with it*", thereby referring to short detentions for younger suspects who are not yet often convicted (11-IJ; alluding on a kind of 'short-sharp-shock' incarceration). Also some alternative, but nevertheless very intrusive, measures such as (sometimes long-lasting) home curfew orders may reflect similar objectives – without even talking about the very strict regime of electronic monitoring (see below, par. 5.3).

With respect to **sentence length**, the legislation only provides for a threshold of the possible maximum penalty that can be imposed *in abstracto* (imprisonment of one year or more). Arguments relating to the expected sentence length that would be imposed by the sentencing courts *in concreto* do not seem to play a major role in the decision-making process, except in cases at both extremes of the continuum, i.e. where either very long sentences or just rather short sentences could be expected. As one of the defence lawyers indicates, in cases that can result in very long prison sentences, it makes little sense to release the suspect from custody prior to trial, knowing that he will be convicted to a serious sentence (and has to return to prison for a long time anyway; 10-DL). Nevertheless, when it is expected that the sentencing court will not impose a sentence that is longer than the time already spent in pre-trial detention, this could be an argument for defence lawyers to plea for a release (under or with conditions; 1-DL).

1-DL

DL: How it then evolves in your argumentation depends on the kind of case and the specific position of your client. For bigger cases this entails advancement. When you see that a dossier has not moved forward for a long time, it can be a reason for us to go for it. When they are stuck for six months already and the investigation cannot be closed, this becomes the argument to plead for. Then the duration of the investigation does become an important argument.

Detentions, which already last for a long time while the criminal investigation process is not yet concluded and still will take some time, could eventually convince public prosecutors to agree with alternative measures, such as financial bail (12-PP(app)).

> 12-PP(app)
>
> PP: Another problem: at a certain moment, and it has to do with the duration of the detention, you get to a certain point in some cases at which everybody realises: the danger of absconding remains existent and the investigation will surely take another six months. At a certain moment you will have to decide… then you will more easily agree with a [financial] bail of… I always demand a substantial bail. This is of course always subjective: what is a substantial bail?

The expectation that the offence will be sentenced with a rather short sentence, can also influence the decision of the investigation judge, in that it would not 'justify' a (long) period of pre-trial detention (4-IJ).

> 4-IJ
>
> IJ: As you mentioned, when it can only lead to a punishment of 6 months [*in concreto*], I cannot justify someone staying in pre-trial detention for 6 months. Or even thinking further: the indications of guilt. Those are not proofs. Especially in the beginning these could be rather light elements when it comes to evidence. But if you doubt as an investigating judge that these people would ever get convicted, then I find it hard to put them in pre-trial detention. I do think you need to keep this in mind when you arrest someone.

And finally, the **attitude** of the suspect can play an influential role. This not only refers to the situation where suspects invoke their right to remain silent (see par. 5.1.6), but more in particular also to other specific characteristics, such as insight in failure, cooperative behaviour, motivation for change, self-reflection on consequences/impact of the offence (see also below, results of the case vignette study, par. 9.2), or suspects "*who don't f**** *care*", as one of the respondents expressed it.

**Summary**

- Pre-trial detention (and alternatives) may be ordered only in case of an offence punishable by a prison sentence of at least one year. The investigating judge needs to have serious indications of guilt, and the warrant (and alternatives) is only possible when it is absolutely necessary for public security. Furthermore, if the maximum sentence for the criminal offence does not exceed 15 years of imprisonment (except terrorist cases: 5 years), remand in custody or alternatives have to be based on additional grounds: risk of re-offending, absconding, collusion and/or destroying evidence.

- The legislation only requires (serious) 'indications' of guilt which does not necessarily means 'proof'. Sometimes cases with very poor available evidence are referred to criminal investigation (instruction) by public prosecutors, and available evidence is not always very clear.
- Some defence lawyers complain about their limited or very restricted possibilities to build up an adequate defence: no access to case file information in the initial stage of the procedure, extensive case files, difficulties to consult case files in a proper manner, and substantial discussions on the indications of guilt in front of review/appeal courts often lacking or neglected.
- The criterion of 'absolute necessity for public security' is not clearly defined, open to a lot of discretion, and often implicitly assumed.
- The criteria of risk of collusion and of recidivism seem to be the most predominant, with the former especially present in the beginning of the criminal proceedings. In particular the risk of recidivism can easily be justified/motivated.
- The risk of absconding is also frequently used, and quasi-automatically assumed in cases with foreigners who have no (legal) stay of living/residence in Belgium. Judicial authorities seem to have many difficulties with elaborating or imagining alternative measures for them, except (financial) bail.
- From a general point of view, the legislative framework is considered as adequate and at least theoretically being able to provide for pre-trial detention as an *ultima ratio*. A lot depends on the practical use and concrete operationalisation of the underlying key concepts.
- Other factors than the strictly legal criteria that might influence pre-trial detention practice and policy were also discussed by respondents, such as: the impact of (social) media, public sensitivities and prosecutorial policies, expectations of police officers or public prosecutors, policies with respect to the implementation of short, unconditional prison sentences, repressive or punitive considerations, expected sentence length, and the attitude of suspects.

# 5. Non-custodial alternatives or less severe measures

Legal framework

In cases where pre-trial detention may be ordered or maintained, the same judicial authorities (investigating judge, judicial council or chamber of indictment) may decide on an alternative measure (release on bail or under conditions) or decide that the arrest warrant will be executed under the form of electronic monitoring.

## 5.1. Freedom or release under conditions

Legal framework

With respect to release under conditions, the Pre-trial Detention Act of 20 July 1990 does not provide for an exhaustive list of conditions that can be imposed. The choice of conditions is entirely left to the judges' discretion. When the judge decides to release the suspect and imposes one or several conditions, this is valid for a determined period of no longer than three months, however renewable each time before the end of the maximum terms.

### *5.1.1. General observations on the use of release under conditions*

Freedom/release under conditions (RUC) seems to be used very extensively as an alternative to pre-trial detention. Since its introduction in 1990 (Pre-trial Detention Act of 20 July 1990), this measure became very 'popular', and the number of applications was continuously growing. As such, in 2015 more than 5,300 suspects were released under conditions supervised by probation services (flow; data available from the datawarehouse of the Probation Service), compared to more than 11,000 committals to prison as pre-trial detainee or not yet definitively convicted offender. The daily population supervised by probation officers within the framework of this alternative measure amounted to 2,479 on the 31th of December 2014[7].

Such alternatives are applied in all judicial districts, although the extent of **its use** may **vary** in a significant way by type of decision maker (investigating judge *vs.* court) and by individual judges. Some defence lawyers indicate that (certain) investigative courts are more reluctant to impose such measures than other, at least in the very beginning stages of the criminal investigation process – i.e. when the public prosecutor requested pre-trial detention and the investigating judge has decided to issue an arrest warrant (see

[7] Dienst Justitiehuizen, 'Jaarverslag 2014' (Vlaamse Gemeenschap Departement Volksgezondheid, Welzijn en Gezin 2015), 74.

also, par. 7). In these instances, previous prosecutorial requests/judges' **decisions** are likely to be **confirmed** by decision makers who intervene in later stages of the proceedings (2-CI). On the other hand, one of the investigating judges also points out that, even in the initial or early stages of the proceedings, a lot of differences might occur in decision outcomes: whereas some investigation judges impose alternative measures rather frequently, some will almost never or very rarely do so (14-IJ; see also 13-DL, 16-JC).

### *5.1.2. Role of different actors in requesting alternatives*

Occasionally, alternative measures are imposed by investigating judges or courts without any prior request by other actors. In the vast majority of cases, however, these kinds of decisions result from **explicit requests**. Although one defence lawyer witnesses about 'good experiences' with prosecutors in a particular judicial district (1-DL, however contradicted by an investigating judge from the same district: 4-IJ), almost all other interview respondents do observe that – at least if the suspect is already in remand custody – **public prosecutors** themselves will "*never*", "*very rarely*", "*not often*", "*in an absolute minority of cases*" (1-DL, 2-CI: sometimes in cases of stalking, 7-IJ, 8-PP(loc), 9-DL, 10-DL, 11-IJ, 14-JC, 15-JC, 17-PP(loc)) request for the application of an alternative measure. When public prosecutors ask for alternatives, this usually happens at the very early stage, when they are referring the case to the investigating judge and requesting for a judicial criminal investigation (in Dutch: '*gerechtelijk onderzoek*'). In this case, it sometimes happens that the public prosecutor will ask for the "*issuing of an arrest warrant, at least the imposition of conditions (freedom under conditions)*" (4-IJ, 8-PP(loc): e.g. for drug addicted burglars – as a "*big stick*", 11-IJ, 17-PP(loc)), thereby implicitly suggesting to the investigating judge that the public prosecutor's office has no objections against the imposition of alternatives (even if the prosecutor at this stage has no legal possibilities to contest this initial decision of the investigating judge). Some of the public prosecutors indicate that they will never/not request more "*firmly*" or "*explicitly*" for an alternative measure (at the beginning of the formal procedure), because they want to leave full discretion to the investigating judges and do not want to interfere with judges' competences of (independent) decision making (8-PP(loc)), or another reason is that they "*never have full information*", e.g. on the possible risks of collusion (17-PP(loc)). In addition, such 'prudent' formulation of the (initial) request can also serve 'strategic' objectives: namely, according to a prosecutor, investigating judges could perhaps make valuable use ("*it gives them ammunition*") of the prosecutor's priority request for "*an arrest warrant*" during their interrogation of the suspect by confronting the suspect with the "*really serious character*" of the offences (17-PP(loc)). More generally, public prosecutors do not even consider it as their role/task to actively propose alternative

measures to court; they see it as the main task of defence lawyers to take the initiative. Public prosecutors are not physically present during the interrogation of the suspect by the investigating judge, but are heard in their observations/request at review and appeal hearings. Some respondents indicate that, notwithstanding individual differences (e.g. at the level of the court of appeal) at these stages, public prosecutors will "*seldom explicitly agree*" with alternative measures (9-DL), or, "*sometimes*" (only) will do so after having heard the plea of defence lawyers (12-PP(app)). One of the prosecutors also indicates that the "*real*" role of the public prosecutor does rather not come to full extent at (review) hearings of the judicial council, but merely *after* these hearings, when he decides to make appeal or not against the judicial council's decision (e.g. if release under conditions is granted: is there a risk of collusion, are the imposed conditions "*realistic*"?) (17-PP(loc)).

In practice, **defence lawyers** are the predominant actors who pro-actively work out and propose alternatives to pre-trial detention – investigating judges themselves imposing alternatives "*out of the blue*" being rather seldom (1-DL), at least not proposing such measures at (review) hearings of the judicial council (4-IJ). Lawyers also consider this as (one of) their main tasks in the course of criminal investigative proceedings (8-PP(loc), 10-DL). Besides exerting control on the legally correct and proper conduct of the procedure, their major concern is to avoid detention or at least to get their client "*out of prison, and this, at all costs*" (9-DL). This latter specification gives an explanation to previous research findings[8] and our own observations during the field work (*conducted within the framework of work stream 1 of the current research project*[9]), which indicate that releases without conditions are becoming more and more 'rare', while alternative measures seem to be increasingly used. The credo "*out is out*!" (1-DL) is moreover reinforced by one of the defence lawyer's observation that nowadays "*it's not done anymore*" (i.e. no longer accepted by judges) to ask the judge or court for a simple release without conditions (13-DL) – and expectations about the suspect's capacity to comply with conditions is not a decisive factor whether or not to propose alternatives (1-DL). In addition, according to one of the interviewed defence lawyers, colleagues don't have to be hypocritical by denying that they themselves also (financially) benefit from this situation: getting out clients from prison generates publicity, attracts new clients, and as a consequence more "*money*", so it only concerns an "*obligation to achieve a result, whatsoever*" (13-DL).

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[8] Dieter Burssens, Carrol Tange and Eric Maes, 'Op Zoek Naar Determinanten van de Toepassing En de Duur van de Voorlopige Hechtenis / A La Recherche de Déterminants Du Recours à La Détention Préventive et de Sa Durée' (NICC, Operationele Directie Criminologie 2015).

[9] Maes and Deblock (n 2), 13.

The role of **probation officers** in this respect (proposing alternatives) is rather limited, if not of insignificant importance at all. Official statistics show that only in very few occasions probation officers are asked (by the judicial authorities) to conduct social inquiry reports in view of pre-trial detention decisions (in 2014, for example, only in 202 cases for the whole Belgian territory[10]). In general, probation officers have no information about whom is presented to investigating judges or has to appear before investigative courts (unless they got such information for example from suspects or offenders who are already supervised by their services). And even if they would have obtained such kind of information, they cannot autonomously take initiative to conduct social inquiry reports. They have to be 'mandated' in advance to do so by the appropriate judicial authorities, as indicated by the legal provisions; therefore, also contacts between defence lawyers and probation officers are almost inexistent. Social inquiry reports are based on information obtained from the suspects themselves, eventually family members and/or (verified) information from other administrative or social services. Due to the very strict time constraints in which decisions on pre-trial detention/alternatives have to be taken in the early stage of the criminal proceedings (– at the time of conducting the interviews – within 24 hours after police arrest for the investigating judge, with a first review decision by the judicial council within 5 days after the arrest warrant ordered by the investigating judge), and – probably also – individual workload of probation officers, reports will not (cannot) be communicated to judicial authorities within such restricted periods of time. If requested at the beginning of the proceedings, probation services will (try to) deliver a social inquiry report at least before the second review hearing of the judicial council (i.e. within one month after the first review hearing). However, by then, defence lawyers usually will already have examined possibilities of, or prepared (concrete) proposals for alternatives. Therefore, the intervention of probation services within the framework of alternatives to pre-trial detention (more specifically, release under conditions) is mainly focused on the assistance and supervision of suspects released (under probationary) conditions before trial (as mentioned, this represents more than 5,000 new cases per year for the whole territory), i.e. after a decision to grant an alternative measure has been taken.

#### *5.1.3. Moment of/to whom requesting (or granting) alternatives*

The moment when, and to whom (investigating judge or judicial council; see below), alternatives will be requested for by defence lawyers, or when they will eventually be granted by the judicial authorities, **depends on many different factors**, such as: the

[10] Dienst Justitiehuizen (n 7), 67.

concrete circumstances of the case and related legally defined 'risks' (e.g., presence of co-suspects, additional investigative acts to be done, nature and seriousness of the offence); personal characteristics of the suspect (presence and seriousness of possible underlying problems: alcohol- and/or drug-related, financial, behavioural, psychological/psychiatric; necessity of and urgent need for treatment; and connected to this, the extent to which conditions have to be formulated very specifically, or in more general terms,…); and, last but not least, the person of the investigating judge or judges of the judicial council/chamber of indictment (see also the results of the case vignette study, par. 9.2).

With respect to the latter, a defence lawyer explicitly emphasises the importance of "*knowing well your judge*", in order to be able to propose something that would fit his expectations (which arguments to use, which conditions to propose, etc.; 1-DL). In this respect, the plea of defence lawyers would be different depending on the judicial district and/or individual judges who are dealing with the case (type of measure, but also type of conditions) (13-DL). The defence lawyers we interviewed, all of them with extensive experience in criminal (procedural) law and active all-over the country, seem to be very well aware about these (differences in) expectations, and (try to) **adapt** their **defence strategies** accordingly. Nevertheless, some still get surprised sometimes by the (unexpected) inconsistencies in individual decision-making and the concrete outcomes (9-DL), and seem to feel very uncomfortable with so much difference (relative unpredictability, lack of uniformity across districts/judges) in decision outcomes (1-DL, 9-DL, 13-DL). On the other hand, other actors (prosecutors/judges, and even a defence lawyer, 1-DL) find it quite normal/acceptable that the **"*human*" factor** accounts for variability in decision outcomes (e.g. 8-PP(loc), 14-IJ).

> 14-IJ
>
> IJ: I think sometimes people are brought in before the investigating judge that don't belong here at all. When you should say that a pre-trial detention is not at issue. This could have different reasons, sometimes not enough indications of guilt according to me. Even when you do have indications of guilt, it could be someone who totally doesn't belong in pre-trial detention, but this is of course our judgement. It is about people judging other people. There are [x] investigating judges in [judicial district x] that all have their own background and way of working as well as their vision about it. Of course you stay within the limits of the law, but the law about pre-trial detention is actually quite broad, to judge. […] always the same investigating judges [have] the highest and the lowest number [of arrest warrants]. This says a lot about how broad one can go in judging the pre-trial detention and that it really depends on how a person deals with the issue.

As mentioned above, the **moment of (possible) release** (under conditions), electronic monitoring or (financial) bail, heavily depends on the concrete circumstances of the case: characteristics of the suspect (especially, fixed residence in Belgium or not), the progress of the criminal judicial inquiry (cf. risk of collusion) and the seriousness of underlying problems (cf. severe addiction alcohol- and/or drug-addiction where residential care is indicated,…). Although one of the probation services (5-PS) 'estimates' that most releases under conditions take place within 24 hours after police arrest (and that those released from prison stay not much longer than 6 to 8 months in prison, sometimes after appeal), the former statement does not seem to be confirmed. Research in (francophone) judicial districts indicates that most releases under conditions are only granted after having spent a period of time 'behind bars'[11]. Moreover, also other interview respondents mention that it is often quite difficult to release (under conditions) at the beginning of the procedure. Not only the 'quality' of the defence lawyer (pro-actively looking for alternatives) does make a difference (see also, par. 6), but also the 'time aspect' plays a very important role (e.g. 7-IJ). After the first interrogation by the investigating judge, defence lawyers usually will have more information (i.e. access to file information if the suspect is detained by the investigating judge), but also will have more time to have contact with suspect's relatives and/or treatment facilities (with supporting documents/proofs) in view of elaborating (credible) proposals at consecutive judicial council's or appeal hearings (7-IJ). If suspects have no (legal) stay in Belgium or need to be treated in residential care facilities (in order to make any chance of being released), a period of pre-trial detention in prison almost seems to be 'guaranteed'; only in 'less severe' cases (social bounds in Belgium, not 'too severe' problems, no imminent risk for public security) immediate release (after interrogation by the investigating judge) will be conceivable.

Some lawyers make very '**creative use**' of the procedural opportunities Belgian legislation provides for. Even though cases of suspects who are in pre-trial detention (in prison or under electronic monitoring) are frequently and automatically subjected to review hearings (at the judicial council, with possibility of appeal before the chamber of indictment), the investigating judge has the decision power to release a detained suspect at any given moment during the criminal investigation process, and this without possibilities to appeal against it by the public prosecutor. Experienced defence lawyers of course know this procedural opportunity and make 'creative' use of it. Sometimes, for example, when there are new elements in the case in favour of release and if, at recent review

[11] Alexia Jonckheere and Eric Maes, 'Actualités Autour Des Alternatives à La Détention Préventive' in Yves Cartuyvels, Christine Guillain and Thibaut Slingeneyer (eds), *Les alternatives à la détention en Belgique: un état des lieux, à l'aune du Conseil de l'Europe* (La Charte 2017), 153.

hearings, already an 'opening' was created for possible release (e.g. investigating judges/judicial council's judges showing themselves to be prepared to release if certain preconditions would be met in a near future). However, in other instances, defence lawyers use this possibility even when they have already an (almost) completely finished concrete 'plan' that could be plead successfully at the judicial council's review hearing. One of the interviewed defence lawyers explains that this defence strategy implies that he would rather plea in a certain way for a maintain in detention of his client at the hearing of the judicial council, and then, some days after this hearing, present an alternative measure to the investigating judge, thereby avoiding that the public prosecutor would appeal and that pre-trial detention would be prolonged due to the appeal procedure (1-DL). According to this lawyer, contacts with investigating judges usually are very much more informal, there is more room for explaining somewhat more 'human' aspects of the case (which is only to a lesser degree possible during judicial council's hearings), and investigating judges are informed the best about the criminal investigation (1-DL). Although investigating judges declare that they generally do not appreciate defence lawyers requesting alternative measures just a few days after (sometimes even just one day after) formal detention hearings at the judicial council – because they do not want to be perceived as "*an instance for appeal against decisions of the judicial council*" (14-IJ) –, some explicitly mention that they are prepared to examine the case and possibly release the suspect, but only as far as 'new' favourable elements to the case are brought forward (14-IJ). Another investigating judge believes that this procedural opportunity has gained much more importance since, due to a recent legislative reform (in February 2016), judicial council's hearings are no longer organised on a monthly basis (or every three months), but only every two months (for all cases) from the third review hearing onwards (7-IJ, see also par. 7). As such, it guarantees (can guarantee) continuous reconsideration of submitted cases. The previous legal rule providing arrest warrants to be valid for three months for the most serious offences, was in practice not observed in some judicial districts; i.e., judicial council's hearings were still organised on a monthly basis, and this in order to exclude 'mistakes' and being obliged to release suspects due to procedural irregularities (4-IJ, 7-IJ).

#### *5.1.4. Social inquiry reports*

Social inquiry reports are **not often asked** (see also, par. 5.1.2), and this also depends on the person of the judge. As an investigating judge explained, this would also be little meaningful when a suspect invokes his right to remain silent (14-IJ). If a social inquiry report is requested for, this usually happens – **almost immediately** – after the issuing of an arrest warrant by the investigating judge.

Probation officers indicate that elaborating social inquiry reports demands **a lot of preparation**: visiting the suspect in prison – and sometimes the travel to prison is not very fruitful, because the suspect is not always available (e.g. he has visit from family, from his defence lawyer, is interrogated by the police or brought to court, etc.) –, eventually interviewing relatives of the suspect in the home environment, … When probation officers are asked to write a social inquiry report [in 2014, only in 202 cases – see above –, compared to almost 5,000 (new) supervision orders within the framework of release under conditions[12]], such report will not be delivered to the requesting authority before the first review hearing (i.e. within 5 days after the issuing of the arrest warrant by the investigating judge), because this time frame is considered as too short (3-PS, see also par. 5.1.2): travel to the prison often takes some time, probation officers go to prison 'on good luck' (5-PS; cf. the suspect is not always available) and need some time to clarify and elaborate a proposal and have to discuss this again with the suspect (5-PS). If a suspect is for instance arrested on Friday and the first review hearing by the judicial council will take place on Tuesday, it seems quite impossible to deliver the report before that date (because there is only one workday left; 5-PS). According to the interviewed probation officers, instructions from the head office of the (Flemish) Probation Service indicate a time limit of one month (3-PS, 5-PS), which means that social inquiry reports would only be available at the second review hearing (i.e. within a month after the first review hearing). This is also confirmed in the annual report of the (Flemish) Probation Service[13]: "*The strict time frame, within which the judicial authority has to take his decision to release under conditions, plays a large role in whether or not applying for a prior social inquiry report. The time limit for performing a social inquiry report is at least one month. This term is not sufficiently adapted to the strict timeframe of the measure of release under conditions. In any case, the judicial council must review pretrial decisions within the month.*" However, this does not restrain some probation offices to deliver social inquiry reports sooner, if possible; as a governor of a local probation office explains, the aim is to perform these reports within two weeks (5-PS).

In practice, as mentioned above (par. 5.1.2), defence lawyers in co-operation with their client are the main actors who elaborate and request concrete alternative measures. Information contained in social inquiry reports of probation officers are "*pure **advisory***" (5-PS) in which, inter alia, possibly useful conditions are proposed – although, according to one of the investigating judges, "*sometimes giving an uninformative answer*" [14-IJ; e.g. the statement that the suspect 'would benefit from treatment for drug addiction',

[12] Dienst Justitiehuizen (n 7), 69.

[13] ibid., 67.

something he (the judge) 'already had imagined himself'] – rather than fully elaborated plans; the elaborating of which is seen as a task for defence lawyers (e.g. to get a certificate from residential care institutions that their client will be treated in their facility) or the psycho-social services active in prisons. '**Public relations**' for social inquiry reports will usually only be done by probation offices if it would be observed that judges impose conditions with which probation services 'cannot work' (5-PS). Most often, probation officers thus intervene in the process after the competent judicial authorities took the decision to release under conditions (i.e. supervising), in order to make conditions concrete, to assist released suspects and to help them to comply with the conditions. The added value of preliminary social inquiry reports is questioned, not only by other actors in the criminal justice system but even by some probation officers themselves, and this for different reasons. To the question if such reports are often requested by judges, one defence lawyer – alluding to (inversed) **power relationships** between probation officers and suspects, and the question of intimidation – stated for example:

> 13-DL
>
> They will not do that [requesting a social inquiry report]. Imagine that the outcome would be positive? [And] the policy of infantilising [in Dutch: "*bepamperingspolitiek*"] of some probation officers,... all of them young girls. If you have a hardened, experienced criminal and she needs to visit his family, I think they eat her, figuratively speaking. They can twist and turn so well...

Social inquiry reports are not often requested for by judicial actors in the pre-trial phase, but contacts take place between (investigating) judges and probation officers after 'alternative' measures (release under conditions) have been granted (by written reports, and/or more informal means of communication). At least in some judicial districts (attempts to regular) more structural consultation (e.g. once a year or every two years) is installed in view of sharing experiences with the application of alternative measures (problems, obstacles, possible solutions, ...) (e.g. 3-PS, 5-PS, 6-PS); this allows, for example, also to explain (to judges) which type of conditions are 'workable', how preferably to formulate conditions, to clarify how conditions have to be interpreted, ...

### *5.1.5. Targeted group and type of conditions*

As mentioned above, Belgian legislation does not provide for an exhaustive list of conditions that may be imposed. It is at the discretion of the individual judge to decide on the conditions. Belgian legislation mentions only one particular condition that *can* be imposed, namely: it can be prohibited to the suspect to engage in activities which could bring him into contact with minors (art. 35, § 1 Pre-trial Detention Act).

In practice, a distinction can be made between rather **general** conditions and more specific conditions that are **tailored** to individual case/offender characteristics. Conditions to comply with that are commonly imposed, are, for example, the following:

- prohibition to commit further offences;
- obligation to reside on a permanent address;
- obligation to stay at the disposal of judicial authorities;
- obligation to respond immediately to convocations of the police services and judicial authorities;
- obligation to present him/herself to the probation service, before a specified date or within a certain time period;
- prohibition to leave the assigned place of residence within fixed time periods (home curfew order, e.g. between 10 p.m. and 7 a.m.; in Dutch: "*avondklok*");
- obligation to search for employment (and submit proof), to keep a job, or to follow vocational training;
- obligation to have a meaningful daily occupation;
- obligation to follow appropriate (ambulatory or residential) treatment for alcohol- and/or drug problems;
- obligation to follow treatment for problems of aggressive behaviour, or inpatient psychiatric treatment;
- attend a course organised by the Belgian Road Safety Institute (7-IJ);
- prohibition to visit certain establishments, such as pubs, bars;
- prohibition to have contact with victims or co-suspects mentioned in the case file;
- prohibition to make press announcements (7-IJ);
- prohibition to be (professionally) active within a specified (type of) business, company or association (cf. court observations work stream 1[14]);
- prohibition to have access to internet (17-PP(loc), 9-DL);
- prohibition to enter (12-PP(app))/leave Belgium (cf. court observations work stream 1[15]).

Some conditions serve interests of the criminal justice proceedings and **aim** at avoiding absconding/collusion or (physically/psychologically) protecting (possible) victims (directly involved in the concerned case). Many conditions however refer to the prevention of possible risks of recidivism (employment, treatment, supervision by the probation service, prohibitions with respect to activities/locations).

[14] Maes and Deblock (n 2), 11.

[15] ibid.

The type of conditions often seems to be quite **standardised** – commonly used and applicable to a large amount of various cases –, and it is not unusual that a **large set** of conditions is imposed. Whilst in some judicial districts only a few conditions are imposed, in others, the number of conditions sometimes adds up to more than 10 conditions (3-PS).

Some – and, according to a defence lawyer, mainly "*older, somewhat special*" – judges are seemingly very '**creative**' in formulating specific **conditions** (13-DL). As such, they impose for example conditions 'to read books' (detailing specific titles), 'to go running in the park', or 'to stay with his grandmother in Morocco for a couple of months'. Conditions that suspects usually comply with, and sometimes may have positive effects (e.g. the latter condition to remove the suspect from his habitual environment; 13-DL). 'Creative' – and apparently beneficial – use of conditions was also reported by another defence lawyer who referred to a 'ban on access to venues of (football) matches' with the obligation 'to report to the police during halftime of the game' (1-DL) – although police forces do not appreciate very much such type of conditions (because of additional workload).

Some conditions are quite '**popular**' in some districts, but not at all in others. Whilst one investigating judge will not impose 'home curfew orders' (in Dutch: '*avondklok*') because of its "*very intrusive character*" (11-IJ), such a condition is frequently imposed in other districts. According to some respondents, it is applied in a variety of cases, but according to others predominantly for young suspects involved in drug dealing and/or fights, with the main objective to 'keep them out of the street at night' (times and places when and where these kinds of offences usually would be committed). The specific implications of this kind of 'house arrest', however, do not always seem very clear to probation officers, as investigation judges might have a different understanding: e.g. does a restraining order ('not to be on the street'; in Dutch: "*straatverbod*") mean that one cannot stay at someone else's house or at another (non-public) place? (5-PS).

> 5-PS
>
> NICC: The investigating judges probably also do not wonder when determining the conditions about how to concretely formulate it.
> PS: During the meeting it also became clear: for investigating judge [X] a [home] curfew means not being on the street, but in a different judicial district this entails staying at your place of residence. Thus when I receive a mandate from [judicial district X], I know how to fill it in. But with a mandate of [judicial district Y] for example, how does this investigating judge think about it? We would like to get to some uniformity. Or it should at least include a uniform formulation: curfew at the place of residence. Sometimes

> we do get a change of address, as it is indicated, but this is not told to the police. When the police then comes to control, he does not live at that address anymore, a PV (police record) is made up, it goes to the public prosecutor,... But eventually this entails work for nothing and leads to frustration for both parties. We will also ask to add this to the conditions.

Although most respondents admit that many conditions are quite similar to **probationary conditions** that would be **imposed to convicted offenders**, one of the respondents did notice that there are also some differences in 'philosophy' and type of conditions. Release under conditions merely has to be considered as an 'opportunity' for the suspect (6-PS; see similarly, also other interviewed respondents), and conditions (to be) controlled by the police, such as 'home curfew orders' or restraining orders of 'not to have contact with specified (types of) persons', are not, or at least less often, imposed on probationers (6-PS). On the other hand, the condition 'to pay financial compensation to the victim' will generally not be imposed on not yet tried suspects – but, a condition 'to save money' is sometimes applied (3-PS) –, because this would imply a sort of pre-judgment on the guilt of the suspect. Nevertheless, although compensating the victim cannot (may/will not) be imposed, the fact that victims are (being) compensated is sometimes used by defence lawyers, not with an aim of imposing such a condition, but rather as a 'positive' factor or argument (1-DL) in favour of release.

In some cases conditions will be **formulated** in a **very concrete** way and for example precisely indicate where (in which institution) a suspect has to reside for treatment purposes or to which ambulatory treatment centre/person he has to address himself. In other cases similar conditions are circumscribed in more general terms. Precise instructions are usually given in cases of severe (alcohol/drugs) addiction or psychiatric problems when risks of re-offending and/or absconding are estimated as very high, and immediate transfer to a residential care institution (without precedent release) is deemed necessary (e.g. 14-IJ, 16-JC, 17-PP(loc.)). Nevertheless, some respondents mentioned that formulating such precise 'instructions' could cause problems, in particular when there is not yet a definitive agreement of the centre or institution at the moment the release decision has been taken (e.g. 5-PS).

Some conditions which seem to be applied quite frequently in other countries – such as regularly reporting to the police – are **not (often) applied** in Belgium: this type of condition – although considered as useful by one of the interviewed investigating judges (4-IJ) – seemingly has fallen into disuse, probably also because it results in additional workload for police officers (4-IJ, 9-DL). In contrast, 'terrorist' cases or cases with 'radicalised' suspects (which receive a lot of attention in the last couple of years) confront judges and probation offices with **new challenges**, e.g. with respect to the question

which conditions can be imposed and the availability of adequate (de-radicalisation-)programs (6-PS). In this respect, one of the interviewed defence lawyers also reported about sometimes contradictory conditions, such as a location ban (not to enter a certain city district) combined with the obligation to present himself to a de-radicalisation centre located in the same (prohibited) area (13-DL).

#### *5.1.6. Difficulties and needs*

Although alternatives to pre-trial detention such as 'release under conditions', are used very frequently, the preparation and practical implementation of 'release under conditions' often encounter numerous **problems** which delay or even exclude the imposition of these alternatives. Many different factors play a role:

- **Procedural** aspects: at the moment of the interrogation by the investigating judge, and even at first review hearings, only little (verified) information on the personal situation of the suspect (e.g. on the employment status, education, income situation, family relations, housing, …) is available to the decision-makers. Additional (certified) information is often needed (e.g. by requesting a report of a psychiatric expert) to take well-informed decisions, and if the suspect invokes his legal right to remain silent, many judges feel themselves 'obliged' or 'forced' to incarcerate (e.g. 14-IJ), due to the massive lack of information (in this case, detention will often be justified by the fact that further investigation is required). If it is considered that there is an important risk of **collusion or destroying evidence** and therefore other investigative acts still have to be done (e.g. home or telephone search, arrest/interrogations of/confrontation with co-suspects, etc.), alternatives are less likely to be imposed, at least in the early stages of the criminal investigative proceedings.
- **'Waiting lists' at the level of probation services**: as mentioned above, the preparation of social inquiry reports – not often requested for – takes time (par. 5.1.4), and even when alternative measures are being granted, there is some time lapse between the eventual decision to release under conditions and the real 'start' of probation service's supervision and guidance (e.g. first interview by a personal probation officer some weeks after initial notification at the probation service) (6-PS);
- In some judicial districts there is a **lack of adequate offer** (e.g. in a specific judicial district, it was reported that there are no (not much) facilities for people with problems of aggression; e.g. 3-PS). Some ambulatory as well as residential care facilities do even **exclude** certain type of suspects (or 'justice clients' in general), because they are still presumed innocent (and might deny the alleged offences), 'judi-

cial pressure' is not seen as (enough) internal (personal) motivation for treatment, and/or due to co-morbidity or specific (psychological/psychiatric) characteristics of the suspect (e.g. 3-PS, 7-IJ, 8-PP(loc), 14-IJ, 15-JC, 16-JC, 17-PP(loc));

- Sometimes suspects themselves are **not motivated** for treatment, or alternative measures in general (14-IJ), at least some of them seem difficult to motivate (3-PS, 6-PS);
- **Intake procedures** for incarcerated suspects: most, if not almost all, treatment facilities are not willing to travel to prison to conduct intake interviews, while for imprisoned suspects it is not evident or possible to leave prison for intake interviews outside prison, which means that many suspects can be caught in a very 'vicious circle'. In some judicial districts such problem is 'resolved' – and an almost 'common practice' among judicial authorities (i.e. investigating judges as long as the criminal investigation has not yet been concluded, public prosecutors if the investigation has ended (17-PP(loc)) – by giving orders to local police forces to (temporarily) transfer prisoners to extra-mural treatment facilities/centres outside in the regard of making intake interviews possible (7-IJ, 17-PP(loc), 16-JC). In other districts, however, this is not (often) practised, due to the workload of police forces who rather do not like to take up such additional tasks (14-IJ). When the risk of re-offending is considered as high (e.g. severe problems of addiction), judges do not prefer to release suspects in order to undertake intake interview(s) and await treatment; as one of the interviewed public prosecutors pointed out, in case residential care is required, it would be better to be directly transferred from prison, instead of being first released in the community and then undergo residential care (17-PP(loc)), not only for safety reasons (7-IJ, i.e. the risk of re-offending), but also because motivation for treatment would be higher if imprisoned prior to treatment (17-PP(loc)). One of the interviewed judges, in turn, expects very concrete, detailed information from these care institutions, i.e. date and hour of the start of treatment, and a promise to start within one week in case of positive intake (16-JC).
- **In-prison facilities** who played a very important intermediary role in motivating and referring prisoners with alcohol- and/or drug problems to post-release (ambulatory or residential) treatment facilities – so-called 'central registration points', in Dutch: "*centrale aanmeldingspunten* (CAP) *drugs*" –, were abolished (16-JC, 17-PP(loc))), due to budgetary reasons and discussions about who has to pay for such kind of service (cf. the complicated Belgian State structure and division of competences between the federal State, language Communities, and Regions). Recently having been re-established, they are now imbedded into broader structures (in the Flemish Community, within mental health care facilities). In a particular judicial district, a similar co-operation exists with 'case managers' who (can) arrange (op-

portunities for) treatment in residential care facilities and inform investigating judges on the concrete possibilities (place and time) (6-PS); in other districts, sometimes concrete arrangements are made depending on personal networks of investigating judges, e.g. originating from previous work experiences (11-IJ);

- Nevertheless, ambulatory and residential care facilities often have limited **capacity**, and therefore, have to cope with (long) **waiting lists** (e.g. 3-PS, 5-PS, 6-PS, 7-IJ, 8-PP(loc), 14-IJ, 15-JC, 16-JC); if immediate care is deemed necessary – which often seems to be the case (see e.g. 7-IJ) – this, of course, might influence length of pre-trial detention (e.g. 3-PS);
- **Long duration** of programs outside prison sometimes creates difficulties, because this can interfere with the course of the criminal justice process (5-PS): e.g. if a suspect follows treatment and afterwards is convicted to an unconditional prison sentence (and re-incarcerated in prison). Such outcomes with interruptions of treatment make treatment facilities reluctant to accept not yet definitively convicted offenders;
- **Language** problems (5-PS, 6-PS, 14-PS): if suspects do not speak the native language, this not only causes difficulties to probation officers – an interpreter is present at interrogations of the investigating judges and at investigative court's hearings, but not in probation services, although probation clients can sometimes be assisted/helped by a friend, or even the victim in case of intrafamilial violence; for external facilities/services which provide for specialised care such language problems most often cannot be handled; how to treat somebody if he does not speak or even understand the language? (5-PS). Rather exceptionally 'solutions' are found within local immigrant communities who can provide for or develop initiatives for non-native speaking fellow citizens (14-IJ);
- Restricted regulations with respect to **accredited treatment facilities** can be an obstacle to take in charge certain suspects; e.g., in principle, for certain sex offenders an intake is required by a so-called forensic team of a specialised institution; if a defence lawyer proposes another (private) therapist, this will usually not be allowed (because the suspect has to do an intake in a specialised facility); consequently, there will be no 'problem' if the latter facility agrees, but if this facility does not, and therefore the probation service has to accept the initial proposal of the defence lawyer anyway, the probation service will 'suffer a loss of face' (5-PS);
- According to interviewed probation officials, it sometimes occurs that defence lawyers deliver **incorrect information** to (external) institutions (and judges; see also par. 6.2.); e.g. in case of co-morbidity of sexual and drug addiction problems, it was mentioned that the defence lawyer arranged treatment for drugs problems, while the investigating judge expected treatment for sexual problems (and supposed that

the suspect would be treated for this problem); in such cases it is not impossible that institutions will no longer agree to co-operate and that the probation service 'has to resolve all the practical problems' if the suspect has been released with such specific 'treatment'-conditions (5-PS);

- Judges find it very difficult to imagine concrete alternatives for suspects who have **no** fixed address/**residence** in Belgium; in many of these cases risk of **absconding** will be invoked to justify pre-trial detention (cf. 2-CI: 'no solution' or alternative). Although (very exceptionally) alternatives are applied to foreign non-residents – and in some occasions also perceived as useful to a certain extent, e.g. to prevent further crime in cases of domestic violence (3-PS) – probation officers generally experience it as 'very difficult' to work with illegal aliens, because "*actually, they may not be here*" and probation officers then have to work with clients without future prospects in the country – and no possibilities (no work permission, no financial social benefits/resources) – who soon or late will/can be expulsed (3-PS); even Belgian citizens without a permanent residence will probably temporarily be 'locked up' (3-PS; see also, par. 4.3);
- Another factor that sometimes complicates the application of alternatives is **lack of consent/agreement of** suspect's **relatives**, e.g. with respect to provide housing or financially support (see more in particular, par. 5.3., with regard to electronic monitoring);
- And finally, it is not unusual that judges are sometimes **sceptical about conditions proposed by defence lawyers** (i.e. that they have different expectations about the capacity of the suspect to comply with certain conditions; 12-PP(app), 1-DL), e.g. where it concerns restraining orders (prohibition to have contact with) in case of partner violence (1-DL).

Several interview respondents expressed concrete needs or proposed initiatives that could stimulate the use of alternatives to pre-trial detention, such as:

- Presence of **probation officers at review hearings of the judicial council** who could conduct preparatory work after the investigating judges' interrogation, inform the court about the suspect, possible alternatives, etc., and reply to proposals/statements made by other actors (7-IJ);
- '**Permanent presence**' **of probation officers in courthouse**, in order to 'screen' suspects (immediately), to inform judges, and to propose and elaborate alternatives:
- More **involvement**, in general, **of probation officers** in informing decision-makers about the person of the suspect, his personal situation, possibilities (~ social inquiry reports, see par. 5.1.4) (1-DL), with the advantage, according to one of the

interviewed defence lawyers, that information coming from probation officers would be considered as more 'neutral' (in contrast to defence lawyers' information which is perceived as "*coloured*") (1-DL);

- A more professional and effective **verification**, by probation officers, of the imposed conditions (e.g. via "*unannounced home visits*" – 13-DL; (announced) home visits being reduced over time, mainly due to budgetary restraints);
- Development of **care** facilities (or specific sections within existing institutions) that can take up/admit "**immediately**" suspects who are in 'urgent' need for specialised care and treatment (rather than to be incarcerated; e.g. 7-IJ, 14-IJ, 15-JC);
- More 'credible' **policy at the level of sentence execution**, in order to prevent that pre-trial detention is being used as a (incapacitating) means of "*calling a halt*", at least for a while, to re-offending suspects "*who normally would be in jail*" (7-IJ);
- The (**abolition** of) **automatic periodical review** hearings by investigating courts (which is sometimes seen as redundant, cf. cost-benefit arguments); there are a lot of costs (lawyers and interpreters to be paid), while often proposals for alternatives are not yet ready or concrete enough (10-DL: "*a lot of money for a senseless debate*"; see also below, par. 7).

#### *5.1.7. Length of release under conditions*

Contrary to pre-trial detention, which is frequently and automatically reviewed by the investigating courts, release under conditions as an alternative measure can be imposed for a maximum of three months, and is renewable before the end of each term (by decision of the investigating judge). As it was observed in previous research and confirmed by statistical information, alternatives – more specifically, release under conditions – often take (much) longer than three months, and therefore, in general, have a **higher average duration than pre-trial detention**[16].

In principle – and in practice –, release under conditions initially will be imposed for the (legally allowed) maximum term of 3 months (i.e. full use of the maximum term); a shorter (initial) duration (e.g. 1 month) is very exceptional (3-PS, 5-PS, 6-PS). One of the reasons for this is that the concrete implementation of some conditions (e.g. starting up a therapy) usually takes some time. Not only are there specific registration procedures to be followed by the suspect at the Probation Service – first intake at the (concrete) moment, or within the time limits, indicated in the judge's decision, and a first interview

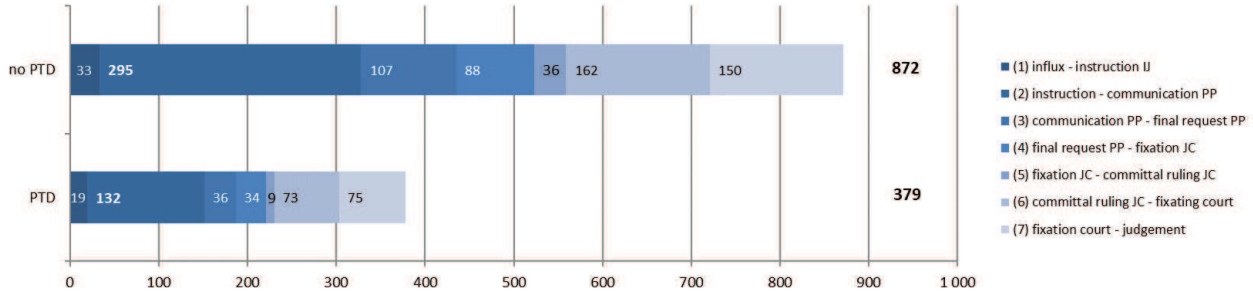
[16] Alexia Jonckheere, 'La (mise en) liberté sous conditions: usages et durée d'une mesure alternative à la détention préventive (2005-2009). Note de recherche dans le cadre de l'exploitation scientifique de SIPAR, la base de données des maisons de Justice' (INCC 2012).

with an assigned (personal) probation officer within about two weeks after the first (intake) registration (6-PS). But – if it not yet prepared before the moment of release – also finding an appropriate treatment facility and effectively starting up the proposed treatment may take a lot of time, especially due to problems of capacity of treatment centres, corresponding long waiting lists, and specific prior intake procedures (5-PS).

How to interpret the term of '**3 months**' does not always seem to be very clear: is it a term of 3 months, counted day-to-day, e.g. 30 January till 30 April, or 3 times 30 days? This is an important issue because measures can only be prolonged by a decision taken before the end of the determined term and, of course, probation officers want to know clearly if a suspect is still under supervision or not. Some interviewed probation officers prefer that the end date would be unambiguously indicated in the decision of release; to this end, in some judicial districts probation officers and investigating judges tried to (or will) clear this out and (will) made some arrangements about it (5-PS, 6-PS).

While in some judicial districts measures of release under conditions most often will be restricted to (the initial maximum term of) three months, interview respondents indicate that such measures are almost always – quasi-automatically – **prolonged** in other judicial districts (3-PS, 11-IJ, 12-PP(app), 15-JC, 16-JC). Periods range from 6 to 9 months and in some cases even last for 1 or 2 years, or till the beginning of the hearings at the sentencing court (3-PS, 5-PS). As an investigating judge mentioned, "*when things go well*", he would prolong the alternative measure (11-IJ). In this respect, it also has to be noted that apparently **less priority** is given to the progress of the criminal investigation process if the suspect is not detained (e.g. 5-PS, 10-DL, but in contrast to the situation reported by another respondent: 14-IJ). This is confirmed by statistics of the Board of Prosecutors-General: with respect to cases for which a judicial criminal investigation ("*gerechtelijk onderzoek*") was opened and a first judgment was pronounced in the years 2011-2015, it was found that the criminal investigation process (by the investigating judge) does not take half as long in cases with pre-trial detention as in cases without such detention (132 vs. 295 days; statistics received on July 18th, 2016, based on a data-extraction of 10 May 2016; see below, figure 1).

*Figure 1. Criminal case handling times, from influx (at the public prosecutor's service) till first sentencing court's judgement, per stage of the proceedings and suspect's status (averages, years 2011-2015)*




Source: Board of Prosecutors-General, data received on July 18th, 2016 ('*Doorlooptijden Gerechtelijke Onderzoeken*'; data-extraction May 10th, 2016)

Some interviewed actors have '**mixed feelings**' about such extended lengths of non-custodial alternative measures before trial – which often resembles 'real' probation measures as would have been imposed to convicted offenders. On the one hand, there is the 'advantage' that there will be no 'gap' or interruption of (social/psychological) care, but rather a certain kind of 'continuity of care' (6-PS, 14-IJ), as far as sentencing courts take this into account and would be prepared to sentence suspects to unconditional (prison) sentences with probationary supervision. On the other hand, however, probation officers indicate that the motivation of their clients risks to decrease if the measure lasts too long, that especially more intrusive measures such as home curfew orders (house arrest) and the uncertainty about the final end of the measure are heavy to bear, and that it leads to frustration and incomprehension among suspects under supervision who are thinking that they are 'doing quite well' but that 'after all, all the efforts they do, finally count for nothing' (i.e. there are no legal provisions regulating any kind of 'deduction' on the final sentence of time spent on release under conditions, in contrast to pre-trial detention and electronic monitoring; 5-PS, 6-PS).

From a strict theoretical and legal point of view, the question arises as to whether such measures do not have to be terminated when the criteria for pre-trial detention are no longer satisfied (as, according to Belgian legislation, the same criteria or requirements apply to both pre-trial detention and alternatives) and the suspect otherwise would no longer be held in custody (see art. 16, § 1 Pre-trial Detention Act of 20 July 1990). As a probation officer (5-PS) pointed out, it sometimes happens that, instead of extending the measure, one appeals to **'voluntary' continuation**, so that the suspect can 'prove' himself before his case will be handled by the sentencing court. According to his experience, sex offenders usually continue to attend for example therapy sessions, drug (addicted) offenders on the other hand generally don't.

### *5.1.8. Verification and breach of conditions*

Most of the releases under conditions are supervised by the probation services, as there are '*probably not so much*' releases under conditions without probation supervision (3-PS). Often these measures of release under conditions combine so-called '**police conditions**' (e.g. prohibitions) and '**probationary conditions**' (e.g. obligation to follow treatment, search for work, etc.). Some conditions are controlled/verified by police officers; others are supervised by the probation service. As the interviewed probation officers indicate, most often it is quite clear which conditions have to be controlled/verified by probation or by police officers – note that all imposed conditions are notified to both services (5-PS). Although so-called 'police' conditions are also discussed with the client by probation officers – sometimes it creates confusion for suspects (to be interrogated by both police and probation staff with respect to the same conditions) (5-PS) –, they are not (pro-)actively verified by probation officers (5-PS). And most of these 'police conditions' are even not or cannot be pro-actively verified by the police forces, but rather reactively (e.g. prohibition to enter pubs, …); one of the reported problems, however, is that the imposed conditions are (sometimes?) registered very late into the police-database (17-PP(loc)) and that computer systems of the police forces and judicial authorities are not compatible. In contrast, 'home curfew orders' are "*now and then*" (3-IJ) or "*very conscientiously*" (2-CI) verified, at randomly selected time intervals (sometimes with intervals of one or more weeks, but sometimes also during two or three evenings/nights in a row; cf. e.g. 17-PP(loc)). In some judicial districts such type of condition is controlled by specific teams established within the local police forces (14-IJ). Very exceptionally, foreign non-residents, are released under conditions with the permission to return to their home country (e.g. Dutch citizens), but with an obligation to report regularly at the police station (abroad, or in Belgium) – a sort of application of a European Supervision Order '*avant la lettre*' (e.g. 2-CI, 15-DL; see also, par. 8) – or to visit the (Belgian) probation officer at regular times (3-PS).

Official statistics from the Probation Service(s) show that only a very small proportion of supervision orders within the framework of pre-trial detention are **concluded in a 'negative' way**, i.e. absconding or revocation of the measure (in 2014, in 2% of all closed supervision orders supervised by the probation service; in absolute numbers, in 106 cases on a total of 4860[17]). It is, however, not very clear as to whether these figures reflect the success of alternative measures before trial with regard to the suspect's compliance with the imposed conditions, or rather if other factors account for this.

[17] Dienst Justitiehuizen (n 7), 75.

During the interviews, most of the actors confirm that a majority of the suspects generally **comply** with the imposed conditions. On the other hand, some respondents stated that it is difficult to declare this, because not all possible violations of conditions and/or new offences are detected by the official authorities (e.g. 12-PP(app)). Besides this, the **reaction** (by the competent judicial authorities, i.e. investigating judges as long as the criminal investigation progress is not completed) **to breach incidents** may also vary; in some cases supervision orders would be continued, in other the suspects would be re-incarcerated. Some respondents also express the view that previous breach incidents serve as a negative factor when it comes to take decisions about a possible release under conditions (counter-indication) (2-CI), or that there will be given 'no second chance' in case of a (severe) violation of conditions (14-IJ) and suspects (probably) will be re-incarcerated (2-CI). However, as one of the interviewed investigating judges reflected the general opinion of the majority of interviewed actors, it seems to be merely a question of "*being consequent but also flexible*" (4-IJ), as in a lot of cases the way towards desistance from further offences is a dynamic 'process' with ups and downs; in this sense, interviewed probation officers also report that they continuously try to get out this 'message' towards judicial authorities, and that (most of) the investigating judges are receptive for this (e.g. 5-PS – and sometimes more difficult to understand by police officers). For suspects who are already referred to the sentencing court (after the committal ruling; in Dutch: "*regeling van de rechtspleging*") and still under supervision, specific (and more complicated) rules apply in case of breach incidents (such as the appointment of a judge and hearing in court within 24 hours) which increases the chances that no reaction will follow (9-DL).

The 'low' degree of failure reported by the Probation Service (see above) could also be explained by the fact that probation officers who supervise suspects released under conditions are **not always informed on eventual re-incarcerations** of suspects they are supervising, at least when this event is due to the committal of new offences – nor are they informed about (sentencing) court hearings where their clients are supposed to appear, or of release decisions (without conditions) by investigative courts (5-PS). It therefore not seldom occurs that they still invite clients for interview sessions whilst he/she is re-incarcerated (or already sentenced). In some judicial districts, use is made of a **digital platform** ('*digitaal daderprofiel*') in which judicial decisions and reports from the probation service are uploaded and accessible to judges, prosecutors and probation officers. Users of this platform are however not automatically warned about new information; they pro-actively have to check for it (6-PS). Nevertheless, the program is generally considered as being a useful progress in terms of communicating and sharing information. Pre-sentence social inquiry reports are not often requested by the judicial

actors, but the other reports in which probation officers inform about the supervision and follow-up of suspects who are released, are often consulted by judges and prosecutors, and this in order to make their request before the sentencing courts and take their (sentencing) decisions.

## 5.2. (Financial) Bail

Legal framework

The Pre-trial Detention Act of 20 July 1990 provides for release on the (sole) condition that bail is paid (Art. 35, paragraph 4). The judge freely determines the size of the amount, since there are no legal criteria for it. The investigating judge is not even required to give a reason for the decision on the amount of bail if the parties have not filed submissions on this point[18].

The amount must be paid in advance and in full; it is indeed a prerequisite to release. If the suspect was present at all the proceedings and has presented himself in order to serve his sentence, the bail is returned to him.

The lack of official (statistical) data makes it difficult to assess whether the financial bail is frequently used in Belgium. Nevertheless, based on the observations in court (cf. work stream 1[19]) and the expert interviews, it seems that the **use** of financial bail is not as exceptional as it was suggested in previous research[20]. Although other alternatives, such as release under conditions (and even electronic monitoring?) are applied more often, in quite some instances financial bail is the preferred alternative measure. However, this applies to very specific cases, and mainly consists of drug trafficking offences/types of organised crime in which usually foreign non-residents are involved.

One of the major **challenges** for judges as well as defence lawyers with respect to financial bail is to determine the amount of bail to be proposed or set. Defence lawyers declare that the amount that they propose to court would in general be lower than what the suspect in reality could afford, thereby bearing in mind that the court will impose a higher amount anyway. Judges/courts on the other hand (sometimes) determine or propose a quite high(er) amount, knowing that what defence lawyers propose is only a minimum; afterwards, at a consequent review hearing, it would become clear if the initial amount was fixed 'too high' (if not too high, it would have been paid in the meanwhile).

[18] Chambre des Représentants, Réponse écrite du 4 novembre 1996 du ministre de la Justice, *Bulletin des questions et des réponses écrites*, n°44, 1996-1997, p. 7, 532.

[19] Maes and Deblock (n 2), 9.

[20] Burssens (n 5). Burssens, Tange and Maes (n 8).

In fact, these proceedings in many respects resemble some kind of 'ordinary bargaining', or 'horse-trading'.

> 1-DL
>
> DL: [...] I will always myself propose an amount, taking into account the fact that the judicial council will add up to it. So you will go a bit below what you expect. It is a bit of a gamble and experience.
> [...]
> My feeling is that it does work. It is just a bit annoying when the judicial council does add a lot. You propose [€] 5,000, but the judicial council will set free for 15,000. Which leads the person to saying: 'I really cannot afford this.' He does remain in jail and at the next judicial council [hearing] you have to say: 'He really cannot afford it.' And then you really have to start and haggle: 'Can we do it for 7,5?' And then we hope he will top it off at 10. That's how it happens in reality. After a while they do go for a lower amount, because they are realistic: if the money would be there, they would have paid it. They do get that insight then as well.
>
> 4-IJ
>
> IJ: (...) When they say that € 5,000 is feasible, it will probably be a bit more. That is why the bail should be high enough. When they declare this amount, it means they can afford it.
>
> 16-JC
>
> JC: When someone asks to pay 3,000 but I demand 5,000 and he still sits there a month later, it is a sign of him not having 5,000. Then I know enough.

Financial bail often applies to foreign suspects with no fixed residence in Belgium. In these cases, particular problems may occur with respect to 'parallel' **decisions of the Immigration Office**. As several respondents confirm, actors of the criminal justice system and the Immigration Office are working completely separate from each other, using a different logic. As a result, they sometimes take very contradictory decisions. As such, according to a defence lawyer, it happens that suspects are released on (financial) bail, but then are expelled from the country by force, based on an administrative decision/advice of the Immigration Office. Since one of the requirements for the restitution of the bail money is that the suspect was present at all procedural steps and has presented himself to serve his sentence, an expulsion (and prohibition to re-enter the country during a determined period of time!) may have far-reaching consequences, according to a defence lawyer [13-DL; see also 10-DL who refers to a "*violation of article 6 ECHR*", 17-PP(loc)] – (*remark: nevertheless, Belgian legislation provides for the possibility of legal representation by a defence lawyer before the sentencing court*). The same mechanism can apply with respect to an 'ordinary' release under conditions: deportation (by the Immigration Office), as a consequence the suspect no longer being able to comply with imposed conditions, request of the prosecutor to re-incarcerate, issuing an arrest warrant by default of appearance by the investigating judge, ... (17-PP(loc)).

Some of the interviewed lawyers are very **critical** on the (practice of) release on financial bail, and they qualify it as "*totally arbitrary*", "*hypocritical*" (13-DL), – because judges/prosecutors very well know that some suspects cannot or will not comply with the conditions for restitution, but nevertheless impose it, 'so that the money will be seized for the benefit of the Belgian Treasury' (13-DL), …, and/or because of big differences in the imposed amounts of bail (9-DL).

> 13-DL
>
> DL: […] [it is] a rather distributive form of justice, because you can only set yourself free by paying a [financial] bail and we are working hypocritically. Because we do know those people will never come back. Thus this bail, for whom is it? For the Belgian state. We are talking about € 5,000. We, you and I, have to work hard for that amount. To get this into my account, without any expenses we deal with monthly, I would have to work for […] months. The Belgian state knows this. That is indeed the hypocrisy of the story. Since a month, the law on money-laundering has been changed. But before that, one came with € 100,000 to the post office, but no-one ever asked me where the money came from. You walk around with your little case… Those 100,000, knowing these people can never come back anyway. The bail is cashed, the public prosecutor asks for confiscation and it goes to the Belgian state. People have been convicted for fraud for less than this.
> […]
> DL: It is not allowed as a punishment. The big problem is that the [financial] bail is then used. The public prosecutor's office likes it. That is the only thing where the public prosecutor's office doesn't ask questions about, where the money comes from. That you get into the post office with your case with € 100,000, of which one knows he is gone, that he will never recuperate this and that the public prosecutor can claim it to pay the legal costs. That is very hypocritical.

One of the defence lawyers also notices that the **amount of bail** fixed by the judge, is often set higher, due to the 'reputation' of the defence lawyer (i.e. one supposes that clients with experienced, well-known lawyers would also be able to spend more money to pay bail) (13-DL, see also 16-JC for a confirmation of this thesis). There are no prescribed criteria to determine the 'right' amount of bail. But as one of the interviewed judges explains, in practice several indicators can be taken into account, such as the person of the suspect, his financial situation, (un)employment situation, possible financial means of relatives (family), life style, … (4-IJ). In addition, the supposed organised type of crime (e.g. big drug traffics) and assumed financial benefits also play a role (16-JC). However, one has to be cautious (not to pre-judge on the guilt of the suspect), e.g. by taking into account the amount of bail on the basis of supposed 'financial benefits of criminal activities' (4-IJ).

4-IJ

IJ: The juridical problem with regard to this, is the fact that you have to determine the amount of the [financial] bail, but in function of what? For some people, € 1,000 is a lot of money, while for others € 20,000 doesn't mean a lot. We have to determine the bail. This guarantees that the person does find it important enough to remain available. We have to put the limit exactly that high, that he can just deal with it. But what do you take into account? The person himself and his financial state of affairs. But what is this? Mister x is without a job, but does live a luxury life, thus he is getting the money for somewhere. The investigating judge cannot decide about guilt or no guilt, so when you then say: 'Sir seems to be doing well. He does get a lot of income of possibly illegal activities, thus he can miss a bail of € 50,000€. While he is out of a job and receives a benefit of € 900. Thus you see the discrepancy. Juridically speaking, that's the hard part. You are on thin ice when you determine the amount of the bail in function of the suspected revenue of the crime.
NICC: Because you then say something about the guilt of the person.
IJ: Yes. But on the other hand, it should not become silly either. Giving someone with a luxury life a bail of € 2,000, that's making fun of it.

It appears that the financial bail system sometimes also serves some '**hidden**', investigative **purposes**, e.g. to assess if somebody takes part in a criminal organisation or at least to determine his hierarchical position in a gang/criminal organisation (17-PP(loc)). Additionally, it is not unusual that in cases in which financial bail is applied, a (parallel) investigation is/can be induced with a charge of money laundry (15-JC; PP-17(loc)).

## 5.3. Electronic monitoring

Legal framework

With the Law of 27 December 2012 (in operation since 1 January 2014), electronic monitoring was introduced in Belgium as a new 'alternative' measure to pre-trial detention. More specifically, electronic monitoring is considered as a 'modality of execution' of an arrest warrant, which means that the investigating judge (or investigating courts) will first decide whether an arrest warrant has to be issued (or prolonged) and then, in a second step, will decide where the arrest warrant will be executed: in prison or at the suspect's home (or at another assigned residence).

At this stage of the criminal justice process, suspects are monitored using GPS-technology, without limitation in time. In case of non-compliance, electronic monitoring can be converted into pre-trial detention in prison.

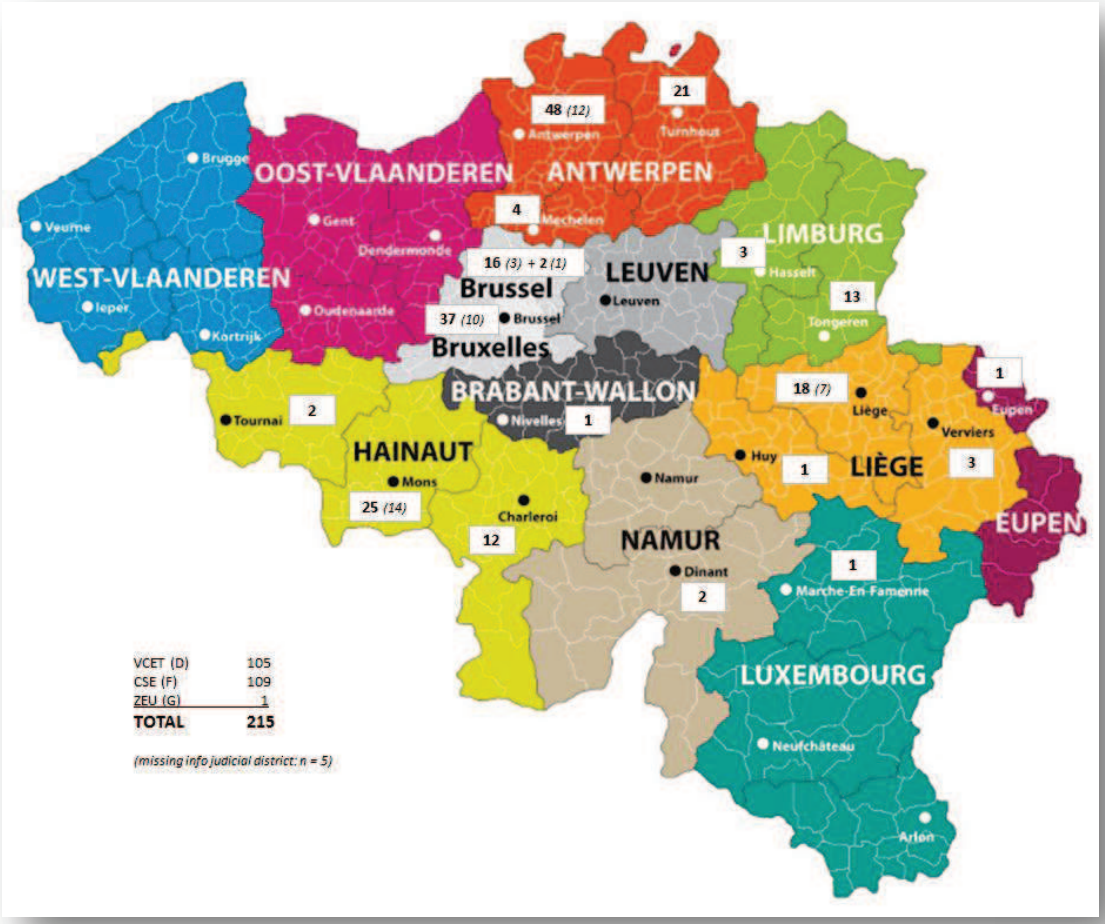
The continuation of electronic monitoring will be reviewed on a regular basis, just as would have been the case were the suspect detained in prison.

A suspect under electronic monitoring is not allowed to leave the assigned place of residence except for a limited number of movements allowed for medical reasons, in case of *force majeure*, or in relation to the criminal investigation process (e.g., hearings by judicial authorities and police interrogations). Electronic monitoring in the pre-trial stage thus appears to be a form of '24-hour home detention'.

Furthermore, similar to 'classic' pre-trial detention, the electronic monitoring system can also be 'individually modulated', i.e., a prolonged term of 'prohibition of free movements' is possible, in terms of contacts with the outside world by way of correspondence, visits and telephone contacts.

As shown in figure 2, electronic monitoring still seems to be **used rather scarcely** in the context of pre-trial detention, at least according to 'Belgian standards' where electronic monitoring is widely used for (in particular short term) sentenced offenders (but not in comparison to other EU-countries involved in the DETOUR-project).

*Figure 2. Number of suspects placed under electronic monitoring (EM) on June 8, 2017 (EM-population), by judicial district of the authority who decided to grant EM*




Legend: Number of suspects under EM (of which [number] after appeal decision)
Source: *chart via https://justitie.belgium.be/nl/rechterlijke_orde/hervorming_justitie/nieuws/news_pers_2014-04-01
*data obtained from VCET (on 9/6/2017) and CSE (on 10/6/2017)

During the year 2016, 5610 sentenced or not yet convicted offenders were placed under electronic monitoring, of which 769 within the framework of pre-trial detention (i.e. 13.7 per cent; data obtained from the Flemish Centre for Electronic Monitoring, on the 9th of June 2017). On a daily basis, on the 8th of June 2017, a total number of 215 suspects were placed under EM: 105 of them were monitored by the *Vlaams Centrum Elektronisch Toezicht* (VCET, Flemish Centre for Electronic Monitoring), 109 by the fran-

cophone *Centre de Surveillance Électronique* (CSE) and one by the *Zentrum für Elektronische Überwachung* of the German-speaking Community (ZEU).

Electronic monitoring, formally no alternative but an execution modality of an arrest warrant, has so far thus certainly been much less 'popular' than the measure of 'freedom or release under conditions'. While the application of electronic monitoring remains rather limited, in particular if compared to the more than 10,000 arrest warrants with detention in prison, the **various practices between** (the 12) **judicial districts** are quite remarkable. In Flanders, it is often used in Antwerp and Limburg, but scarcely in West- and East-Flanders, and Leuven. In the Walloon region, electronic monitoring is concentrated in Hainaut and Liège, with almost no application in Brabant-Wallon, Namur and Luxembourg. The Brussels region also accounts for a considerable part of EM-applications, in strong contrast to the German-speaking part of Belgium (judicial district of Eupen).

There are several **reasons** why electronic monitoring in the pre-trial stage is barely used in Belgium, at least in some judicial districts. Some magistrates – in particular those who just recently took up their function – are not so familiar with this measure, especially its technological (in)possibilities (11-IJ), there is no pro-active publicity campaign from the monitoring centres towards prosecutors and judges (*information from an additional interview with VCET-directors,* 9 May 2017), there may be fear for (and experience with) additional administrative caseload (11-IJ), and serious doubts arise with respect to the ability to effectively prevent risks of recidivism (e.g. drug dealing/traffic, domestic violence, intra-familial sexual offences) – or not complying with the strict conditions of the regime (e.g. offenders with mental health problems) –, absconding (e.g. foreign suspects with no residence in Belgium) and/or collusion (with prison as the most 'secure' solution). Although the same applies to 'freedom or release under conditions', this latter measure offers more space to work "*appealing*" (3-PS, 5-PS, 10-DL), pro re-integration and with an explicit aim to reduce re-offending. This ascribed more added value makes 'release under conditions' more attractive, both to defence lawyers and judges.

The very **'strict' regime** of electronic monitoring (almost comparable to a '24-hour home detention', i.e. with very restricted possibilities to leave the assigned place of residence) does not only severely limit its scope of application, but also does not leave any place for individualisation and proportional allocation: no possibility to work, to shop or to bring kids to school (e.g. 5-PS, 13-DL, 14-IJ), which heavily affects the lives of suspects and their families (cf. 'pains of electronic monitoring'). While some advocate more

flexibility (e.g. 9-DL, 10-DL, 13-DL, 7-IJ, 14-IJ, …), others argue that it is the only measure that resembles 'real detention' (15-IJ) and therefore is considered as a way of serving pre-trial detention, and not an 'alternative'.

Some respondents also emphasises discriminatory aspects of electronic monitoring (referring to differences in material 'comfort' of the own living spaces or **EM-detention places;** 13-DL). Although electronic monitoring can also be executed in home shelters or other residential (e.g. psychiatric) institutions, the existing different types of electronic monitoring often confuse responsible staff members of these centres and complicate its implementation in such institutions (5-PS). For example, convicted offenders are allowed to move freely within certain determined time frames, whereas pre-trial detainees under electronic monitoring are not. So it occurs that movements to other places than the private room (e.g. dining room or communal rooms for group therapy-session) are reported to the central monitoring centres as technical violations (i.e. an unauthorised movement outside the installed perimeter).

Finally, **'bad' experiences** may make decision-makers reluctant to apply this measure. The latter not necessarily refers to re-offending or manipulating the technical equipment (see e.g. 1-DL), but also to the (delicate) question of consent of co-habitants. It happens that co-habitants (e.g. parents, girlfriend) do not agree with housing the potentially electronically monitored suspect or withdraw their initial consent (14-IJ); legally, a consent of co-habitants is not required, but in practice judges (nowadays) usually ask for an written consent (14-IJ), (sometimes) as a result of previous experiences with suspects/defence lawyers who told at court hearings to have obtained consent, but in fact did not. As it is the case with other 'alternative' less severe measures, public prosecutors most often will not request for an application of electronic monitoring, in a best case scenario (from the point of view of the suspect) they will only request electronic monitoring when it was already granted by the judge, i.e. they would ask to 'maintain' the suspect under electronic monitoring (17-PP(loc)).

Although electronic monitoring has been conceived as a 'real substitute' of pre-trial detention given its specific content (strict regime, see also 15-JC), there is a 'risk' that the availability of electronic monitoring installs a kind of '**cascade**'-system (in Dutch: "*waterval-systeem*"; 9-DL, 10-DL, 13-DL, 15-JC). This means that release under conditions will only be granted after a prior period of electronic monitoring (as a period in which the suspect has to 'proof' himself), thereby extending the total period of pre-trial supervision. As we also observed during our research activities within work stream 1[21],

[21] Maes and Deblock (n 2), 13.

defence lawyers not seldom plea for electronic monitoring in subsidiary order, i.e. as an additional alternative in case the judge would not be convinced to grant a simple release under conditions. And, it is not unusual that electronic monitoring once granted, will last for quite some time, according to a defence lawyer minimum 3 months (9-DL: "(one) *gets stuck into it*").

9-DL

ADV: It is a handy instrument when you think: they [judges] will not yet grant the VOV [RuC: release under conditions], they will give us a hard time about it. ET [EM: electronic monitoring] will be easier. While in earlier days one [lawyers] would for sure have opted for VOV. Even when sometimes it [electronic monitoring] is absolutely useless. When it comes to electronic monitoring you cannot impose conditions, which is a big lacuna in the law. People have to stay home.

**Summary**

- In cases where pre-trial detention may be ordered or maintained, the same judicial authorities (investigating judge, judicial council or chamber of indictment) may decide on an alternative measure (release on financial bail or under conditions) or decide that the arrest warrant will be executed under the form of electronic monitoring.
- Freedom/release under conditions (RUC) became very 'popular' since its introduction in 1990 and still is been used extensively as an alternative to pre-trial detention (in 2015 more than 5,300 suspects were released under conditions supervised by probation services, compared to more than 11,000 committals to prison as pre-trial detainee or not yet definitively convicted offender). The extent of its use may vary in a significant way by type of decision maker (investigating judge *vs.* court) and by individual judges.
- In the vast majority of cases decisions to release result from explicit requests. Public prosecutors will (almost) never request for the application of an alternative measure. Defence lawyers are the predominant actors who propose alternatives to pre-trial detention. As their major concern is to avoid detention or at least to get their client "*out, at all costs*", releases without conditions are becoming more and more rare, while alternative measures seem to be increasingly used.
- The role of probation officers in proposing alternatives is rather limited. Only in very few occasions probation officers are asked to conduct social inquiry reports in view of pre-trial detention decisions. Due to very strict time constraints in which decisions on pre-trial detention/alternatives have to be taken in the early stage of the criminal proceedings and individual workload of probation officers, reports will not be communicated to judicial authorities within very restricted periods of time, as the elaboration of social inquiry reports seems to be time-consuming.
- The moment when and to whom alternatives will be requested for by defence lawyers, or when they will be granted by the judicial authorities, depends on many different factors, such as the concrete circumstances of the case and related legally defined 'risks', personal characteristics of the suspect, and the person of the judge (importance of 'knowing well your judge'). Defence lawyers seem to be very well aware about (differences in) judges' expectations, and (try to) adapt their defence strategies accordingly.
- Most releases under conditions are only granted after having spent a period of time 'behind bars'. It is often quite difficult to release (under conditions) at the beginning of the procedure, in particular due to the 'time aspect'.

- Some lawyers make very 'creative use' of the procedural opportunities Belgian legislation provides for, i.e. the decision power of the investigating judge to release a detained suspect at any given moment during the criminal investigation process, and this without possibilities to appeal against it by the public prosecutor.
- Belgian legislation does not provide for an exhaustive list of conditions that may be imposed when a release under conditions is granted. In practice, a distinction can be made between rather general conditions and more specific conditions that are tailored to individual case/offender characteristics. Some conditions serve interests of the criminal justice proceedings and aim at avoiding absconding/collusion or protecting victims (directly involved in the concerned case). Many conditions however refer to the prevention of possible risks of recidivism. The type of conditions often seems to be quite standardised and it is not unusual that a large set of conditions is imposed. Some judges are very 'creative' in formulating specific conditions. Some conditions are quite 'popular' in some districts, but not at all in others. Specific implications of some conditions do not always seem very clear to probation officers. Many conditions are quite similar to probationary conditions that would be imposed to convicted offenders, even though there are also some differences in 'philosophy' and type of conditions. In some cases conditions are formulated in a very concrete way, whilst in other cases similar conditions are circumscribed in more general terms. Some conditions – commonly imposed in other countries - are not (often) applied in Belgium. In contrast, judges and probation offices are nowadays confronted with new challenges, e.g. with respect to 'terrorist' cases or cases with 'radicalised' suspects.
- Release under conditions as an alternative measure can be imposed for a maximum of three months, and is renewable before the end of each term (by decision of the investigating judge). In practice, these alternatives often take (much) longer than three months and, in general, have a higher average duration than pre-trial detention. Release under conditions initially will be imposed for the (legally allowed) maximum term of 3 months (i.e. full use of the maximum term), shorter (initial) durations (e.g. 1 month) being very exceptional. While in some judicial districts measures of release under conditions most often will be restricted to (the initial maximum term of) three months, such measures are almost quasi-automatically prolonged in other judicial districts. If the suspect is not detained (but released), apparently less priority is given to the progress of the criminal investigation process. Extended lengths of non-custodial alternative measures before trial may have the 'advantage' that there will (or can) be no 'gap' or interruption of (social/psychological) care, but also can create difficulties such as decreased motivation for treatment, intrusive measures and the uncertainty about the final end of the measure being heavy to bear, and frustration and incomprehension among suspects.
- Most of the releases under conditions are supervised by the probation services. Often these measures combine 'police conditions' (e.g. prohibitions) and 'probationary conditions' (e.g. obligation to follow treatment, search for work, etc.). Only a very small proportion of supervision orders within the framework of pre-trial detention are concluded in a 'negative' way, i.e. absconding or revocation of the measure. However, it is not very clear as to whether this reflects the success of alternative measures before trial with regard to the suspect's compliance with the imposed conditions, or rather if other factors account for this, such as: absence of reactions to breach incidents, lack of communication with respect to breach incidents and decisions to recall to prison.

- Although the alternative of 'release under conditions' is used very frequently, the preparation and practical implementation of such measure often encounter numerous problems which delay or even exclude its imposition: procedural aspects (lack of information, time, risk of collusion), waiting lists at the level of probation services, lack of adequate offer in the (local) community, exclusion of suspects by specific care facilities, lack of motivation among suspects, complicated intake procedures, abolition of specific in-prison facilities, limited capacity and waiting lists at the level of extra-mural care facilities, long duration of treatment programs, language problems, restricted regulations of accredited treatment facilities, incorrect or incomplete information, lack of residence in Belgium, lack of consent of suspect's relatives, scepticism about proposed conditions.
- Interview respondents expressed several concrete needs or proposed initiatives in order to promote the use of alternatives, such as: presence of probation officers at review hearings, 'permanent' presence of probation officers in courthouses, more involvement (in general) of probation officers in informing decision-makers, more professional and effective verification of conditions, development of immediate intake by care facilities, more credible policies of sentence implementation, and abolition of automatic periodical review hearings.
- Although the use of financial bail is not so exceptional, it applies to very specific cases, mainly drug trafficking offences/types of organised crime in which usually foreign non-residents are involved. One of the major challenges for practitioners is to determine the amount of bail to be proposed or set. There are no prescribed criteria to determine the 'right' amount of bail, in practice several indicators can be taken into account, such as the person of the suspect, his financial situation, (un)employment situation, possible financial means of relatives (family), life style, … As financial bail often applies to foreign suspects with no fixed residence in Belgium, particular problems may occur with respect to 'parallel' (contradictory) decisions of the Immigration Office. Some respondents are very critical on this (practice of) release on financial bail and qualify it as arbitrary or hypocritical. It appears that the financial bail system sometimes also serves some 'hidden', investigative purposes.
- According to Belgian legislation, electronic monitoring within the framework of pre-trial detention is considered as a 'modality of execution' of an arrest warrant. The continuation of electronic monitoring will be reviewed on a regular basis, just as would have been the case were the suspect detained in prison. A suspect under electronic monitoring (monitored using GPS-technology) is not allowed to leave the assigned place of residence except for a limited number of movements allowed for medical reasons, in case of *force majeure*, or in relation to the criminal investigation process (e.g., hearings by judicial authorities and police interrogations). According to 'Belgian standards' where electronic monitoring is widely used for (in particular short term) sentenced offenders, electronic monitoring still seems to be used rather scarcely in the context of pre-trial detention. The various practices between (the 12) judicial districts are quite remarkable: it is often used in some judicial districts, but not at all in others. Several reasons can account for the rather limited use of electronic monitoring in the pre-trial stage: unfamiliarity with the measure and the technological (in)possibilities, lack of pro-active publicity campaign, fear for or experience with additional administrative caseload, doubts with respect to the ability to prevent re-offending, absconding or collusion, the 'strict' regime of electronic monitoring, possible discriminatory aspects, 'bad' experiences. Although electronic monitoring has been conceived as a 'real substitute' of pre-trial detention, there is a 'risk' that the availability of electronic monitoring installs a kind of 'cascade'-system (i.e. that release under/without conditions will only be granted after a prior period of electronic monitoring, thereby extending the total period of pre-trial supervision).

# 6. Role of the players in the decision-making process

When it comes to decisions on pre-trial detention and alternatives, many different actors come into play: suspects (and their victims), defence lawyers, police officers, public prosecutors, investigating judges and judges of investigative courts, probation services, and so on. But not only those key actors, directly involved in the case, are concerned, also 'the public', (social) media (see also par. 4.4) and other, official, institutions such as the Immigration Office (see in particular, par. 5.2) play a part in the discussions.

The role of the different 'official' actors seems to be quite clear.

## 6.1. The role of the public prosecution service

**Public prosecutors**:

- are in the lead of the so-called "*opsporingsonderzoek*", i.e. criminal investigations as long as the case is not referred to the investigating judge for a judicial criminal investigation called "*gerechtelijk onderzoek*" (required in case the public prosecutor would ask for pre-trial detention that exceeds the maximum possible term of police arrest of 24 hours);
- decide whether or not to bring the case before the investigating judge in view of a judicial criminal investigation "*gerechtelijk onderzoek*" and to ask for an arrest warrant (or alternatives); instead of referring the case to the investigating judge, the prosecutor can – and according to interviewed respondents often tries to, especially when it does not concern repeated offences (8-PP(loc), 17-PP(loc)) – settle the case himself, and use 'diversion' measures (e.g. dismissal, financial transaction, penal mediation, …), or bring the case to the sentencing court without a "*gerechtelijk onderzoek*";
- make requests at regular review hearings of the investigative courts (to prolong pre-trial detention, or propose alternatives);
- decide whether to appeal or not against (release) decisions of investigative courts (this is not possible against decisions of the investigating judge who can release suspects at any given moment of the proceedings, see also par. 5.1.3);
- write final requisitions (in Dutch: "*eindvordering*") when the criminal investigating process has been concluded by the investigating judge (and before the 'committal ruling'-hearing of the judicial council; in Dutch: "*regeling van de rechtspleging*").

As already mentioned above (par. 5.1.2), public prosecutors usually do not propose alternatives to pre-trial detention, but – when ordering a judicial criminal investigation ("*gerechtelijk onderzoek*") – rather request the issuing of an arrest warrant or a prolongation of pre-trial detention at the investigative courts. They would leave an opening for alternative measures when they request the issuing of an arrest warrant by the investigating judge rather than in the further progress of the proceedings; at that stage, it is very rare that prosecutors would ask for alternatives. As the prosecution service quite regularly appeals against release decisions of investigative courts, defence lawyers may adapt their defence strategies accordingly and try to obtain release decisions from investigating judges (see par. 5.1.3).

The role of prosecutors at the local (district) level seems to be quite different from the role of their colleagues at the level of the court of appeal. Whilst the investigative judge in charge of the case is present at review hearings of the judicial council (cf. periodical, automatic review hearings) and reports on the progress of the criminal investigation, investigating judges are not present at hearings of the chamber of indictment at the level of appeal (i.e. appeal against decisions of the judicial council). The public prosecutor seems to play a more prominent or active role in the debates before the chamber of indictment, since the public prosecutor makes – in absence of the investigating judge – his statement by reporting not only on the facts "*à charge*" (evidence against the defendant) but also on exculpatory elements ("*à décharge*") (12-PP(app)).

Public prosecutors have an important 'filtering' function as they finally decide which cases are referred to the investigating judge for criminal investigation, and thus make a first 'selection' of cases that can result in pre-trial detention (or alternatives). This selection process is determined by local/national prosecutorial policies and the priorities set, which are influenced by, *inter alia*, impact on society/victims, public sensitivity, perceived seriousness of the offence, … In this respect, also the role of traditional and modern, social **media** may not be underestimated. Many interview respondents were very critical towards the reporting on concrete cases in the media, and often considered it as being 'misleading', 'partial', 'untrue', … (e.g. 10-DL, 13-DL, 15-JC) Therefore, respondents are of the opinion that (traditional) media should rather (re-)take their role of reporting on the meaning/purpose of pre-trial detention (and alternatives; what is pre-trial detention?, why should it be used cautiously?, etc.), instead of being too strongly involved in public discussions on cases of which 'they do not know all the necessary details'. While it is seen as a duty of the media to report correctly in an objective manner on these topics, it is also considered as a challenge for experts to inform and 'educate' the (traditional) media about the criminal justice system and how it operates in a more

broader sense (e.g. 1-DL, 14-IJ). Nevertheless, also the role of defence lawyers and the way they make 'use' of the media, is sometimes criticised (7-IJ).

> 7-IJ
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> IJ: [...] It is easy to look down on justice, that is acting very destructively towards justice. Unfortunately, a lot of lawyers are allowed to do so because they only defend the interests of one party. 'When I defend the interests of my party, namely the client that pays me, I will ensure in my defence that my client is freed or that I can critique the system. I don't want the system to stop me, because this is my job.' Those men get on TV [specific television programmes], but we are not allowed to speak, because we are dealing with our case.

## 6.2. The interplay between defence lawyers and judges

**Defence lawyers**:

- take up the defence of their clients (as a chosen or State paid/pro bono lawyer);
- are (can be) present and assist their clients at police interrogations and following interrogations by the investigating judge;
- analyse case files and bring in arguments for the benefit of their clients;
- eventually appeal against decisions (to prolong pre-trial detention or alternative measures).

The main task of the **investigating judges** is to lead the criminal investigation process when the case has been referred to him by the public prosecutor, to give orders to the police services with respect to criminal investigative acts to be conducted, eventually to request social inquiry reports or psychiatric reports, to hear the suspect in his observations, to take decisions on pre-trial detention or alternatives, to report on the progress of the criminal investigation at the regular periodical review hearing, and to inform and hand over the case to the service of the public prosecutor after the conclusion of the criminal investigation. The **judicial council** organises regular, periodical review hearings, examines the case and takes decisions with respect to pre-trial detention (to maintain pre-trial detention, to release on financial bail/under conditions, or to impose or prolong electronic monitoring), and – at the stage of the committal ruling (in Dutch: "*regeling van de rechtspleging*") – to decide whether or not to refer the case to the sentencing court. The **chamber of indictment** examines cases referred to the appeal court when the prosecutor or the suspect (defence lawyer) appeals against decisions of the judicial council; at this stage, it thus concerns 'selected' cases, i.e. there has already been a request of the public prosecutor to conduct a judicial criminal investigation, and there was already a decision by the investigating judge and at least one review hearing by the judicial council.

Although the picture cannot be generalised – in that sense that **defence lawyers** sometimes were also very positive on certain (individual) judicial actors – all of the interviewed defence lawyers touched upon – to their view – some '**shortcomings**' or obstacles in the concrete functioning of the criminal justice system and sometimes made quite 'cynical' comments, each of them focusing on the same (shared) points or on particular aspects (that expressed more individual concern). As such, they questioned for example the following:

- the added-value of their presence at interrogations by the police and/or the investigating judges (e.g. 1-DL, 9-DL, 10-DL) (some of them considering their presence at investigating judge's hearings more useful: 1-DL, 10-DL);
- related to this, the (absence of) access to case file information in the initial stage of the proceedings (see also par. 4.1; 9-DL, 10-DL): as they are not allowed to actively participate in the discussions, and have no detailed information on the case (only access to the file just before the first review hearing of the judicial council), they see their role merely as a kind of "*watchdog*" (1-DL), controlling the proper/correct conduct of the interrogation. They ask whether it would not be more useful to video-tape such kind of interrogations (9-DL), in particular police interrogations (1-DL, 13-DL). During interrogations by the investigating judges only two questions are explicitly addressed to defence lawyers, at the end of the interrogation, namely by asking the defence lawyer if he has particular observations with respect to a) the possibility that an arrest warrant would be issued against the suspect, and b) the course of the interrogation/hearing session [at this moment the defence lawyer can intervene, and for example propose alternative measures or request for a release without any conditions];
- the role and functioning of the judicial council and chamber of indictment in some judicial districts (just confirming previous decisions, apparently not having read or thoroughly examined the case files – see also par. 4.1 –, not taking (enough) time to listen to the arguments of the defence (e.g. 9-DL), the easiness of not extensively motivating the decisions but referring to the argumentation of the investigating judge, …), which makes one of the interviewed defence lawyers conclude that pleading at (some) judicial councils or initiate appeal is "*just a waste of time*" (1-DL, see also e.g. 10-DL) – also, appealing against decisions unnecessarily prolongs the proceedings (*see also the discussions at the second international DETOUR-workshop, held in Brussels on the 11th of May, 2017*); as a public prosecutor confirmed, defence lawyers are often reluctant to appeal against decisions taken at 'committal rulings' (in Dutch: "*regeling van de rechtspleging*") because it prolongs the proceedings and leads to longer deten-

tion than when the decision is not appealed against (quicker hearing before sentencing court; 17-PP(loc));

- disparities in and relative unpredictability of decision outcomes (type of measure, type of conditions imposed, amount of financial bail, use of electronic monitoring, duration of the measures; see in more detail, par. 4.1, par 5.1.3, par. 5.2, par. 5.3), but also many different and various 'policies' with respect to more practical aspects of the procedure, such as the possibility to have a consultation with the client before/during an interruption of the hearing by the investigating judge (9-DL, 10-DL, 13-DL), allowed practical means to consult case files before hearings of the judicial council (see par. 4.1), and possibilities to have informal contacts (e.g. a meeting at the office) with investigating judges in view of discussion on proposals for release (9-DL):
- the 'new' (young) generation of investigating judges having "*fear*" of older public prosecutors, and therefore not daring to contest or contradict the expectations of the prosecutorial office (13-DL; problem of the generation gap).

In a reaction to some critical observations, one of the investigating judges replies that it is not because some 'elements' (colleagues) are dysfunctioning, that therefore the whole system has to be discredited (7-IJ). Like defence lawyers, being critical towards some judges/courts, also judicial actors (judges/prosecutors) distinguish, between 'good' and 'bad' lawyers; the latter, for example, being criticised as not doing enough efforts for their clients (i.e. not actively taking initiative to elaborate alternatives), too frequently advising their clients to invoke their right to remain silent (14-IJ; however, contradicted by one of the defence lawyers, indicating that he rather would advice his client to confess if evidence is clear: 1-DL), too easily making 'misuse'/inappropriate use of procedural opportunities, or trying to mislead the court with incorrect or incomplete information (defence lawyers themselves indicating that longer experience of working together increases 'mutual trust').

> 9-DL
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> DL: [...] The big difference may be that when you have been around for a longer while and you have a trusted reputation, that they more easily take your word for it, but maybe that is not illogical. Someone who has been standing there for 30 years, will probably not lie, compared to someone who is just there for the third time.

Although there seems not to be a general – unanimous – impression among the different actors that one particular actor dominates the proceedings (e.g. 9-DL) or is given a preferential treatment (cf. in particular the role and position of defence lawyers vs. public prosecutors), one of the interviewed defence lawyers explicitly stated that the defence

always departs with a certain arrear, from a kind of '*underdog*' (more disadvantaged) position; since the suspect is the 'subject' of the investigations and other actors (public prosecutor and investigating judges) already have taken decisions which were not in favour of the suspect, i.e. to refer the case to the investigating judge and to issue an arrest warrant (1-DL).

## 6.3. Different roles of probation officers

Finally, **probation officers** do not play a significant role in preparing proposals for alternative measures – as they are almost never requested to conduct social inquiry reports (see par. 5.1.4). In contrast they become a very important actor once a decision of 'release under conditions' has been granted by the judicial authorities (see par. 5.1.2 and 5.1.8).

**Summary**

- Public prosecutors have an important filtering function as they finally decide which cases are referred to the investigating judge for criminal investigation, and thus make a first selection of cases that can result in pre-trial detention (or alternatives). Public prosecutors usually do not propose alternatives to pre-trial detention, but – when ordering a judicial criminal investigation ("*gerechtelijk onderzoek*") – rather request the issuing of an arrest warrant or a prolongation of pre-trial detention at the investigative courts. The role of prosecutors at the local (district) level seems to be quite different from the role of their colleagues at the level of the court of appeal.
- The role of traditional and modern, social media may not be underestimated. Many interview respondents were very critical towards the reporting on concrete cases in the media. It is considered as a challenge for experts to inform and 'educate' the (traditional) media about the criminal justice system and how it operates in a more broader sense.
- Defence lawyers touched upon some 'shortcomings' or obstacles in the concrete functioning of the criminal justice system. As such, they questioned for example: the added-value of their presence at interrogations by the police and/or the investigating judges; the (absence of) access to case file information in the initial stage of the proceedings; the role and functioning of the judicial council and chamber of indictment in some judicial districts (disparities in decision outcomes, but also many different and various policies with respect to more practical aspects of the procedure); the generation gap between investigating judges and public prosecutors, and its implications.
- Like defence lawyers, also judicial actors (judges/prosecutors) distinguished and made critical comments on the functioning of defence lawyers: some of them not doing enough efforts for their clients (i.e. not actively taking initiative to elaborate alternatives), too frequently advising their clients to invoke their right to remain silent, too easily making 'misuse'/inappropriate use of procedural opportunities, or trying to mislead the court with incorrect or incomplete information.
- Probation officers do not play a significant role in preparing proposals for alternative measures, but, in contrast, they become a very important actor once a decision of 'release under conditions' has been granted by the judicial authorities.

# 7. Procedural aspects (safeguards, control & practical problems)

Most of the interviewed actors agree with the observation that Belgian legislation, at least in theory, in general is an adequate instrument and provides for several procedural safeguards in order to apply pre-trial detention as a last resort and to guarantee fundamental defence rights – one of the interviewed investigative judges calling it a "*magnificent instrument*" (7-IJ). Therefore, it is for example referred to: a) possibilities of consultation of and assistance by defence lawyers at police and investigating judge's interrogations, b) access to case files, c) periodical automatic review hearings, and d) possibilities of appeal. Nevertheless, also some shortcomings and proposals for improvement were formulated, as well as some (sometimes critical) comments on recently adopted or foreseen legislative reforms.

As some of these issues have already been addressed in other paragraphs of this report (see in particular, also the critiques of defence lawyers, mentioned in par. 6), we here just remind and/or illustrate some of them, and additionally discuss some of the (legislative) proposals and reforms.

Whilst the current legislative framework has not been fundamentally called into question, rather the practical use of it (by some individual actors and/or in some specific judicial districts) has been criticised. Many of these questions however do not only relate to the attitudes/practices of individual actors, but can also be attributed to several practical obstacles (see also, par. 5.1.6 with respect to problems/difficulties with preparing and implementing 'alternative' measures, such as 'release under conditions', or par. 5.3 with respect to identified difficulties with or resistance against the use of electronic monitoring).

One of the major problems for taking deliberate decisions about pre-trial detention and/or implementing alternatives as soon as possible, consists of '**time pressure**' and lack of adequate information. According to Belgian legislation, investigating judges have to decide on pre-trial detention and notify their decision to the suspects within a maximum time limit of 24 hours after deprivation of liberty (police arrest). In practice, this **24 hours-time frame** to take a decision, is not fully at their disposal, as the request to conduct a judicial criminal investigation and to issue an arrest warrant is often posed quite late; in some instances, investigating judges will only have a couple of hours to take a decision on pre-trial detention (or alternatives). In addition, **information**

**available** in this very early stage of the proceedings, mainly consists of police reports which predominantly focus on the alleged offence(s) and do contain no or only very little information about the personal situation of the suspect (employment, family relations, income situation, underlying problems, treatment history, and so on) (e.g. 1-DL, 7-IJ, 14-IJ). Detailed social inquiry reports to be conducted by the probation service are often not requested at this stage, because they are time-consuming and cannot be delivered within such a short time frame (which also relates to problems of **capacity**). And when psychiatric problems are assumed, this could prolong the proceedings (and an eventual period of pre-trial detention) for a long time (10-DL) – even more now than before, since psychiatric experts complain that they are paid belatedly by the Belgian State and some therefore stopped to do this kind of work, with as a result a shrinking group of available expert-psychiatrics (14-IJ). The limited time frame – together with possible capacity problems within the judiciary (too little investigative judges/judicial council judges for too many cases in some districts ?) – perhaps could also explain why **interrogations** by the investigating judges sometimes are quite **short** (*in the court district where we observed interrogations by an investigating judge – empirical research conducted within work stream 1 of the DETOUR-project –, interrogations didn't even take more than 15 minutes*)[22]. Although the observed investigating judge explained that "*it is not intended to rehash everything again*" (thereby referring to the information that is already available in the police reports), one of the interviewed defence lawyers replies that "*it is not the police, but the investigating judge himself who has to take the decisions*" (9-DL) – apparently big differences exist between judicial districts (7-IJ, 9-DL). The same applies to (review) hearings by the investigative courts (judicial council): in some larger districts, a lot of cases have to be handled each hearing day, resulting in rather short hearing sessions (per case), whilst in other districts more time can be spent to each case (e.g. 9-DL, 15-JC, 16-JC). Differences are also observable with respect to the **setting** and the way in which hearing sessions take place. In contrast to review hearings in a 'traditional' court room [*as we observed during empirical research conducted within work stream 1 of the DETOUR-project*: the suspect sitting on a bench, defence lawyers standing behind the suspect, and the judge and his clerk (both dressed in toga) somewhat farther away from and higher than the suspect (if present), and (eventually) his lawyer)[23]], one of the interviewed judges (from another – smaller – judicial district) reported on how he organises more 'informal' hearings (referring in a certain sense to principles of perceived 'procedural justice'), as follows:

[22] ibid.

[23] ibid., 6.

16-JC

JC: [...] we all sit around a very big table. Lawyers also plead while seated. People don't have to stand up with me. It should be more a talk.
NICC: Is it a room like this one?
JC: Yes, a rectangular table that's a bit bigger.
NICC: Levels neither?
JC: No, I find that very important. It also speaks a lot more difficult. The suspect should stand when he talks. I don't do that. It is a lot easier to get information from someone when they can sit on the same level. Sometimes I for example get people that are insane. You should surely not sit above them, because they will not say anything anymore. You can more easily start a talk: how are you doing in jail, what do you do during a day... I also allow lawyers to ask the investigating judges questions. It should be more a debate. I also want to see these people and talk to them. What I also find very important: the moment they enter, the cuffs are taken off and the moment that they exit again and the cuffs are put back on. That is usually when you see their true nature.

An **extension** of the 24 hours-time frame (a maximum period of arrest without intervention of an independent judge) **to 48 hours**, has frequently been proposed by politicians and some practitioners – and, influenced by recent IS-terrorists' attacks, even proposals for an extension, for such particular offences, to 72 hours were launched. Only very recently, a proposal to extend this period to 48 hours – which necessitated an amendment to the Constitution – was ultimately adopted by Belgian Parliament (on the 10th of October, 2017, and published in the *Official Journal* on November 29th, 2017). Interview respondents had no unanimous position on this issue: while some of them were in favour [2-CI, 7-IJ (not opposed), 8-PP, 9-DL, 14-IJ, 15-JC (eventual 48 hours, but against 72 hours)], others opposed [1-DL, 10-DL, 11-IJ (eventually 48 hours)], with the argument that an extension of this time period would not necessarily imply that the investigating judge would have more time to decide as it might also be the case that police officers and the public prosecutor would take more time (and so, this would only result in a *status quo*-situation for the investigating judge). Those who advocated an extension to 48 hours indicated that it would allow to obtain more information, and/or that investigating judges would have more time to take a decision (thereby relying on/trusting in a "*professional*" attitude of the police officers and prosecutors concerned, i.e. that they refer the case to the investigating judge within a reasonable time frame; e.g. 7-IJ, 15-JC). Closely related to this discussion, some also proposed a bigger implication of probation officers in informing judges and preparing alternatives, for example by providing for a permanent presence of probation officers at the court house (where they immediately could advise investigating judges) and/or their presence at (review) hearings of the judicial council (see also above, par. 5.1.6; 7-IJ). A prerequisite would – of course – be an enlargement of the human resources currently available and, as a consequence, additional budgetary investments.

Problems of **capacity** were not only reported with respect to investigating judges (in some districts), police services [who sometimes do not like to take up additional tasks, such as controlling some conditions imposed to suspects (see par. 5.1.5), transferring detained suspects to residential care institutions for intake interviews, … (see par. 5.1.6)], probation services (time needed for elaboration of social inquiry reports; see par. 5.1.4, 5.1.6, and 7), external care institutions (limited capacity, and therefore sometimes long waiting lists, see par. 5.1.6), … Supposed capacity problems were also mentioned with respect to investigative courts, such as judicial councils, who – in particular in large judicial districts – often have to deal with 40-50 cases on one single day (1-DL).

> 1-DL
>
> DL: […] and in [large judicial district] you have the judicial council, they have plenty of dossiers, during a hearing you can sometimes get 40 cases. That is not human for those judges. You cannot judge it in-depth, thus to be safe, […]. Because I also belief that the number of files does lead to the consequence that pre-trial detention is more and more often applied and also longer.

The recent legal reform (of February 5th, 2016) with respect to the **periodicity of review hearings** by the judicial council did not receive much of approval of the interview respondents. One of the investigating judges saw some merits of the reform, namely its simplicity (uniform review periods, instead of a distinctive temporality, dependent on type/severity of the offence).

> 4-IJ
>
> IJ: […] The last change, the bi-monthly maintenance, I think it is a good thing. It simplifies matters. Before we had the system of 1 or 3 months (for Assize matters), [so] for non-correctionalisable crimes there were other rules. It was very different. To be sure, we opted for monthly maintenance in order not to make mistakes. That is not ideal either.
> NICC: Does the risk not exist that the pre-trial detention will last longer because the investigation is proceeding less quickly?
> IJ: Yes, that is a real danger. What I have experienced during the years is that the investigators/police are less apt to work with urgency on the matter. Pre-trial detention is an exceptional measure, thus from the point of view of investigation, it should be handled with absolute priority and urgency. When I look at x years, police was conscious of this and it moved forward, but now… What are the reasons for this? Budget, the oversubscription of the police (due to the threat of terrorism, …). I note that it becomes a lot harder to have them fulfill the tasks.

Nevertheless, all other actors who discussed this topic, disapproved this reform, or at least found it 'not really necessary' (1-DL, 7-IJ, 9-DL, 10-DL, 13-DL, 14-IJ, 17-PP(loc)). Some of them explicitly stated that this reform was only inspired by an objective of cost-

savings, and many respondents invoked that there would be a real danger for increasing lengths of pre-trial detention. It might slow down the criminal investigation process, since the investigation usually seems to become more intensive in the period just before (and so, under the pressure of reaching deadlines of) review hearings (see e.g., 9-DL, 16-JC). Extending the time lapse between these periodical reviews thus could have undesirable effects, and it was seen as an important task for the judicial council to closely monitor that investigators would not make 'abuse' of it (15-JC, 16-JC).

> 9-DL
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> NICC: What do you think of the extension of the time limit?
> DL: I am not a big fan of it. We sometimes 'so to speak' forget he is still in jail, because in those two months nothing happens. Before, when it was month to month, then at least you knew that one would do something the last three-four days, now it just moves up for a month.

> 16-JC
>
> NICC: And the extension of the maintenance limits, do you think this will have a different impact on the application of pre-trial detention? For example that the duration of the pre-trial will increase?
> JC: I don't think so.
> NICC: Or that the police work will remains where it is at, because there is less pressure.
> JC: That is something one fears. One can now see when it is month to month: the last week the PVs (police reports) enter. There is pressure from the judicial council and then everything enters, even the day before. There is indeed a fear that when one has two months, one will leave it laying around for a while. But I think that as president of the judicial council, one should see to this. When in a file nothing happens for two months and during the last week an interrogation of the suspect enters, then I will signal: 'In important files, this might happen once, but we will not leave this man in jail for two months for one police report.' That entails that the investigation is not that important and it can also be done when the man is at home.

One of the interviewed respondents made an interesting observation in this respect, and proposed to **inverse** the respective time periods that are concerned, namely first a period of two months (since, in the early stage, there is often a risk of collusion and sometimes a lot of investigation acts still have to be done), evolving in a further stage towards monthly review hearings (17-PP(loc)). One of the interviewed defence lawyers, in turn, proposed to **abolish** periodical automatic review hearings and to install a system in which defence lawyers would be able to request for alternatives to the investigating judges, with the judicial council rather functioning as an instance of appeal (against investigating judges' refusals to release, whether or not under conditions) (10-DL).

In line with this, some respondents also criticised the lack of – substantial – **motivation** (justification) of decisions to prolong (i.e. maintain) pre-trial detention (see e.g. below, 1-DL). As we observed during our research activities within work stream 1, such

decisions often simply state that there are still serious indications of guilt and an absolute necessity for public security, and that: "*indeed, the facts proper to the case and to the personality of the suspect, that were already mentioned in the arrest warrant, are circumstances that still exist and touch on public security in such a way that prolongation of pre-trial detention, therefore, is absolutely necessary.*"[24]

1-DL

DL: When you read it, those are almost standard motivations. In some cases, it has happened that the copy paste was not done well enough and that a name from another file was still there. I am sorry, but then I will not shut up. I am not saying that the pre-trial detention is always undue. It could be that the person is rightly so in pre-trial detention, that is still another question. The decisions of the investigating judge: the order to arrest is not too bad. They just interrogated the suspect, so there is still some body when it comes to considerations. But afterwards, the judicial councils and chamber of indictment [in judicial district X]. The decisions are not redundant when it comes to number of words [in Dutch: "*niet gekenmerkt door woordovertolligheid*"]. Those are standard phrases and they are totally not spelled out according to the uniqueness of the dossier. You do have to make a difference. In the KI (chamber of indictment) [in judicial district Y], those are writers. There I have known judgements of 10-15 pages to motivate why that man should stay in jail. You have to differentiate according to the judicial district. [Judicial district Z] stands in between.

That decisions of investigating judges are often more substantially motivated than those of the investigative courts (in some judicial districts) was confirmed by other actors, but also explained by the fact that 1) investigating judges, who take the initial decision to remand in custody or not, (as first decision-makers) report more extensively on the criminal offences that have been committed (e.g. 17-PP(loc)), and 2) the Court of Cassation decided [*in a judgment of 2013, 24th September*[25]) that it is allowed (and enough) to refer to the motivation of previous decisions if the same arguments still persist (9-DL, in the same sense, referring to the law: 2-CI).

2-CI

NICC: As regards the motivation of the decisions: what do you think of those?
CI: The decisions of the judicial council should be a bit more motivated. We try to do so, but on the other hand it is neither the aim to write a novel during pre-trial detention. The law also stipulates that we ought to motivate our decision only to a limited extent. But nevertheless, it should be incorporated so one knows why one is kept in detention.

[24] ibid., 10.

[25] See also, Mennes (n 4).

9-DL

DL: When you indicate the strict necessity for public security for punishments higher than 15 (years), thus murder, torture, terrorism, … than that's it. The Court of Cassation in that sense has made it easy for them. They do not have to indicate what it is. So what does one do at the level of the KI (chamber of indictment)? There they say they refer to the pertinent motivation of the legal claim of the prosecutor's office.

Similarly – and also conform to, e.g. the statement of Friedrich Forsthuber, president of the Vienna Regional Court for Criminal Matters, at the final conference of the DETOUR-project (9th November 2017) – it seems that instances who are farther removed within the '**chain of decision-making'** have 'trust' in, and rely on, decisions of actors who intervene earlier in the proceedings:

2-CI

NICC: From your own experience as a judge in the chamber of indictment: do you think that you yourself decide a lot to maintain in pre-trial detention?
CI: In a lot of cases, the decision is indeed to maintain. We are in fact the last instance: the case has already been assessed by the public prosecutor and an investigating judge. In which case I consider that they do their job correctly. And after that, there is [a review hearing] for the judicial council. So before the case comes to us,… they are usually people where there is a great risk of recidivism, a risk of flight. They keep their lips tight. So to prevent them from spreading information about the file to their leader…

The existence of periodical, automatically organised review hearings on pre-trial detention has been used by the Belgian Government as an important argument against the (necessity of the) introduction of a legal **maximum length** for pre-trial detention[26] (in reaction to the EU-Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention). Interview respondents who discussed upon this issue, adopted the same position. Although they stressed the importance that pre-trial detention in practice has to be restricted to the shortest possible duration, they do not belief in a legally imposed maximum duration, because it would (sometimes) be very difficult to apply such abstract and general legal provision to specific, concrete cases (1-DL, 2-CI, 7-IJ, 10-DL).

Another possible reform, namely the installation of so-called 'quota' (restricted **maximum prison capacity** for pre-trial detainees) – a recent proposal by an expert committee on the reform of criminal procedure, installed by Belgian Government –, was not

[26] European Commission, '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'.

so much discussed by interview respondents. While one defence lawyer took a prudent position and thought that it eventually could lead to more reflection among judges about the consequences of their decisions (10-DL), representatives of the judiciary were firmly against such means to restrict their individual discretion (2-CI, 14-IJ).

**Summary**

- In general and at least in theory, the current Belgian legislation was considered as an adequate instrument that provides for several procedural safeguards in order to apply pre-trial detention as a last resort and to guarantee fundamental defence rights. Therefore, it was for example referred to: a) possibilities of consultation of and assistance by defence lawyers at police and investigating judge's interrogations, b) access to case files, c) periodical automatic review hearings, and d) possibilities of appeal. Nevertheless, also some shortcomings and proposals for improvement were formulated, as well as some (sometimes critical) comments on recently adopted or foreseen legislative reforms.
- One of the major problems for taking deliberate decisions about pre-trial detention and/or implementing alternatives as soon as possible, consists of time pressure and lack of adequate information. In practice, the (legally provided) 24 hours-time frame in which investigating judges have to take a decision, is not fully at their disposal, as the request to conduct a judicial criminal investigation and to issue an arrest warrant is often posed quite late. An extension of this 24 hours-time frame to 48 hours -adopted very recently by the Belgian Parliament (amendment of article 12 of the Constitution) - was not unanimously supported by interview respondents. The main argument *contra* was that an extension of this time period would not necessarily imply that the investigating judge would have more time to decide as it might also be the case that police officers and the public prosecutor would take more time.
- Information available in this very early stage of the proceedings mainly consists of police reports which predominantly focus on the alleged offence(s) and do contain no or only very little information about the personal situation of the suspect. Detailed social inquiry reports to be conducted by the probation service are often not requested at this stage, because they are time-consuming and cannot be delivered within such a short time frame (which also relates to problems of capacity).
- Closely related to this discussion, some proposed a bigger implication of probation officers in informing judges and preparing alternatives, for example by providing for a permanent presence of probation officers at the court house (where they immediately could advise investigating judges) and/or their presence at (review) hearings of the judicial council.
- Interrogations by the investigating judges sometimes are quite short and the same applies to (review) hearings by the investigative courts (judicial council), with differences between judicial districts. Differences are also observable with respect to the setting and the way in which hearing sessions take place (hearings in a 'traditional' court room *vs.* more 'informal' hearings which refer to principles of perceived 'procedural justice').
- Problems of capacity were reported with respect to different levels/actors: investigating judges (in some districts), police services, external care institutions, probation services, and investigative courts, such as judicial councils, in particular in large judicial districts.

- The recent legal reform (of February 2016) with respect to the periodicity of review hearings by the judicial council did not receive much of approval of the interview respondents, as extending the length between the different review hearings might slow down the criminal investigation process. It is observed that the investigation usually becomes more intensive in the period just before (and so, under the pressure of reaching deadlines of) review hearings. Some respondents therefore proposed to inverse the respective time periods concerned, or to abolish periodical automatic review hearings (and installing a system of 'decision on request').
- Respondents also criticised the lack of – substantial – motivation (justification) of decisions to prolong (i.e. maintain) pre-trial detention, and claimed that instances who are farther removed within the 'chain of decision-making' have 'trust' in, and rely on, decisions of actors who intervene earlier in the proceedings (i.e. most often tend to prolong pre-trial detention).
- The idea to introduce a legal maximum length for pre-trial detention was not supported by interview respondents, as it would be very difficult to apply such abstract and general legal provision to specific, concrete cases. The installation of so-called 'quota' (restricted maximum prison capacity for pre-trial detainees) – a recent proposal by an expert committee on the reform of criminal procedure, installed by Belgian Government –, was not much discussed by interview respondents; nevertheless, representatives of the judiciary were firmly against such means to restrict their individual discretion.

# 8. European aspects (European Supervision Order)

Just one week before the last interview took place, **Belgium adopted** a law (**23 March 2017**) transposing the so-called '**European Supervision Order'** (EU-FD 829) into domestic legislation. When asking to the interview respondents if they had ever heard about the European Supervision Order (ESO), or knew something about it, most of them responded that they had **never heard about** it; and some others did have, most often, only some **vague notions**. Due to this very belated adoption of appropriate legislation, Belgian judicial actors of course had no concrete experience with any practical use of this specific instrument.

Although most respondents thought, at first sight (after some brief explanation by the researcher interviewing them), that the European Supervision Order could bring **some kind of solution** to the question of the pre-trial detention of (EU-)suspects not permanently (and officially) residing in Belgium – who nowadays are often taken into custody quasi-automatically, as conditions cannot/will not be controlled by the foreign authorities in the home country –, some few others had certain **critical comments**, whether or not based on experiences with other EU-instruments. So, for example, it was referred to: too much 'bureaucracy', a lot of additional paper work, complicated and maybe long-lasting procedures, language problems, problems of co-ordination (12-PP(app), 15-JC), and of … 'trust'/'recognition' (e.g. 1-DL, 15-JC).

Like some of these more critical commentators indicated, a lack of 'trust' may indeed hamper the implementation of such instruments. In this respect, a public prosecutor (at the level of the court of appeal) for example indicated, that it often seems much easier to co-operate with other, (i.e. Eastern European) countries, than with neighbouring countries who are often requesting for more information, evidence, etc. (12-PP(app), see also 2-CI, 4-IJ, 14-IJ), whilst from a legal point of view they are not allowed to interfere with questions on the 'opportunity' (appropriateness) of requested measures (European Arrest Warrant; 1-DL, 4-IJ, 10-DL) – an experience of several judges which contradicts with the 'perception' of a lawyer who thinks that judges could have less 'confidence' in EU-countries from the East (1-DL).

The **European Arrest Warrant** (EAW) was, in general, not seen as an adequate instrument to overcome the identified problems with the situation of foreign suspects without residence in Belgium. Although this instrument makes it possible to ask for the extradition of foreign EU-citizens suspected of having committed an offence in Belgium, and to request the extradition of such foreign suspects in order to execute the imposed

sentence, most actors are reluctant to release foreign suspects without conditions and to make use of the EAW in a later stage, in case the convicted foreign would not present himself for the sentence execution. Apparently, the main consideration seems to be that pre-trial detention 'better' guarantees that the suspect will show up (or be represented) at trial, that he will not be sentenced by default of appearance, and that he will not be able to avoid the execution of his sentence (see e.g. 2-CI, 7-IJ, 12-PP(app.), 11-IJ). **Additional**ly, a **difficulty** that also applies to the European Supervision Order (ESO), is that some foreign suspects even do not have a legal residence in their supposed home country and are not in line with administrative obligations (e.g. 1-DL, 8-PP(loc)).

7-IJ

NICC: And when you talk about Europe?
IJ: There you still have the option of executing an EAW [European Arrest Warrant] when you have lost him. That is an argument that lawyers use: 'My client is just in the Netherlands. You can set him free.' But it is not that simple. When I lose one today, the Netherlands will not come and say: 'Let's go and find him.' When you really fear he will walk away from justice, this is not a valuable alternative. The bigger the menu, the more apt you can cater the meal to your client.

11-IJ

NICC: It could offer a solution for those who do not have the right to stay and for whom we do not have a straight-forward solution.
IJ: Of course, for 'travelling offenders' this is of no use, because they will stick around and commit new offences. But for a drug carrier from the Netherlands or France for example.

8-PP(loc)

NICC: Do you know the European Supervision Order?
PP: No.
NICC: *(short explanation)* Would that offer a solution?
PP: Not for our wanderers ['travelling offenders'], I don't think, because they often do not have a place of residence abroad either. They live somewhere or not, so you would have to be sure they live there. But for some it could be a solution.
[…]
PP: They are not the good guys in their own country, let's say. They will not be resident there per se. For example, a colleague's file with very serious facts: a Dutch men had a relation with a Belgian woman and had tried to kill her. The qualification as such was very severe. For that category, it would be an option. No VOV (RuC: release under conditions), but having the conditions being controlled in the Netherlands. Because their impediment to opt for VOV, is indeed that you cannot control […] the conditions. For such a category, it could possibly be an option. For foreigners that commit a serious offence here, but for whom you know that in their country everything is in order: they work, they have a place of residence,… so that could be a category. Our wanderers are often those that are not in order in their home country, so then it becomes more difficult.

**Summary**

- Belgium only very recently transposed the so-called 'European Supervision Order' (EU-FD 829) into domestic legislation, by adopting a law on March 23th, 2017. Most of the interviewed respondents – almost all interviews took place before the adoption of this legislation – had never heard about the ESO, and those who did, had only some vague notions. Due to the very belated adoption of appropriate legislation, Belgian judicial actors had no concrete experience with any practical use of this specific instrument.
- Most respondents thought that the European Supervision Order could bring some kind of solution to the question of the pre-trial detention of (EU-)suspects not permanently (and officially) residing in Belgium. Some few others had certain critical comments and referred to: too much 'bureaucracy', a lot of additional paper work, complicated and maybe long-lasting procedures, language problems, problems of co-ordination, and … 'trust'/'recognition' (whether or not based on experiences with other cross-border co-operation issues).
- The European Arrest Warrant (EAW) was, in general, not seen as an adequate instrument to overcome the identified problems with the situation of foreign suspects without residence in Belgium. Most actors are reluctant to release foreign suspects without conditions and to make use of the EAW in a later stage. Apparently, pre-trial detention 'better' guarantees that the suspect will show up (or be represented) at trial, that he will not be sentenced by default of appearance, and that he will not be able to avoid the execution of his sentence.
- An additional difficulty that also applies to the European Supervision Order (ESO), is that some foreign suspects even do not have a legal residence in their supposed home country and are not in line with administrative obligations.

# 9. Responses on the vignette

## 9.1. Methodology of the case vignette study

In Flanders (Dutch-speaking part of Belgium) case vignettes – as elaborated by the DE-TOUR-consortium (see below for the case vignette description presented to investigating judges) – were presented to all interviewed respondents (N=17), i.e. including probation officers (n=3). However, these vignettes were only discussed in-depth with those respondents who have a decisive role in the criminal procedure by requesting pre-trial detention or less severe measures (such as bail, electronic monitoring or release under conditions), i.e. public prosecutors and defence lawyers, or by deciding on issuing arrest warrants or alternatives within the first 24 hours after police arrest (i.e. investigating judge), during regular periodical review hearings (judicial council) or appeal hearings (chamber of indictment).

*Case vignette example for investigating judges*

A 23 year old male is suspected of burglary in a house at 3 o'clock at night, while the house-owners and their 4 years old daughter were sleeping upstairs. He went into the house by cutting the glass of the entrance door and opened the door. Next morning the owners discovered that precious jewelry, a laptop and money all together worth 3000 euro was stolen.

The police identified the suspect from CCTV recordings. The suspect is currently unemployed and was sentenced before to an unconditional work penalty (with a prison sentence as substitute sentence) two years ago. Apparently he is living with his parents.

The person is arrested at Monday-afternoon and brought before you within the usual time limits. You have to decide if you keep him in custody (by issuing an arrest warrant) or not.

The total number of respondents with which case vignettes were discussed with in-depth, was 14, and distributed as follows: 4 defence lawyers (associated to the bar association of 3 different sections of local judicial districts), 3 public prosecutors (from 2 different judicial districts; one prosecutor at the appeal level, two at the level of the tribunal of first instance), 4 investigating judges (from 4 different sections of judicial districts), 2 judges of the judicial council (different judicial districts), and 1 judge of a chamber of indictment (court of appeal).

All respondents were asked 1) as to whether the vignette represented a case that was recognisable to them from their own practice and to give their first impressions or reflections on the case, 2) to inform us about the measure(s) they would request for or the decision they would take if the case was presented to them (investigation judges and courts), and 3) to answer if their request/decision would change if some offence- or offender-related characteristics would be different (e.g. type of offence of previous convic-

tion, confession or denial, residence status, drug dependency as motivation for committing the offence, nationality, …).

The case vignettes were slightly adapted according to the role in the procedure of each actor and to the moment in the criminal procedure at which they would intervene (e.g. for the chamber of indictment the case was presented as if the suspect was already in prison for two months and the court had to decide on appeal against an earlier decision of the judicial council). The initial English version of the case vignette was modified with respect to the information on the criminal record (previous conviction: 'cso/conditional sentence') into a previous conviction to a 'stand-alone (autonomous) work penalty' (community service order), i.e. not combined with, nor as a condition of an (unconditional) prison sentence, as Belgian legislation does not allow for such combined sentencing outcome.

## 9.2. Main results

All respondents agree that the case vignette as submitted represents a **familiar situation** they could encounter in criminal justice procedures related to pre-trial detention or alternatives. However, to make an adequate request or take a correct decision, **more detailed information** about the case or the person of the suspect would be **needed**. This additional information should be gathered through the consultation of police records (case file), and/or conversation with/interrogation of the suspect, and - for defence lawyers – with relatives of the suspect which are identified in the case vignette (cf. parents of the suspect). Respondents mention that very diverse aspects could be of significant importance for their request or decision, and thereby refer, for example, to the following type of information/questions:

*Case(-evidence)*: what is the available evidence (besides possible identification by CCTV; some lawyers explicitly mention that they would ask to watch the videotapes), did the suspect confess, can the suspect be connected to/is he suspected of other (similar) offences, are there other suspects involved in the case (or is he member of a gang), has the loot been recovered (or is it still hidden), was the suspect weaponed or not?

*Criminal record*: what (how extensive/type of offences) is the criminal record of the suspect (i.e. is the previous conviction to a work penalty the only criminal antecedent), for which offence was the suspect previously convicted to a work penalty, are there new offences committed since the previous conviction to work penalty, is this work penalty fully served (without major incidents)?

*Personal situation of the suspect:*

- Education/employment: did he finish school education and what are the educational qualifications, has the suspect ever/never worked, for how long is he unemployed, what are the reasons for being unemployed, are there prospects for employment in the near future?
- Activities: employment of time during the last couple of years (activities), in particular since the conviction mentioned in the case vignette?
- Income situation: what is the income situation of the suspect (unemployment benefit or other source of income/means of subsistence)?
- Home/family situation: is the suspect 'really' living with his parents (cf. the expression 'apparently' in the case vignette presented), do the parents agree with the fact that the suspect would return at home, how is the relationship between the suspect and his parents (e.g. support of and control on the suspect, or having no control, always having quarrels, …), in what (kind of) neighbourhood is the suspect living in?
- Motivation: what is the motivation for committing the offence, are there other underlying problems (e.g. alcohol-related, drug addiction, financial, psychological/psychiatric, gambling problems…)?
- Personality: more generally, how is the suspect as a 'person' (e.g. intelligence, insight in failure), what is his attitude (denial, explanation), was he cooperative or not at the time of arrest, is there a motivation for change, self-reflection on consequences/impact of the offence, are there previous sentences by default of appearance (indication of suspect's mentality) ?

Although substantial and crucial information seems to be 'missing' in the presented case vignette, a majority of the respondents (defence lawyers, prosecutors as well as some judges) think that, dependent on specific offence- and/or offender-related characteristics, this case could offer possibilities for less severe **measures** than pre-trial detention (in prison):

- *Defence lawyers* would (dare to) request for less severe measures: two lawyers would request for release under conditions (e.g. with home curfew order as a particular condition to be imposed), one lawyer electronic monitoring or release under conditions, and another one electronic monitoring in the initial stage of the procedure and release under conditions afterwards. Although defence lawyers think that this case presents opportunities for 'alternative' measures, they nevertheless expect that the suspect would be placed in pre-trial detention, maybe for a short term, and this mainly because of possible needs for further crimi-

nal investigation (co-suspects, other offences) or difficulties for an immediate implementation of alternative measures (e.g. in case of severe drug addiction, blurred family relations).

- *Public prosecutors* at the *local* district level mention that this case would not necessarily lead to pre-trial detention: one prosecutor would not refer the case to the investigation judge at all or refer the case with a request for release under conditions, whilst the other one would request for pre-trial detention, possibly a release under conditions, although electronic monitoring would also be an option.
- None of the interviewed *investigating judges* would by definition issue an arrest warrant (or take the suspect in detention for a long period of time) if this case would be presented to them, all of them – at least in the most favourable scenario – seeing some opportunities for a release under conditions, e.g. with a home curfew order and a specific condition related to the (un)employment situation (as one judge specifies).
- With respect to the possible decision by the *judicial council* (first review hearing within 5 days), one judge initially takes an 'undecided' position, due to the insurmountable lack of information, but nevertheless specifies that this case would not automatically lead to pre-trial detention or maintain in prison at the review hearing; the other judge indicates that maintain in pre-trial detention would be a realistic option.
- The *public prosecutor* and *judge* at the *appeal* court level (chamber of indictment) also seem to rather rely on severe measures: the public prosecutor would not propose by himself a less severe measure such as a release under conditions (as they usually take up a more re-active position, by evaluating proposals that are made by other actors, in particular defence lawyers), and according to the judge of the chamber of indictment the expected outcome would be a maintain in pre-trial (in prison) or a conversion into electronic monitoring (in practice 2 months of pre-trial detention seems to be a kind of 'standard minimum' for such type of offences brought to the appeal court).

According to the respondents different **factors** (actually presented in the vignette or not; additional facts stressed in italics below) might **positively or negatively impact** on the expected outcome. Some characteristics will tend to the imposition of, or conversion into, less severe measures, whereas other will make a decision towards pre-trial detention more probable.

*'Positive' elements* are e.g.: *if it concerns an 'isolated' offence* (i.e. if the suspect is not involved in, or suspected of, other offences), the non-violent character of the offence, the time lapse between the previous conviction and the actual offence (already two years ago), the fact of having a fixed residence, *if the parents support the suspect/if there is a 'good' relationship between the suspect and his parents, if they are prepared to take him at home again*, *if the suspect previously was always employed*, the suspect being still young (potential for 'personal change', cf. risk of recidivism), *if there are no other suspects involved in the case* (no risk of collusion)

In contrast, the case would rather tend to pre-trial detention ('negative' factors): if the previous conviction to a work penalty concerned a *similar type* of offence (perception of increased risk of recidivism); *if the work penalty was not executed or failed*; having already a criminal record; if the *loot* has *not yet* been *recovered* (further investigation needed; risk of concealing evidence by selling the stolen goods); if *other suspects* are involved in the case (further investigation needed and risk of collusion); *if the suspect could possibly be related to other (similar) offences* (additional judicial investigation required); *if the suspect has a bad relationship with his parents*; *if he was never employed in the past;* the *nationality* or *neighbourhood* where the suspect is living in (bad reputation: risk of recidivism - however, only explicitly mentioned by one defence lawyer); if *violence* was used against victims or victims were threatened (i.e. bigger impact and danger; impact on public opinion and feelings of safety); if the suspect was *caught in flagrante delicto* while committing the offence during the night (mentioned by the public prosecutor at the appeal court level, hereby referring to 'specific dynamics' of the criminal investigation in such circumstances); the social impact and seriousness of the current offence (burglary at home); if the suspect represents an 'arrogant' *attitude* (<> authenticity), if there are *previous convictions by default of appearance*.

The answers and general reflections of respondents on **specific, additional questions**, in which we altered or added some information to the initial case vignette, can be summarised as follows:

- Whereas some respondents, in particular some of the investigating judges, indicate that 'relapse' in a *same type of offence* (cf. hypothesis of being suspected of a burglary and already having been convicted to a work penalty for a same type of offence in the past), would not have an important impact on the final decision – as it is more meaningful to know what happened during the last two years (since the last conviction) or to impose adequate conditions in case drug related problems are or were present –, other respondents estimate that this fact influences the final outcome. The risk of recidivism

(one of the grounds for pre-trial detention) would be perceived as high and therefore possibly can result in pre-trial detention.

- According to most respondents, the presence of problems of *drug addiction*, as a 'motivation' (reason) for committing the offence, will be important with respect to imposition of specific conditions, i.e. treatment for this problem would be indicated and being imposed as a condition if the suspect would be released.

- Absence of a *fixed residence in Belgium* generally results in pre-trial detention, as most respondents find it very difficult to imagine concrete alternatives for this target group (no policy agreements with the Immigration Office; address required for electronic monitoring; risk of absconding, or at least, a risk of not appearing in court or responding to convocations …). Having no permanent residence, or a lack of housing, also seems to be a 'valid' argument to incarcerate Belgian citizens, and this because of investigative reasons (cf. convocations) and/or the perceived greater risk of recidivism.

- Strongly related to the question of 'fixed residence' in Belgium is the *nationality* of the suspect. As a considerable proportion of non-nationals have no residence in Belgium, the latter argument is of decisive importance. Foreigners with legal residence in Belgium are treated equally as Belgian citizens, according to most of the interviewed respondents; nevertheless, one defence lawyer explicitly criticises experienced differential treatment of non-nationals by judicial authorities in certain judicial districts (being overtly repressive, especially towards citizens from other ethnical origins), and this irrespective of their residence status or the (reputation of the) often socio-economically disadvantaged neighbourhood they are living in.

- To the opinion of most respondents *expected sentencing outcomes* would not be very influential. Cases have to be punishable with at least a prison sentence of one year anyway, and as – even in this scenario - very different kinds of sentencing outcomes are possible (conditional or unconditional prison sentence, probation, work penalty, electronic monitoring), it seems to be quite difficult to take this into account (as confirmed by the judge of the chamber of indictment). However, according to a defence lawyer, the perspective of a work penalty could possibly have a mitigating effect, at least on the length of pre-trial detention, while, to the opinion of an investigating judge, longer periods of pre-trial detention are probable where it concerns murder cases or big drug traffic case (offences that can generate very long prison sentences), due to the complexity of the cases (long criminal investigation) and/or risk of absconding. On the other hand, some cases can be handled quite easily (e.g. if there is a confession and the loot has been re-

covered) and brought to court very quick, thereby also avoiding long periods of pre-trial detention.

- With respect to the influence of *denial/confession* on the decision about pre-trial detention, very different and quite nuanced answers were given. Defence lawyers, for example, indicate that denying the facts against all available evidence, is most often not a good strategy: although a confession is not a guarantee for release, it can at least be used in later stages of the procedure (to plea for release, when everything is cleared out), it helps to reduce possible perceived risks of collusion, and can avoid requests for further criminal investigation or 'negative' perceptions by judicial authorities.

**Summary**

- All respondents agreed that the case vignette as submitted represented a familiar situation they could encounter in criminal justice procedures related to pre-trial detention or alternatives. However, to make an adequate request or take a correct decision, more detailed information would be needed, and this with respect to case evidence, criminal record and other aspects of the personal situation of the suspect.
- A majority of the respondents (defence lawyers, prosecutors as well as some judges) thought that, dependent on specific offence- and/or offender-related characteristics, the case presented could offer possibilities for less severe measures than pre-trial detention.
- However, different factors (actually presented in the vignette or not) could positively or negatively impact on the expected outcome. In particular, the absence of a fixed residence in Belgium would generally result in pre-trial detention, whereas underlying problems (such as drug addiction) rather would be important in order to impose appropriate conditions related to release.

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2nd Belgian National Report on Expert Interviews

# DETOUR –
# Towards Pre-trial Detention as Ultima Ratio

## Part II
## Report on (French-speaking) Expert Interviews

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Content

# 1. Introduction

## 1.1 Framework of the research

This report is based on an analysis of the interviews conducted with 19 practitioners working and involved in the pre-trial detention and / or pre-trial supervision in the French-speaking part of Belgium[1]. The heart of these interviews was the main following research question: "Is Pre-Trial Detention an *ultima ratio* in practice?"[2].

This report is one of the outcomes of the European Union funded project "Towards Pre-Trial Detention as *Ultima Ratio*", conducted in 2016-2017 in 7 European countries (Austria, Belgium, Germany, Ireland, Lithuania, the Netherlands and Romania). The same questionnaire was administered in these 7 countries. For Belgium, the questionnaire was translated into French and Dutch.

From the main research question, several secondary research questions were deducted, including the following:

- What developments are to be observed with respect to the use of pre-trial detention (PTD) and alternatives and what factors appear to be of relevance in this regard?
- How extensively is PTD used?
- What factors influence the decision-making?
- Does the decision-making appear to be fair, well-grounded and free of discriminatory tendencies?
- Is the decision making open or bound by certain quasi-automatisms?
- Are alternatives to PTD available and are they used?
- What are obstacles to use alternatives more often?
- Which procedures in general appear to be in favour of PTD or in favour of alternatives (or of release)?
- If alternatives are used are there indications of net widening?
- Are there any groups who are treated differently and if so, which ones and in what respect?

[1] See also the report of E. Maes & M. Deblock on the interviews conducted with practitioners working in the Flemish Community.

[2] This report is focused on the situation of major suspects; we don't take into account the situation of children (the penal majority is 18 in Belgium) who are subject of a special legislation.

Based on the analysis of the 19 interviews, we propose an overview of the current use of pre-trial measures in the French Community of Belgium. However, we cannot aim for an exhaustive overview of all the practices relating to the pre-trial detention and less severe measures in this part of Belgium since we interviewed a large, but still limited number of practitioners. So, we can only reflect on a certain number of practices, even though we can assume that maybe some of them are shared in the different judicial districts of the country. This is why we invite the reader not to generalise without precaution the analyses presented in this report.

### 1.2. Context of the research

The research was carried out in a context of uncertainty. In 2016-2017, the Pre-Trial Detention Act was amended on numerous occasions, while a draft reform was introduced to remove the current functions of the investigating judge. In addition, the courts have to keep up with budgetary restrictions but also with organisational difficulties. More generally, the judges feel deprived of means of action to face problematic social situations which, according to them, may lead to recidivism. Several interviewed practitioners have suggested that in certain situations (e.g. for addicted suspects) they felt very strongly this lack of means, with the consequence that: "*We don't know what to do*"[3].

During the interviews, not so much elements were pointed out by the practitioners as influencing the still large number of pre-trial detentions in Belgium. One of these elements concerns the evolution of the investigations methods (more cases would be resolved than in the past).

But furthermore, some practitioners observed a very recent decrease in the use of pre-trial detention in their practices. They attribute this decrease to different factors.
First, it might be due, according to them, to an increased use of accelerated procedures: in some judicial districts, the public prosecution now prefers that the suspects are sentenced as quickly as possible, even if this means not pursuing certain offenses. Instead of referring the case to an investigating judge to investigate in depth on various offences, they only send the case for judgment for a limited number of offenses.
The hypothetical trend of a decrease in the use of pre-trial detention is also attributed to an evolution of the criminality and/or the police activity and/or the criminal policy of the public prosecutor. In two large judicial districts, certain practitioners told us that in 2016, since the attacks in Paris and Brussels, there have been fewer arrests and/or fewer

[3] In French : « Nous ne savons pas quoi faire ».

files referred to the investigating judges by the public prosecutor. Different explanations are given: the increased presence of the police and of the army in the streets, the focus of the police or the public prosecutor on particular or more serious offenses and so on.
For a defence lawyer, the decrease in pre-trial detention would also be due to a decrease of the number of people illegally resident in Belgium (which is impossible to demonstrate statistically). According to this lawyer, when these foreigners are suspected of offences that may lead to pre-trial detention, the public prosecutor is in favour of their release: they are not placed in prison then under an arrest warrant like before but they would now directly be placed in an administrative detention centre, for expulsion from Belgian territory. Thus, the decrease felt in the use of pre-trial detention would not so much be a result of a decrease in the number of people illegally resident in Belgium, but more to a change in the criminal policy towards them. We will come back to this problem (see below 5.1).
Strikes in prisons and very bad conditions of detention have also played an important role in the use of pre-trial detention in 2016: some judges avoided detention of suspects considering this prison strikes and bad conditions of detention. This situation also prompted them to release detainees early[4].
Additionally, an investigating judge explained that they are more than in the past aware of the conditions of detention in prison and of the too frequent use of pre-trial detention. They would therefore try to imply less pre-trial detention and make more use of alternative measures.
Anyway, it will be necessary to observe in the years to come whether this decrease can be confirmed[5].

The report begins by describing the methodology adopted in the interview process, followed by the analysis of the experience of pre-trial detention and / or supervision of the interviewed practitioners through the following thematic sections:

- Basis for decision-making (criteria for the application of pre-trial detention and alternatives)
- Less severe measures: electronic monitoring, release under conditions with probation supervision, bail (financial bond) and other less severe measures such as the release under conditions without a probation supervision
- Actors in the decision-making process
- Relevant aspects with respect to the proceedings (informal talks, time aspects, diversion and information available)

[4] Alexia Jonckheere and Eric Maes, 'Actualités Autour Des Alternatives À La Détention Préventive', *Les alternatives à la détention en Belgique: un état des lieux, à l'aune du Conseil de l'Europe* (2017).

[5] This trend should also be related to the "crime drop" highlighted in other studies.

- Procedural safeguards and control (access to file, legal assistance, conciliation meeting between suspects and defence lawyers, appeals)
- European aspect (mainly the European Supervision Order and the European Arrest Warrant)
- Analyse of the responses to the submitted case vignette(s)

This report, of course, is not able to capture all what possibly can be said about the practices of pre-trial detention and less severe measures. The author thanks the reader for keeping in mind that only the aspects addressed by the interviewees are reported in this document. Although this (limited) empirical research does not allow for generalisations, it nevertheless offers important insights and reflections on practices around alternatives to pre-trial detention further to explore.

## 2. Methodology and realisation of the research

The analysis is based on interviews conducted with 19 practitioners working in the French Community of Belgium and who are involved in the process of pre-trial detention and/or supervision: 4 investigating judges, 3 public prosecutors (at different levels: local and appeal), 4 defence lawyers, 4 probation officers, 1 judge of the judicial council and 3 judges of a chamber of indictment.

16 interviews were completed with those 19 practitioners: at the request of the respondents, an interview was conducted with 2 probation officers and another interview with the 3 judges of the chamber of indictment, who considered that they wanted to be interviewed together, and equally respond collectively to the research questions.

The research took place in 4 judicial districts: 2 large ones, 1 medium and 1 small. The respondents are distributed as follow within these districts:

*Table 1. Distribution of the respondents within the judicial districts in the French Community of Belgium*

| | **Large districts** | | **Small / Medium districts** | | ***Total*** |
|---|---|---|---|---|---|
| | *No.1* | *No.2* | *No.1* | *No.2* | |
| Investigating Judges | | 2 | 1 | 1 | ***4*** |
| Investigation Courts | | | | | |
| *Judicial council* | | *1* | | | ***1*** |
| *Chamber of Indictment* | | | *3* | | ***3*** |
| Public Prosecutors | | | | | |
| *Local (district) level* | *1* | *1* | | | ***2*** |
| *Regional (appeal) level* | | | *1* | | ***1*** |
| Defence lawyers | 2 | 2 | | | ***4*** |
| Probation Officers | 2 | | 2 | | ***4*** |
| ***Total*** | ***5*** | ***6*** | *7* | ***1*** | ***19*** |

6 respondents come from one large judicial district where, within the framework of the project's work stream 1, we observed interrogations by an investigating judge and where we analysed some case files.

In principle, the selection of the practitioners was made by the researcher, according to the judicial districts, to ensure a certain diversity in the sample. A first exception concerns the probation officers: they were appointed by their hierarchy. A second exception concerns the public prosecutor: in one judicial district, a request had been made to interview a magistrate of the office of the public prosecutor ("*un substitut du procureur du Roi*") but only an interview with the public prosecutor himself ("*le procureur du Roi*") was authorised.

All preliminary contacts were made by e-mail. 4 people refused an interview and 5 others did not respond to our request.

Of the 19 people finally interviewed, there are 10 women and 9 men. When referring to female respondents throughout the report, we use the male personal pronoun 'he' instead of 'she', this in order to preserve maximum possible anonymity.

The interviews took place between 7 February and 5 May, 2017.

All interviews took place in the office of the practitioners and were carried out by the same researcher. The interviews were conducted in a half-structured way following the interview guidelines developed by the research consortium. The case vignette was submitted at the end. The interviews lasted between 45 minutes and 2 hours.

All interviews were recorded on a digital audio recording device, after the practitioners had given their consent for such registration. Only 1 interview was not recorded: the 3 judges of the chamber of indictment did not give their authorisation to register. The recording was systematically interrupted when the interviewed person received a telephone call or when the interview was interrupted by an outside person (e.g., when a clerk entered the office to take a file).

The recorded interviews were fully transcribed and the transcribed interviews were encoded and analysed using the software for qualitative data analyses 'QSR NVIVO 8'.

# 3. The basis for decision making

## 3.1. As a reminder: legal framework

The Pre-trial Detention Act of 20 July 1990 requires as first condition for pre-trial detention that the offense is of a certain gravity: the pre-trial detention may only be ordered in case of an offense punishable by a prison sentence of at least one year. Secondly, the investigating judge needs to have serious indications of guilt. And, thirdly, the warrant is only possible when it is absolutely necessary for public security.

Furthermore, if the maximum sentence for the criminal offence does not exceed 15 years of imprisonment, remand in custody or alternatives have to be based on additional grounds, which are the following: a risk of recidivism, absconding, collusion or evidence being destroyed by the suspect.

## 3.2. Analysis

*Regarding the seriousness of the offense*, it must be noticed that the vast majority of the offenses referred to in the Belgian Criminal Code are punishable by a prison sentence of at least one year. The motivation for the arrest warrant is therefore not difficult from this point of view.

*For the serious indications of guilt*, the motivation, in general, refers to the confession (totally or partially) of the offense by the suspect, declarations of witnesses, evidence provided by police and so on. In the interviews, no difficulties were mentioned with regard to this condition.

*The absolute necessity for public security* was not much discussed in the course of the interviews, as if it didn't raise any difficulties[6], with the exception of the situation of foreign suspects staying illegally in Belgium. For these so-called 'illegal suspects' -who can't work legally and therefore in general do not have any financial income-, the risk of recidivism seems automatically assumed. But according to this lawyer, it is not always absolutely necessary to deprive them of liberty: "*the role of the investigating judge is not to make the migration policy*"[7]. This opinion indicates that the conception of absolute ne-

[6] The researcher did not ask specific questions about this.

[7] In French : « Le juge d'instruction n'est pas là pour faire la politique migratoire de la Belgique ! ».

cessity depends in a way on the local criminal policy. For instance, in one of the judicial districts, the criminal reaction to the sale of drugs in the public space is automatically a matter of public security because "*it hurts the population, it shocks tourists*"[8]. It must be noted that this condition of absolute necessity seems to provoke little debate among practitioners.

Finally, the subject of discussion was above all *the additional grounds,* in particular, the risk of recidivism and, at the beginning of the investigation, the risk of collusion. The latter is invoked to protect the investigations.

Many respondents consider the risk of recidivism as the risk most often invoked when issuing an arrest warrant. For a defence lawyer, it is "*a catch-all concept*"[9], which gives an important discretionary power to the investigating judges. Two major considerations have to be noted. First, if the suspect has no financial resources, this risk of recidivism is assumed quasi-automatic, according to the defence lawyer. And secondly, in narcotic cases, the fact of being a drug addict seems to be sufficient as a justification for a risk of recidivism. Moreover, for a public prosecutor, as soon as a person is released from a narcotics case, the investigation necessarily stops because of a significant risk of collusion but also because people stop cooperating in the investigation due to a fear of retaliation. High risk of recidivism and high risk of collusion are the two main reasons why drug related cases lead most of the time to a pre-trial detention.

If a foreign suspect does not have a residence permit in Belgium, then many respondents consider this as an element constituting the risk of absconding. An investigating judge has declared about people who have no domicile and no income in Belgium:
"*These people, I must admit, I systematically place them under arrest warrants. Because we have no other solutions*"[10].

A defence lawyer explains that, in this kind of cases, the presumption of the double risk (recidivism and absconding) can only be cleared out by a certificate proving that the suspect has a family, an identified place of life, financial resources…

The existence of a criminal record is also often cited as an important element to assess the hypothesis of a risk of recidivism.

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[8] In French: « Cela heurte la population, cela heurte les touristes ».

[9] In French: « C'est un critère un peu fourre-tout ».

[10] In French: « Ces personnes-là, je dois vous avouer, je les place systématiquement sous mandat d'arrêt. Parce qu'on n'a pas d'autres solutions ».

This being said, alongside the legal grounds for pre-trial detention, an extra-legal criteria has been cited by a defence lawyer as being in some cases the only true justification for the arrest warrant, whereas the legal criteria are added later to 'legally dress' the decision. One of them states:
"*The main motivation is the immediate repression. It is the objective to repress immediately. Because it is known that, depending on current detention policies, if he does not go to pre-trial detention, he may not be detained after*"[11].

When asked about this, an investigating judge explains that in practice, this sometimes happens because the short sentences are no longer executed. But the judge also recognises that this pre-trial repression shouldn't be the purpose of pre-trial detention, only to change the situation, the whole organisation of the administration of justice should be reviewed. The situation in Belgium is indeed very specific, in particular for prison sentences of less than three years: the administration may decide, on the one hand to reduce the length of the sentence and, on the other hand to transform the sentence into electronic monitoring or provisional release. According to a public prosecutor, this discourages the practitioners (police officers and public prosecutors). He explained that for some, "*pre-trial detention is the only sentence that is executed*"[12], adding that this is obviously shocking because pre-trial detention does not, according to the law, have a punitive character.

Another extra-legal motivation cited by a defence lawyer relates to organisational aspects. According to this lawyer, in certain types of cases, a pre-trial detention of 5 days is accepted, for example, in case of conjugal violence, to allow the search for new housing and the intervention of social services. Or else, for suspects who require psychiatric care so they have time to contact an appropriate institution. If there always would be available places in emergency host institutions, imprisonment would not be necessary in these situations.

When the legal criteria are met, what other factors can be considered by the investigating judges in the decision-making process regarding pre-trial detention?
The seriousness of the offence, the need to investigate, the experience of the suspect and his personality, the feelings of the investigating judge during interrogation ... these are

[11] In French: « La principale motivation, c'est la répression immédiate. C'est l'objectif de réprimer tout de suite. Parce qu'on sait après que si on ne le place pas, en fonction des politiques actuelles de détention, s'il ne fait pas de détention préventive, il pourrait ne pas en faire après ».

[12] In French: « La détention préventive est la seule peine qui soit exécutée ».

all elements that are indicated as influencing the decision. Also, the important trauma to the victim, the public opinion, the consideration of the victim's family… are taken into account by certain investigating judges, in some cases, in order to decide on pre-trial detention.

On the other hand, if the suspect has a job, this situation may encourage the investigating judge not to issue an arrest warrant to prevent an impact on the social live. The family situation, a confession of the offense… are also elements likely to have a positive influence on the decision of the investigating judges.

**Summary**

- The risk of recidivism is at the heart of the decision-making process on the pre-trial detention.
- This kind of risk is assumed for certain suspects, in particular suspects staying illegally in Belgium without financial income; for those suspects there is also a risk of absconding.
- The narcotic cases seem to lead mostly to pre-trial detention, due of the double risk of recidivism and collusion.
- In some cases, the pre-trial detention has a punitive character; the measure is used as a kind of 'pre-sentence' or 'short punishment'.
- For a specific public (drug users, suspects who require psychiatric care, suspects in case of conjugal violence), detention could be avoided if there were (more) residential care institutions.
- Certain elements in the suspect's situation can be taken into account in a favourable way (e.g. the fact of having a job).

# 4. Less severe measures

In this chapter, we will discuss four less severe measures than pre-trial incarceration in jail: the deprivation of liberty at home under electronic control which is considered in Belgium as a 'modality of execution' of an arrest warrant (4.1.); the release under conditions with probation supervision (4.2.), the bail (financial bond) (4.3.) and finally, other forms of release, whether conditional or not, and not followed by probation services (4.4.).

Before discussing each of these measures in turn, we draw attention to *a kind of progressiveness in the granting of measures* which seems observable in practice. It was mainly the introduction of electronic monitoring that led to this progressivity. According to a lawyer, it would become a sort of intermediate stage between prison and pure and simple release. In his words, electronic monitoring could be seen as a kind of "*decompression airlock*"[13]. Before fully releasing a suspect imprisoned under arrest warrant, electronic monitoring would now be used as an intermediate step. This is of course only for judicial districts where electronic monitoring is used regularly. It should, however, be stressed that its use as modality of execution of an arrest warrant is far from being generalised in Belgium (see hereafter)[14]. Another hypothesis can be formulated in terms of progressivity of the measures: after a warrant of arrest (whether executed in prison or at home under electronic monitoring), the suspect would first be released conditionally before pure and simple release. Unfortunately, there are no data to confirm or disconfirm this hypothesis.

## 4.1. Electronic monitoring

### *4.1.1. As a reminder: legal framework*

With the Law of 27 December 2012 (in application since 1 January 2014), electronic monitoring was introduced in Belgium as a new alternative measure to pre-trial detention. More specifically, electronic monitoring is considered as a 'modality of execution' of an arrest warrant, which means that the investigating judge (or investigating courts)

[13] In French: "On a l'impression que la surveillance électronique, c'est une sorte de sas de décompression".

[14] We observe in this regard that Belgian criminal statistics don't make it possible to determine whether there are fewer pure and simple releases after being detained in prison following an arrest warrant since electronic monitoring was introduced.

will first decide whether an arrest warrant has to be issued (or prolonged) and then, in a second step, will decide where the arrest warrant will be executed: in prison or at the suspect's home (or at another assigned residence). At this stage of the criminal justice process, suspects are monitored using GPS-technology, without limitation in time. In case of non-compliance, electronic monitoring can be converted into pre-trial detention in prison.

The continuation of electronic monitoring will be reviewed on a regular basis, just as would have been the case for the suspect detained in prison.

A suspect under electronic monitoring is not allowed to leave the assigned place of residence except for a limited number of movements for medical reasons, in case of *force majeure*, or in relation to the criminal investigation process (e.g., hearings by judicial authorities and police interrogations). Electronic monitoring in the pre-trial stage thus appears to be a form of '24-hour home detention' (home arrest)[15].

Furthermore, similar to 'classic' pre-trial detention, the electronic monitoring system can also be 'individually modulated', i.e., a prolonged term of 'prohibition of free movements' is possible, in terms of contacts with the outside world by way of correspondence, visits and telephone contacts.

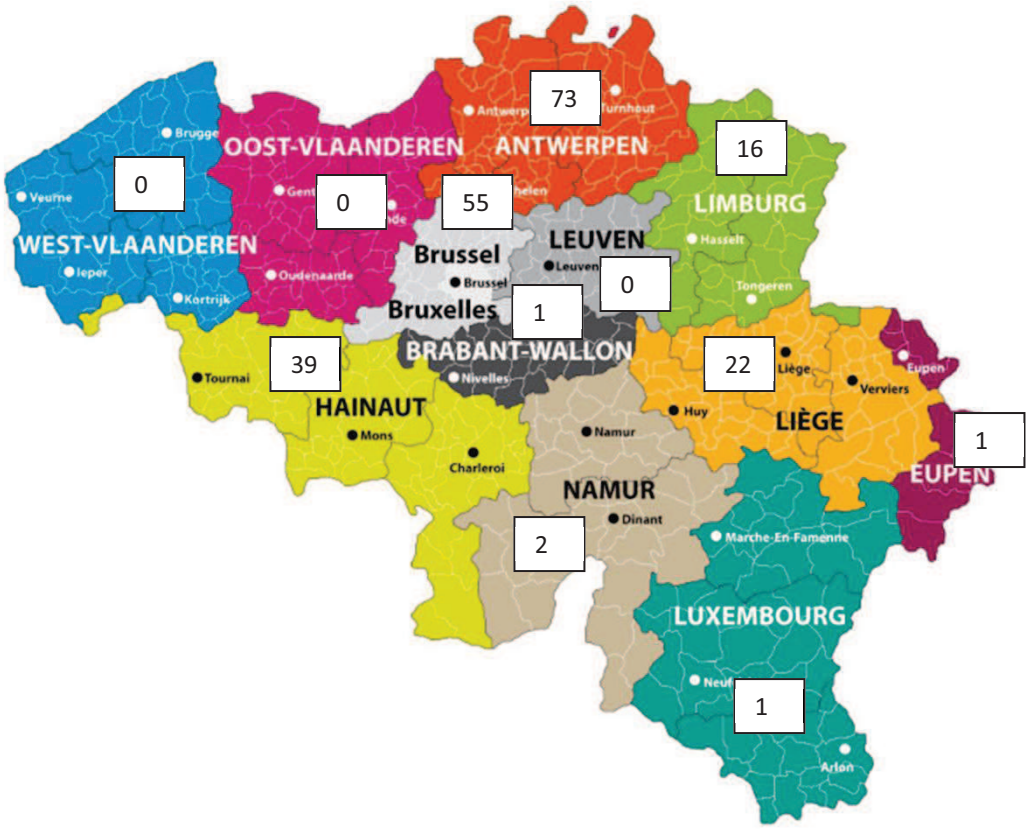
#### *4.1.2. Use of electronic monitoring*

The electronic monitoring is not yet used by all investigation judges and investigating courts. On June 8, 2017, 3 judicial districts (all located in Flanders) had no suspects under electronic monitoring, 3 had only one (two judicial districts are located in the French Community of Belgium and one in the German-speaking Community) and 1 had two suspects. The other 210 suspects were in the 6 other judicial districts[16].

[15] Some investigating judges would like to have periods of freedom granted to the suspect.

[16] Data obtained from the Centers for Electronic Monitoring: VCET (on 9/6/2017) and CSE (on 10/6/2017).

*Figure 1. Number of suspects under electronic monitoring on June 8, 2017, on basis of the judicial district of the authority which has decided on the electronic monitoring*




*Source: data from the Centres for Electronic Monitoring: VCET (on 9/6/2017) and CSE (on 10/6/2017); chart from https://justitie.belgium.be/nl/rechterlijke_orde/hervorming_justitie/nieuws/news_pers_2014-04-01*

According to a lawyer, some investigating judges are by principle opposed to the electronic monitoring. Although, also the complexity of the procedure was cited to explain the non-use of electronic monitoring by some investigating judges: it would be simpler to issue a warrant arrest and order its execution in prison rather than authorise the suspect to stay at home under electronic monitoring (less preliminary contacts and follow-up). Another reason would be that, at the beginning of the introduction of the electronic monitoring, the investigating judges and investigating courts didn't know too well how it worked. Other factors such as the low capacity of the electronic monitoring to prevent the risks and the required authorisation of the cohabitants, are underlined in the interviews as explanatory factors contributing to the limited use of monitoring, especially within 24 hours of arrest (see below).

When questioned about the situations in which he would accept to place someone under electronic monitoring within 24 hours, an investigating judge explained that he granted this measure for very young suspects who could return to their parents in case they

could supervise them. But this judge points out that it is quite rare to accept an electronic monitoring within 24 hours; he usually uses the electronic monitoring after a period of detention, when he got to know the situation a little bit better, the investigation ended and in case that the suspect has a family.

The following dialogue illustrates this opinion:

- Investigating judge: "*I used the electronic monitoring for a murder file; I was afraid of being criticised. It was a very young man, who had just had a little baby, the wife could not stand it anymore with the little baby, it was he who worked, who brought in money for the household and so I put him under electronic monitoring*"
- Research worker: "*Was he first in prison or did he directly benefit from an electronic monitoring at home?*"
- Investigating judge: "*Yes, of course. He spent first eight months in prison or more. I don't know anymore. Then the investigation was ended, and it didn't bring up so much more that he was in prison. But to release him… for the public opinion, the family of the victim… He had killed! But it was a boy without antecedent, who had a job, who had a family … 22-23 year old*"[17].

This dialogue shows also that - even unconsciously - the investigating judges indirectly can take into account the public opinion and feelings of the victims.

#### *4.1.3. Ability to prevent the risks*

When there is a risk of collusion, it seems difficult to control a suspect with an electronic monitoring. When the suspect confesses the offence, some lawyers try to temper this risk. For the prevention of the risk of recidivism, it seems to depend on the nature of the offenses. For example, some magistrates have explicitly rejected electronic monitoring in drugs files as the suspects may continue to sell narcotics from their homes.

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[17] In French:

Juge d'instruction : "J'ai utilisé la surveillance électronique dans un dossier de meurtre; j'avais peur d'être critiqué. C'était un homme très jeune, qui venait d'avoir un petit bébé, l'épouse n'en pouvait plus avec le petit bébé, c'est lui qui travaillait, qui rapportait de l'argent dans le ménage et donc, je l'ai mis sous bracelet »

Chercheur : « Après un temps de détention préventive ? »

Juge d'instruction : « Oui quand même. Il a quand même fait 8 mois ou plus. Je ne sais plus. L'enquête se terminait et ça n'apportait plus grand-chose qu'il soit en prison. Mais le libérer, par rapport à l'opinion publique, la famille de la victime… il avait tué ! Mais c'était un gars sans antécédent, qui avait un travail, qui avait une famille… 22-23 ans ».

#### *4.1.4. Consent*

The law does not impose the authorisation of the cohabitants before to be able to grant electronic monitoring but in practice, this authorisation is often required.

It is difficult for the suspect, if not impossible, to have the confirmation issued to the investigating judge within the 24 hours of his arrest by the police.

#### *4.1.5. Execution of the electronic monitoring*

When electronic monitoring is decided as way to execute an arrest warrant, the suspect is not automatically released: he has to go to prison for the installation of the monitoring which is not always immediately available. Sometimes he has to wait a few days in jail.

During the period of electronic monitoring, the investigating judge is warned of any unauthorised exit, as well as any gap in the routes taken by the suspect. If, for example, the suspect stops in a fast-food restaurant after a hearing, this gap will be identified by the electronic centre and reported to the investigating judge. A call to order will then be addressed to him. Although it seems only exceptionally that imprisonment in prison will be ordered by the investigating judge in this case.

Sometimes it's at the request of the suspect himself that electronic monitoring is replaced by imprisonment. Some suspects say it's harder to be detained at home than in prison because they have to take care of everything at home and their family has trouble understanding the situation. Thus, it seems that the consequences of confinement are more apparent to suspects when they are deprived of liberty at home, rather than in prison.

### 4.2. Release under conditions (with probation supervision)

Freedom and/or release under conditions seem to be used very extensively as an alternative to pre-trial detention. Since its introduction in 1990 (Pre-trial Detention Act of 20 July 1990), this measure became very 'popular', and the number of applications was continuously growing (see the 1st Belgian National Report in the framework of the DETOUR project).

#### *4.2.1. As a reminder: legal framework*

In the case where pre-trial detention can be ordered or maintained, the investigating judge can, *ex officio* or at the request of the public prosecutor or the suspect, decide to release him and impose one or several conditions for a determined period no longer than three months. Before the termination of the first period established, the judge may decide to extend the conditions for a new period and determine the duration, which once again cannot exceed three months. This possibility continues to be available to the judge throughout the judicial investigation (Art. 36 of the Pre-trial Detention Act).

During the process, acting *ex officio* or at the request of the public prosecutor, the investigating judge may also impose one or several new conditions, as well as withdraw, modify or extend the conditions already laid down in whole or in part. At the end of the investigation, the judicial council may decide to maintain or withdraw the conditions. Finally, when the investigation is completed, it is up to the trial court handling the case to decide whether to extend the existing conditions, always for a maximum period of three months. The council may also withdraw or dispense conditions in compliance with some of them, but never impose new ones (Art. 36).

The type, as well as the number of conditions is left to the judges' discretion.

#### *4.2.2. Preliminary social inquiry*

Before a decision on the measure for the suspect is taken, the Probation Service can be hold responsible for carrying out a social inquiry about the relevance of a pre-trial detention and the suitability of a release under conditions (Art. 35, paragraph 1 of the Pre-trial Detention Act). Such inquiry may also be made about a suspect already in prison. There are two types of inquiry: an extended social inquiry report and a concise social information report. The latter aims at answering only precisely formulated questions and was introduced in 1999 to simplify and speed up the procedure[18].

The use of social inquiry is very low and decreases year by year. In 2015, only 112 social inquiry requests were reported (data provided by the probation services), while 5,329 new releases under conditions were ordered and monitored by the Probation Service[19].

[18] Kristel Beyens and Veerle Scheirs, 'Encounters of a Different Kind. Social Enquiry and Sentencing in Belgium' (2010) 12 Punishment & Society 309.

[19] Marcelo Aebi and Julien Chopin, 'Annual Penal Statistics SPACE II, Survey 2015'. Even though the SPACE II survey mentions that this number concerns the number of people released conditionally, the

However, one of the public prosecutors interviewed, stresses that the advantage of the preliminary inquiries is that on its basis, they can adapt the conditions to the situation of the suspect. If the conditions make sense to him, it can be assumed that they will be more respected and this is also important for the rest of the procedure: according to the same public prosecutor, the way in which the suspect respects his or her conditions has an influence on the sentence that subsequently may be imposed.

It appears from the interviews that some investigating judges sometimes ask the police to make a social inquiry. This situation is regretted by one of the lawyers because the police is not trained in this type of act and their reports are rather succinct. This lawyer appreciates the social investigation done by a probation officer as this allows him to have a lot of useful information about his client.

Moreover, only the probation officer knows well the services and associations that can be involved in the implementation of conditions (centres offering assistance to drug addicts, therapeutic follow-up to people suffering from mental disorders, etc.); their intervention is therefore deemed necessary by many of the actors interviewed.

Few reasons were given in the interviews to understand why the preliminary social inquiry is weakly used. It seems to be because the practitioners are not yet habited to ask for this inquiry. Probation services have tried in the past to promote the social inquiry, but without any apparent results[20]. Perhaps it is due to the lack of geographical proximity between magistrates and probation officers.

#### *4.2.3. At what stage of the process does release under conditions occur and who asks for this release?*

A certain number of releases under conditions are ordered within 24 hours of deprivation of liberty but this situation is quite rare. In a previous research, we were able to establish that, in the majority of the judicial districts, the release under conditions was mainly ordered after a pre-trial detention[21]. So, with a few exceptions, release under

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data reported by Belgium and published in the survey refer to the number of releases (Probation Service Statement) (a suspect could have been the subject of several release decisions in the same year).

[20] Alexia Jonckheere, 'Structure de concertation locale des maisons de justice: «Détention préventive et liberté sous conditions»' (2012).

[21] Jonckheere and Maes (n 4).

conditions is a tool to reduce the length of pre-trial detention rather than to reduce the number of arrest warrants.

According to the interviews, it seems that the public prosecutor will very rarely ask for a release under conditions, some prosecutors saying openly that they never ask for this favourable measure, in order to give the investigating judges complete freedom to assess the situation. In exceptional cases, however, the investigating judge may understand that the public prosecutor will not object to release. Informal contacts play a key role in this case.

From the lawyers' point of view, there are several strategies:

- They don't ask a release under conditions if they anticipate a negative decision of the investigating judge. A lawyer says "*I plead for a release under conditions if I know I have a chance to get it*"[22]. This lawyer recognises that such a strategy is tricky in relation to his client. But his will is also to remain credible towards the judge;

- Lawyers prefer to ask release under conditions rather than a pure release and that again in anticipation of the judge's decision.

The investigating judges regularly release under conditions on their own initiative but it appears that they are expecting lawyers to provide them with evidence supporting such release. Informal contacts between judges and defence lawyers play here an important role in the decision to release under conditions. The defence lawyers seem to agree with this role. One of them explains that for the first judicial review within five days of the arrest warrant, he has to construct the file, with documents relating to the possible work of his client, to the housing, his family status, etc. Sometimes, the investigating judge warns the lawyer: "*I might consider releasing him under conditions if you bring me some new elements*"[23]. The lawyer can then contact the family to try to present guarantees to the judge. Neither the interviewed investigating judges nor the interviewed defence lawyers had the reflex to delegate these investigations to the probation officers. However, the defence lawyer cannot directly ask the probation officer to conduct a social inquiry but he can ask the judge for such an inquiry made by the probation service.

[22] In French: "Je plaide pour une libération sous conditions si je sais que j'ai des chances de l'obtenir ».

[23] In French: "Je pourrais envisager de le libérer sous conditions si vous m'apportez des éléments nouveaux".

#### *4.2.4. For which type of files?*

According to one lawyer, once a suspect has an addiction problem (alcohol or drug) or has committed acts of conjugal violence, he or she is very rarely released unconditionally. He will always have conditions related to his situation because the risk of recidivism is considered too high in this kind of situations.

It appears that in the majority of cases, release under conditions is granted only if the suspect has a fixed residence. However, one or the other actor explained that exceptionally, a release under conditions could be granted to persons without fixed residence if a reference address (e.g., in a public welfare centre) or a telephone number was given. This solution seems, however, to be reserved for suspects of Belgian nationality who, moreover, are not addicted (for them the risk of recidivism is considered too high).

Or else, the granting of a favourable measure also seems to depend on the seriousness of the offence, the state of the investigation, the environment of the suspect or even his personality. Many actors have as well told that the granting of such a measure also depends on the investigating judge himself, who can be more or less favourable of granting such a measure.

#### *4.2.5. What types of conditions are imposed?*

As a reminder, the choice of conditions is left to the judges' discretion. This explains why we observe in practice a wide variety of conditions.

Several conditions are systematically imposed (see below, the standard conditions), to which are added other conditions, in principle adapted to the situation of the suspect. It's common to have about fifteen conditions imposed in one file. The Probation Service has noticed a trend towards increasing the weight of conditional measures, particularly for offences related to membership in terrorist networks.[24]

To present the type of conditions, we refer below at the official categorisation of the conditions in the database of the Probation Service. 8 categories of conditions are observable:

- *Standard conditions* which are imposed (in theory) in all cases and in a *pro forma* manner: do not commit a new offense, respond to convocations, have a fixed res-

[24] Administration générale des maisons de justice, 'Rapport Annuel 2015'.

idence, submit to the guidance of the probation officer and provide evidence of compliance with the conditions;

The following conditions are imposed depending on the suspect's situation and are generally aimed to avoid recidivism. The probation agents interviewed insist on the personification of these conditions. They regret that they are sometimes too general; they should be "tailor-made" for the suspect, depending on his / her personality, history, etc. The role of defence lawyers in this regard is essential.

- *Conditions of daily occupation*, for instance look for work or follow a training.
The daily occupation is a condition found in more than half of the files of release (55.1% of new files opened in 2015 in a probation office)[25]. The idea underlying this type of condition seems to be the higher risk of recidivism that would exist in default for the suspect to have something to do in the day. For suspects who do not have work, it is sometimes required that they actively look for one and that they prove this. The probation service reports that this condition is sometimes incompatible with another condition, such as the prohibition to use the internet for example[26]. At last, there are some special training courses for perpetrators of conjugal violence, traffic offenses, etc.

- *Conditions relating to psycho-medico-social guidance*: the measures concern the imposing of medical treatment, psychological follow-up, and so on.
It's the third type of conditions most often imposed on released suspects (44% of new files opened in 2015 in a probation office contained at least one such obligation)[27]. So, it's a measure to which judges are often in favour. An investigating judge told us for instance that he was trying to systematically impose a psychological follow-up for all suspects released under conditions. It seems that we are not far from the idea that the fact of being suspected of having committed an offence, causes in itself the necessity of being followed psychologically. Probation officers are sometimes difficult to set up with such a follow-up because it is not always easy to convince a suspect to initiate a psychological follow-up even before he is found guilty of the alleged offenses. It is also difficult to find a therapist who agrees to intervene in this situation, especially since the duration of the care is sometimes very short[28].

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[25] Jonckheere and Maes (n 4).

[26] Stéphane Davreux, 'Les Alternatives À La Détention Préventive: Réalités et Perspectives de Travail Au Sein Des Maisons de Justice', *La détention préventive: comment sans sortir ?* (Larcier, Bruylant 2017).

[27] Jonckheere and Maes (n 4).

[28] Davreux (n 26).

- *Conditions related to the victim*: this measure consists mainly of an obligation not to approach the victim. The issue of compensation to the victim at this stage of the proceedings is controversial; some judges refuse to impose it on the basis of the principle of the presumption of innocence. And indeed, it seems that this compensation is a rarely imposed condition at this stage of the procedure;

- *Prohibitions* (sometimes called 'negative conditions' of 'do not do something'): not to leave the country, not to enter and drink in a bar or coffee shop, not to be in contact with other suspects, and so on.
We were surprised to notice that a curfew also seems to be regularly imposed, especially on young suspects. The concrete aim is to prohibit a suspect to leave his home between two time points, for example, from 8 pm to 6 am. The use of this condition is surprising in so far as it was debated at the time of the adoption of the 1991 Act. The Minister of Justice of that time had expressly stated that the prohibition to leave a place of residence could not be imposed when the suspect is not being deprived of liberty. In practice, however, this condition seems to have become popular. Indeed, probation officers believe that this condition is now almost systematically imposed whereas it is sometimes totally unsuited to certain individual situations[29];

- *Conditions for budgetary and / or administrative requirements*: this obligation is often intended to allow the suspect to assert his rights in terms of social allowance, housing assistance, and so on;

- *Conditions for medical tests* (urine or blood test for drug users). These tests are often expensive and they are particularly intrusive. The agreement of the suspects is therefore necessary, even if legally this agreement is not expressly provided for by law;

- *Others*: in this category, we sometimes find strange conditions, more or less intrusive, such as 'read a book on the condition of the woman', 'buy detergent to clean the apartment', 'go regularly to a fitness centre', and so on.
How to understand such conditions? They reflect the image that the judge has built about the suspect and this image (of a person who is not clean, who lets go, has little regard for women ...) will remain in the suspect's file during the criminal process. It may be questioned whether such conditions are relevant and necessary in relation to the objectives of the pre-trial measures (in particular the prevention of recidivism). It is as if

[29] ibid.

social conditions were added to penal conditions. We understand the aim of the judges but there is a specific dilemma here: can social policy be done through criminal policy?

All of these obligations are not necessarily related to the offense being investigated. Regularly, it are the live conditions of the suspect that are the subject of the penal conditions, and this to prevent the deterioration of this live conditions and to prevent reoffending.

#### *4.2.6. Length of the measure and extension of the time limit*

As a reminder, when a release under conditions is imposed, the judge has to decide the length of the measure. This is in fact always 3 months, the maximum duration.

In terms of extension of this first time limit of three months, the practice shows itself very diverse. In certain judicial districts, an extension is automatic because the probation service begins its work only after the first term (see below, Difficulties). Where guidance is more rapidly implemented, a lawyer estimates that, on average, release is extended once.

In 2014, in the French-speaking probation services, the average length of release under conditions was 178 days, that is to say a little under 6 months, reflecting a practice of renewal of release under conditions[30]. But the length varies greatly from one judicial district to another: between 3 and 6 months in some districts and between 15 and 18 months in others. The guidance of the suspects in one case and in another would thus be very different, which could pose a problem from the point of view of the principle of equality between citizens[31].

Different reasons may explain an extension of the length of the social-guidance. When the investigating judge thinks, for example, based on the report of the probation officer, that guidance is still necessary because the suspect has difficulties respecting what is imposed on him or, on the contrary, when he respects the conditions such as therapeutic treatment so well, that it seems preferable to continue to impose them.

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[30] Stéphane Davreux, 'Les Alternatives À La Détention Préventive: Réalités et Perspectives de Travail Au Sein Des Maisons de Justice', *La détention préventive: comment sans sortir?* (Larcier, Bruylant 2017).

[31] Administration générale des maisons de justice, 'Rapport Annuel 2015', 61.

In some cases, the prosecutor has an important role in the decision to extend or not extend the measure of release under conditions. Some prosecutors have explained to us that they maintain a timetable and systematically review - every three months - files where a release has been ordered. When they consider it necessarily, they request the investigating judge to extend the period of three months. But elsewhere, prosecutors intervene only if they are informed of a breach of conditions or the commission of a new offense.

The probation officers interviewed, reported a relatively long duration of release under conditions. One of them evokes the control of a suspect for more than two years ; another, more than three and a half years. In a previous study, we observed that the mean duration of release under conditions appears to be higher than the average duration of pre-trial detention (see above). The problem is that in the case of a release under conditions, the duration of the measure will not be taken into account at the time of execution of the sentence.

#### *4.2.7. Control*

In the majority of cases, the probation service and the police are together responsible for the control of the conditions.

The role of the probation service is special: at the same time the probation officers have to help the suspect to respect the imposed conditions, they also need to control if these conditions are respected. In this double perspective, the information of the suspect is important: the probation officer will take the time to explain who is doing what in the judicial process, what he or she is expecting from the suspect, what evidence he/she needs to give him or her in terms of compliance with the conditions, how it will encourage and support in its efforts, etc. Probation officers also monitor the adequacy of the conditions; if one of them appears obsolete, they report this to the investigating judge, asking him to overrule the obsolete condition or to adapt it to the situation of the suspect.

Regarding the police, its responsibility is more specifically the control of prohibitions (prohibition of illicit drug use, going out at night, talking to other suspects, etc.). In practice, this control is organised quite differently from one place to another; in some cases, police verification is only reactive while in other cases verification by police is pro-

active[32]. Police control of the conditions is often organised at the local level: the neighbourhood agent will often be informed of the suspect's release and will check with him the respect of the conditions.

More recently, the police and probation services are stimulated to collaborate to reinforce an effective control of conditions[33].

### *4.2.8. Breach of conditions and consequences*

In case of breach of conditions, an arrest warrant may be issued, whether or not there is a commission of a new offense in addition to this breach.

For one of the lawyers interviewed, an investigating judge will not hesitate in this case to issue an arrest warrant, but the same lawyer admitted that he had very few files where a client was deprived of liberty for breach of conditions. Another lawyer considers that, overall, there are no consequences in case of breach. According to this lawyer, the problem is that the investigating judge will not necessarily be informed of a breach of condition because, on the one hand, a probation officer evaluates the situation that has occurred and decides whether or not to report this to the investigating judge[34] and, on the other hand, it seems that in certain judicial districts the policemen who find that a condition has been violated report exclusively to the public prosecutor, who has a margin of discretion as mentioned above: he has to decide which information he gives to the investigating judge. For instance, the public prosecutor may decide to hear the suspect on his or her failure and, following his or her reaction, release him or report the facts to the investigating judge. Then, when he's informed of a breach of conditions, the investigating judge also evaluates the situation and based on his judgement, he makes a decision. For instance, on the basis of the gravity of the breach, he can issue an arrest warrant. If he does not consider it necessary, he can also decide to extend the length of the socio-judicial control, impose another condition or adapt the former conditions. It appears that the suspects, for the most part, respect the conditions (the revocation rate is only

[32] Jonckheere and Maes (n 4).

[33] The partnership between the police and the probation services has been regulated since June 7, 2013 (see Collège des procureurs généraux, 'Circulaire Commune Du Ministre de La Justice, Du Minitre de l'Intérieur et Du Collège Des Procureurs Généraux Concernt L'exécution de Peines et Mesures. Echange D'informations Concernant Le Suivi Des Personnes En Liberté Moyennant Le Respect de Conditions et La Procédure de Recherche Des Personnes Condamnées Ou Internées En Fuite Ou Évadées').

[34] Even if the investigating judge is the main addressee of the probation officer's report when the investigation is still open, a copy of the report is also sent to the public prosecutor.

about 2 to 3 percent[35]). An arrest issue seems quite rare in the case of breach of conditions.

### *4.2.9. Overall collaboration and individual exchanges*

The Pre-Trial Detention Act provides for consultation structures in which the actors involved in pre-trial alternative measures meet regularly to assess their overall collaboration (Art.38bis). In some judicial districts, the actors organise this meetings, which facilitate their respective interventions in the files. Elsewhere, consultation is non-existent or rare.

For the follow-up of the files formal relationships are organised. First of all, the probation officers always report their interventions to the investigating judges. They send three types of reports:

- A report at the beginning of the guidance has to be drafted in principle within one month of the decision to release under conditions. Each condition is presented, as well as the means that will be used to control;
- An "alert" report is written when there is a change in the conditions, when the suspect encounters difficulty in respecting them or when he commits new offenses;
- A report on the evolution of the guidance; it must be sent 15 days before the end of the measure. It summarises the relevant elements of guidance and mentions whether the objectives have been achieved.

Beside these reports, probation officers sometimes contact the investigating judge, and more often their clerks, to clarify a condition, ask for an amendment, and so on. These informal relationships are more or less easy, depending on interpersonal relations. The probation officers interviewed regret that they do not always receive feedback from the judges following the reports they send them. They sometimes report problems, seriously and repeatedly, which does not systematically involve reaction from the judge, which considerably weakens the probation officers' intervention with suspects. On the other hand, they sometimes write to the judge to attest to a favourable development in the situation of the suspect, without the judge subsequently adapting the conditions, as proposed. In these situations, the work of probation officers is deprived of an important support. This creates difficulties in working with suspects (these may be discouraged by efforts that are not followed by effects). A problem of legitimacy in the intervention of probation officers may also arise in these cases[36].

[35] Davreux (n 26).

[36] ibid.

Informal contacts between lawyers and probation officers appear to be more rare, as well as contacts with the public prosecutor, except in a judicial district where a specific department exists, within the public prosecutor's office, for the follow-up of the suspects released under conditions.

#### *4.2.10. Difficulties, obstacles, needs*

In some judicial districts, due to the workload of probation services, *the 3-month period is almost completed when a probation officer is appointed*. The suspect does not always understand this situation (the investigating judge tells him that he will be contacted by a probation officer but he has to wait several weeks for this contact) and the judges are not satisfied with this delay. Indeed, in these circumstances, it also means that no verification of the conditions is ensured, except by the police. This is why a lot of investigating judges impose as a condition for the suspect to contact the probation service himself, for example within 3 days of the release. In one judicial district, there is also a permanence ensured in the law court, so that the suspects have immediately after their release under conditions an interview with a probation officer who can then immediately explain the procedure.

As already explained above, *the communication between investigating judges and probation officers* on a local level, seems to be in need of improvement, some probation officers regretting, for example, that some investigating judges do not react to the information they write in their report[37]. For example, a probation officer explained that a release under conditions had been extended, whereas on several occasions the investigating judge had been informed that there was no contact between the suspect and the probation service and that therefore, it was impossible to provide guidance.
Several actors interviewed regretted the lack of services accepting to support suspects with a particular profile, especially drug addicts, sexual offenders, alcoholics and people requiring psychiatric care. Some services exist but their capacity is insufficient and they have waiting lists because of their workload. In addition, there are very, very few services that agree to meet the suspect in prison to organise his possible accommodation in residential service if he is released under conditions (on the French part of the country, only one institution is known to meet suspected drug users in prison). Because of this situation, a judge of the judicial council considers that "*we are almost forced to keep certain*

[37] Wich maybe explains why several probation agents consider that the investigating magistrates don't read their report. The question of the usefulness of their work therefore arises, insofar as they don't receive feedback on their interventions.

*people in preventive detention*"[38]. According to the judge, there is a lack of institutions that could immediately receive people who have no one to help them, who have nothing in terms of means of existence.

In addition, illegal immigrants are sometimes released under conditions while they have an order to leave the territory. We observe several situations. First of all, there is the special situation of people who have an order to leave the territory but are not arrested for deportation. Their administrative situation complicates the socio-judicial guidance to be provided by the probation officer. For example, it is difficult, if not impossible, to work or to follow certain trainings in Belgium without a valid residence permit. A probation officer also reported that he now refuses to implement social guidance for those suspects who have been ordered to leave the territory because there is an apparent discrepancy between the two decisions (order to leave the territory and release under conditions on the Belgian territory). The situation is even more difficult for illegal aliens who are locked up in a closed centre while waiting for their deportation because access to the centre is difficult for probation officers and any work for reintegration into Belgian society is compromised. In this case, social guidance is rarely effective. Finally, a foreign suspect, released under conditions, may be given an order to leave the territory upon his release from prison and then deported in his country whereas an investigation concerning him is still in progress. A defence lawyer tells us that in this case, he keeps contact with the suspect, by phone or email. The suspect is apparently allowed to re-enter in Belgium on the basis of the summons to appear before court for his judgment. With regard to the practices of the Belgian administration for this matter, areas of obscurity remain; it would therefore be interesting to explore these issues further in a new research.

## 4.3. Bail (financial bond)

### *4.3.1. As a reminder: legal framework*

The Pre-Trial Detention Act of 20 July 1990 provides for release on the (sole) condition that a bail is paid (Art. 35, paragraph 4). The aim of the measure is to dissuade the suspect from avoiding justice.

The judge freely determines the size of the amount, since there are no legal criteria for it. The investigating judge is not even required to give a reason for the decision on the

[38] In French: "On est quasi contraint de maintenir des personnes en détention préventive" .

amount of bail if the parties have not filed submissions on this point[39]. The amount must be paid in advance and in full; it is indeed a prerequisite to release. If the suspect was present at all the proceedings and has presented himself in order to serve his sentence, the bail is returned to him.

### *4.3.2. Practice*

In the absence of statistics, it is difficult to know whether the bail is used frequently or not and whether it is more or less used than in the past.

The defence lawyers questioned this measure, and also some magistrates are not in favour of the measure for different reasons. First of all, it is a question of principle: freedom and the absolute necessity for public security cannot be bought[40]. They think also that the measure is unequal because it allows those who have resources to escape pretrial detention[41]. But above all, a doubt will always subsist as to the legality of the money (risk of money laundering by the State).

It seems that the investigating judges and the special courts (judicial council and chamber of indictment) will eventually release the suspect in turn for the payment of a bail only if the defence lawyer of the suspect asks for it. A public prosecutor told us that he never made the request of a bail. For him, it's within the competence of the lawyer to request it.
Given the limited number of files concerned, it is difficult to know in which type of files the bail is more used. On one or another occasion, we have been told, for instance, that suspects of Dutch nationality and resident in the Netherlands have been granted bail, with the aim of ensuring that they are present at their judgment. But it seems that the bail sometimes also is imposed on foreigners residing illegally on Belgian territory[42]. In this case, the magistrate does not expect that the suspect would come back to appear before the court, but it would be a good opportunity for the Belgian State to recover a part of the costs of the proceedings. This type of information should be considered carefully in so far as we do not known if this practice is exceptional or not. And in any case, this practice goes against the spirit of the law.

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[39] Chambre des Représentants, « Réponse écrite du 4 novembre 1996 du ministre de la Justice », *Bulletin des questions et des réponses écrites*, n°44, 1996-1997, p.7.532.

[40] Damien Vandermeersch, 'La Détention Préventive de La Personne Présumée Innocente et La Privation de Liberté de L'étranger' (2015) 6 Revue de droit pénal et de criminologie 602.

[41] Jonckheere and Maes (n 4).

[42] This practice has been reported by probation officers and lawyers as well as by investigating judges.

The amount of the deposit is quite variable. According to an investigating judge, it's on the basis of what the defence lawyer proposes. According to a magistrate of the judicial council, this can range from 2,000 to 100,000 euros.

## 4.4. Others

The intervention of the probation service for a suspect released under conditions is not obligatory. The judge may release somebody under conditions, while having him supervised by the police. An investigating judge explained that this depends on the nature of the condition:
"*Imagine that I had put as a condition the continuing of his professional activity, not to be on the street after 10pm, etc. Such conditions are not verified by the probation officer but by the police*"[43].

There is no statistical data on this practice. The number of release under conditions in Belgium is therefore slightly underestimated due to this lack of data.

It also happens, but exceptionally, that the investigating judge imposes on the suspects to present themselves directly and regularly in his office, thus endorsing himself the role of the probation officer.

**Summary**

- We observe in practice the emergence of a kind of progressiveness in the granting of measures (pre-trial detention in jail, pre-trial detention at home under electronic control, release under conditions, release without conditions).
- The electronic monitoring is considered as a modality of execution of an arrest warrant; in practice, it's a form of '24-hour home detention'.
- The use of the electronic monitoring is limited and rather exceptional within 24 hours
- Although having a preliminary social inquiry before deciding on the measure for the suspect is positively evaluated, it is not very often requested.
- The defence lawyer plays an important role in the decision to release under conditions; he takes the initiative to suggest the measure and he plays an important role in preparing the release. In particular, he has to provide some information or evidence to the judge. His informal relations with the judges help to obtain the release under conditions.

[43] In French: "Imaginons que j'ai mis comme condition de poursuivre son activité professionnelle, de ne pas se trouver sur la voie publique après 22h, etc. Ce genre de conditions n'est pas vérifié par l'assistant de justice mais par la police ».

- The public prosecutor asks rarely for a release under conditions; in most cases, he is requesting an arrest warrant.
- A fixed residence is generally required for the release under conditions.
- If a release under conditions is ordered, there are in certain cases a lot of conditions.
- Those conditions are generally aimed at avoiding the risk of reoffending.
- In practice, a wide variety of conditions are imposed.
- Standard conditions are systematically imposed, in a *pro forma* manner, and in addition conditions adapted to the situation of the suspect.
- The average length of release under conditions was, in 2014, 178 days (a little less than 6 months).
- The average length varies from one judicial district to another: between 3 and 6 months in some districts and between 15 and 18 months in others.
- The probation service and the police are together responsible for the control of the conditions.
- The role of the probation service is double: to help the suspect to respect the conditions, but also to control whether these conditions are respected.
- Most of the suspects do comply with the conditions.
- The revocation rate is very low, of about 2 to 3 percent.
- Formal and informal relationships exist between judges and probation officers.
- Difficulties: the workload of the probation officers, the communication between judges and probation officers, the lack of services accepting to support suspects with a particular profile (drug addicts, suspects requiring psychiatric care and so on) and the situation of illegal suspects released under conditions while they have an order to leave the Belgian territory.
- The release under bail (financial bond) seems little used in Belgium. The measure is not appreciated by the interviewed actors, due to questions of principle (freedom and public security cannot be exchanged for money), equality (between those who could pay to avoid pre-trial detention and others) and uncertainty as to the origin of the money (legality of the money).

# 5. The actors in the decision-making process

Practitioners were asked for their views on the actors in the decision-making process: the respective role that each actor plays and the relationships between the actors.

## 5.1. General overview

According to the persons interviewed, the investigating judge and the public prosecutor have the main role in the process, but nevertheless, the police and the defence lawyer also have an important role. The actors do not seem to give an essential role to probation officers; this is probably due to the fact that they do not systematically collaborate together.

One actor remained in the shadow in the framework of the DETOUR project and its role has to be clarified in future researches; this is the foreigners' office. In fact, in certain files, rather than issuing an arrest warrant, it appears that some investigating judges contact the foreigners' office and obtain the detention of a foreign suspect staying illegally in Belgium in a closed-centre, with the aim to repatriate him. In this case, they do not issue an arrest warrant; the suspect is only incarcerated for deportation. There are no data to understand the extent of this practice nor the relationships between the foreigners' office and the judicial actors. Moreover, to our knowledge, there are no rules that uniformly determine how to act in these situations. In the future, a research should be conducted on this subject.

Concerning the relationships within the judicial services, we discussed about the fact if actors feel obliged or not to take into account the decisions taken by other actors, upstream of their own interventions.

Reactions are mixed. Certain investigating judges say not to feel compelled by decisions taken by other actors in files, in particular by the requisitions of the public prosecutor. But others declare that they respect the decisions taken by their colleagues, even if it was not the same decision. An investigating judge states:
"*It is a question of independence. And it's also part of our culture: we don't have to challenge the decisions of each other*"[44].

[44] In French: "C'est une question d'indépendance. Et ça fait partie de notre culture: on n'a pas à contester les décisions des uns et des autres ».

We observe here that the principle of the independence of judges leads to two quite different attitudes: independence means that each judge freely decides on a case, but it also means that each judge has to respect the decision taken independently by another judge.

Let us note in addition that we observe at different points of the process a phenomenon of anticipation. To understand this phenomenon, it should be recalled that the judicial actors intervene sequentially, after having received the file from another actor: the police gives the file to the public prosecutor, the public prosecutor decides to refer the case to an investigating judge and so on. Before referring it to another actor, there is a conscious or unconscious evaluation of the follow-up to the file. We have already pointed out that sometimes defence lawyers do not ask a release under conditions if they expect a negative decision of the investigating judge (see above). Certain public prosecutors also anticipate the decision of the investigating judge and according to this anticipated decision, they decide to refer the files to one or the other procedure. A public prosecutor explained us:
"*In a case where one hesitates, the question that will be asked is 'Who is at the investigation?'. Depending on that, we can renounce to refer the case to the investigating judge because we will never have an arrest warrant. We're going to do an accelerated procedure. But if it is such investigating judge, we refer the case to him and we ask to deliver an arrest warrant*"[45].

The penal reaction to an offense thus also depends on the relationships between the different actors in the process; the relationships between judicial actors can lead to the collaboration of some actors, or not.

In general, we also note that personal relationships are established between actors who act regularly simultaneously in the same case. Getting to know each other makes subsequent contacts easier. Another factor influencing relationships is the location of offices. An investigating judge explains that the relations between the investigating judges and the public prosecutors became aggravated since they no longer work in the same building:

[45] In French: « Dans un dossier où on hésite, la question qu'on va se poser est "Qui est à l'instruction?". En fonction de ça, on peut laisser tomber car on n'aura jamais de mandat. On va alors faire une procédure accélérée. Mais si c'est tel juge d'instruction, on met le dossier à l'instruction et on demande un mandat d'arrêt ».

"*Before, we were in the old courthouse and the public prosecutor's office was on the floor above* (…) *we greet each day and there was a real understanding, a collaboration* (…). *Here it is over, we are separated, they do no longer come*"[46].

It should also be noted that in some judicial districts the relations between presiding judges and public prosecutors are extremely tense, which results in mutual misunderstandings about how to handle files. The rights of the defence can be affected if these misunderstandings cause delays in the management of the files, granting of less favourable measures and so on.

Difficulties are also denounced by defence lawyers as regards the judicial council in certain places: they feel that they are not listened to, even to the extent that some say they have renounced to present legal argument before this court.

These few elements related to relations between actors in the decision-making process call for more development; the data collected do not allow for in-depth analyses in this respect. Future research should be conducted in this regard. However, we can relay the point of view of the investigating judges as to the relations they have with certain actors who intervene during the investigation process.

### 5.2. The relationships from the viewpoint of the investigating judges

As noted above, the investigating judges do not feel constrained by the decisions of *the public prosecutor*. Legally, the only relations they maintain are through the files (written contacts) and their respective presence in the judicial council. Informal relationships exist in some cases (see above), but these contacts are not systematic. These informal contacts are appreciated by the investigating judges; it helps to understand a file or the position of the public prosecutor. An often cited example is the public prosecutor who applies for an arrest warrant in writing but telephones with the investigating judge to say that he will not object to a release under conditions. Although these relations, formal or informal, did not raise a problem among certain investigating judges, others were more reserved. It seems indeed that in certain judicial councils, tensions disrupt the good relations between these two main actors. Some investigating judges are sorry about the very light files, with very little information on the offence and suspect; in those files, they do not understand the application to deliver an arrest warrant. They are complaining about

[46] In French: « Avant, on était au vieux palais et le parquet était à l'étage au-dessus (…) on se disait bonjour et il y avait une véritable entente, une collaboration (…).Ici c'est fini, on est séparé, ils ne viennent plus ».

the public prosecutors, and especially young public prosecutors: they would decide to refer every case to the investigating judges, with a request for an arrest warrant, as a precautionary measure. The responsibility then belongs to the investigating judges to keep a person at liberty, despite the prosecutor's request.

The investigating judges did speak very little about their relations with *the police*, as if the work they do together is self-evident. Police and investigating judges work together daily, in a concerted manner. Investigating judges need the police. We feel that work habits have been established in each judicial district between people who have come to know each other and work together and that overall, this partnership is rather appreciated. Again, more research is needed on this topic.

In general, the investigating judges appreciate the work of the *defence lawyers*; they consider that they play an important role.
Their presence at the first hearing before the investigating judge is seen as a positive step forward. However, this presence is considered, at least according to the view of some lawyers, little useful in so far as lawyers consider that they have little argument at this stage of the proceedings to influence the judge's decision. And this, because, in some cases they have very little information on the facts and the evidence, on the personal situation of the suspect, his antecedents and so on. We also saw in our observations that the interview of the suspect by the investigating judge, in the presence of the lawyer, is very formal and that the lawyer's place is very small. His opinion is solicited after the interrogation; he can only use a few words to draw the judge's attention. But after this first phase, the place and the role of the defence lawyer become more important[47].
The investigating judges observe nevertheless that some defence lawyers are more proactive than others. They appreciate it when they come with attestations, projects, possibilities of work for the suspects and so on. In other words, they expect the lawyers to make a concrete and realistic proposal in terms of alternative measures. Some also expect them to influence their client, especially to let them “tell the truth”. On their side, the lawyers are not unanimous when describing their relationships with investigating judges. Some are fully satisfied with the contacts they have. Others feel that they are not respected in their role; they have the impression that some investigating judges are more willing to accept release under conditions if requested by some specific lawyers. One of the lawyers declares:

[47] We observe also that the presence of the defence lawyer during the interrogation by the police is accepted and appreciated by the penal actors. But a change in the law, which took place in December 2016, is criticised by lawyers: according to the interviews, before the new law, if the subject refused the presence of a lawyer during his interrogation by the police, telephone contact took place with a lawyer before this interrogation. Since the new law, this telephone contact is deleted. For lawyers, this is a step back in the legal guarantees granted to the suspect because pressures would be exerted on the suspects.

"*it's not normal that you can get a release under conditions more easily because you have this or that defence lawyer. Not because a lawyer used better arguments but because such a lawyer gets along better with the investigating judge*"[48].

Regarding *the probation officers*, we observe that the investigating judges attribute a role to them only after the decision on the release under conditions (see above; the very low use of social inquiry):
"*The probation officers, that is when the suspects are already on release under conditions. Not before*"[49].
In the follow-up of the released suspects, the role of the probation officers is sometimes reduced to the control of the conditions whereas in Belgium, probation officers must not only control the conditions, but also provide assistance (judicial aid) to the suspects. On the whole, for the investigating judges, "*it goes well*" with the probation officers, only the delay in taking charge of the suspect is sometimes regretted (some probation officers have a heavy workload).

**Summary**

- The investigating judge and the public prosecutor have the main role in the process but they cannot work without the police who is an auxiliary essential in the process.
- The defence lawyer has also an important role, in particular to assist the suspect and to suggest more favourable measures than pre-trial detention.
- The role of the probation service is limited because in practice the probation officers intervene only when the suspect is released under conditions.
- Because of the successive interventions of the judicial actors, they take into account the subsequent decisions of the other actors when making their own decision; so they anticipate on this decision.
- The relationship between the judicial actors and the foreigners' office has to be clarified in the future.

[48] In French : « Ce n'est pas normal que vous puissiez obtenir une libération sous conditions plus facilement parce que vous avez tel ou tel avocat. Pas parce qu'un avocat a utilisé de meilleurs arguments mais parce que tel avocat s'entend mieux avec le juge d'instruction ».

[49] In French: « Les assistants de justice, c'est quand les suspects sont déjà en libération sous conditions. Pas avant ».

# 6. Relevant aspects with respect to the proceedings

The use of pre-trial detention and less severe measures depends not only on legal criteria but also on organisational and human factors. There would be a lot to say about this, but based on the interviews we have to emphasise that an essential point concerns the relations between the judicial actors. This point has already been discussed; we shall therefore briefly describe it (6.1.). After that, we will consider tree organisational factors: the first concerns time aspects (6.2.), the second the various procedures which exist and which make it possible to provide a criminal response to an offence (6.3.) and finally, the problem of the available information on the basis to make a decision about a case (6.4.).

## 6. 1. Informal talks

As seen previously, informal contacts between the various actors play an essential role according to the interviewees. They facilitate the articulation of the different and sometimes concomitant interventions of these actors. As a reminder the investigating judges have regular informal contact with the police and defence lawyers. They are sometimes contacted by the probation service but, in some judicial districts, these contacts take place only through the clerks. Contacts with the public prosecutor appear to be fluid in some judicial districts but more restricted in others. The location of each other's offices sometimes explains this. "*But it depends mainly on people*", declared an investigating judge. Although some public prosecutors do not hesitate to call the investigating judges to explain a complex situation, others avoid doing so. In return, some investigating judges sometimes spontaneously contact prosecutors to ask for additional information; others refuse to do so.

These contacts are generally perceived as being necessary for a good understanding of what each of them is doing. The danger would be that they would be the sign of a suspicious connivance between actors. A situation often related by defence lawyers is the situation in the judicial council where the relations between the investigating judge, the judge of the judicial council and the public prosecutor are considered as a type of collusion because they stay all the time together in the same place while defence lawyers must leave the courtroom after each case. The 'equality of arms' between the parties to the trial would recommend, according to the lawyers, that the investigating judges also leave the courtroom after each case, even if they come back for the following case.

In general, the informal contacts between actors are appreciated. For instance, in some cases, they make it possible to limit the duration of pre-trial detention (see above, e.g. informal contacts between investigating judges and lawyers on elements in favour of a release under conditions) or to adapt some obsolete conditions.

### 6.2. Time aspects

The time aspects of the process would again call for a series of considerations. However, we will limit ourselves to three main considerations, based on the conducted interviews:

- The investigating judge is sometimes (very) late informed of the deprivation of liberty of a suspect and the end of the 24-hour period. In principle, if the arrest of a suspect takes place for a case for which the judge is already responsible, he will be informed promptly. If he does not, he will have to wait until the public prosecutor decides to refer the case to an investigating judge. Consequently, the suspect's hearing will sometimes take place at the very end of the 24-hour period. The rights of the defence sometimes create a problem in this regard, as the police has to wait in some cases for a defence lawyer to start an interview; the same applies to the investigating judge, who must sometimes await the arrival of the lawyer before he can audition a suspect. Locally, certain arrangements with the police, the prosecutor's office or the public prosecutors themselves allow the investigation judge to be informed of the need to interrogate a suspect before the end of the 24-hour period;

- Files without remand detainees have a lower priority with regard to investigations and closure of the investigation process. We observe therefore, in cases with pre-trial detention, that the criminal investigation process does not take half as long as in cases without pre-trial detention (132 days *versus* 295 days)[50]. Of course, we can understand why files with detainees are treated as a priority, but we must also observe that the length of treatment of certain files without detainees poses various problems, for the victims for example, but also for the suspected persons who can be subjected for years to a supervised liberty (see above). This sometimes leads defence lawyers to prefer that their client is detained for a short period of time while investigations are quickly done, rather than languishing a file for months in the office of the investigating judge.

- After the investigations, it may take some time before the case is examined by a court: when the investigating judge finished the investigations, he hands the case file over to

[50] Analysis by the Board of Prosecutors-General.

the public prosecutor and this one does not have a time limit to make requisitions. When he finished his task, the file comes back to the investigating judge office to complete the inventory. Subsequently, there is a request for the examination of the case before the judicial council (or, in certain cases, the chamber of indictment) who decides finally to refer or to not refer the case to court. To have a hearing date before the judicial council, this may take, according to an investigating judge, a month for a file with detention but 3 months on average for a file without a detainee and, if additional investigation tasks have been requested, then it is sometimes postponed *sine die*. If the decision of the judicial council is to refer the case to the court, it can also take a few weeks / months before the appearance of the suspect in this court. A relatively simple file can be fixed and discussed within a month, but if there are more suspects, if morality surveys, psychiatric or psychological assessments are necessary ... it can take much longer. Otherwise, after having taken account of the file, the decision is generally not taken the same day. It is still necessary to wait for this decision. These time aspects must also be taken into account when considering the respect of fundamental rights.

### 6.3. Diversion

Pre-trial detention is sometimes avoided because, rather than to refer the case to an investigating judge, the public prosecutor has chosen to treat the case via another possible way than the investigation. He may decide to:

- *summon the suspect in his office*, hear his explanations and reprimand him;

- *organise an informal probation*: in a limited number of judicial districts, there is an informal probation organised by the public prosecutor, in particular in drug files. If the addict suspect accepts outpatient treatment and provides evidence of regular follow-up, the public prosecutor will not prosecute the case;

- *refer the case to the penal mediation process*, under the control of the probation officer and, in this context, impose community service, training and therapy. If the suspect complies with the conditions imposed, he/she will not be prosecuted for the offense committed;

- *subpoena the suspect before a court, under an accelerated procedure*: this possibility is in use in certain judicial districts, e.g. for a limited number of thefts, of low-value. The advantage of the procedure, according to the interviewees, is that it allows a judgment very quickly (within the month). In a large judicial district, there would be a directive

from the public prosecutor calling for the accelerated procedure instead of referring the case to an investigating judge.

These different penal reactions are therefore also important to consider in the context of a reflection aimed at reducing pre-trial detention.

### 6.4. Available information

The information available to investigating judges is quite varied. In some cases, the public prosecutor has already carried out investigative acts for which he didn't need an investigating judge. He has the opportunity to decide, for example after several months, to refer the case to an investigating judge, for example because he wants an arrest warrant issued to an identified suspect. When they receive these types of files, the investigating judges have a certain amount of information in their possession[51]. In other cases, they only have the investigation record of the suspect done by police. Some of the investigative judges regret that very small files are communicated to them, with requests for arrest warrants while they don't have enough elements to charge a suspect (see also above). In this case, the investigating judge would have appreciated having a preliminary contact with the public prosecutor to discuss together as to whether to refer the case for a judicial criminal investigation

The information provided to the probation officers is also limited; they receive as a minimum the order of release under conditions. They sometimes ask to have, in addition, the investigation record of the suspect to be able to work with him on the facts for which he is suspected of having committed. Some probation officers are also asking for access to the file of the investigating judge, but this situation is rather rare. When they do not understand a condition or the context of the offense, probation officers contact the investigating judge directly and informally. Otherwise, in case they have access to the file or to a confidential information, the probation officers cannot communicate to the suspect the information that they will have received. Indeed, the Pre-Trial Detention Act specifically provides that "*any person who intervenes in the supervision of compliance with the conditions is bound by professional secrecy*"[52].

[51] But it depends also of the number of offences for which the prosecutor public refers the file to the investigating judge: even if the person is suspected of having committed more than one offense, the public prosecutor may choose to refer the case to the judge only for one – or for a limited number - of these offenses. However the police is obliged to inform the public prosecutor of all the offences of which they are aware.

[52] Art. 38, §1.

A major problem in terms of access to information is the lack of scanning files. This scan is organised in some judicial districts[53], which greatly facilitates access to the file, but elsewhere, the situation is problematic. This organisational problem has a significant impact in the respect of fundamental rights, and in particular, the rights of the defence.

**Summary**

- The use of pre-trial detention and of less severe measures depends not only on legal criteria but also on organisational or human factors.
- Informal exchange of information between judicial actors may help to reduce pre-trial detention, but these relationships are sometimes considered to be the sign of a suspicious connivance between actors.
- Particular attention should be paid to the time-out of the procedure (time periods in which they are waiting for the decision of an actor).
- Effective diversion procedures avoid that the case would be referred to an investigating judge and that an arrest warrant would be requested and delivered. The 'good practices' of certain judicial districts could be shared and discussed in other districts.
- The information needed for the decision-making is not always available; it is urgent to organise the possibility to scan the files for a better efficiency in the sharing of the available information, and also, in respect of the rights of the defence.

[53] At least for the files in which suspects are detained.

# 7. Procedural safeguards and control

Again only a few elements will be mentioned here, based on the interviews: the access to files (7.1.), the legal assistance (7.2), the meeting between the suspect and his lawyer before the first hearing by the investigating judge (7.3) and the review appeals (7.4).

## 7.1. Access to files

The law guarantees the access to the files, but organisational problems make this access sometimes difficult. During a workshop organised May 11th, 2017 in Brussels in the framework of the DETOUR project, a defence lawyer explained the difficulties he encounters as follows: "*We don't get a copy, we need to go to the court room, open till 16.00.We are allowed now in almost all courthouse (except one) to use a scanning pen. We are getting a bit more modern. In one courthouse we even get a DVD if we are willing to pay for*"[54]. The widespread digitisation of documents would facilitate the work of all actors in the criminal process but this implies that resources (human and financial) are allocated to this task.

## 7.2. Legal assistance

Legal assistance is a right in Belgium. This right is generally respected even if organisational problems occasionally pose also certain difficulties (see above). The legislation was amended during the research process (in September 2016); this change has been criticised by some defence lawyers. Further research would be needed to assess the current state of the rights of the defence in Belgium as part of the investigation. An evaluation on this subject is on its way. The person in charge of this evaluation communicated at the workshop held in Brussels in May 2017 some initial observations: "*New rules lead to better information to the parties and procedural safeguards are guaranteed. The relation between police and lawyers is constructive; the declaration of rights is a good thing* (…) *Lawyers respect duty as observatory or supervisor, from hyper active to not active at all. They have to work on infrastructure, on investigation rooms, problems with translations, IT,… Quite complex rules towards minors, sometimes problems with availability of youth defence lawyers".*

[54] This lawyer was referring mainly to the situation in the north of the country (in the Flemish Community); in Wallonia, the use of scanning is far from being generalised.

We have observed a difficulty in cases where there are a large number of suspects: it is sometimes difficult to find as many lawyers as suspects. With a few exceptions, all defence lawyers interviewed agree that if there are several suspects in the same case, they must be defended by different lawyers because there is a possible conflict of interest in this case. But practically, it is not always possible to find as many lawyers as necessary.

### 7.3. Conciliation meeting between the suspect and his lawyer before the first hearing by the investigating judge

The defence lawyers don't complain about the time they have to speak with the suspect, but some of them point out the problematic conditions in which this interview is being hold. It's often in the corridors, in front of the door of the investigating judge's office that they can discuss, in the presence of the police. Sometimes the policemen walk away to ensure the confidentiality of the interview with the lawyer, but it happens, according to a lawyer, that they refuse to go away.

### 7.4. Review appeals

There are clearly strategies for appealing decisions taken at the investigation stage. On several occasions, defence lawyers have told that they hesitate to appeal a decision because in this case, the file will leave the investigating judge's office, which will slow down the investigation process. In the judicial districts where the files are scanned, this difficulty is removed: the investigating judge may continue to work on the file since he has access to these file by computer.

Moreover, lawyers will try to obtain a withdraw of the arrest warrant by the investigating judge, rather than by the judicial council, because in this case the public prosecutor can challenge the decision of the investigating judge. According to several actors, in certain judicial districts, the public prosecutor systematically appeals for release decisions, to the extent that some investigating judges release on their own initiative in order to avoid appeal by the public prosecutor.

**Summary**

- The access to the files is guaranteed by law but organisational problems make this access sometimes difficult.
- The digitisation of the judicial documents appears an highly recommended evolution to protect the rights of defence but also to facilitate the task for all actors in the investigation process.
- The right of legal assistance is generally respected even if organisational problems occasionally pose certain difficulties.
- Attention should be paid to the confidentiality of the dialogue between the suspect and his lawyer.

# 8. European aspects

There is very little talked about the European aspects of pre-trial detention and alternative measures, as the interviewees had very little experience in this regard. We will discuss here succinctly the European Supervision Order (8.1.), the European Arrest Warrant (8.2.) and other situations with a European aspect.

## 8.1. The European Supervision Order (ESO)

The vast majority of respondents did not know what the European supervision order is but they were interested in our explanations.

It should be noted that it is only after the interviews that Belgium adopted at last legislation in order to implement the European Supervision Order[55]. This explains why we were not able to discuss the application in Belgium of the ESO with the practitioners.

## 8.2. The European Arrest Warrant (EAW)

The Framework Decision on the European Arrest Warrant has been transposed into Belgian law by an Act of 19 December 2003. In general, few problems have been reported concerning this EAW[56], with some differences depending on the procedure (active procedure or passive procedure). It is indeed necessary to distinguish cases in which the Belgian judicial authority issues a European arrest warrant to another Member State (active procedure) and cases in which the Belgian judicial authorities are responsible for executing an EAW in Belgium issued by a Member State (passive procedure)[57].

The judicial practitioners were generally satisfied when a Belgian investigated judge issues a European arrest warrant. Overall, collaboration with foreign partners is going well; only a few cases of bad collaborations have been reported but they have been presented as relatively marginal.

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[55] Law of 23 March 2017 concerning the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [19 May 2017] Official Journal (*Moniteur belge / Belgisch Staatsblad*).

[56] We only refer in this report to the European arrest warrant issued for criminal prosecution and not the one issued for the execution of sentences.

[57] Constant Laffineur and Suliane Neveu, 'L'exécution En Belgique de Mandats D'arrêt Européens Émis À L'encontre de Mineurs Âgés de Seize Ans Ou plus: État Des Lieux D'une Question Délicate' (2017) 368 Journal du droit des Jeunes 33.

The procedure is somewhat problematic when a suspect is arrested and presented for the execution (in Belgium) or, a European arrest warrant issued abroad. Within 24 hours of the deprivation of liberty, the investigating judge must hear the concerned person, give him certain information and decide on his detention. He may also, at any time during the proceedings, release the person under conditions or on bail[58]. A magistrate of the judicial council explains that it is sometimes difficult to know whether the acts for which a foreign authority issued an arrest warrant are prescribed or not[59]. Not all elements of the file are always available to assess the situation. Many actors say that in practice, there are very few elements of the file that are initiated by the foreign authority; they must be requested.

### 8.3. Other

During the interviews, the actors repeatedly reported the control of suspects released under conditions but residing abroad. It's a situation that presents itself quite rarely. It concerns mainly suspects residing in France or in the Netherlands but sometimes also outside Europe. The control of those suspects was carried out outside the ESO, which had not yet entered into force at the time of the interviews. In these cases, the suspect is invited to report regularly to the probation officer. This situation is problematic because, as one public prosecutor pointed out, control of conditions is very limited. This prosecutor welcomed the application of the ESO because the authorities of the suspect's country of residence will be strengthened.

**Summary**

- It was only after the interviews that Belgium adopted legislation to implement the ESO in Belgian law; new research should be carried out to evaluate this new legislation.
- Concerning the EAW, few problems have been reported; it concerns the situation of suspects for whom an European arrest warrant issued abroad is presented for the execution in Belgium (impossibility to execute the European arrest warrant under electronic monitoring and lack of information).

[58] Damien Vandermeersch, 'Le Mandat D'arrêt Européen et La Protection Des Droits de L'homme' (2005) 3 Revue de droit pénal et de criminologie 219. See also the Act of 19 December 2003 on the EAW and the ministerial circular of August, 8, 2005, [31 August 2005] Official Journal (Moniteur belge / Belgisch Staatsblad).

[59] It seems that this happens more and more often, due in particular to the extension of the DNA analyses which allow to solve old cases.

# 9. Analyse of the responses to the submitted case (vignettes)

This part of the report focuses on the outcome of the last part of the interviews that introduced a case vignette:

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

This case vignette was translated into French and presented to the interviewed actors.

Most of the respondents opted for a pre-trial detention (9/12) but there are nuances in their reactions. Nobody envisaged an unconditional release. We present successively the decisions and comments on the casus.

*For the Public Prosecutor*, the question was as follows: "*You receive the file of the police at 2 o'clock Monday afternoon and have to decide if you request for pre-trial detention or not*". Without hesitation, the 3 Public Prosecutors interviewed decided to request an arrest warrant, and this for three main reasons: the need to give an immediate response to the offense, the seriousness of the facts (material prejudice of 3.000 euros) and the priority given to the prosecution of such offenses (theft in houses) in terms of criminal policy. The presence of victims in the house was also an important element. The existence of a previous conviction was not specifically mentioned as a major element in the decision-making process, other elements being considered as sufficient.

*For the Investigating Judge*, he had to decide if he would keep the suspect in custody or not (i.e. issuing an arrest warrant within the maximum term of police arrest of 24 hours). The 4 interviewed judges decided to maintain the deprivation of liberty, although two of them would grant electronic monitoring at home (which is a modality of the execution of an arrest warrant). For these 4 judges, the most important decisive element was the existence of a previous conviction. With regard to this conviction, judges would like to have more information: was it a conviction for similar facts and was it recent or not? In addition, was the work penalty enforced or not? For one investigating judge, if the previous conviction was ancient and the offence of a different nature than

this theft, he might envisage a release under conditions. Two other factors were also worth considering by the investigating judges: the suspect's personality (and for that reason it was important to be able to interrogate him directly, e.g. to know if he has any regrets) and that of his parents (can his parents give him a framed environment or not). One judge added that he would choose a less severe measure if the suspect confessed the offense and if the damage is restored.

On the French-speaking side, only one magistrate of *the Judicial Council* was interviewed. This magistrate also underlined the importance of the suspect's personality in the decision-making process. Depending on this information the judge would decide whether or not to prolong pre-trial detention in prison or under electronic monitoring.

*Lawyers* were asked what defence strategies they would adopt in the case vignette presented to them. Three out of four lawyers reported that they would ask for a release under conditions, while one lawyer felt that it would not be useful to argue against the judge, as to his opinion pre-trial detention appeared inevitable. The lawyers who would ask for a release immediately specified two conditions that they would propose to the judges: a home curfew order, e.g. staying at home from 22pm till 6 am (as one lawyer stated, "*a very punitive measure intended to counter risk of recidivism*"), and actively searching for a job ("*because it's time to manage himself*", another lawyer said). In addition, two lawyers reported that it would be appropriate to verify the available evidence (indications of guilt), one of them adding that, if no doubt could be observed, he would advise his client to confess the facts and to formulate regrets, which would indicate a lower risk of recidivism and could allow a less severe measure.

**Summary**

- The reaction of the French Belgian respondents is rather severe: pre-trial detention in jail is mostly considered as the response to the casus (9/12), even if two investigating judges (2/4) were able to consider that the arrest warrant would be executed at home under electronic control. At no time did respondents consider unconditional release.

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2nd Belgian National Report on Expert Interviews (Belgium)

# DETOUR –
# Towards Pre-trial Detention as Ultima Ratio

## Part III
## Integrated conclusions and recommendations

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# Conclusions and recommendations

As mentioned in the introductions to the reports on the Dutch and French-speaking expert interviews conducted within the framework of the Belgian contribution to the DETOUR-project, although our (limited) empirical research does not allow for generalisations, it nevertheless offers important insights and reflections on practices around alternatives to pre-trial detention that are further to explore. In this conclusion we highlight some problems and recommendations that were discussed during the interviews.

First of all, it must be observed that the **Belgian law already contains important guarantees** to preserve the principle of exceptionality of pre-trial detention and respect for the rights of the defence. Unless a drastic reduction of the use of pre-trial detention (for example by means of the installation of quotas) would be strived for, it would be recommended to act more on concrete practices than on further legislative reforms. If legislative reforms would be preferred, only 'radical' reforms (e.g. excluding certain offences from the field of application of pre-trial detention) could obtain desired effects in terms of a reduction of the population in remand custody.

With respect to the practice of pre-trial detention and alternatives, an **inventory** should be established, in consultation with practitioners, **of all organisational problems** that currently prevent an adequate application of the legislation. It has been observed that many of these organisational problems are predominantly related to a lack of financial means, although not exclusively.

One of the major practical obstacles concerns the consultation of case file information (*scan of case files*). Digitalisation of case files would greatly facilitate easy access to files, especially for defence lawyers, and as such would have a significant impact on the respect of fundamental rights, in particular the rights of the defence. Although a process of digitalisation is on-going in Belgium, it is essential that it can be generalised as quick as possible.

It also has to be emphasised that **criminal policies are also related to social policies and migration policies**.

In Belgium, problems of pre-trial detention will not be 'solved' if the *high percentage of suspects with foreign nationality* placed in pre-trial detention is not taken into consideration. As such, it is also observed that the vast majority of the suspects released under

conditions are Belgian citizens; foreign suspects who stay illegally on the Belgian territory rarely benefit from less severe measures. Penal policies should avoid the exclusion of certain categories of the population from less severe measures and a reflection on the articulation between migration policy and criminal policy has to be encouraged.

The research also raises the question of the strong presence of *drug problems* in cases that are referred to criminal judicial investigation. It is questionable whether for such cases criminal justice responses are appropriate, or if, at the very least, social policies should not be strengthened in order to provide for an inclusive societal approach of drug users, which implies taking them in charge adequately by a *specialised service*. Many interviewed practitioners repeatedly pointed out that pre-trial detention could be avoided if a sufficient number of safe crisis-centres and shelters, transitional or emergency housing were available. Similar problems occur with respect to other subpopulations, e.g. suspects who require psychiatric care, suspects involved in cases of domestic or intrafamilial violence, etc.

**Local structures of co-operation** (representing judicial and extra-judicial actors) should be re-activated, as the Belgian Pre-trial Detention Act (art. 38*b*) refers to this, with an explicit objective that practitioners regularly evaluate their collaboration (and take time and space to share their practices). Although this is already part of the professional culture in some judicial districts, in other districts it is not. A *permanent dialogue* is nevertheless necessary; such a dialogue, for example, would allow probation officers to be physically present near the investigating judges' office and take in charge immediately and in a concerted way suspects who are released under conditions, or to prepare concrete alternative measures. A strengthened dialogue may also stimulate an increased use of social inquiry reports to be conducted by probation officers and an optimal exchange of 'good practical ideas' that are developed in some judicial districts, e.g. on diversion procedures.

Whilst such recommendations can be formulated for the local level, one has, however, **to remain vigilant** to two aspects. First, avoiding that the introduction of less severe measures would lead to an increase in the number of persons placed under one or another form of pre-trial supervision (control), and secondly, preventing that pre-trial measures would be used as a kind of '*short punishment*'. With respect to the former point of interest, it was observed, in Belgium, that alternative measures caused to a certain extent a net-widening effect; as such, the total 'population under judicial control' in the pre-trial stage kept growing over time. A hypothesis is that suspects who in the past would have been released without conditions are nowadays placed under judicial con-

trol. And not only 'alternative measures' are used more and more, at the same time the application of pre-trial detention increased. This situation is closely related to the *emergence of a kind of progressiveness in granting of (alternative) measures* (pre-trial detention in prison, pre-trial detention at home under electronic monitoring, release under conditions, and release without conditions). Regarding the second aspect, different stages of the criminal justice proceedings (pre-trial, sentencing, and sentence implementation) have not to be taken into consideration separately from each other, but rather in their interconnectivity. Particularly for the Belgian situation, this is important, since short (prison) sentences are no longer executed (or executed under the form of electronic monitoring), with the result that pre-trial detention sometimes is used, consciously or not, as 'a sentence before the sentence'. A punitive character of certain pre-trial measures is also observable among the conditions that sometimes are imposed to suspects. To maintain this double vigilance, training on sociological and criminological issues of pre-trial measures should be organised, on the behalf of judges but also defence lawyers.

Finally, it has to be noted that even though pre-trail detention and less severe measures have been the object of many research projects for years in Belgium, there are until now still **largely ignored (research) areas** with respect to current practices within the different judicial districts. Future **research projects** seem necessary, more particularly focusing on *the relations between judicial actors and the Immigration Office*. Likewise, very essential to researchers are reliable *statistics* correctly reflecting the activity of the different actors within the (judicial) criminal investigation proceedings.

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DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

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