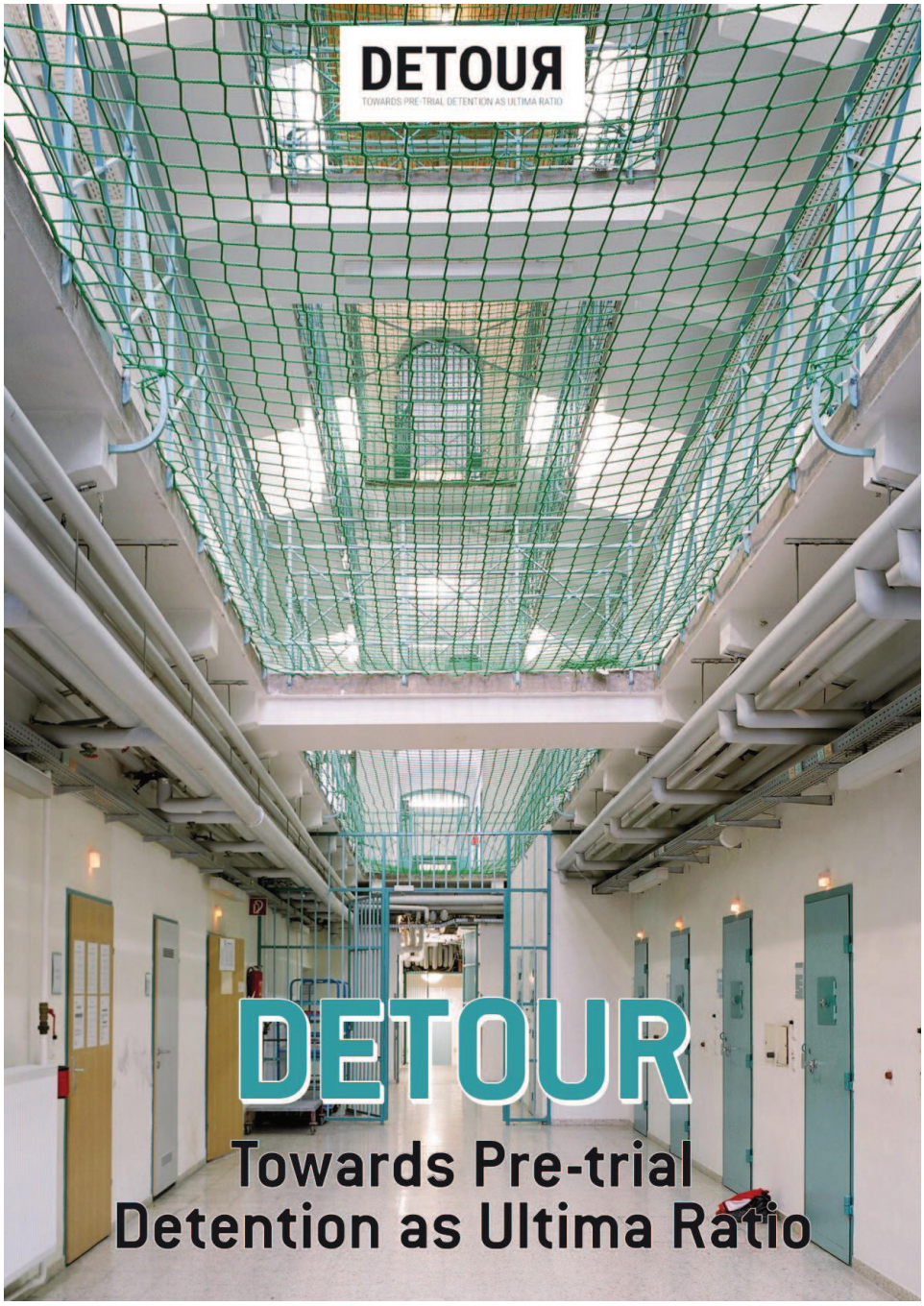
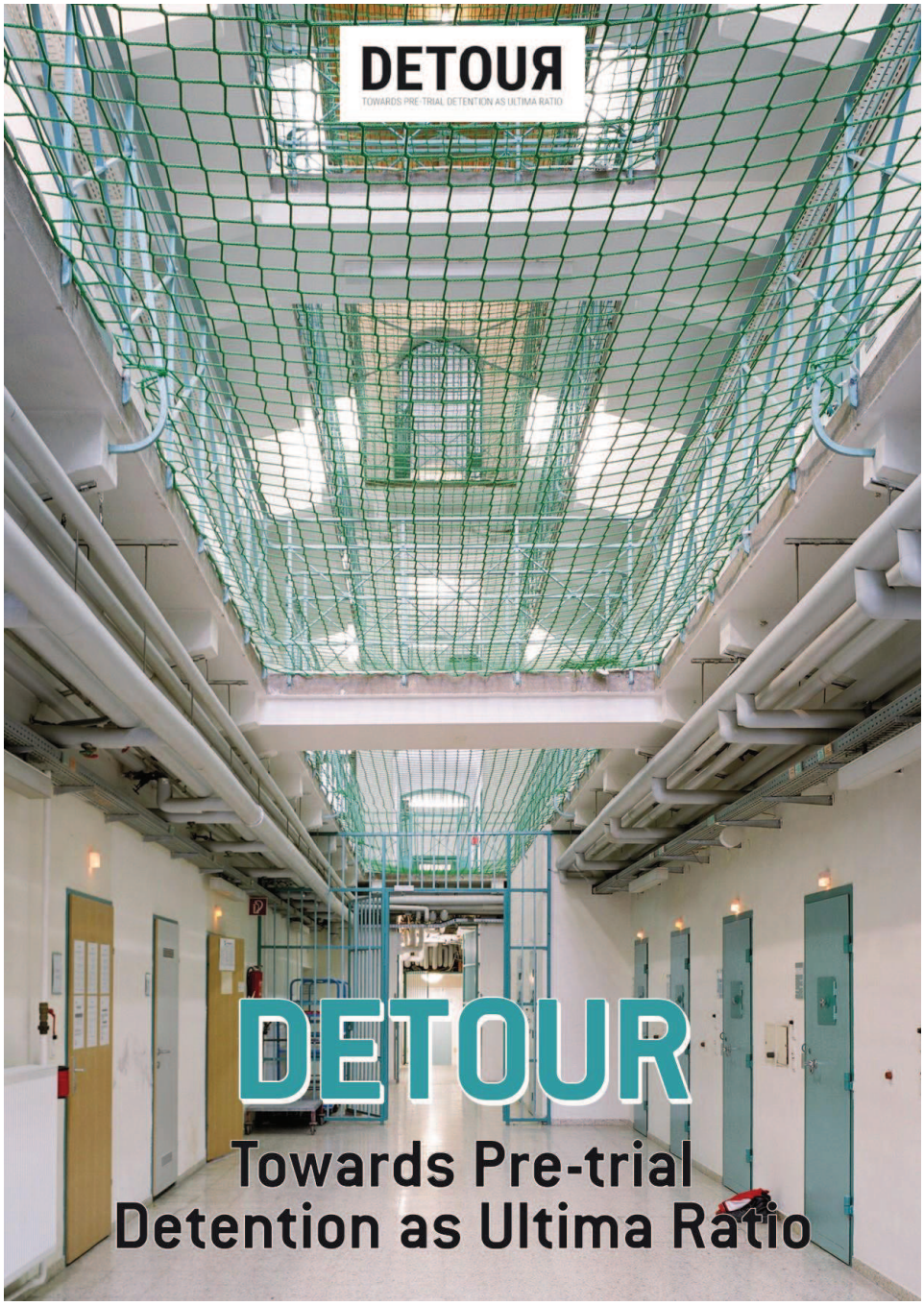



# SAMENVATTING - RÉSUMÉ & COUNTRY BRIEFS

Brussels & Vienna, November 2017

Funded by the Justice Programme of the European Union




# SAMENVATTING – RÉSUMÉ

Eric Maes & Alexia Jonckheere (coll. Magali Deblock & Michiel Praet)

Brussel/Bruxelles, november/novembre 2017

Funded by the Justice Programme of the European Union

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## Samenvatting België

Eric Maes & Alexia Jonckheere
*met medewerking van Magali Deblock & Michiel Praet*

In deze bijdrage vatten we enkele resultaten samen van het DETOUR-project zoals dit in België werd uitgevoerd in 2016-2017. De bevindingen die in deze bijdrage worden gepresenteerd, zijn hoofdzakelijk gebaseerd op het onderzoek dat werd verricht binnen werkpakketten 1 en 2 van het DETOUR-project, en hebben betrekking op analyse van de wetgeving, literatuuroverzicht, analyse van beschikbare statistische data, observaties van zittingen en analyse van gerechtelijke dossiers (werkpakket 1), alsook expertinterviews met diverse betrokken actoren (onderzoeksrechters en rechters van onderzoeksgerechten, parketmagistraten, advocaten en justitieassistenten; werkpakket 2).

Na een korte inleiding over België en zijn staatsstructuur en een beknopt overzicht van het huidige wettelijk kader van de voorlopige hechtenis en haar alternatieven, wordt verder ingegaan op enkele belangrijke onderzoeksbevindingen, met een specifieke focus op de vraag naar dilemma's over toezicht vóór berechting (*pre-trial supervision*) en de rol die de verschillende actoren hierin spelen.

### Over België

België is een federale staat die samengesteld is uit drie gemeenschappen, afgebakend naargelang taalregime (Vlaamse Gemeenschap, Franse Gemeenschap en Duitstalige Gemeenschap) en drie gewesten die economische autonomie trachten na te streven (Brussels Hoofdstedelijk Gewest, Vlaamse Gewest en Waalse Gewest). Materies zoals Justitie en Binnenlandse Zaken behoren tot de bevoegdheid van de federale staat, behoudens enkele uitzonderingen zoals de Justitiehuizen (behorend tot de bevoegdheid van de Gemeenschappen sinds 1 januari 2015). Deze justitiehuizen hebben als opdracht 'straffen in de gemeenschap' uit te voeren. Op deze manier valt de uitvoering van vrijheidsberovende maatregelen in het kader van de fase vóór berechting binnen het bevoegdheidsdomein van de federale Staat (organisatie van hoven en rechtbanken, en het gevangeniswezen), terwijl de uitvoering van alternatieve maatregelen tot de bevoegdheid van de Gemeenschappen behoort.

Op 1 januari 2016 telde België 11.267.910 inwoners. De bevolkingsdichtheid bedroeg in 2015 363 inwoners per km², waarbij Vlaanderen (in het noorden van het land) veel dichter bevolkt is dan Wallonië (in het zuiden). Meer dan 1 miljoen inwoners hebben een andere nationaliteit dan de Belgische: de grootste groep vormen de Fransen, gevolgd door Italianen, Nederlanders, Marokkanen en Polen.

## Wettelijk kader

De straf(vorderings)procedure is nader omschreven in het Wetboek van Strafvordering. De voorlopige hechtenis is wettelijk apart geregeld, in de Wet betreffende de voorlopige hechtenis (van 20 juli 1990). In principe, en in de meeste gevallen, wordt een (rechts)zaak geopend voor elk misdrijf dat ter kennis komt van het openbaar ministerie. Nadat de parketmagistraat het initiële proces-verbaal van de politie over het misdrijf ontvangt, kan hij beslissen een opsporingsonderzoek te voeren, met medewerking van de politie, of de zaak verwijzen naar de onderzoeksrechter. In dit laatste geval wordt een gerechtelijk onderzoek geopend en vindt het onderzoek plaats onder verantwoordelijkheid van de onderzoeksrechter en de raadkamer (een specifieke kamer binnen de rechtbank van eerste aanleg). Indien het openbaar ministerie bijzondere maatregelen wenst (bv. aanhoudingsbevel), dient hij een gerechtelijk onderzoek te vorderen. Na arrestatie door de politie kan de onderzoeksrechter in hoofdzaak twee soorten dwangmaatregelen nemen: voorlopige hechtenis via een aanhoudingsmandaat (opsluiting in de gevangenis of onder elektronisch toezicht op een toegewezen plaats) en alternatieve maatregelen (borgsom en/of vrijheid onder voorwaarden).

Volgens Belgisch recht zijn dergelijke dwangmaatregelen enkel mogelijk wanneer er 'ernstige aanwijzingen van schuld' bestaan, het 'absoluut noodzakelijk' is voor de 'openbare veiligheid' en het misdrijf strafbaar is met een gevangenisstraf van één jaar of meer. Indien de toepasselijke maximumstraf niet meer dan 15 jaar bedraagt (uitgezonderd terroristische feiten: 5 jaar), dient het aanhoudingsbevel of de beslissing tot alternatieve maatregel gebaseerd te zijn op bijkomende gronden (recidive-, onttrekkings-, collusie- of verduisteringsgevaar).

Vooraleer een aanhoudingsbevel kan worden uitgevaardigd, moet de verdachte, die recht heeft op bijstand door een advocaat, door de onderzoeksrechter worden gehoord. Voorlopige hechtenis is aan geen enkele maximumduur onderworpen, maar wordt wel regelmatig gecontroleerd (door de raadkamer). De maatregel van vrijheid onder voorwaarden heeft een maximumduur van 3 maanden, zij het telkens opnieuw verlengbaar.

## Actuele debatten

Nieuwe wetgeving is en werd bediscussieerd, eerst en vooral met de goedkeuring door het Belgische Parlement van een Voorstel tot wijziging van de Grondwet waarbij de arrestatietermijn (door de politie) werd uitgebreid (van 24 uur) tot 48 uur. En in zijn *Justitieplan* van maart 2015 kondigde de minister van Justitie (Koen Geens) een grootschalige hervorming van de voorlopige hechtenis aan: in bepaalde gevallen vervanging van voorlopige hechtenis door elektronisch toezicht, en in andere gevallen waar voorlopige hechtenis wel nog mogelijk zou zijn, beperking van de duur ervan, of nog, invoering van een bijzondere motiveringsverplichting voor de verlenging ervan. Een zeer recent voorstel van een expertengroep die werkt aan een hervorming van de strafprocedure, om een zogenaamde 'quota'-regeling of maximumcapaciteit in te voeren, gaf aanleiding tot levendige debatten in het Belgisch Parlement en lokte heel wat media-belangstelling en (kritische) reacties uit vanuit gerechtelijke en academische kringen.

Het actuele debat over het strafrechtelijk beleid wordt in hoge mate aangestuurd door de fenomenen van radicalisering en terrorisme, maar ook door het probleem van gevangenisoverbevolking. Slechte leefomstandigheden in vaak verouderde en overbevolkte gevangenissen leiden tot veroordelingen door het Europees Hof voor de Rechten van de Mens, expliciete afkeuring in CPT-rapporten en publieke verklaringen (bv. de publieke verklaring van 13 juli 2017, Europees Comité voor de Preventie van Foltering), en veroorzaakt problemen op het vlak van internationale samenwerking (bv. de weigering van buitenlandse EU-lidstaten om eigen onderdanen uit te leveren aan België).

In het verleden, in het bijzonder sinds het begin van deze eeuwwisseling, hebben andere ministers van Justitie, vaak geïnspireerd op buitenlandse voorbeelden, ook al nagedacht over specifieke maatregelen om het gebruik van de voorlopige hechtenis in te perken. Zo werd bijvoorbeeld gedacht aan: de optrekking van de 'toelaatbaarheidsdrempel' voor toepassing van voorlopige hechtenis (van één tot drie jaar; Marc Verwilghen); het opstellen van een misdrijflijst met opgave van misdrijven waarvoor voorlopige hechtenis niet langer meer mogelijk zou kunnen zijn (of het omgekeerde; 'negatieve' vs. 'positieve' lijst; Laurette Onkelinx); een beperking van de maximumduur van voorlopige hechtenis (Marc Verwilghen/Laurette Onkelinx); de invoering van elektronisch toezicht als alternatief voor voorlopige hechtenis (Jo Vandeurzen/Stefaan De Clerck); en, de uitbreiding van de arrestatietermijn (van 24 uur naar 48, of zelfs 72 uur). Terwijl sommige van deze voorstellen werden vertaald in nieuwe wetgeving (bv. de uitbreiding van de arrestatietermijn van 24 tot 48 uur, en elektronisch toezicht als uitvoeringsmodaliteit van een aanhoudingsmandaat), werden andere ideeën niet geïmplementeerd, wellicht omdat ze niet als "sociaal aanvaardbaar" en/of "politiek haalbaar" werden gecatalogeerd.

## *Back to the nineties*: uiteindelijk een geslaagd recept?

Ook al voordien braken politici zich het hoofd over oplossingen voor het 'overmatig' gebruik van voorhechtenis. Bijna een kwart eeuw vóórdat het elektronisch toezicht operationeel werd (per 1 januari 2014), en decennia na invoering van de borgsom als alternatief, zag in 1990 een nieuw alternatief voor voorlopige hechtenis het levenslicht, de zgn. 'vrijlating of invrijheidstelling onder voorwaarden' (VOV).

De vraag rijst of de destijds geuite ambitie van deze wetgevende hervorming – om het aantal voorlopige hechtenissen terug te dringen – is waargemaakt, nu bijna 30 jaar na datum. Beschikbare cijfergegevens doen geloven van niet, wel integendeel! In 2014 verbleven in de Belgische gevangenissen gemiddeld 3.625 gedetineerden (incl. minderjarigen) in voorlopige hechtenis. Eind 2014 werden 2.479 personen door de Justitiehuizen opgevolgd in het kader van een maatregel van vrijheid onder voorwaarden, en 105 gedetineerden ondergingen hun voorlopige hechtenis onder de vorm van elektronisch toezicht. Dit betekent dat in totaal meer dan 6.200 personen onder één of andere vorm van 'justitiële controle' stonden in afwachting van een definitief vonnis. Cijfers over het aantal personen dat onder borgstelling was vrijgekomen of enkel verbodsbepalingen te controleren door de politie (zonder tussenkomst van de justitiehuizen) diende na te leven, zijn niet beschikbaar. Hierdoor

houdt het globale plaatje bijgevolg nog een zekere onderschatting in. Ter vergelijking, in 1990, toen er van vrijheid onder voorwaarden en elektronisch toezicht in de praktijk nog geen sprake was, verbleven er 'slechts' iets meer dan 1.800 beklaagden in de Belgische gevangenissen. Met andere woorden is het aantal personen onder justitieel toezicht in de fase vóór definitieve berechting over een periode van bijna dertig jaar meer dan verdrievoudigd.

Het jaarlijks aantal opsluitingen in de gevangenis en alternatieven ('vrijheid onder voorwaarden') in het kader van de voorlopige hechtenis (opgevolgd door de Justitiehuizen), loopt, in 2014, op tot meer dan 11.600 opsluitingen en meer dan 5.000 nieuwe VOV-mandaten (tegenover 600 mandaten in het jaar 1995). Een gelijkaardige tendens werd in vele Europese landen voor de periode 1990-2010 ook al vastgesteld met betrekking tot gevangenisstraffen en straffen in de gemeenschap (zie Aebi, Delgrande & Marguet, 2015).

## Evoluties en praktijken rond alternatieven voor voorhechtenis

Het kan op het eerste gezicht – zonder substantiële stijging van de algemene criminaliteitscijfers – verrassend lijken dat de 'alternatieven', en in het bijzonder de 'vrijheid onder voorwaarden' sterk toenemen, terwijl ook de (voorlopige) hechtenis 'populair' blijft. Nochtans kunnen hier in de Belgische context verschillende verklaringen voor worden aangevoerd.

Verschuivingen in maatschappelijke gevoeligheid, verwachtingen vanuit de publieke opinie (samen met de opgang van sociale media) en soms scherpe berichtgeving in de traditionele media leggen druk op en/of hebben effectief invloed op het beleid van parket. Klassieke afhandelingsmodaliteiten op het niveau van het openbaar ministerie kunnen het op die manier, op zijn minst bij specifieke criminaliteitsfenomenen (bv. intra-familiaal geweld, vluchtmisdrijf), steeds vaker afleggen tegen de vordering tot gerechtelijk onderzoek met verzoek tot aanhouding. Dat parketmagistraten zelf alternatieven voorstellen, blijft een uitzondering, in het verdere verloop van de procedure (periodieke verschijningen voor raadkamer), nadat een onderzoeksrechter (eerder) al heeft beslist tot voorhechtenis.

Als mogelijke verklaring voor het grote aantal aanhoudingsmandaten wijzen magistraten ook op een mogelijks grotere sensibilisering en aangiftebereidheid bij slachtoffers van welbepaalde delicten (seksuele feiten, intra-familiaal geweld, …), toenemende ophelderingsgraad door vooruitgang in technieken van het forensisch en opsporingsonderzoek, en wijzigingen in de aard van de criminaliteit (bv. een sterker internationaal en georganiseerd karakter, met name in het kader van mensensmokkel, drughandel en -productie, vermogenscriminaliteit, …). Niettegenstaande het fel bekritiseerde beleid in verband met 'korte' gevangenisstraffen (niet-uitvoering, omzetting in elektronisch toezicht, 'soepele' toekenning van voorlopige invrijheidstelling) geen reden is, noch mag zijn, om voorlopige hechtenis te gebruiken als een soort van 'vóórafname op de straf' of 'kortdurende bestraffing', kan het onrechtstreeks wel meespelen: voorlopige hechtenis als een (incapaciterend) middel om, op zijn minst toch voor even, een halt toe te roepen aan recidiverende verdachten die

normaal in de gevangenis zouden zitten. En, volgens sommigen, kan een korte periode van voorlopige hechtenis ook een positief, educatief, en ontradend effect hebben, in het bijzonder voor jonge primaire delinquenten (‘*short sharp schock*’-detentie).

Advocaten zullen veelal beargumenteren dat van voorlopige hechtenis nog steeds té veel gebruik wordt gemaakt, dat het criterium van absolute noodzaak voor de openbare veiligheid (vaak) nauwelijks of helemaal niet wordt gemotiveerd, dat het debat over ernstige aanwijzingen van schuld soms onvoldoende diepgaand wordt gevoerd, en/of dat criteria van gevaar op recidive en onttrekking veel te makkelijk en soepel worden ingevuld. Anderzijds is het ook zo dat advocaten van de verdediging zelf ook bijdragen tot een zeker *net-widening*-effect. In hun verdedigingsstrategie vragen zij niet langer om een ‘vrijlating *zonder* voorwaarden’, maar pleiten ze voor de oplegging van ‘alternatieven’ aangezien ze ervaren dat dergelijke ‘oude gewoontes’ tegenwoordig “*not done*” zijn. Vaak gebruiken ze de optie van het striktere elektronisch toezicht als pasmunt om weifelende magistraten over de streep te trekken en opsluiting van hun cliënt in de gevangenis te vermijden (‘*buiten is buiten, op welke manier dan ook*’); in sommige gevallen lukt dit ook…

Ook al worden alternatieven vaak bepleit en uiteindelijk veelvuldig opgelegd, meestal worden dergelijke maatregelen pas toegekend na een periode van voorhechtenis in de gevangenis. Onderzoek in een aantal (Franstalige) arrondissementen wijst uit dat 60 tot 80% van de VOV-maatregelen wordt voorafgegaan door detentie. Structurele problemen om alternatieven in de praktijk te brengen, zijn hieraan niet vreemd. Deze belemmeringen hebben onder meer betrekking op het gebrek aan adequate extra-murale voorzieningen in de sector van geestelijke gezondheids- en welzijnszorg in bepaalde regio’s, té geringe beschikbare capaciteit, lange wachtlijsten, moeilijkheden om intakegesprekken georganiseerd te krijgen voor voorlopig gehechten, het feit dat sommige verdachten zelf geen vragende partij zijn of moeilijk te ‘motiveren’ zijn, taalproblemen, strikte exclusiecriteria ten aanzien van cliënten met multiple problemen, ten aanzien van justitiecliënteel in het algemeen, of nog, specifiek voor voorlopig gehechten, afwijzing omdat ze nog niet definitief veroordeeld zijn en voor hen nog steeds een vermoeden van onschuld geldt.

Elektronisch toezicht op zijn beurt, formeel gezien geen alternatief maar een uitvoeringswijze van een aanhoudingsmandaat, is tot nog toe zeker veel minder populair dan de maatregel van ‘vrijheid onder voorwaarden’. In België blijft de toepassing van het elektronisch toezicht beperkt. In 2016 werden 800 verdachten onder elektronisch toezicht geplaatst, tegenover meer dan 10.000 aanhoudingsmandaten met hechtenis in de gevangenis. Ook de uiteenlopende praktijken naargelang gerechtelijk arrondissement vallen op: in Vlaanderen overwegend toegepast in Antwerpen en Limburg, maar nauwelijks in West- en Oost-Vlaanderen, en Leuven. In Wallonië is het elektronisch toezicht geconcentreerd in Henegouwen en Luik, en wordt het bijna niet toegepast in Namen en Luxemburg. Er zijn verschillende redenen waarom elektronisch toezicht in de fase vóór berechting in België spaarzaam wordt gebruikt. Sommige magistraten zijn niet zo vertrouwd met de maatregel, en in het bijzonder de technologische (on)mogelijkheden, en op dit vlak wordt ook geen pro-actieve wervingspolitiek gevoerd vanuit de monitoring-centra naar parketmagistraten en rechters toe. Wellicht speelt ook

vrees voor (en ervaring met) bijkomende administratieve werklast een rol, en er bestaan ernstige twijfels over het vermogen om risico's op recidive, onttrekking en/of collusie effectief uit te sluiten (met de gevangenis als meest 'zekere' oplossing). Hoewel hetzelfde waar is voor de 'vrijheid of invrijheidstelling onder voorwaarden', biedt deze laatste maatregel wel meer ruimte om "*aanklampend*" te werken, re-integratiebevorderend en met als expliciet doel recidive te verminderen. Dergelijke meerwaarde die aan 'vrijheid onder voorwaarden' wordt toegeschreven, maakt het een veel aantrekkelijker alternatief voor zowel advocaten als rechters. Het zeer 'strikte' regime van elektronisch toezicht (bijna vergelijkbaar met '24-uur thuisdetentie', met zeer beperkte mogelijkheden om de toegewezen verblijfplaats te verlaten) beperkt niet enkel sterk het toepassingsgebied ervan, maar laat ook geen ruimte voor individualisering en proportionele toebedeling: geen mogelijkheid om te werken, boodschappen te doen of kinderen naar school te brengen, wat serieuze impact heeft op het leven van verdachten en hun families (cf. '*pains of electronic monitoring'*). Terwijl sommigen meer flexibiliteit bepleiten, menen anderen echter dat het de enige maatregel is die lijkt op 'echte detentie' en net daarom ook is opgevat als een uitvoeringsmodaliteit van voorlopige hechtenis, en niet als een 'alternatief'.

De situatie van vreemdelingen zonder vast verblijf in het land vraagt bijzondere aandacht, gezien hun aanwezigheid op het grondgebied vaak wordt beschouwd als één van de belangrijkste 'oorzaken' van het frequent gebruik van voorlopige hechtenis (uitgevoerd in de gevangenis). Niet alleen bestaat 44,8% van de totale gevangenispopulatie en meer dan 55% van de populatie beklaagden (en gelijkgestelden) uit niet-Belgen. Veel van de niet-Belgische voorlopig gehechten beschikken ook niet over regulier verblijf in België. In 2013 had 34,4% van de totale beklaagdenpopulatie geen verblijfsrecht. Deze populatie valt zo goed als altijd uit de boot voor 'vrijheid onder voorwaarden', en hetzelfde geldt met betrekking tot het elektronisch toezicht. Beschikken over een vaste verblijfplaats in België wordt vaak als voorafgaande vereiste voor toepassing van elektronisch toezicht gezien. Invrijheidstelling (onder voorwaarden) lijkt moeilijk te verzoenen met een verblijfsstatuut waaraan een risico op onttrekking of ontvluchting wordt verbonden, en contradictorisch te zijn met beslissingen van andere instanties op vlak van migratiepolitiek. Bovendien worden internationale instrumenten zoals het Europees aanhoudingsmandaat op dit vlak ongeschikt of ontoereikend geacht. De vraag rijst of het – pas recent in nationale wetgeving omgezette – *European Supervision Order* een oplossing kan bieden. Tot nog toe wordt enkel de borgsom (vaak aanzienlijke geldbedragen) nu en dan toegepast (als geanticipeerde straf?), zij het meestal na een voorafgaande periode van opsluiting.

## Kritische commentaren op alternatieven

'Alternatieven' voor voorlopige hechtenis, zoals de 'vrijheid onder voorwaarden', zijn niet zonder kritiek, ook al mogen verdachten – bij een onmiddellijke, snelle justitiële reactie op de gepleegde feiten – dan wel gemotiveerd zijn om aan hun situatie te werken, met mogelijk gunstige straftoemetingsuitkomsten in het achterhoofd. Niet enkel het gewenste effect van 'alternatieven' op de algemene gevangenispopulatie en deze in

voorhechtenis lijkt uit te blijven. Rond alternatieven duiken nog andere kritische vragen op.

Vaak worden veel en een variëteit aan voorwaarden opgelegd, er is de laatste jaren ook een tendens tot 'verzwaring' van voorwaarden. Vele voorwaarden getuigen van een therapeutische en/of zelfs repressief-punitieve inslag. Sommige 'alternatieven' hebben veel weg van 'werkelijke' probatiemaatregelen (zoals die worden opgelegd wanneer rond schuld geen twijfel meer heerst), en gaan bijgevolg eerder uit van een vermoeden van schuld ("*presumption of guilt*").

En, hoewel voor VOV-maatregelen dezelfde wettelijke criteria gelden als voor voorlopige hechtenis (en elektronisch toezicht), worden ze meestal initieel opgelegd voor langere periodes, worden ze regelmatig verlengd, en duren ze daardoor gemiddeld genomen langer dan voorhechtenis in de gevangenis. Dit gebeurt zonder dat de periode ondergaan onder het 'alternatief', wordt afgetrokken van de uiteindelijke (gevangenis)straf, laat staan dat de verdere noodzaak ervan even frequent wordt gecontroleerd als de voorhechtenis zelf, en zonder dat enige compensatie mogelijk is (naar het beeld van de 'onwerkdadige hechtenis').

Is er een toekomst voor minder voorlopige hechtenis zelfs zonder alternatieven …? *Quo vadis?*

Een waar dilemma, want… dienen ook de 'alternatieven' geen *ultimum remedium* te blijven?

# DETOUR – Towards pre-trial detention as ultima ratio

## Résumé Belgique

Eric Maes & Alexia Jonckheere
*avec la collaboration de Magali Deblock & Michiel Praet*

La présente note résume certains résultats du projet de recherche DETOUR réalisé en Belgique en 2016 et 2017. Ces résultats reposent principalement sur les activités de recherches ayant porté sur l'analyse de la législation, un examen de la documentation existante, une analyse des données statistiques, des observations menées au sein de juridictions d'instruction et une analyse de dossiers judiciaires (première partie de la recherche), ainsi que des entretiens spécialisés avec les acteurs de l'instruction (juges d'instruction et juges au sein des juridictions d'instruction, magistrats du parquet, avocats de la défense et assistants de justice) (deuxième partie de la recherche).

Après une brève introduction sur la Belgique et sa structure étatique ainsi qu'un aperçu succinct du cadre légal actuel de la détention préventive et de ses alternatives, nous poursuivons avec une discussion sur les principaux résultats du projet de recherche, en nous concentrant sur la question des dilemmes liés aux mesures de contrôle présentencielles et au rôle joué par les différents acteurs dans ce contexte.

### À propos de la Belgique

La Belgique est un État fédéral comptant trois Communautés réparties principalement en fonction de la langue (Communauté flamande, Communauté française et Communauté germanophone) et trois Régions aspirant à davantage d'autonomie économique (la Région flamande, la Région de Bruxelles-Capitale et la Région wallonne). Les questions comme la Justice et les Affaires intérieures relèvent de la compétence de l'État fédéral, à quelques exceptions près, comme celle des maisons de justice (services de probation qui relèvent, depuis le 1er janvier 2015, des Communautés). Ces maisons de justice sont chargées de l'exécution des peines et mesures en milieu ouvert. Ainsi, l'application de mesures de privation de liberté au stade présentenciel relève de l'État fédéral (organisation des services judiciaires et pénitentiaires), tandis que l'exécution de mesures alternatives relève de la compétence des Communautés.

Au 1er janvier 2016, la Belgique comptait 11 267 910 citoyens. En 2015, la densité de population était de 363 personnes par km², sachant que la Flandre (au nord) est beaucoup plus densément peuplée que la Wallonie (au sud). Plus d'un million d'habitants n'ont pas la nationalité belge, les ressortissants français représentant le plus grand groupe, suivis des Italiens, des Néerlandais, des Marocains et des Polonais.

## Cadre légal

Les procédures pénales sont fixées dans le Code de procédure pénale. Depuis 1990, la détention préventive est soumise à une législation distincte, à savoir la loi relative à la détention préventive (du 20 juillet 1990). En principe, et dans la plupart des cas, un dossier pénal est ouvert pour toute infraction connue du procureur du Roi. Après avoir reçu le rapport de police initial sur l'infraction, le procureur du Roi peut décider de mener une enquête avec l'aide de la police (une procédure appelée information judiciaire). Une autre option consiste à transférer le dossier à un juge d'instruction. Dans ce cas, une instruction judiciaire est ouverte et l'enquête se déroule sous la responsabilité du juge d'instruction et de la chambre du conseil, une chambre spéciale du tribunal de première instance. Si le procureur du Roi requiert des mesures spéciales (par ex. un mandat d'arrêt), il doit demander d'ouvrir une instruction. Après une garde à vue, il y a deux principaux types de mesures coercitives que le juge d'instruction peut appliquer : la détention préventive sous mandat d'arrêt (détention en prison ou à domicile sous surveillance électronique) et des mesures alternatives (mise en liberté sous caution et/ou libération sous conditions).

Dans la législation belge, les mesures coercitives ne sont possibles qu'en cas « d'existence d'indices sérieux de culpabilité », « d'absolue nécessité pour la sécurité publique » et quand l'infraction pénale est punissable d'une peine de prison d'un an ou plus. Si la peine maximale possible pour l'infraction ne dépasse pas 15 ans d'emprisonnement (sauf pour les dossiers terroristes : 5 ans), le placement en détention préventive et les mesures alternatives doivent reposer sur des motifs supplémentaires (risques de récidive, de fuite, de collusion ou de destruction de preuves).

Avant de pouvoir émettre le mandat d'arrêt, le suspect doit être entendu par le juge d'instruction et il a droit à un avocat. Il n'y a pas de longueur maximale absolue pour le placement en détention préventive mais un examen juridictionnel de l'ordonnance de détention préventive a lieu régulièrement. La mesure de mise en liberté sous conditions a quant à elle une validité maximale de trois mois, renouvelable.

## Débats en cours

La nouvelle législation a été et est encore discutée, principalement en raison de l'adoption par le Parlement belge d'une proposition de loi visant à amender la Constitution et à étendre la période de garde à vue de 24 heures à 48 heures. Dans son Plan Justice de mars 2015, le ministre de la Justice Koen Geens a également annoncé une révision en profondeur du régime de la détention préventive : remplacer la détention préventive par de la surveillance électronique à domicile dans certains cas et, dans les autres cas, quand la détention préventive en prison reste possible, limiter sa durée ou soumettre la prolongation de la détention à une obligation de motivation spéciale. Une proposition très récente d'un groupe d'experts travaillant sur la révision des procédures pénales, visait à mettre en place un 'quota' ou une capacité carcérale maximale pour les détenus en préventive ; elle a généré des débats animés au Parlement belge et provoqué une vaste couverture médiatique et des réactions (critiques) de la part des autorités judiciaires et académiques. Les discussions actuelles sur la politique pénale

sont fortement influencées par le phénomène de radicalisation et de terrorisme mais aussi par le problème de la surpopulation dans les prisons. Les mauvaises conditions de vie dans des prisons souvent vétustes et surpeuplées donnent lieu à des condamnations par la Cour européenne des droits de l'Homme, une désapprobation explicite dans des rapports et des déclarations publiques du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) (par ex. la déclaration du 13 juillet 2017) et cause des problèmes en termes de coopération internationale (par ex. refus d'États membres européens d'extrader des suspects nationaux vers la Belgique).

Par le passé, et surtout depuis le début de ce siècle, d'autres ministres de la Justice, souvent inspirés par des initiatives prises à l'étranger, ont également réfléchi à des mesures visant à réduire la détention préventive. Ainsi, par exemple, les idées suivantes ont été envisagées : renforcer le seuil d'éligibilité pour l'application de la détention préventive (d'un à trois ans, Marc Verwilghen), établir une liste d'infractions pour lesquelles la détention préventive ne peut plus être imposée (ou le contraire : une liste « négative » ou « positive »), limiter la longueur maximale de la détention préventive (Marc Verwilghen/Laurette Onkelinx), introduire la surveillance électronique comme alternative à la détention préventive (Jo Vandeurzen/Stefaan De Clerck) et étendre la période de garde à vue (de 24 heures à 48 heures, voire à 72 heures). Tandis que certaines de ces propositions ont été coulées dans la législation (par ex. l'extension de la garde à vue de 24h à 48h, et la surveillance électronique comme alternative à un mandat d'arrêt exécuté en prison), d'autres idées ne l'ont pas été, sans doute parce qu'elles n'étaient pas socialement acceptables et/ou politiquement réalisables.

## Retour aux années 1990 : enfin, une recette qui fonctionne ?

Déjà par le passé, les décideurs politiques avaient cherché des solutions pour remédier à la 'surutilisation' de la détention préventive. Près de 25 ans avant que la surveillance électronique ne devienne opérationnelle (au 1er janvier 2014) et des décennies après l'introduction de la mise en liberté sous caution comme option alternative, une nouvelle alternative à la détention préventive est née en 1990, la « liberté ou mise en liberté sous conditions ». On peut se poser maintenant la question de savoir, près de 30 ans plus tard, si le but principal de cette réforme législative, à savoir limiter le recours à la détention préventive, a été atteint. Quand on analyse les données disponibles, il semble que la mission n'ait pas été accomplie, au contraire ! En 2014, une moyenne de 3 625 détenus (dont des mineurs d'âge) séjournaient en détention préventive dans des prisons belges. Fin 2014, 2 479 personnes étaient suivies par les maisons de justice en raison d'une mesure de mise en liberté sous conditions et 105 détenus étaient en détention préventive sous surveillance électronique. Au total, cela signifie que plus de 6 200 personnes ont subi l'une ou l'autre forme de contrôle judiciaire, dans l'attente d'une condamnation définitive. Mais il faut aussi tenir compte du fait que les chiffres concernant les personnes libérées sous caution ou contrôlées uniquement par la police (sans aucune implication des assistants de justice) ne sont pas disponibles. Le chiffre global est donc encore sous-estimé. À titre de comparaison, en 1990, quand la mise en liberté sous conditions et la surveillance électronique n'existaient pas encore, il n'y avait

'que' 1 800 suspects dans les prisons belges. En près de trente ans, le nombre total de personnes sous contrôle judiciaire avant jugement a donc plus que triplé.

Le nombre annuel d'incarcérations en prison et de placements sous contrôle judiciaire ('mise en liberté sous conditions') dans le cadre de la détention préventive et de ses alternatives supervisées par les maisons de justice atteint, en 2014, plus de 11 600 détentions et plus de 5 000 nouveaux mandats de 'mise en liberté sous conditions' (comparé à 600 mandats en 1995). Une tendance similaire s'affiche concernant l'usage de l'emprisonnement et des peines alternatives dans de nombreuses juridictions européennes au cours des années 1990-2010 (voir Aebi, Delgrande & Marguet, 2015).

## Évolutions et pratiques des alternatives à la détention préventive

À première vue, il peut sembler surprenant que, sans une hausse substantielle du taux de criminalité global, les mesures alternatives et en particulier la mise en liberté sous conditions augmentent à ce point alors que la détention (préventive) reste également répandue. Toutefois, il y a plusieurs choses à dire à ce sujet au vu du contexte belge.

Des changements de sensibilité dans la société, des évolutions dans les attentes du public (ainsi que la montée en puissance des médias sociaux) et parfois des reportages très critiques des médias traditionnels mettent la pression sur et/ou influencent réellement les politiques des magistrats du parquet. Le règlement ordinaire d'affaires au niveau du ministère public serait peut-être de moins en moins utilisé, du moins quand il s'agit d'affaires pénales spécifiques (ex. violence intrafamiliale, inconduites au volant), favorisant ainsi le recours à une instruction judiciaire avec des demandes de détention préventive. Par ailleurs, nous avons observé que les magistrats du parquet ne proposent eux-mêmes qu'exceptionnellement des mesures alternatives, au cours des procédures pénales (lors par ex. des audiences devant les juridictions d'instruction), après donc qu'un juge d'instruction ait déjà (initialement) décidé d'émettre un mandat d'arrêt.

Une explication plausible du grand nombre de mandats d'arrêt résulte peut-être aussi, selon les magistrats interviewés, d'une plus grande sensibilisation à l'égard de délits spécifiques (agressions sexuelles, violence intrafamiliale…), d'une volonté des victimes de témoigner dans de telles affaires, d'un meilleur éclairage des dossiers grâce aux progrès réalisés dans les techniques d'investigation pénale et médico-légale, voire de changements dans la nature de la criminalité (par ex. davantage de dossiers à caractère international et organisé, en particulier dans le trafic des êtres humains, la production et le trafic de drogue, les crimes contre la propriété). Malgré la présence de politiques de court-terme - fortement critiquées - relatives à l'exécution des peines de prison (non-exécution des courtes peines, conversion de peines de prison en surveillance électronique, usage 'libéral' des programmes de libération conditionnelle), ceci n'est pas et ne devrait pas être une raison pour utiliser la détention préventive comme une sorte de 'pré-condamnation' ou de 'courte peine'. Mais il semble que ceci soit quand même de nature à influencer pratiquement et indirectement les décisions présentencielles : il s'agirait d'utiliser la détention préventive comme un moyen (incapacitant) de mettre un terme, au moins pour un moment, à la récidive de suspects. Et selon certains, une brève période de détention préventive peut aussi avoir un effet positif, éducatif et dissuasif, en

particulier chez les jeunes premiers-délinquants (détention 'courte', produisant un effet 'choc').

Les avocats argumenteront que la détention préventive reste toujours utilisée trop souvent, que le critère de l'absolue nécessité pour la sécurité publique est (souvent) à peine ou pas motivé du tout, que le débat sur les indices sérieux de culpabilité n'est parfois pas mené en suffisance et/ou que le critère de risque de récidive et de fuite est invoqué trop facilement ou trop rapidement. Mais par ailleurs, les avocats de la défense contribuent parfois eux-mêmes à l'augmentation du recours aux mesures présentencielles. Dans leur stratégie de défense, ils ne demandent plus une 'mise en liberté sans conditions' mais plaident pour l'imposition de mesures alternatives, car ils semblent préjuger du fait qu'une libération pure et simple ne s'octroie plus désormais. Souvent, ils plaident d'ailleurs en faveur de l'option encore plus stricte de la surveillance électronique pour convaincre des magistrats indécis ou hésitants et éviter la prison à leur client ('*dehors, c'est dehors, de quelque manière que ce soit*'). Dans certains cas, cela fonctionne…

Malgré le fait que les mesures alternatives sont souvent demandées et imposées, elles sont généralement octroyées après une période de détention préventive en prison. Une étude menée dans certains arrondissements judiciaires (wallons) montre que 60 à 80 % des mesures de mise en liberté sous conditions sont précédées d'une période de détention. Une des raisons principales est qu'il n'est pas toujours facile de mettre en place des mesures alternatives, en raison d'obstacles structurels. Ces obstacles concernent, entre autres, un manque de services de soins en santé mentale et de services sociaux extra-muros adéquats dans certaines régions, un manque de capacité d'accueil, la longueur des listes d'attentes, les difficultés à organiser des entretiens d'admission avec des détenus en préventive, le fait que certains suspects ne demandent pas de traitement ou sont difficiles à 'motiver', des problèmes avec la langue (maternelle), des critères d'exclusion stricts à l'égard de justiciables ayant des problèmes multiples (exclusion envers la clientèle de la justice en général, et plus spécifiquement des détenus en préventive, rejetés parce pas encore condamnés et toujours présumés innocents).

La surveillance électronique, qui n'est officiellement pas une mesure alternative à la détention préventive mais une modalité d'exécution d'un mandat d'arrêt, a jusqu'ici été nettement moins populaire que la mesure de 'liberté ou mise en liberté sous conditions'. En Belgique, l'application de la surveillance électronique reste limitée. En 2016, 800 suspects étaient placés sous surveillance électronique, comparé à plus de 10 000 mandats d'arrêt délivrés avec détention en prison. La diversité dans les pratiques entre les différents arrondissements judiciaires est également remarquable. En Flandre, la surveillance électronique est souvent utilisée à Anvers et dans le Limbourg, mais peu en Flandre occidentale et orientale, ainsi qu'à Louvain. En Wallonie, la surveillance électronique se concentre dans le Hainaut et à Liège, avec pratiquement aucune application à Namur et au Luxembourg. Ils y a plusieurs raisons qui expliquent pourquoi la surveillance électronique au stade préventif est à peine utilisée en Belgique. Certains magistrats ne sont pas familiarisés avec cette mesure, en particulier ses (im)possibilités technologiques, il n'y a pas de campagne publicitaire proactive de la part des centres de surveillance électronique à l'égard des procureurs et des juges, il y a peut-être une peur

(et une expérience) d'une charge administrative supplémentaire, et de sérieux doutes se posent en ce qui concerne la capacité à effectivement éviter les risques de récidive, fuite et/ou collusion (la prison étant perçue comme la solution la plus 'sûre'). Les mêmes critiques peuvent être adressées à la 'liberté ou mise en liberté sous conditions' mais cette dernière mesure demeure plus attractive ; elle permet de soutenir un travail axé sur la réintégration des suspects, avec un objectif explicite de réduction des risques de récidive. Cette supposée valeur ajoutée rend la mise en liberté sous conditions plus attrayante, à la fois pour les avocats de la défense et pour les juges. Le régime très 'strict' de la surveillance électronique (presque comparable à une détention à domicile 24h/24, notamment avec des possibilités très réduites de quitter le lieu de résidence assigné) limite énormément son champ d'application, et ne laisse pas non plus la place à l'individualisation et à une allocation proportionnelle : pas de possibilité de travailler, de faire des courses ou d'amener les enfants à l'école, ce qui affecte lourdement la vie des suspects et celle de leur famille (cf. 'les maux de la surveillance électronique'). Tandis que certains plaident pour plus de flexibilité, d'autres argumentent que c'est la seule mesure qui ressemble à une détention réelle et qui est donc considérée comme une façon d'exécuter la détention préventive, et non comme une mesure alternative.

La situation des ressortissants étrangers qui ne séjournent pas de manière permanente dans le pays nécessite une attention particulière car leur présence sur le territoire est souvent perçue comme l'une des principales 'causes' de l'usage fréquent de la détention préventive (exécutée en prison). 44,8% de la population carcérale totale et plus de 55% des personnes en détention préventive se composent de citoyens non belges, et beaucoup de ces personnes n'ont pas un lieu de résidence régulier en Belgique. En 2013, 34% des personnes en détention préventive ne disposaient pas du droit de résider sur le territoire. Cette population est difficilement perçue comme éligible pour une mise en liberté sous conditions, et le même principe s'applique à la surveillance électronique. Avoir une résidence fixe en Belgique est souvent considéré comme une condition préalable à la surveillance électronique et la mise en liberté (sous conditions) semble difficile à concilier avec un statut de résidence auquel sont associés des risques de fuite. Cela semble contradictoire avec des décisions d'autres autorités dans le domaine de la politique migratoire. Des outils internationaux comme le mandat d'arrêt international sont également considérés comme inappropriés et inadéquats dans ce contexte. On peut se demander à ce propos si la transposition très récente dans la législation belge de la décision européenne relative au contrôle judiciaire pourra apporter une solution. Pour le moment, seule la libération sous caution (représentant souvent des sommes d'argent considérables) est parfois utilisée (comme peine anticipée ?), mais la plupart du temps, après une période de détention.

## Commentaires critiques sur les mesures alternatives

Les mesures alternatives à la détention préventive comme la mise en liberté sous conditions ne sont pas exemptes de critiques, bien que les suspects - après une réaction judiciaire rapide et immédiate à leurs actes - puissent être incités à modifier leur situation, en ayant à l'esprit qu'une condamnation éventuellement plus favorable pourrait ensuite intervenir. Ces mesures alternatives ne semblent pas produire les effets

escomptés sur l'ampleur de la population carcérale, tant générale que celle composée uniquement de détenus préventifs. En outre, d'autres questions sensibles sur les mesures alternatives se posent.

Souvent, de nombreuses conditions différentes sont imposées et, ces dernières années, on observe une tendance à la multiplication des conditions. Certaines poursuivent une intention thérapeutique et/ou répressive/punitive. Parfois, ces conditions font que les mesures alternatives avant jugement ressemblent à de 'réelles' mesures de probation (telles qu'imposées lorsqu'il n'y a plus le moindre doute quant à la culpabilité), et partent donc du point de vue d'une 'présomption de culpabilité'.

Et, bien que les mesure de mise en liberté sous conditions ne peuvent être imposées que si elles respectent les mêmes critères légaux que la détention préventive (en prison ou sous surveillance électronique), elles sont généralement imposées initialement pour des périodes plus longues, sont fréquemment renouvelées et, par conséquent, elles durent en moyenne plus longtemps que la détention préventive. Ceci sans que la période durant laquelle un suspect est sous contrôle judiciaire ne soit déduite de la durée de la peine (de prison) définitive et sans pratiquement d'évaluation régulière de la nécessité de maintenir la mesure et du fait qu'elle respecte toujours les conditions de la détention préventive, et enfin sans qu'une quelconque compensation ne soit prévue en cas d'usage inadéquat (et ce, par contraste avec l'indemnisation prévue en cas de 'détention inopérante').

Y a-t-il en Belgique un avenir pour moins de détention préventive, même sans mesures alternatives…? *Quo vadis ?*

C'est un vrai dilemme car… les mesures alternatives ne doivent-elles pas également rester un 'dernier recours' ?

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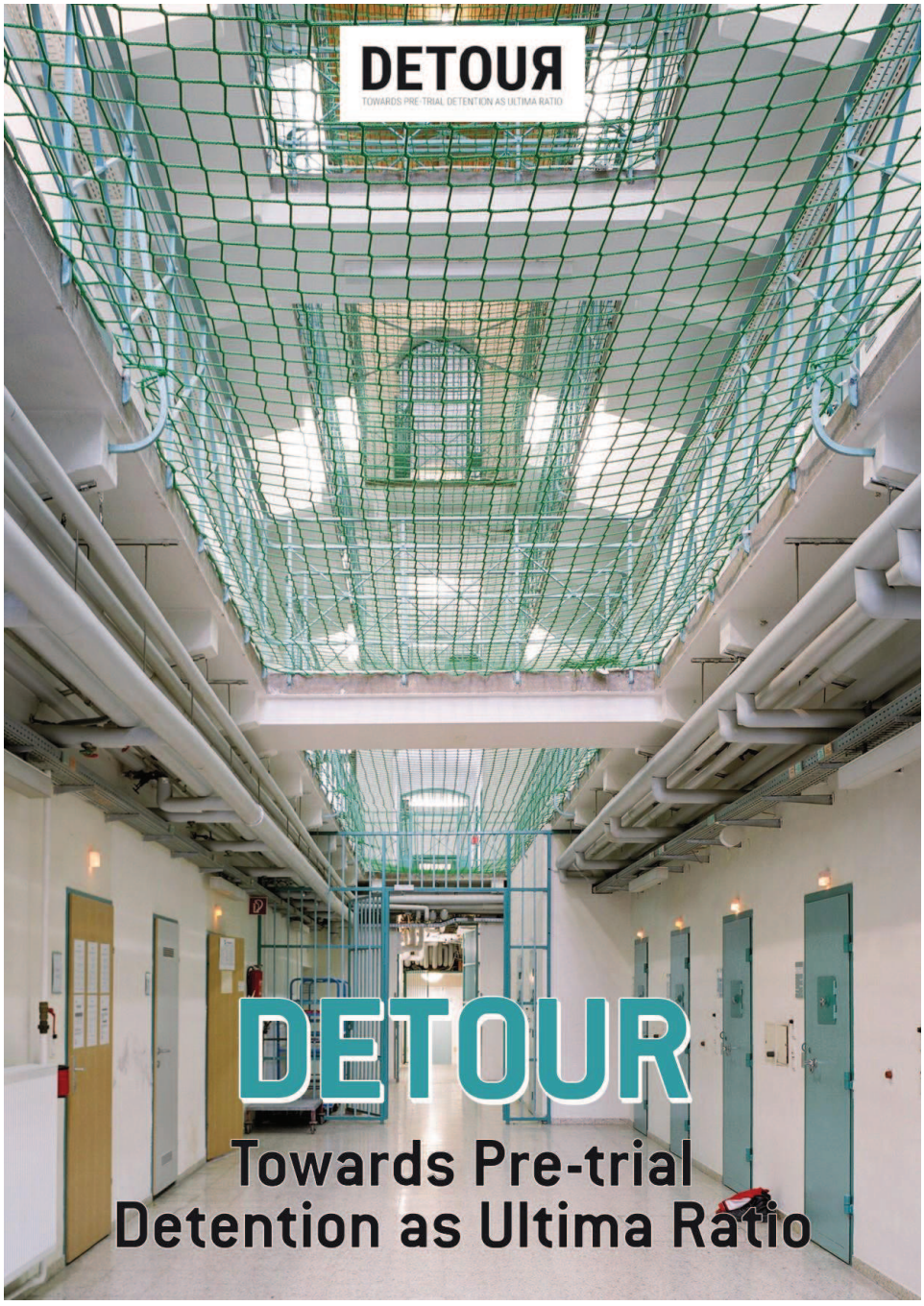


## COUNTRY BRIEFS

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# Introduction

The country briefs presented in this booklet include central outcomes of the empirical work carried out in the countries participating in the DETOUR project – Austria, Belgium, Germany, Ireland, Lithuania, the Netherlands and Romania. They are intended to provide some in-depth insights into law and practice on pre-trial detention as well as on alternative, non-custodial measures in these seven countries. Central bases of these outcomes are expert interviews carried out in the context of the DETOUR project in 2016 and 2017. Interview partners were above all judges, public prosecutors, defence counsellors and in some countries also police representatives as well as representatives of organizations involved in the organization of pre-trial detention and of non-custodial alternatives respectively. The research carried out in the run of the DETOUR project also included research into and analysis of the legal frameworks, analysis of available statistical data, literature review, court observations and case file analysis. Outcomes of these research steps have been included in the country briefs supplementary.

Our research shows that there are considerable differences with respect to the detention practice in the partner countries and in the end with respect to the realization of the ultima ratio principle. Not least the increasing need for transnational cooperation and the increasing number of cross border cases ask for mutual understanding. Mutual understanding and trust, however, are built up best on the basis of knowledge about the systems, procedures and practice in other countries as well as on the basis of common standards. The DETOUR-project aims to support the development of both. The final conference of the project as well as the country briefs are contributions in this spirit.

The DETOUR-Team

# 1. Austria[1]

*Walter Hammerschick, Veronika Reidinger*

## 1.1. Pre-trial detention in a nutshell

According to §§ 173 pp CCP, Pre-Trial Detention (PTD) is the deprivation of liberty of an untried or not yet convicted person following a decision by the court. The literal translation of the German term "Untersuchungshaft" means 'investigating detention' but it actually comprises any detention during the pre-trial phase up to the end of an appeals procedure. Securing the proceedings is a central objective of Pre-Trial Detention expressed in the Personal Freedom Act (Art. 2) as well as in §173 CCP. This includes: Preventing the suspect or accused from absconding, preventing collusion, preventing obscuring of evidence or the obstruction of the "ascertainment of truth" in any other way. Furthermore, PTD may be ordered in cases where it is necessary with respect to the prevention of new crimes. It may only be ordered if there is an **urgent suspicion** that a suspect has carried out an offence, if it is necessary **to avoid one of the mentioned risks**, and if PTD **is not disproportionate to the aims** pursued. No deprivation of liberty is allowed if more lenient measures are sufficient to achieve the aims. Therefore, alternative measures to PTD are supposed to be given priority to counteract assumed risks.

Since 2008, all procedures during the pre-trial phase have **to be initiated by the public prosecutor**, while all decisions concerning rights of suspects are the responsibility of a **detention and legal protection judge** ("Haft- und Rechtsschutzrichter").

In 2010, the possibility for pre-trial detainees to spend PTD in house arrest monitored by an electronic monitoring device was introduced. In Austria, **Electronic Monitoring (EM)** is not defined as an alternative but a way to serve PTD at one's own place of living. This means that PTD carried out via EM also has to be terminated if milder measures secure the aims. However, up to now, EM has hardly been used for PTD (3 to 14 cases a year). Practitioners say, in most cases, EM would only fit if other alternative measures also apply. Interestingly, judges and prosecutors did not know about the rather recent availability of GPS-monitoring[2] devices, which may broaden the use of EM for PTD.

After rather high numbers of pre-trial detainees (an average of 2,000) in the early years of the century, in recent years an average of about 1,700 was observed – 1,752 in 2015. This equals about one fifth of the total prison population and about 24 pre-trial detainees per 100,000 of the Austrian population. The reported average length of PTD is 80 days. Although social developments and legal changes are said to have an impact on the numbers of pre-trial detainees, PTD practice per se was described to not have undergone major changes

[1] The following brief is primarily based on the outcomes of altogether 35 expert interviews carried out in all four higher regional court districts

[2] The standard devices use radio frequency

since 2000. According to some practitioners, the practice may have become somewhat more lenient, yet this would not become visible in the overall picture because of the increased numbers of foreign suspects who would require PTD more often. In fact, the considerable increase of **foreign national detainees** is one of the main developments and problems with respect to PTD to be observed. Since 2001, the number of Austrian nationals in PTD has actually decreased by 45% while the number of foreign nationals in PTD has increased by 64% (2015). Foreign nationals may not have a higher risk of detention per se. However, certain groups of foreigners definitely appear to be at a higher risk than others: Offenders assumed to be "criminal tourists"; foreign nationals who are assumed to likely try avoiding trial and conviction based on assessments of (a lack of social) ties to Austria and of regular residency; and foreign nationals (visibly) involved in drug dealing.

In the past the very vague regulation of an **assumption of criminal offences being directed at a continuing income regularly** served as a ground for PTD. A recent, more precise regulation in this respect was generally assumed to make it harder to justify PTD with this argument. In the past, this assumption was regularly employed with drug dealers (in the streets) and therefore the amendment led to political pressure. The police argued that the amendment would hamper the prosecution of these offenders. Consequently, a new regulation was introduced threatening drug dealing in public spaces with high sentences and thereby again allowing PTD to be applied in these cases more often.

A fact with respect to the PTD practice confirmed by the practitioners is the so-called **east-west decline**. This means that the PTD practice appears rather extensive in the east of Austria (the region of Vienna) and more lenient towards the west with the district of Innsbruck being called the most liberal one. Apart from a different crime structure which may explain some of the differences, this phenomenon also shows that there is quite some room for interpretation in the application of PTD law. A decisive role in this respect can be appointed to the rulings of the higher regional courts being the appellate courts.

### 1.2. Reasons to detain and the decision making

Decisions of the authorities involved in the **decision-making processes** appear to be coined by the known practice of the authorities following in the "chain of decisions and of control": Prosecutors act on the knowledge of the practice of the judges and view the rulings of the higher regional courts as central guidelines, as do the judges. Judges and prosecutors often refer to an essentially common understanding with respect to PTD. In fact, in most cases applications for PTD brought forward by the prosecution are granted by the judges.

The **personal impression** a suspect leaves with the judge during the first interrogation appears to be important, particularly for the first decision on PTD, when the file is still thin and decisions have to be made based on rather little information on the person and on social conditions. Judges in general appear to have quite some **discretion** in their decisions

on PTD. The judiciary views this discretion necessary to be able to sufficiently consider the complexity of the individual cases. Attorneys assess this discretion to be too extensive.

The importance of the **principle of proportionality** is regularly addressed. The practitioners, however, consider it mostly to be fulfilled quite easily, indicating that the requirements in this respect are not high. The Austrian Supreme Court e.g. ruled that the principal of proportionality is fulfilled if the length of the expected sentence suffices, no matter whether it is expected to be unconditional or conditional. Burglary into a home, e.g. is threatened by a sentence of up to five years. If one would only expect a sentence of about a third of the maximum, the principal of proportionality appears to be easily fulfilled indeed.

#### *1.2.1. The dominance of preventive aspects*

Austrian PTD practice is very much coined by **preventive aspects**. Available data suggests that a **risk of reoffending** is assumed in about 90 percent of all PTD-cases. This is not least due to the rather detailed regulations with respect to the risk of reoffending as a ground for detention. These regulations and their practical application mirror societal concerns with respect to security. The example of the so called "criminal tourism" indicates that **general preventive considerations** do sometimes also influence decisions on PTD although they are actually not supposed to. Furthermore, while judges and prosecutors clearly expressed that PTD may not be an anticipation of a punishment, the repeatedly mentioned aspect of "PTD teaching a lesson" at least points towards a punitive motivation.

The domination of this ground for detention seems also grounded in the frequently provided explanation that it is a **strong ground rather easily substantiated** in many cases. This is not least due to the unfavourable (social) background of many offenders. In fact, this ground is often applied with rather minor offences with assumed "criminal tourists", who are accused of property offences aiming at a regular income. Counsellors criticize the risk of reoffending being applied too extensively. While the formal prerequisites often may be fulfilled it was stated that evaluations of the real risks to be expected are hardly carried out.

This ground for detention is mostly applied based on prior convictions, often based on repeated offending, but rather seldom on the severity of offences. Prior records actually "trigger" some succeeding questions aiming at the assessment of a possible need for PTD like the time that has passed since the last conviction, alternative measures already applied and especially the question whether **prior offences concerned the same legal values** ("einschlägige Vorstrafen", eg. property offences). Carrying out a similar offence of anything but minor quality within a short period of time carries a high likelihood of PTD.

#### *1.2.2. Other factors of relevance for PTD*

It was explained that the legal requirements for the **risk of absconding** to justify PTD are more difficult to fulfil, because of a rather high threshold with respect to the expected sentence and an obligation to consider bail (if it is the only ground). Still, this ground is also

applied often, mostly combined with a risk of reoffending. The risk of absconding primarily aims at ensuring the proceedings. Interestingly, some practitioners explained that this motivation may also be pursued by applying a risk of reoffending which more strongly ensures detention. Obviously, the ground for detention central to an application is not necessarily the one which fits the actual intended purpose best, but the one which secures detention best. Apart from the motivation to secure the proceedings, procedural economics also seem to be a possible motivation for PTD. We have heard arguments that it may be possible to get a hold of a suspect in his home country with a **European Arrest Warrant**, but this would cause delays and hassle. Considering delays of proceedings and administrative difficulties it appears tempting to rather keep the suspect in custody. According to the Austrian Supreme Court, a regular **place of living within the EU** is supposed to exclude the assumption that a suspect will abscond if there are no other indications this way. Austrian judges and prosecutors do not uniformly share this view. Some called this unrealistic because, in practice, a regular place of living in the EU would often be hard to be ascertained and then suspects may not be seizeable.

Austrian nationals, but also other nationals with a regular residency and with indications of integration in Austria, are rarely detained because of a risk of absconding. Central to the assessment of a risk of absconding are a regular place of living, social ties, and integration. If these are given it is regularly assumed a suspect would not easily abandon them and thereby the criminal procedures - appearance at court, delivery of summons, etc. – are ensured. Foreigners having no residency in and no social ties to Austria are regularly assumed to have a rather high risk of absconding. The precarious social situation and the (offending-) history of many of these suspects do not only ground a risk of reoffending, but often also a risk of absconding. While the term **foreigner includes very different groups** we can assume that the characteristic of "precarious social conditions" is true for many of them. Suspects who are socially integrated apparently have a better chance to avoid PTD while others living in vulnerable conditions, engaging in criminal activities for poverty reasons are increasingly the ones in detention. Criminal law cannot solve social inequalities. The application of the criminal law however should try to avoid aggravating social inequalities.

The risk of **tampering with evidence or to influence witnesses** plays a rather minor role in practice, not least because of the rather high-level criterions. PTD only based on this risk is restricted to two months.

### 1.3. The use of alternatives

While no statistical data is available, estimates of practitioners on the share of suspects released with "**more lenient measures**" (cases decided by the judge) range from 5 to 15 percent. Their application is a regular practice with juveniles, but they are used rather seldom with adults. § 173 CCP lists a non-exhaustive list of "lenient" measures. Mostly, combinations of non-custodial alternatives in form of pledges/obligations are ordered. Regular orders to seek employment or to take up employment as well as medical/therapeutic treat-

ment are considered useful. Preliminary probation is rarely ordered for adults but often for juveniles. Different to the legal situation in Germany, PTD is not suspended in cases of the application of alternatives. If alternatives apply, the court refrains from ordering PTD, instead ordering alternative measures.

**The rather reluctant use** was reflected in the interviews. Though the view of practitioners on less severe measures varies considerably, most of them focussed on limits and problems rather than on qualities and advantages. Above all, it was regularly stressed that non-custodial alternatives must effectively meet the assumed risks. In most cases, alternative measures are not considered apt to do so. Especially with the risk of re-offending, chances to counter the risk with alternative measures were often explained to be very limited. Restrictions addressed often were a lack of effectiveness, along with problems to monitor or control them properly, but also time pressure during the pre-trial proceedings and the workload it entails. At the time of the first decision, the information available on the social situation, on the place of living, and on other aspects possibly relevant for the application of alternative measure was said to often not suffice to support release. Later, when more information is available, it was regularly said that the circumstances and the suggested alternative measures would not fulfil the requirements. With the flaws of alternative measures predominantly highlighted, **PTD appears to represent the "safe side".**

Difficulties to apply alternative measures became especially visible with respect to foreign-national suspects. Constraints on the use of lenient measures, for instance, arise from the legal status of foreigners (e.g. no access to the labour market) and/or from a lack of residency in Austria. Also, language barriers were mentioned to be a factor largely excluding some measures, like preliminary probation.

### 1.4. The actors involved

**Prosecutors** are the inducing actors, who initiate the processes by requesting PTD. This role appears to be connected to a tendency to favour PTD although prosecutors on principle also have to pursue exculpatory factors. Once the decision to apply for pre-trial detention is made, they also tend to be in favour of its extension during the course of the proceedings. This impression was nurtured by indications that prosecutors mostly tend towards "the safe side", which, according to their understanding, regularly means detention. Another observation supporting this is the fact that the representatives of the prosecution "automatically" bring in applications for an extension of PTD at detention hearings. In the interviews, this approach was legitimized by the procedural division of labour, with the judge being responsible for an evaluation of the application and for the decision. Still the prosecution does also fulfil a filtering function. They themselves stress that they carefully assess the information provided by the police, regularly filtering out cases brought forward by the police which, to their assessment, do not justify PTD.

**Judges** mostly follow the applications of the prosecution. When questioned about this fact, judges explained that the applications would mostly be well grounded. Both judges and, especially, prosecutors referred to a high level of shared assessments. All in all, the professional relationship between these professional groups appears mostly rather harmonic. Attorneys view prosecutors and judges as too close, indicating that the procedural safeguard based on the system of application and decision making may be weakened thereby.

**The defence counsellors** consider themselves the actors involved in PTD cases who have to ascertain fair procedures and limited use of PTD. They, however, also assess their chances as being restricted: Despite the principal right of suspects to ask for the presence of an attorney during the first interrogations at the police and at the court, in most cases counsellors are only involved in PTD cases rather shortly before the first detention hearing. Chances to successfully file complaints against PTD decisions were assessed to be limited.

Counsellors are also the ones whose initiative is generally expected when it comes to the question of alternative measures. The experts reviewed the performance of attorneys in this respect to be often improvable. On the one hand, short notice and often little time available were said to make it difficult to check the options and to prepare and organize alternative measures. On the other hand, attorneys were said to need more creativity with respect to possible alternatives. No generalizable differences were reported by the questioned experts with respect to the quality of representations of state paid and of privately paid attorneys – estimations refer to state paid attorneys being active in about 90 percent of all PTD cases. The fact that the system of legal aid regularly obliges attorneys without experience in criminal matters to represent in such cases, however, was regularly criticised by all groups of experts.

### 1.5. Procedural aspects and legal safeguards

Prosecutors and judges consider the time from apprehension till the first decision on PTD mostly sufficient to prepare decisions (48 hours until the transfer to prison and for the application and another 48 hours for the first interrogation and the decision on PTD). Still, sometimes the basis for the decision – normally provided by the police – may be only a thin file. Judges say that fundamental requirements with respect to the suspicion and to the grounds for detention have to be fulfilled, otherwise a suspect has to be released. For the first decision, however, some uncertainties were explained to be acceptable, considering possible dangers and the fact that a review will already take place after 14 days.

In cases of PTD, **suspects have to be represented** by defence counsellors. At the first interrogations at the police and before the court, before PTD is ordered, the suspect is entitled to have a counsellor present. However, in practice, this is reported to be the exception. With the beginning of 2017 new regulations supposedly improving early legal advice and representation were introduced. At the time of the interviews there apparently were still organizational problems in this respect. Suspects were, for instance, said to often be unclear

about the costs of "first legal aid". Late in 2017 however a quadruple increase of the use of the newly introduced first legal information via phone was reported by the Ministry of Justice. Considering the importance of an effective early access to a lawyer for suspects, developments in this context should be subject to further evaluation. Among judges and prosecutors, early representation of suspects is not uniformly viewed positively. Sceptics are afraid that this may primarily lead to suspects remaining silent, which would not always be an advantage for the suspect. Counsellors, on the other hand, stress the importance of early representation for the suspect as well as for ensuring the standards of the rule of law.

With the first decision on PTD it seems that suspects are rather **released without any order, or kept in custody**, than released on conditions. Once PTD has been ordered it is likely to be continued. Repeals were reported to primarily take place because of substantial changes concerning the suspicion or the grounds for detention, which would not happen often. Attorneys criticize this practice, talking about an "**automatism"** of continuing PTD.

Exchange of information on possibilities to apply alternative measures between counsellors and the judiciary, as well as preparations in this respect were explained to mostly take place **outside the courtroom** between hearings. If prosecution and court agree on release on non-custodial measures, the release regularly takes places immediately without a hearing. **Detention hearings** appear to be above all formal requirements, which are rarely concluded with a release of the suspect. Despite critique, the practitioners consider detention hearings important procedural events which, if nothing else, highlight detention periods.

All experts questioned confirmed efforts towards **a speedy process** in cases involving PTD to be general practice. In this context, a few judges and prosecutors explained it was better to realize a speedy process than releasing a suspect who then had to return to prison to serve the sentence. Attorneys opposed this approach, highlighting the negative effects of PTD. They particularly criticized the practice that suspects are often kept in PTD until the end of the trial to be released after the verdict with a sentence adapted to the time spent in PTD.

**Complaints** against PTD decisions were reported **to be rather seldom**. Judges and prosecutors viewed this fact to express a largely well-functioning practice. Counsellors, on the other hand, viewed this fact critically. They themselves, however, explained to only file complaints against PTD if there is a good chance to succeed. Otherwise, the risks connected to a complaint would be too high. The counsellors are for instance afraid the higher court could make statements on the suspicion which could have negative impacts on the verdict. The prevailing PTD practice in the different districts guided and strengthened by the rulings of the higher regional courts was described to leave little chance for complaints questioning this practice. In the end, PTD appears to be questioned too seldom. Judges mostly go along with the applications of the prosecutors and attorneys rarely file complaints, not least because of their knowledge about the prevailing practice and an assessment of little chance to succeed. This way not only a control option remains seldom used, but also a tool serving a legal culture directed at a continuing development. Considering e.g. the rather

wide discretion judges have, some more conflict orientation seems recommendable for the development of the legal system as well as for the quality control.

### 1.6. European Aspects

European dimensions were rarely referred to in the interviews. **The European Arrest Warrant** (EAW) was described to work well by now, as was the judicial cooperation with other countries in this context. Nevertheless, the EAW was also assessed to not guarantee that a suspect will be present for trial. Cross-border cooperation in general was explained to work well with countries with traditionally close cooperation, like Germany. The overall experiences reported on international cooperation also with other European countries differ considerably. Mostly, cross-border cooperation was explained to be rather cumbersome.

Most of the interviewed practitioners did not know about the **European Supervision Order**. Some practitioners commented positively on the option. The prevalent reactions however were sceptical, quickly referring to administrative and bureaucratic burdens which would go along with the implementation: needs for translation, lack of direct contacts to institutions involved, hassle and problems if a suspect would not appear for the trial, etc. Furthermore, different standards within the European Union with respect to the judicial systems as well as with respect to supporting measures and their availability were among the expressed concerns. All in all, judges and prosecutors largely questioned the practicability of supervision measures ordered to be carried out in other countries.

### 1.7. The vignette

The case vignette[3] discussed with the experts in all participating countries showed the strong orientation of Austrian PTD law and practice along preventive considerations, based on a practical example. Regularly, the practitioners quickly asked for additional information on the prior conviction. Assuming a prior conviction because of a similar offence (another burglary), most practitioners voted in favour of detention. Regularly, the social situation of the suspect was discussed, for instance, referring to unemployment being a factor potentially strengthening an assumption of a risk of reoffending, because of a lack of regular income. At the same time unemployment was considered a possibility for an alternative measure, for instance, including an order to take up or to seek for employment.

Assuming the prior conviction was because of another kind of offence, for instance because of an assault, the judges and prosecutors quite uniformly denied a justification for PTD.

[3] 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 year old daughter were sleeping upstairs. He got into the house by cutting the window in the front door to unlock it. The next morning, the owners discovered that precious jewellery, a laptop and money, altogether worth 3,000 euro, was stolen. The police identified the suspect from CCTV recordings. The suspect is currently unemployed and was sentenced two years ago to a cso/conditional sentence (depending on the national situations). Apparently, he is living with his parents.

# 2. Belgium

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In this briefing paper we summarize some results of the DETOUR-project as it was conducted in Belgium in 2016-2017. The findings presented in this paper are mainly based on research carried out within work streams 1 and 2 which concern the analysis of legislation, a literature review, an analysis of available statistical data, court observations and case file analysis (WS1), and expert interviews with actors from different fields (investigating judges and judges from investigative courts, public prosecutors, defence lawyers and probation officers; WS2).

After a brief introduction on Belgium and its state structure and a succinct overview of the current legal framework of pre-trial detention and alternatives for it, we continue with a discussion of some main research findings, with a focus on the question of dilemmas of pre-trial supervision and the role different actors play in this respect.

## 2.1. About Belgium

Belgium is a federal state, composed of three communities divided mainly according to language (the Dutch-speaking Flemish Community, the French-speaking French Community and the German-speaking community) and three regions that aspired to gain economic autonomy (the Flemish Region, the Brussels Capital Region, and the Walloon Region). Issues such as Justice and Home Affairs are the competence of the federal state, with some exceptions, like the probation services (since 1 January 2015 this is at the discretion of the Communities). The probation services are in charge of executing sentences in the community. In this way, the implementation of custodial measures that can be applied in the pre-trial stage fall within the federal state (organisation of the judiciary and prison service), whereas the execution of alternative measures belongs to the competence of the Communities.

On 1 January 2016, Belgium's population was 11,267,910. In 2015, the population density was 363 people per km², although Flanders (north) is much more densely populated than Wallonia (south). More than 1 million inhabitants do not have the Belgian nationality, with French nationals as the largest group, followed by Italians, Dutch, Moroccans, and Poles.

## 2.2. Legal framework

Criminal proceedings are laid out in the Code of Criminal Procedure. Since 1990, pre-trial detention has been subject to separate legislation, contained in the Pre-Trial Detention Act (of 20 July 1990). In principle, and in most cases, a criminal case is opened for any offence

known to the public prosecutor. After receiving the initial police report of the offence, the public prosecutor can decide to conduct the investigations with the assistance of the police (a process called '*information*' or '*opsporingsonderzoek*'). Another option is to refer the case to an investigating judge ('*juge d'instruction*' or '*onderzoeksrechter*'). In this case, an *instruction* ('*instruction judiciaire*' or '*gerechtelijk onderzoek*') is opened and investigations take place under the responsibility of the investigating judge and the judicial council ('*chambre de conseil*' or '*raadkamer*'), a special chamber of the district court in first instance. If the prosecutor requests special measures (e.g. arrest warrant), he must ask to open an *instruction*. Following police arrest, there are two main kinds of coercive measures that the investigating judge can apply: pre-trial detention under arrest warrant (detention in prison or at home under electronic monitoring) and alternative measures (financial bail and/or release under probationary conditions).

Under Belgian law, coercive measures are only possible when 'serious indications of guilt' are present, when it is 'absolutely necessary for public security', and when the criminal offence is punishable with a prison sentence of one year or more. If the possible maximum sentence for the offence does not exceed 15 years of imprisonment (except in terrorist cases: 5 years), remand in custody or alternatives have to be based on additional grounds (risk of recidivism, absconding, collusion or destroying evidence).

Before the arrest warrant can be issued, the suspect must be heard by the investigating judge and is entitled to a lawyer. There is no absolute maximum length of remand custody but a judicial review of the order for pre-trial detention takes place regularly. The measure of release under conditions has a maximum length of 3 months, renewable every 3 months.

### 2.3. Current debates

New legislation is and has been discussed, first of all with the adoption by the Belgian Parliament of a law proposal to amend the Constitution and extend the period of police arrest (from 24h) to 48h. And, in his *Justice Plan* of March 2015 the Minister of Justice (Koen Geens) announced a profound revision of the system of pre-trial detention: replacing pre-trial detention in certain cases with electronic monitoring at home, in other cases, and, where pre-trial detention in prison would remain possible, limiting its duration, or more, subjecting the prolongation of pre-trial detention to a special motivation obligation by the court. A very recent proposal of an expert group, working on the revision of criminal procedures, to install so-called 'quota' or a maximum prison capacity for pre-trial detainees led to lively debates in the Belgian Parliament and provoked a lot of media coverage and (critical) reactions from the judiciary and academics. Current discussions on criminal policy are highly influenced by phenomena of radicalisation and terrorism, but also by the problem of prison overcrowding. Bad living conditions in often old-fashioned and overcrowded prisons result in convictions by the European Court of Human Rights, explicit disapproval in CPT-reports and public statements (e.g. the public statement of 13 July 2017, European Commit-

tee for the Prevention of Torture), and causes problems for international co-operation (e.g. refusal of foreign EU-member States to extradite national suspects to Belgium).

In the past, especially since the turn of the century, other Ministers of Justice also thought about measures to reduce pre-trial detention, often inspired by initiatives abroad. So, for example, ideas considered were: strengthening the 'eligibility threshold' for application of pre-trial detention (from one to three years; Marc Verwilghen), establishing a list of offences for which pre-trial detention could no longer be imposed (or the opposite; 'negative' vs. 'positive' list), limiting the maximum length of pre-trial detention (Marc Verwilghen/Laurette Onkelinx), introducing electronic monitoring as an alternative for pre-trial detention (Jo Vandeurzen/Stefaan De Clerck), and extending the period of police arrest (from 24h to 48h, or even to 72h). Whilst some of these proposals were transformed into legislation (e.g. the extension of the arrest period from 24h to 48h, and electronic monitoring as option for an arrest warrant), other ideas were not, probably because they were not 'socially acceptable' and/or 'politically achievable'.

### 2.4. Back to the nineties: finally, a successful recipe?

Even prior to now, policy makers searched for solutions for the 'overuse' of pre-trial detention. Almost 25 years before electronic monitoring became operational (per 1 January 2014) and decades after the introduction of financial bail as an alternative option, in 1990 a new alternative for pre-trial detention was born, the so-called 'liberty or release under conditions'. The question arises as to whether, almost 30 years later, the main goal of this legislative reform – to limit the use of pre-trial detention – has been attained. When analysing the available data, it seems that the mission was not accomplished, on the contrary! During 2014, an average of 3,625 inmates stayed in Belgian prisons (incl. minors) in pre-trial detention. At the end of 2014, 2,479 persons were followed up by *Justice Houses* (probation service) because of a measure of release under conditions, and 105 detainees underwent pre-trial detention in the form of electronic monitoring. In total, this means that more than 6,200 persons experienced one or another kind of 'judicial supervision', awaiting a final sentence. Figures about persons released on financial bail or who only needed to comply with regulatory conditions controlled by the police (without any involvement of probation officers) are not available. Therefore, the global picture still implies a certain underestimation. For comparison, in 1990, when release under conditions and electronic monitoring did not yet exist, there were 'only' 1,800 suspects in Belgian prisons. So, in almost 30 years the total number of persons under judicial supervision before the final trial has more than tripled.

The annual number of committals to prison and placements under community supervision ('release under conditions') within the framework of pre-trial detention (supervised by the Justice Houses), amounts, in 2014, to more than 11,600 confinements and more than 5,000 new 'release under conditions'-orders (compared to 600 mandates in the year 1995). A similar tendency can be found with respect to the use of imprisonment and community pun-

ishment in many European jurisdictions during 1990-2010 (see Aebi, Delgrande & Marguet, 2015).

## 2.5. Evolutions and practices of alternatives to pre-trial detention

On first sight, it may appear surprising that – without a substantial increase of overall crime rates – the 'alternatives', and especially 'release under conditions' strongly increase, while (pre-trial) detention remains 'popular' too. However, various statements can be made to this respect from within 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 puts 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. 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.

As a possible explanation for the large number of arrest warrants, magistrates also indicate a potentially greater sensitization and willingness to report by victims of specific offences (sex offences, intra-familial violence,…), an increasing degree of illumination through progress in forensic and criminal investigation techniques, 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). Notwithstanding the strongly criticized policy towards 'short term' prison sentences (non-execution, 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: using pre-trial detention as a (incapacitating) means of calling a halt, at least for a while, to re-offending suspects who normally would be in jail. 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 ('short sharp shock'-detention).

Lawyers will usually argue that pre-trial detention is still used too often, that the criterion of absolute necessity for public safety is (often) barely or not motivated at all, that the debate on serious indications of guilt is sometimes insufficiently conducted, and/or that criteria of risk on recidivism and absconding is being addressed too easily or flexible. On the other hand, defence lawyers themselves also contribute to a certain kind of net-widening-effect. In their defence strategy, they do not longer 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 ('*out is out, whatsoever how*'); in some cases, this also works…

Despite the fact that alternative measures are often pleaded and imposed, they are usually granted after a period of pre-trial detention in prison. As research in some (Walloon) judicial districts shows, 60-80 per cent of the 'release under conditions'-measures are preceded by detention. One of the main reasons for this is that it is not always easy to put alternatives into practice, due to structural obstacles. This concerns, *inter alia*, the lack of adequate extra-mural mental health and social care services in some regions, not enough capacity, long waiting lists, difficulties to organise intake interviews with pre-trial detainees, some suspects not asking for treatment or being difficult to 'motivate', problems with (native) language, strict exclusion criteria towards clients with multiple problems, towards justice clients in general, or more specific for pre-trial detainees, rejection because not yet being convicted and still being presumed innocent.

Electronic monitoring in turn, formally no alternative but an execution modality of an arrest warrant, has so far certainly been much less popular than the measure of 'freedom or release under conditions'. In Belgium, the application of electronic monitoring remains limited. In 2016, 800 suspects were placed under electronic monitoring, compared with more than 10,000 arrest warrants with detention in prison. Also, the variation in practices between judicial districts is 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 Namur and Luxembourg. There are several reasons why electronic monitoring in the pre-trial stage is barely used. Some magistrates are not so familiar with this measure, especially its technological (im)possibilities, there is no pro-active publicity campaign from the monitoring centres towards prosecutors and judges, there may be fear for (and experience with) additional administrative caseload, and serious doubts arise with respect to the ability to effectively prevent risks of recidivism, absconding 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*", 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, which heavily affects the lives of suspects and their families (cf. 'pains of electronic monitoring'). While some advocate more flexibility, others argue that it is the only measure that resembles 'real detention' and therefore is considered as a way of serving pre-trial detention, and not an 'alternative'.

The situation of foreign nationals without permanent stay in the country demands special attention, as their presence on the territory is often seen as one of the major 'causes' of the

frequent use of pre-trial detention (executed in prison). Not only do 44.8 per cent of the total prison population and more than 55 per cent of the remand population consist of non-Belgian citizens, a lot of people in this latter category do not have a regular place of residence in Belgium. In 2013, 34 per cent of the remand prisoner population did not dispose of a right to reside on the territory. This population is barely seen as eligible for 'release under conditions', and the same applies for electronic monitoring. Having a fixed residence in Belgium is often considered as a pre-condition for electronic monitoring, and release (under conditions) seems difficult to reconcile with a residence status to which risks of absconding or flight are associated, it appears to be contradictory to decisions of other authorities in the field of immigration policy, and also, international tools such as the European arrest warrant are seen as inappropriate and inadequate in this respect. The question arises as to whether – the very recent transposition into domestic law of – the European Supervision Order can bring a solution. For the moment, only financial bail (often considerable amounts of money) is sometimes used (as anticipated punishment?), but mostly after a period of detention.

### 2.6. Critical comments on alternatives

'Alternatives' to pre-trial detention, such as 'release under conditions', are not without any criticism, although suspects – after a quick and immediate judicial response to their acts – might be motivated to change their situation, bearing in mind eventually more favourable sentencing outcomes. The 'alternatives' do not seem to have their intended effects on the extent of the prison population, neither general nor remand. In addition, other critical questions about alternatives arise.

Often, a lot of and diverse types of conditions are imposed, and in recent years there is a tendency of an 'aggravation' of conditions. Many conditions have a therapeutic and/or even repressive/punitive intention. Sometimes 'alternatives' resemble 'real' probation measures (as imposed when there is no single doubt of guilt anymore), and thus starting from the point of view of a "*presumption of guilt*".

And, even though measures of 'release under conditions' can only be imposed if they meet the same legal criteria as pre-trial detention (and electronic monitoring), usually they are initially imposed for longer periods of time, frequently renewed, and, in consequence, on average last longer than pre-trial detention. This happens without the period of the 'alternative' being deducted from the final (prison) sentence, without regularly reviewing its necessity as it is done with respect to pre-trial detention decisions, and without allowing for compensation in case of inappropriate use (in contrast to 'inappropriate detention').

Is there a future for less pre-trial detention even without alternatives…? *Quo vadis*? A real dilemma, because… must the 'alternatives' not also remain an '*ultimum remedium*'?

# 3. Germany

*Christine Morgenstern, Eva Tanz*

## 3.1. Pre-trial detention in a nutshell

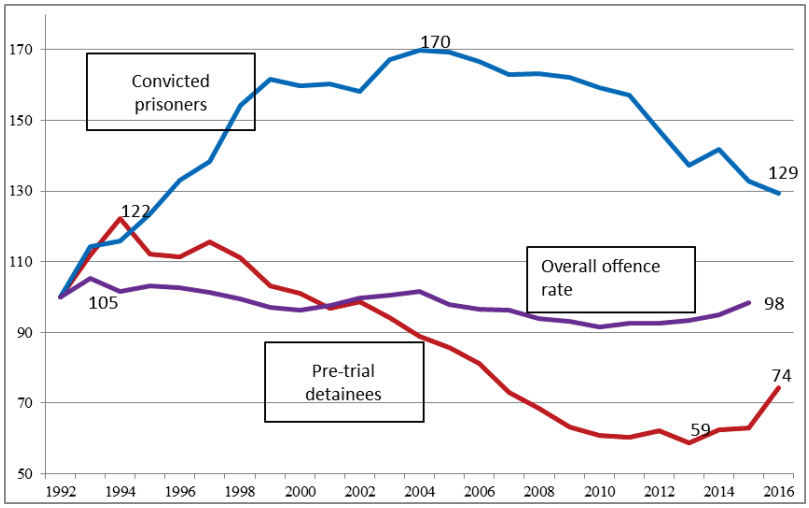
In German law, Untersuchungshaft (literally: "investigation detention") is the deprivation of liberty of an untried or not yet finally convicted person. Its legal bases are the German constitution (Grundgesetz = Basic Law, BL) and sec. 112-130 of the Code of Criminal Procedure (Strafprozessordnung).

Pre-trial detention (PTD) can be preceded by a temporary detention ("preliminary arrest", vorläufige Festnahme) by the police of a maximum of 48 hours. According to German law and doctrine, the main objectives of pre-trial detention are to ensure the public right to a thorough investigation of a crime, to ensure criminal proceedings according to the rule of law, and – if applicable – to ensure the execution of the sentence. Nevertheless, the prevention of new (serious) crimes is also accepted as one objective of pre-trial detention, although the preventive aim is incoherent in the system, in particular regarding the presumption of innocence.

The only way to supervise a suspect or accused in the community - and as such the only "alternative" to pre-trial detention - is the suspension of an arrest warrant (Haftverschonung, sec. 116 CCP). Normally, the warrant is suspended under conditions and obligations such as providing a financial surety, reporting to the police regularly etc. In these cases, the judge always has to comply with the requirements for PTD and must first issue an arrest warrant. Only if these prerequisites are met, s/he can – and because of the principle of proportionality *de jure* must - release the suspect or accused under certain conditions. This mechanism rather results in a reduction of the time in detention than in avoiding custody from the start.

Since the political reunification of the two German states in 1990, the number of prisoners has seen quite some variation, depicted in *fig. 1*.

**Figure 1: Context data, indexed for 1995, 1995-2015**




Source: Own calculations based on data by Statistisches Bundesamt 2016 (Strafvollzugsstatistik) and the Bundeskriminalamt (Polizeiliche Kriminalstatistik) and earlier.

The early 1990s were marked by sharply increasing figures. The overall number of detained persons almost continuously rose until 2004, peaking at about 81,000 detainees, and reaching its low in March 2013 with 63,317. The number of remand prisoners hit a turning point already in the mid-1990s and descended slowly, but steadily until 2011. Peaking in 1994 with about 21,700 remand prisoners, the number had been halved twenty years later (31 August 2013: 10,560 as the lowest number since the reunification). The share of pre-trial detainees then fell below 17%. Since then, we find increases – a moderate of 1.7% regarding the overall numbers, a more expressive one in regard to pre-trial detainees (31 March 2016: 13,389, representing an increase of 20.4% within three years). The remand share now is 21%.

As illustrated in *fig. 1* this development cannot be explained easily by the crime rates that – at least when looking at all crimes – has been relatively stable.

For a few years now, foreigners outnumber Germans in pre-trial detention – statistics on this group, however, are not included in the official data collection (Strafvollzugsstatistik), therefore we have to use different sources, and partly own surveys. While in 2008 43% of all pre-trial detainees were foreigners, the number was 53% in 2013 (and again has slightly risen since, as far as we can see from regional data). Considerable regional disparities exist (from 20% in Thuringia to 76% in Hamburg in 2013). The same development can be seen for EU nationals in PTD, whose share rose from 15% in 2008 to 26% in 2013. This is in contrast to considerably lower percentages of foreigners among sentenced prisoners (in March 2015 only 25%), among suspects (in 2015 25.7%), and among convicted persons (in 2014 26%).

For many years, the only reform project for pre-trial detention legislation aimed at strengthening the procedural rights of suspects. Most importantly, since 2010, a *defence*

*lawyer* (paid by the state, if necessary) is obligatory in all cases where remand detention is actually enforced. Secondly, the right of the defence to inspect files was strengthened.

**In our research** we have observed detention hearings in Berlin and analysed a few files to prepare our interviews. We interviewed 12 judges, 8 public prosecutors, 10 defence lawyers and 3 prison staff mainly in Berlin and Mecklenburg-Vorpommern, a few also in Northrine-Westfalia and Hamburg.

### 3.2. Reasons to detain, and decision-making

Sec. 112 (1) CCP holds two cumulative prerequisites for pre-trial detention: There needs to be a strong (literally an "urgent" or "exigent") suspicion (*dringender Tatverdacht*) that the suspect committed the alleged offence, and there needs to be a ground to remand him or her (*Haftgrund*). Sec. 112-113 CCP lists four grounds to order pre-trial detention:

- flight or the risk of absconding (Flucht, Fluchtgefahr),
- the risk of obscuring evidence (Verdunkelungsgefahr),
- the risk of repeating or continuing a listed offence of a (relatively) serious nature (Wiederholungsgefahr),
- the gravity of the offence (Schwere der Tat) in cases of very serious allegations, mainly capital offences.

The first ground mentioned, namely the **risk of absconding, dominates the practice** – this can be seen from the statistics (93% of all detention orders = arrest warrants are based on it) and was confirmed by our interview partners. Sometimes, and obviously dependent on the region and the share of foreigners among suspects, the risk of repetition also played a role. When reflecting the reasons for this dominance of the "risk of flight", some interview partners hinted at the legal construction that make this ground the easiest to operate. Indeed, the legal prerequisites for the risk of repetition are more elaborate and the risk of tampering with evidence often is harder to prove factually. Behind this traditional dominance also stands the **overriding aim of securing that the trial can take place**:

> *"So, in first instance it secures the trial and in second instance the execution of the sentence. This means, when I have to fear that somebody will not come at all to the trial, that can have any result, I principally have to keep him here".* (interview 15, judge)

While it was explicitly acknowledged by some of our interview partners that the **expected sentence** may not be the sole argument to base a decision on, it nonetheless plays a central role when the risk of flight is considered – once a "perceptible" sentence is expected, the assumption is that the suspect would try to avoid it. When asked for thresholds, very diverse answers were given ranging from 6 months ("you can try it", interview 8, Public Prosecutor) to 5 years ("almost impossible to avoid PTD", several respondents). Often the threshold seems to be an enforceable prison sentence – in Germany only prison sentences of up to two years can be suspended. Such a huge range of different assessments of a sen-

tence severe enough to stimulate flight is an indicator for an incoherent and somewhat irrational judicial practice.

The expected sentence also was considered with regards to **proportionality** – this, however, often does not play a role, even for minor offences, for socially marginalised suspects that are repeat offenders; here, shoplifting often also leads to PTD (or a particular speedy procedure, at least in Berlin).

**Previous convictions** play a role in so far as they may increase the expected sentence.

With regards to the **personal circumstances** that may trigger or hinder PTD, housing – a permanent address – was the main factor considered. Stable family bonds and employment or education were additionally mentioned as stabilising factors (and, if missing, as indicators for the risk of absconding).

**Foreign nationals** do not *per se* run a greater risk of being detained, but the risk of absconding is always linked to stable living conditions in Germany. Therefore, certain subgroups often cannot avoid detention: so-called travelling offenders, those with insecure residence status or those who are already illegally residing, and, due to recent events and political/media pressure, certain groups of young men coming from Northern Africa and/or Arab countries (also depending on regional particularities such as problematic hot spots, for example for drug crimes).

German nationals with **contacts abroad** (bank accounts or second homes) would also be detained because of the risk of flight, usually in more serious cases of economic crimes.

Lawyers pointed out that the risk of flight is grossly overstated:

> *"... maybe 10% of all people that actually are taken into custody because of a risk of flight would actually abscond ... most of the people do not go into hiding, because flight is an unbelievable stress. Financially, the fewest have the possibility... simply not being at home is permanent anxiety, most people can't stand this."* (interview 5, lawyer)

Drug addiction is a feature often mentioned with regards to PTD practice, while the problem of a rising number of mentally ill suspects, discussed in the literature, was only recognised by some interview partners. They, however, pointed out that it is an "exploding problem" (interview 26, lawyer) and very difficult to handle for an unaware and understaffed judicial system.

### 3.3. Avoiding PTD – the use of alternatives

Usually, our interview partners did not want to estimate how many of the arrest warrants, to their experience, are **suspended**, but some at least were able to give rough assessments: While they agreed that this usually happens **rarely in the first hearing** after the initial arrest, it happens more often in later review hearings – between 20% to 40% according to personal impressions by our respondents. Some reported a tendency that these suspensions happen more often than some years ago and that there is a chance for defence lawyers to

successfully argue for such a suspension **earlier** than before, namely in the first detention review that takes place usually after two to three weeks.

There was great consensus among all interview partners that the defence lawyers, in most cases, are the ones who start the discussion about suspending the sentence and possible conditions. These conditions, in most of the cases, include obligations to report to the police, usually weekly. Money bail is hardly used by our interview partners. Electronic monitoring is not used in Germany as a condition to a suspended arrest warrant, except in one Federal State (Hessen) that was not in our sample. Most interview partners said that they don't miss that possibility, except for a few (but by far not all) lawyers that would welcome it.

One of the very clear results in our expert interviews was that most respondents assess that **alternatives generally worked** in their professional experience. We simply asked, 'Does it work?' (meaning the suspension under certain conditions), and most respondents clearly and shortly said something like "Yes, it does". That the lawyers may be very positive about this possibility was perhaps less a surprise, but also judges and public prosecutor said that the suspects generally fulfilled their obligations and also stood trial.

### 3.4. The actors

Constitutional and criminal procedural law attributes the responsibility for the detention decision to the **detention judge (Haftrichter).** This judicial decision, however, depends largely on the submissions of the public prosecution and the police. One interest of our research was to see how the different actors assessed their own role, influence, and responsibility in decision-making. In several interviews the respondents used the image of a system with several filters:

> *"The first preliminary test runs already with the police, which looks at what is going on, which direction it might take, which offence, is there a prison sentence in question or not. Then here with us at the prosecutor's office, where really the course is almost set. And once again more careful, with more peace and quiet and with better information, which is prepared on the table, the judge. These are different filters, I always imagine that for me." (interview 19, public prosecutor)*

We asked, quite boldly, **who actually dominates** the decision-making process in (the initial phase of) detention matters, and the interview partners had to decide for one actor. Some tried to get around the question, but most of them gave an assessment. This varied to an astonishing degree, with most lawyers attributing the most influential and, in that sense, dominating role to the public prosecution. Several public prosecutors, and even some judges, agreed – the majority of **judges**, however, said that it was them who actually have and take the responsibility for the decision and therefore saw themselves as the dominating actors.

The **suspect** usually does not play an active role in the proceedings and hardly articulates him- or herself in the detention hearings.

The important role of the **public prosecution** has to do with their task in the early stage of the proceedings – according to the German CCP, the PP is the "master of the investigation". Regarding the detention decision, the judges are dependent on the PP's preparatory work and gathering of information, which in practice leads to a dependence on investigative work actually done by the police.

The role of the **defence** in pre-trial detention matters was strengthened with the reform in 2010: Only since then is a defence lawyer obligatory (and needs to be paid by the state, if necessary) in all cases where PTD is actually *enforced*. Further demands that a mandatory defence counsel should already be appointed when an arrest warrant is *requested* by the public prosecution were discussed in a more recent reform project, but were rejected. According to German law, however, suspects are entitled to seek advice and support by a defence counsel in any stage of the proceedings, so in some - but often not everyday street crime – cases, the suspect already has a lawyer quickly after the arrest regardless of a state appointment.

Since s/he often comes in only very shortly before the first detention hearing (if at all), the possibilities to influence this are very limited, as both lawyers *("we have little possibilities to define [the situation], we rather have possibilities to intervene",* interview 20) and the other actors confirmed. They become more important during the detention phase, in particular with regards to review hearings.

All interview partners agreed that there are **no quality differences** between state-paid and privately paid lawyers in detention matters; rather, criticism targeted some unengaged and uninspired lawyers mainly interested in getting fees for, sometimes useless, review requests.

### 3.5. Procedural aspects, duration and review

There is a **strict time limit on the first decision of a judge in a detention case**: "Without delay", but no later than at the end of the day after the arrest, the suspect must be brought before the judge. The judge then has to decide upon detention in **two possible scenarios**:

- In the first, a judicial arrest warrant already exists, often based on longer investigations, which means that a more or less substantial and voluminous case file is brought before the judge together with the suspect. In this scenario, a first judicial decision towards detention has been made, so usually it is a question of confirming this decision.
- The second scenario represents the situation that the suspect was preliminarily arrested by the police more or less directly after an alleged offence (sec. 128 CCP); according to empirical studies, this is the more frequent scenario. In our interviews it

also played a greater role – either because the judges interviewed were particularly working as stand-by judges for these cases or the defence lawyers interviewed dealt with that kind of "ad-hoc clients".

This means that our interview partners usually have to deal with **situations in which a decision has to be made within a relatively short period of time and with usually only a thin file containing not much information.**

The **right to inspect files** was strengthened with new provisions in the CCP in 2010.We hardly heard complaints in that regard – most lawyers said that they usually get the files without problems. It is important to know, however, that a **formal request** of getting access to the files is always necessary – this **causes delays** and is not a sensible requirement since all lawyers need the files for their work, as was acknowledged by all our respondents.

While we had the impression that file and paper work dominate the process, and also the decision-making, all interview partners said that there is a lot of **informal communication** – in the early phase of the proceedings between police and PP and later PP and judge, possibly with the result that requests for arrest warrants are declined because they are not substantiated in the eyes of the next decision-maker in the "decision-chain". Once a lawyer is involved, s/he also communicates informally, mostly with PP, but also with judges. Sometimes the discussions are practical (files, information, hearing, and trial dates), sometimes cases are "negotiated" in a "consensual form of defending the client" (interview 9, lawyer).

A lot of deficits, however, were observed regarding the **gathering of information**, partly because responsibilities were unclear or shifted from one actor to the other:

> *"One of the facts that really make me unhappy personally is that detention matters are often operated with insufficient knowledge. Then positive circumstances are not considered because they have not been ascertained. … this is the task for the court and the PP, to determine the facts. They have this duty ex officio to investigate positive aspects. … I want to emphasise that it is not their [the lawyers'] job, but in the forensic reality it is the standard that if something is presented concerning the personal circumstances, it comes from the defence." (interview 13, judge)*

The **duration** of PTD did not play a major role in our interviews, perhaps because, at least in Berlin, the street crime cases in the competence of the district court are usually proceeded quite speedily and certainly within the six-month time limit foreseen by the CCP. Some responses indicated that this is different in the ambit of regional courts where more complex cases are tried, in particular regarding serious economic crimes. The prison director we interviewed said that in his prison PTD lasts "rarely below 6 months".

We observed, on the contrary, a **new enthusiasm for speedy procedures**, in particular regarding foreign suspects.

Several means may lead to a **review of detention**. They differ in the procedural form (written or oral), the frequency of use, and the state of proceedings. The most important are

the application for a review of detention (sec 117 CCP et seq.) and the complaint against a remand decision sec 304 CCP et seq.). Both aim at either a revocation of the arrest warrant (sec. 120 CCP) or the suspension of its execution (sec. 116 CCP). The latter happens far more often, as has been indicated above – even if it sometimes is a "foul compromise" in cases where PTD could legally be challenged because either the suspicion is not strong enough or the facts do not properly justify a ground for detention. However, pragmatism reigns:

> *"The silver bullet is just to issue an arrest warrant and then to suspend with suitable conditions, then both sides are usually happy."* (interview 17, judge)

Also, one of the interviewed defence lawyers argued that neither for her nor for the client there is a big difference between the rejection of an arrest warrant or the suspension, as long as detention is avoided; at least not when the usual obligation to report to the police is the only condition attached, since this is not a very restrictive measure.

### 3.6. European aspects

Even if the European influence by the **European Convention on Human Rights** may be stronger in other countries, the convention is also consulted and implemented in domestic German criminal proceedings related to pre-trial detention. Due to the strong backup of the individual criminal procedural rights by the constitution and the jurisprudence of the FCC, the case law of the ECtHR is perceived as being of lesser importance. Nevertheless, the ECtHR has convicted Germany several times in recent years for breaches to the convention by law and practice of the pre-trial detention. The judgements related to the length of pre-trial detention and to the right to inspect files to ensure fairness in the review proceedings.

In the meantime, influence from the **European Union** on the national criminal procedure evolved, although the German attitude – of both scholars and the judiciary - towards such a development has been a seriously sceptical one for quite some time. The FCC, in particular, highlights the cultural, historical and linguistical imprint of penal law in its judgement concerning the Treaty of Lisbon. It even joins in with critical criminology ("governing through crime") in pointing at the risk of criminal law being misused as a technical instrument for carrying out international cooperation. In spite of these fears, German law enforcement agencies in practice seem to have accepted the new possibilities of EU legislation, at least to some degree, and, for example, make use of the EAW rather briskly – this was confirmed by some of our respondents. Slowly, German courts also accept, at least **where EU-citizens are concerned,** that the fact that someone holds a foreign passport and lives abroad does not necessarily justify pre-trial detention because you can contact and summon him or her there – this however, was **confirmed by only some respondents** while others clearly indicated that it does not make a difference:

> *"[…] on every occasion you talk about a unified Europe, but when you look at detention judges' decisions, you would find often enough arrest warrants saying 'He does not*

*have a fixed abode in the Federal Republic of Germany' and then the court is not fussed about this person having in the neighbouring country Poland the same address for 20 years, because they are too lazy and too comfortable or too delicate to respect this and to get that information."* (interview 26, lawyer)

The European Supervision Order (ESO), however, aiming at facilitating pre-trial supervision in the community 'at home', was transposed into German legislation only with considerable delay and has hardly been used in practice yet. Most of our respondents did not know it, only two had practical experience, both in Berlin and each in one single case.

## 3.7. Outlook

While the overall situation of PTD practice may not be alarming, we found several areas of concern and reasons to act – namely regarding detention thresholds and proportionality considerations, appointing a lawyer at an earlier stage, proper information gathering of the suspect's personal situation, and speeding up the process of accessing files for lawyers.

PTD, however, is not very high on the agenda in German criminal policy discussions. Even despite considerably risen numbers of pre-trial detainees in the last three years, it currently does not seem to be perceived as a problem – only a few voices among the defence lawyers and even fewer among the judiciary try to raise awareness and promote reform. It is not likely that they will be heard.

# 4. Ireland

*Mary Rogan, David Perry*

## 4.1. Introduction

Semi-structured interviews were carried out with 26 participants, comprising judges, prosecution lawyers and defence lawyers. Ethical clearance was granted by Trinity College Dublin, School of Law. Interviews were transcribed and coded, with a thematic analysis employed.

## 4.2. Overall Reflections on the Bail Process

- Participants generally felt that the bail/pre-trial detention regime in Ireland was quite liberal, with priority given to the presumption of innocence and the right to liberty.
- The Irish Constitution has been interpreted to include a presumption in favour of bail. This was viewed as being influential in practice, and was taken seriously by prosecutors, defence practitioners and judges.
- Prosecutors, defence lawyers and judges tend to start out their analysis of whether or not bail should be granted from the position that bail ought to be granted.
- Bail is considered to be the norm in Ireland, with some special factors needed to merit pre-trial detention.
- Participants generally felt that bail practice had not changed considerably in Ireland over the past twenty years or so, but some did express concern that there may be more use of pre-trial detention in the future.
- Participants felt that there was a generally hostile media and political climate towards bail, particularly where burglary is concerned.
- Participants felt, generally, that judges were not influenced by this climate.

## 4.3. Basis for decision-making

- Participants noted that the police in Ireland have a lot of influence over the use of pre-trial detention as they can grant “station bail” at a very early stage of a criminal prosecution.
- Participants felt that the view of the police also has an effect on whether or not the Office of the Director of Public Prosecutions will object to bail.
- Prosecutors felt that, while the view of the police was important, they would advise the police if the grounds for an objection to bail were very weak, and police objections would not be determinative.

- The legal framework for the use of pre-trial detention in Ireland, coming from the *O'Callaghan* case decided by the Supreme Court and section 2 of the Bail Act 1997 were viewed as the guiding principles for decisions on bail in Ireland. These are real ground rules for the decision-making process, which all parties consider in their work.
- The most important ground, in the view of participants, is whether or not the person will turn up for trial.
- The risk of offending while on bail, introduced as a ground by section 2 of the Bail Act 1997, was viewed as not having a major effect on the decisions concerning pre-trial detention.
- While the risk of offending ground was regularly made as an objection, it was not always made by prosecutors. Where it was made, it was felt that this was when the case was weak overall.
- It was felt that denial of bail on the grounds of a risk of offending was still quite unusual as the sole reason for the use of pre-trial detention, and such cases would probably have been denied on the basis of the *O'Callaghan* principles anyway.
- Participants felt that the standard for a denial of bail on the grounds of a risk of offending was quite high, and difficult to prove.
- For most participants, the most important factor in decisions on whether or not to use pre-trial detention was the history of not turning up for trial previously (known as taking "bench warrants").
- Prior history of committing offences on bail is also very influential.
- Less important than these two factors, but still relevant to the decision-making process, are: the seriousness of the charge; the length of time until the trial; and the strength of the evidence.
- Some participants felt that not having a stable address and being homeless meant it was much more likely that a person would be put into pre-trial detention, but others, including judges, disagreed.
- Being from outside Ireland and from a member state of the European Union was viewed as being a neutral factor, but there was a greater concern that the person was a flight risk in such cases. However, being from outside the European Union was viewed as making it more likely a person would be put in pre-trial detention. The European Arrest Warrant was cited as a key factor in this regard.
- Having no, or very few, connections with Ireland meant it was much more likely that the person would be put in pre-trial detention in the view of the participants.

### 4.4. Less severe measures

- The role of conditions attached to bail is very important in Ireland, and certain conditions are viewed as meaning that bail is more likely to be granted. Financial bail and an independent financial guarantee are viewed as highly persuasive. Having a

place on a residential drug treatment programmes is also viewed as very important where there is evidence of addiction.

- There was a view that the standard conditions where bail is granted are: signing on regularly with the police, being subject to a curfew, being contactable by mobile phone, and staying away from certain areas or people. Many participants, especially defence practitioners, criticised a tendency to impose conditions which are unnecessary, and disproportionate. This was especially the case when there were strong objections to bail by the prosecution.
- There was a clear sense from prosecutors and defence lawyers that there was a good deal of variation amongst judges in their approach to bail in Ireland.
- The lack of electronic monitoring at the pre-trial stage was not viewed as a major problem in Ireland, with many participants saying that a police-monitored curfew and the requirement to be contactable by mobile phone amounted to the same thing.
- There were mixed views on whether electronic monitoring would be valuable. Some participants felt that it would lead to more granting of bail, and that defendants may seek electronic monitoring instead of bail. Others feared that most people would be subject to electronic monitoring, even when it wasn't needed.
- Bail hostels were viewed with some caution. Participants acknowledged that they could assist where a person was homeless, but expressed concern that they might become quasi-prisons and that addressing the lack of housing in other ways should be a priority.

## 4.5. The role of the actors in the decision-making process

- It is the role of the prosecutor to object to bail on established legal grounds. There was evidence that prosecutors apply a kind of self-restraint in bail applications. Prosecutors do not object in every case, and will consent to bail if the objections are not strong enough to merit pre-trial detention. Consent to bail remains quite a widespread feature of Irish bail practice at the District Court level.
- Judges were viewed as having very wide discretion, within the legal guidelines.
- There were different views expressed as to who the dominant parties were in decisions on pre-trial detention. Many participants felt that the proceedings were quite evenly balanced.
- Defence lawyers play a very active role in decision-making concerning pre-trial detention. As well seeking to undermine the prosecution's objections to bail, defence lawyers also play a key role in suggesting conditions which would alleviate the court's concerns about granting a person bail.
- Probation staff are not formally involved at the pre-trial stage, but could be informally e.g. if a person was serving a sentence for another offence, or if a judge decided to adjourn the matter under supervision for a period.

- There were concerns expressed about more involvement by probation staff in the pre-trial process as this may erode the presumption of innocence. Resources were also considered to be insufficient at present.
- Participants generally agreed, however, that matters such as drug addiction and mental health did require assistance at the pre-trial stage.

## 4.6. Practical Operation of Bail Hearings and Procedural Aspects

- Many participants referred to time pressure in preparing for a pre-trial detention hearing. Defence lawyers often had very little time to prepare; this was especially the case at the District Court level.
- Some judges felt that more information in advance of the case and time to consider the matter would also help their decision-making.
- There was also a burden on judges evident. The weight of responsibility was clearly felt by judges. There is also a concern that judges can do too many pre-trial detention hearings in a row, leading to fatigue and frustration.
- The possibility of review and appeal was an influential factor, and viewed as a constraining factor in the use of pre-trial detention. The possibility of appeal and review were considered important safeguards for liberty.
- Having legal representation paid for by the state where the defendant cannot afford it was also considered to be a very important protection.

## 4.7. European Aspects

- There was generally extremely low awareness of the European Supervision Order.
- There were interesting examples related of the Irish courts taking an informal approach to situations where a person needed to go back to another country. A kind of 'shadow' European Supervision Order seems to be in place for some cases, especially regarding Northern Ireland.
- Most participants felt that the European Supervision Order would be of benefit.
- Concerns expressed about the European Supervision Order included: questions of trust in the monitoring of conditions in other jurisdictions; confusion as to the responsible agency to deal with matters; and who would be responsible for varying conditions when changes needed to be made.
- Participants were very familiar with the European Arrest Warrant, and considered it to be working well. Participants felt its existence made it easier for EU nationals to obtain bail.

## 4.8. The vignette[4]

- The majority of participants felt that pre-trial detention would not be ordered in this scenario. Many felt the chances of pre-trial detention were extremely low.
- Participants used the legal grounds to direct their reasoning.
- Most participants felt that the lack of a prior history of not turning up for trial was a very influential factor, and made it very likely that bail would be granted.
- Most participants felt that a risk of reoffending was not a strong ground in the case.
- The lack of a long record of prior criminal convictions was also considered to be a very influential factor.
- The offence was generally viewed as serious, but was usually outweighed by the lack of a history of failing to turn up for court.
- It was felt that the likely conditions which would be offered and ordered in this case were: a financial guarantee; a curfew; signing on; and staying away from the injured party.
- Strict conditions were viewed as a genuine alternative to pre-trial detention.
- A previous record of burglaries was viewed as making it more likely that bail would be denied, but many participants felt that this would not be determinative.
- Being a foreign national, especially an EU national, was not viewed as being especially decisive.
- Having a drug addiction was considered a factor making it more likely that bail would be denied, but this was not viewed as being especially decisive.

## 4.9. Conclusion and future directions

- The risk of not turning up for trial continues to be the most important ground on which pre-trial detention can be denied in Ireland.
- Concerns were expressed by many participants that Ireland may be becoming more in favour of pre-trial detention, and this was evident within political and media discourse.
- Participants felt that recent High Court practice was also leading to more denials of bail applications.
- More support for judges to share practice, to find out about international developments and educational opportunities were recommended.

[4] 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 year old daughter were sleeping upstairs. He got into the house by cutting the window in the front door to unlock it. The next morning, the owners discovered that precious jewellery, a laptop and money, altogether worth 3000 euro, was stolen. The police identified the suspect from cctv recordings. The suspect is currently unemployed and was sentenced two years ago to a cso/conditional sentence *(depending on the national situations*). Apparently, he is living with his parents.

# 5. Lithuania

*Skirmantas Bikelis, Virgilijus Pajaujis*

## 5.1. Lithuania in the context

In the DETOUR project, Lithuania is representative of Eastern European post-Soviet countries. These counties share two specific characteristics. First, they inherited a repressive legal culture focused on security and deterrence. Now they are in transition towards pro-human rights approach, which is based on the principle of proportionality and promoted by the European Court of Human Rights. A substantial shift in professional attitudes and practices takes time; even generations. Legal reform can catalyse change in practice, but cannot bring immediate results. Lithuania still has the highest rate of imprisonment in the EU (278 per 100,000 inhabitants, 2015, SPACE) and one of the highest rates of detainment (34 per 100,000 inhabitants; only lower than Hungary (38), Estonia (47) and Latvia (55), 2015, SPACE). Compared to other EU countries, the level of repression against the nationals in pre-trial detention is even higher in the light of the fact that foreign nationals make up only 3% of detainees in pre-trial detention (in Austria 73%, Belgium 67%, Germany 55%). However, positive indications of development towards the practice of detention as ultima ratio can be observed. From 2004 to 2016, the rates of detention decreased by 45%; from 38,2 to 21,1 detainees per 100.000 inhabitants (data from Ministry of Interior of Lithuania). The crime rate also dropped in the same period, although by a lesser 23.3%. Thus, a rather significant change in detention practices can be observed over the last thirteen years.

The second characteristic of most Eastern European countries is a very low inflow of foreign nationals, on one hand and a high (even 'massive') outflow of nationals, on the other. Due to the high rates of emigration, many suspects appear to have connections to foreign countries, in other words, are closely connected to a higher risk of abscondment. For suspects that are foreign nationals of the neighbouring states of Russia or Belarus, legal practitioners are even more sensitive to their abscondment risk owing to the fact that legal cooperation with their home state is complicated.

## 5.2. Basics of the legal framework

The Lithuanian Code of Criminal Procedure provides that provisional measures may be employed to secure the presence of the suspect during the proceedings, including the judicial hearing and execution of the judgment; to ensure unhindered pre-trial investigation; and to prevent the commission of new criminal acts.

The code provides an exhaustive list of the available measures: 1) pre-trial detention, 2) intense supervision (electronic monitoring), 3) house arrest, 4) obligation to live separately from or stay away from the victim, 5) financial bail, 6) obligation to report to the police, 7) commitment not to leave, 8) seizure of personal documents, 9) for a soldier-

observation/supervision by the command of the unit where he or she is s doing his or her service and 10) for a minor–committal to the supervision of parents, guardians or foster parents or the administration of a children's institution. More than one measure that is less severe than pre-trial detention (PTD) can be imposed simultaneously on a suspect.

The law directly declares PTD as ultima ratio, as it explicitly establishes that PTD may be applied only when more lenient alternatives are deemed to be insufficient. The law also provides that the court has a duty to provide a justification, upon deciding to apply PTD, which defends the decision and establishes that more lenient measures would be ineffective.

During the pre-trial investigation, the prosecutor plays a predominant role in the imposition of PTD measures. He or she has authority to decide to impose bail or other more lenient measures. On the other hand, PTD, intense supervision, house arrest and obligation to live separately, can only be imposed by the court, upon the request of the prosecutor. The court has the discretion to impose a less severe measure than the one requested by the prosecutor. Investigators have the authority to impose the least severe measures (LSM): obligation to report to the police, commitment not to leave and seizure of personal documents.

## 5.3. Overall reflections on recent developments

- A significant downward trend in the application for PTD was observed during the period between 2004 and 2016.
- These changes are not related to any legal reforms as no significant changes in relevant legislation have been made. The option to impose electronic monitoring was only introduced in April 2016.
- Lower rates of PTD may be due to a shift in professional (both prosecution and judicial) attitudes, towards a more liberal, human rights-based approach. As a result, the level of scrutiny imposed in the imposition of PTD may have increased in practise. Also, respondents have noted an abandonment (at least to some extent) of formerly common improper practices, including the use of detention for other than legal aims (e.g. to force suspect to confess or to punish him or her), the informal contacts between a prosecutor and a judge and the limitation of the right of the defence to receive all relevant case files.
- The shift in judicial and prosecutorial attitude might be explained by: (1) the steady promotion of high standards in the precedents of the ECHR and Lithuanian higher courts, the internal communication within prosecutoral organization and academic discourse and (2) the influx of the younger generation (educated in the light of contemporary human-rights-focussed standards) into the judicial and prosecution profession. The effective implementation of the European arrest warrant (EAW) system might also be a factor in facilitating more limited use of PTD because the EAW sys-

tem lowers the risk that a suspect's absconding could damage the interests of justice.

- **Therefore, further institutional and academic promotion of PTD as ultima ratio, combined with the promotion of effective international co-operation, might further limit the imposition of PTD.**

## 5.4. Basis of decision making

- The predominant justification for PTD depends on the category of the offence at issue. It is common that more than one justification for PTD is established. Overall, the risk of absconding is the most frequently cited ground for PTD.
- The risk of impeding the proceeding is the rarest justification for PTD in practise. This justification is interpreted in a very restrictive way; usually, an actual attempt to obscure evidence must be established. Our respondents differed in reports of whether the silence of a suspect, e.g. his or her failure to reveal the location of the stolen goods, can be used to prove an act that impedes the proceedings. Among judicial respondents, this was generally considered an invalid justification for PTD.
- In the vignette[5] described below, a majority of both judges and prosecutors decided in favour of alternatives for PTD. They generally found no evidence of a substantial risk of abscondment (due to the suspect's rather undeveloped social skills, dependent lifestyle and lack of connections abroad), re-offending (due to the long-time lapse since the previous, not serious offence), or obscuring the evidence. Also, the anticipated non-custodial sanction as well as the lack of prior imprisonment was important in the determinations.
- The respondents reported that strong justifications in favour of PTD include: the current offence's similarity to previous offences, drug addiction in connection with multiple property offences and a record of absconding in previous proceedings. On the other hand, unemployment has not been deemed as a significant factor.
- The judge's personal impression of the suspect's motives and general social attitudes expressed during the hearing, appear to play an important role in the decision to implement PTD.

## 5.5. Less severe measures substituting PTD

- The professional mentality that 'every suspect should receive a measure' is still prevalent. We may assume that it stems from a couple of considerations: the belief

[5] 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 year old daughter were sleeping upstairs. He got into the house by cutting the window in the front door to unlock it. The next morning, the owners discovered that precious jewellery, a laptop and money, altogether worth 3000 euro, was stolen. The police identified the suspect from cctv recordings. The suspect is currently unemployed and was sentenced two years ago to a cso/conditional sentence *(depending on the national situations*). Apparently, he is living with his parents.

that ‘every suspect naturally deserves a measure’, and the excessive hedging of the risks and from the possibility of reproach for failing to prevent those risks from occurring. These considerations result in very widespread and quasi-automatic application of the least severe measures, often without giving substantial justifications for why these measures are necessary. In addition, the overuse of the least severe measures (LSM) is facilitated by providing police investigators the authority to apply LSM.

- **We recommend restricting the authority to impose the LSM (except seizure of documents) to only prosecutors and the courts and promoting the importance of diligence in reviewing the necessity of the LSM.**
- The application for bail is mostly limited to suspects of ‘white collar crime’ and smuggling cases. Other suspects usually have no financial means or refuse to pay the substantial sums requested for the bail. Recommendations of the Prosecutor General provide that minimum standard bail should start at 1140 EUR. However, some prosecutors demand substantially higher minimum bail sums.
- In smuggling cases, where the suspects are foreign truck drivers, bail is a common alternative for PTD. The bail money is often used to guarantee the recovery of imposed fines. This relatively recent, but already common, practise provides a win–win situation, as it allows suspects to avoid PTD and the State to recover otherwise unrecoverable fines. The financial burden often is not an issue because the suspect often obtains the money from the owners of trucks or the owners of the smuggled goods.
- Some procedural complications (lack of pre-hearing communication between bail providers and the judge and also lack of a set timeframe to collect the requested sum for the bail) may hinder more frequent applications of bail. **Therefore, it is recommended that the law be amended to allow conditional PTD, i.e. a rule which would allow the automatic release of the suspect from detention as soon as the ordered sum of financial bail was paid.**
- Most respondents were sceptical about the use of house arrest. It is by far less effective than the PTD and is no more effective than the combination of LSM’s. In addition, it is more complicated for a prosecutor to arrange house arrest and it is more restrictive to a suspect when compared to other LSMs. Some practitioners believe that house arrest provides no added value to the proceedings, but is instead punitive. **Therefore, it is recommended that the prosecution and judiciary critically reconsider the reasonability of use of house arrest.**
- Starting in April 2016, electronic monitoring (EM) became available. It might be executed using either radius or GPS technology. The respondents’ attitudes towards electronic monitoring were just slightly more positive than towards house arrest, but they remained sceptical about effectiveness and complicated implementation. Additionally, the respondents lacked knowledge about the technical details of the measure.

- While EM is impractical to apply in the initial stages of the proceedings, it might serve as attractive alternative for PTD for serious offences where PTD has already been applied for prolonged period of time. However, due to the severity, complexity and limited effectiveness of EM, other less severe measures, i.e. financial bail, should be considered as prima facie alternatives for PTD.

## 5.6. Role of the players in the decision making

- In the pre-trial investigation phase, prosecutors are the key decision makers. A prosecutor has the authority to apply any provisional measure, except detention, EM, house arrest and obligation to live separately without the authorisation of a pre-trial judge. A prosecutor also has the authority and duty to terminate any measure as soon it is no longer necessary.
- In the past, it was common for police investigators to pressure prosecutors to apply PTD. Now, these practices have largely been abandoned; however, pro-detention attitudes still prevail among police investigators.
- Police investigators have the power to impose the least severe measures without the authorisation of a prosecutor or a judge. It might be considered the catalyst for net-widening effect and increased rates of application.
- The presence of a defence attorney is mandatory in PTD hearings and throughout all the proceedings in which the suspect is detained. However, defence attorneys have very few options for playing significant role in the decision making in the initial phases of the proceedings. One of the only effective options for the defence attorney is offering bail.
- The low quality of public defence services is a challenge.
- Social services play no role in the process of decision-making for the imposition of provisional measures. Their role is not provided for under the law. On the other hand, basic information about the social circumstances of the suspect might be accessed by the police and prosecutors from the social security, labour exchange and tax inspectorate databases.

## 5.7. Procedural aspects

- There are no significant obstacles that prevent defence attorneys from executing their duties in proceedings on provisional measures.
- According to the respondents, the practise of informal communication between the prosecution and the court before court hearings has been mostly abandoned, at least in bigger districts.
- The electronic information system of criminal proceedings (IBPS), which enables electronic communication of the proceeding documents between investigators,

prosecutors and judges, contributes to the elimination of the 'out of hearing' contact between prosecutors and judges.

- Respondents were mixed in their assessments of the value added by the IBPS. On one hand, some practitioners praised the increased speed of communication (delivery of the process documents) from an investigator to a prosecutor and from a prosecutor to a judge via this system. On the other hand, some were sceptical about IBPS, including practitioners from smaller districts where the speed of communication has never been a problem and judges that had seen IBPS as an additional instrument, which required extra work to upload the documents into the electronic system.
- The level of police investigators' pressure on the prosecution to impose the severest measures on the suspect has decreased in recent years, but still, a major difference in the police and prosecutors' attitudes exists.
- Coping with media pressure is an inevitable part of a judge's work.

## 5.8. Procedural safeguards and control

- The rule that provides only one appeal of the decision to detain the suspect or extend his or her detention poses a risk that lengthy detentions (up to 3 months) might be left without judicial oversight after the appeal is dismissed. **Judicial review of detention (repeated appeal) should be available within a shorter period than three months, if the new facts are present in the case.**
- Judicial approval rates (over 90 percent) of requests for detention alone do not indicate that the judicial control of detention lacks scrutiny and is quasi-automatic. The respondents suggested that the increased quality and the decreased number of the requests for the PTD are the main reasons for the high rates of the approval.

## 5.9. European aspects

- Practitioners believe that the European Arrest Warrant system is trustworthy and effective tool. Some respondents believed that, with the EAW system, abscondment does not pose high risk for the interests of justice (if time is not sensitive issue in the particular case) because the chances of the suspect successful hiding in the EU are very low. Moreover, hiding is often complicated and costly for the suspect. Thus, the likelihood of a suspect absconding should not be overestimated.
- The practitioners surveyed had no experience regarding the implementation of the European Supervision Order. They shared a sceptical view that the ESO mechanism is time consuming and complicated due to the need for translations and inter-institutional communication and that little value is added by the international execution of alternatives. The priority for speeding up the proceedings and for the use of financial surety has been given.

# 6. Netherlands

*Miranda Boone, Joep Lindeman and Pauline Jacobs*

## 6.1. Legal requirements and procedure

After having arrested a suspect, the police can *hold* him/her for *questioning* for a maximum of 18 hours,[6] after which the deputy-prosecutor[7] can order police custody for three days. Pre-trial detention starts after *police custody*. The public prosecutor can make a request to the examining judge for *remand in custody* for 14 days. After the remand in custody, the prosecutor can make a request to the chamber in courts for *detention in custody*, which can last up to 90 days.[8] After these 90 days, the trial against the – by then – defendant will have to start. In reality, more complex investigations will usually not have finished by then, which leads to so-called *pro forma hearings*, where the trial court can extend the pre-trial detention for a further 60 days on each occasion. The suspect and the public prosecutor can request the *suspension of the execution*. The judge(s) (who can also initiate suspension themselves) can decide to suspend the pre-trial detention if suspects declare themselves willing to comply with conditions governing the suspension.[9]

The application of pre-trial detention is governed by statutory requirements that can be summarised as follows: (1) there must be a *grave suspicion*;[10] (2) the suspicion must concern a *crime of a more serious nature*;[11] (3) there must be at least one *ground* for pre-trial detention; and (4) the so-called *anticipation-requirement* has to be fulfilled by the judge.[12] The two main grounds for pre-trial detention mentioned in the CCP[13] concern: (A) the (serious) *risk of* the suspect *absconding*, or (B) the existence of a *serious reason of public safety* requiring the immediate deprivation of liberty. Such a serious reason can be considered present in situations that can be summarised as follows: (B-i) fear of *serious upset to the legal order* due to the very serious nature of the crime, (B-ii) *fear of recidivism*, (B-iii) *fear of obstruction of justice*, or (B-iv) the need to facilitate expedited proceedings against sus-

[6] Nine hours for questioning, but not counting the time between midnight and 9:00 AM.

[7] A police-officer with a higher ranking and additional training.

[8] The court in chambers can decide on 90 days at once, or they can choose for a shorter period and extend after a new hearing. Only two extensions are possible and the maximum in total cannot surpass 90 days.

[9] General conditions: (1) not evade the execution of remand in custody if the suspension is terminated; (2) not evade the execution of the final custodial sentence applied by the trial judge. As an optional condition bail can be set. The judge can also decide on additional conditions, which are not limited by law.

[10] A high degree of suspicion that the suspect has committed the offence of which he is suspected. Neither legislation nor case-law provide much clarity as to when this threshold is met, though.

[11] As a general rule, pre-trial detention can only be applied in case of a suspicion of a criminal offence which, according to its legal definition, carries a sentence of imprisonment of four years or more.

[12] No pre-trial detention if a custodial sentence is not expected; no extension of pre-trial detention if that would surpass the length of the expected custodial sentence by the trial judge.

[13] Code of Criminal Procedure.

pects of crimes in public areas or against public officials[14] that caused social unrest. Fear for recidivism is the ground that is used the most often in decisions on pre-trial detention in the Netherlands.[15] Except for (B-iv), all grounds resemble the four categories as distinguished by the ECtHR: danger of absconding, obstruction of the proceedings, repetition of offences and preservation of public order.

The first hearing on pre-trial detention (before the examining judge orders remand in custody) is the most comprehensive and usually takes up to 20-30 minutes. The public prosecutor mostly is not present, but the lawyer is. The hearing before the court in chambers (three judges) for the purpose of the detention in custody is much shorter (usually five-ten minutes). At this hearing, a public prosecutor is present, but this usually is not the prosecutor actually dealing with the case. Decisions are mostly given directly after the hearing and, as said, tend to be quite brief and concise.

Prior to the hearing in connection to the pre-trial detention, the *probation service* can be asked to report on the suspect. This report can contain information about the personal circumstances of the suspect, previous convictions, subsequent counselling, assessment of the risk of reoffending, et cetera. This information can be taken into account with regards to the grounds of pre-trial detention or the possibilities of suspension of the execution.

In 2012 a new procedure was introduced by the public prosecutor's office: the ZSM[16]-procedure, in which decision-making in the majority of the criminal cases[17] is done in a multidisciplinary setting (prosecutor, police, probation service and victim care all have their say) with an aim of swift, but scrupulous and meaningful decisions. Most respondents put forward the view that this new way of working has probably had a mitigating impact on the amount of pre-trial cases.

## 6.2. Facts and figures and debate

The Netherlands has a low prison rate per capita and prison sentences are relatively short. The rate of pre-trial detainees per capita is also relatively low. The percentage of pre-trial detainees related to the total population of prisoners was 44% in 2016 (declined from 49% in 2012). From a comparative perspective, though, the relative number (percentage) of pre-trial detainees of the total prison population does not give much indication concerning good or bad practices with regard to PTD (see for examples the introductory chapter of the comparative report). In our research we merely present qualitative reasons to assume that the population of pre-trial detainees in the Netherlands is higher than can be legitimised in the context of the principle of last resort.

[14] Policemen, firemen, ambulance staff etc.

[15] Crijns, Leeuw and Wernink 2016, p. 29 e.v.

[16] The usual abbreviation for ZSM in Dutch is 'zo snel mogelijk', which translates as 'ASAP': as soon as possible. Deciding on cases fast is one of the goals of this new procedure, but it also aims at dealing with them in a smart, scrupulous and perceptible way.

[17] Apart from the graver crimes.

In past years, there has been a lot of debate about the practice of pre-trial detention. Judges participating in this debate have put forward the opinion that application of pre-trial detention is quite standard in certain cases and that the legal requirements to substantiate the grounds for pre-trial detention allow for shallow reasoning. Multiple researches highlight that little scrutiny was put forward in the pre-trial detention proceedings. In our study, we come to similar conclusions with regard to the use of the grounds for pre-trial detention.

## 6.3. Methodology

It is against the background described above and after some observations at court hearings and the study of some case-files that we conducted semi-structured interviews with lawyers, public prosecutors, judges and probation officers (32 individuals in total). The results of these interviews were transcribed and analysed. Cross references were made using available statistics and recent research. Also, preliminary results were presented and discussed at three expert meetings where all participating countries in this research were represented by practitioners.

## 6.4. Common practice

Most respondents were aware of the debate on the practice of pre-trial detention in the Netherlands. The lawyers especially put forward the view that they thought this practice was still quite extensive, although it did appear to them that, in absolute terms, the number of pre-trial cases seems to have decreased in recent years.

More often than not, an order for pre-trial detention will be requested against suspects of crimes that breach or seriously threaten to breach others' physical integrity or that breach the right to inviolability of the home (e.g. robberies and burglaries). The vast majority of the requests will initially be granted and those that do get rejected lack relevant substantiation of the suspicion rather than sufficient grounds. In other words: the statutory demands regarding grounds for pre-trial detention do not have a significant restraining effect on the application of pre-trial detention.

The burden of proof for a grave suspicion does not seem to raise many issues, although some lawyers put forward the view that lengthy pleas in this regard are mostly not appreciated as it would be too early for that (the hearing on the merits of the case is still far away).

Fear of reoffending and fear of serious upset to the legal order are the most common grounds for pre-trial detention. Most respondents agree that both of these grounds can be substantiated quite easily. Especially the ground of risk of reoffending was found to be substantiated quite easily. Depending on the nature of the crime and the background of the suspect, even a first offender that has committed a crime can be considered as a potential recidivist if needs be. And if it is expected that the average person in the street (the neighbour) wouldn't understand the release of a suspect, that's an important clue that the crime

has seriously upset the legal order – although it seems that perhaps the impact of the release, rather than the impact of the crime itself, is taken into consideration as well.

The scrutiny applied to the other important grounds (fear of absconding and fear of obstruction) seems paradoxical: the public prosecutor will usually have to bring forward more solid arguments to use these grounds. The new ground (facilitate expedited proceedings against suspects of unsettling crimes in public areas or against public officials) is hardly ever used and is deemed superfluous.

The apparently limited restraining effect of the safeguards implied by the statutory grounds for pre-trial detention, however, is not considered as the most important reason nor an obstacle for the wide use of pre-trial detention according to our respondents. The wide use of pre-trial detention in the Netherlands is more often explained in terms of 'legal culture' or even 'legal policy' (politics). Most of our respondents, even some of the lawyers, acknowledge that in certain types of cases there are many advantages to using pre-trial detention as an advance on the final sentence. This is supported by three important arguments. The first argument is that you cannot explain to the victims of a serious offence or to society in general that somebody who just committed a serious crime gets released within hours or days. 'Can you explain it to your neighbour?' is often heard as a criterion. The second line of reasoning is that it is assumed to be much better for the offender to serve his/her time directly after arrest, instead of being released and detained again after months or – sometimes even – years. The third argument can be considered as the reverse of the second one. Prosecutors and examining judges or court in chamber judges are convinced that the trial court will be hesitant to send someone who has been suspended from pre-trial detention (or against whom an order for pre-trial detention has been refused) back to jail. It is their perception that trial courts impose more lenient (unconditional) prison sentences, if any, when the suspect is not detained at the moment of the hearing. Therefore, the fear that a convicted offender will escape a deserved punishment is a third reason not to suspend.

We tried to outline if certain groups of suspects or certain categories of crimes were more susceptible for pre-trial detention. In that regard we explained that in particular foreigners, suspects of 'high impact crimes' and repeat offenders are overrepresented in the pre-trial population.

## 6.5. The role of the players

In the Netherlands, the **public prosecutor** is the 'gatekeeper' of the criminal law proceedings. The expediency principle not only allows for the public prosecutor to decide whether to prosecute or not but it is also the prerogative of the prosecutor to request pre-trial detention or not. The prosecutor is a member of the judiciary and is supposed to make decisions like a magistrate, weighing the general interest and the interest of victims against the interest of the suspect. However, the public prosecutor's office is also an important ally for the Department of Justice and Security and the police when it comes to the execution of crimi-

nal policy. As has already been shown above, as a consequence of this policy, pre-trial detention is applied in certain types of cases. Public prosecutors contest the assumption that their individual decisions are directly dictated by policy, though. Despite being magistrates, most public prosecutors don't necessarily invest much in finding ways to organise a suspension of the pre-trial detention. If necessary, they'll consent to the lawyer's wish to let a probation officer draw up an (additional) report to substantiate a possible suspension (but at the same time they will not fail to let the probation officer know that as far as they are concerned, suspension is not an option). The busy schedule of most public prosecutors doesn't allow them to be present during the hearing before the examining judge. Most respondents don't see this is a drawback. At the hearing before the court in chambers, in general one public prosecutor handles the whole bundle of cases dealt with at the session. To that purpose he/she will receive briefings from all public prosecutors who actually have the case in their workload.

**Lawyers** play a significant role in the proceedings. Public prosecutors and judges confirm that a lawyer that manages to find relevant information to substantiate a request for pre-trial detention can really make a difference for their client. That said, lawyers claim that they experience difficulties in fulfilling this task: they have very little time to compile all the information and they often do not get possession of any documents from the case-file until very shortly before the hearing. This can also hamper their possibilities to challenge the facts and circumstances that are put forward in order to substantiate a 'grave suspicion'. The financial compensation they receive in the majority of the cases is insufficient for the time-consuming work that is needed to really paint a complete picture of the suspect's life. Another handicap is that a lawyer cannot directly communicate with the probation service if he/she wishes a report on his/her client. Lawyers also denounce the often very thin reasoning of the judicial decisions on pre-trial detention: they feel that they can talk until they are blue in the face, but their arguments would be refuted with a fatuous reasoning.

The **probation service** in their turn recognise that they have very little time to write up the so called pre-trial assistance report and that – within that short time-frame – it is virtually impossible to assess what risks the release of a suspect could have, what possibilities there would be to reduce that risks and if those possibilities would be sufficient to enable release under conditions. They also acknowledge that their institution is not ideally organised such as to meet the demands of the pre-trial proceedings. After the very preliminary observations reported before the hearing by the examining judge, additional information does not get compiled automatically but only after an order by the public prosecutor.

Our interviews demonstrated that the **judges** do not usually actively explore the possibilities of alternatives to pre-trial detention. Whether the judge will be willing to grant a suspension will very much depend on the availability of enough concrete information supporting conditional suspension. The judges we spoke to in our research were very aware of the critical debate on the practice of pre-trial detention in the Netherlands. In 2015, the criminal courts formulated so-called professional standards for judges regarding many aspects of

their work, including the provision that decisions on pre-trial detention should always be substantiated. This is expected to lead to an improvement of the reasoning put forward by the courts. Some of our respondents emphasise, though, that better substantiation might not change the outcome of the procedures: the law simply leaves much room to flesh out the grounds for pre-trial detention.

### 6.6. Alternatives

Within the Dutch criminal procedure, autonomous alternatives for pre-trial detention do not exist. Alternatives can only be applied in the framework of a suspension of the pre-trial detention with the exception of the so-called behavioural order that can be issued by the Prosecution Service outside the scope of the pre-trial detention framework. Inherent to this system is that pre-trial detention is not used as a last resort. Instead of looking at the less intrusive measures first, the most severe measure has to be applied before less severe measures can be considered. The use of alternatives for pre-trial detention should be in accordance with the subsidiarity principle. Alternatives should (only) be used if they can fulfil the underlying goals of the pre-trial detention in a less intrusive way than detention does. Much consensus exists on the opinion that alternatives (conditions) can reduce the risk of recidivism and, to a lesser extent, risk of absconding. The use of alternatives can therefore result in reduced application of pre-trial detention based on one of these grounds. The fundamental problem, however, is that the grounds for pre-trial detention are so widely interpreted that it is difficult to judge if an alternative for detention meets the subsidiarity requirement or not. Many respondents give examples of so-called 'improper remands', cases in which remand detention is applied, not to detain a person, but to create a framework for probation, treatment or other forms of help and assistance. Prosecutors and judges admit that they use the pre-trial detention decision in these cases to create a framework to do something that 'probably makes sense', because they are pretty sure that if they release someone without conditions, the delinquent behaviour will continue because the underlying problems are not addressed. In these cases, it is clear that the conditional suspension of the pre-trial detention does not meet the subsidiarity requirement. That is not to say that suspects wouldn't benefit from an approach with a more binding framework regarding behaviour and/or treatment, though. However, we agree with our respondents that the current legislation on pre-trial detention is not primarily designed to provide that framework and sometimes seems to be used in an improper manner to coach people towards guidance and counselling.

In general, however, we got the impression that alternatives can fulfil a useful role in attempts to reduce the use of pre-trial detention. A broad category of cases exists in which the grounds for detention are constantly weighed against the personal circumstances of the offender. Whether the judge will be willing to grant a suspension will very much depend on the availability of enough concrete information supporting conditional suspension. On the one hand, this information would have to substantiate that personal interests of the suspect

outweigh the interests served by pre-trial detention. On the other hand, the information should contain guarantees that the conditions attached to the release provide a solid alternative related to the ground(s) for the pre-trial detention – in most cases: preventing recidivism. Important information that can plea for conditional suspension is related to the housing situation of the suspect, his/her day activities, his/her family circumstances and possible (mental) health problems.

Preferably this information is available at the hearing of the examining judge through a probation (pre-trial) report. This report gives information about earlier trajectories of the suspect at the Probation Service, personal circumstances of the suspect and the possibilities of supervision in case of a suspension. The extent to which these reports are available and the moment of their availability fluctuate a lot between regions, while probation officers indicate that they often have a real struggle to produce a sufficient preliminary probation report before the hearing of the examining judge. To our surprise, their organisational structure does not seem to be adjusted to them writing an improved or extended version for the hearing in chambers. A complicating factor is that, although it's mostly the defence lawyer who is held responsible for the collection of information to substantiate a suspension, s/he does not have the autonomous power to directly request the Probation Service for a pre-trial detention report. If s/he thinks a pre-trial report is of importance, a request will have to be made to the prosecutor, who will then decide if the Probation Service gets the assignment to report. Although most of the prosecutors and defence lawyers say that the prosecutor is mostly willing to follow these requests, exceptions were also mentioned.

In the absence of a (sufficient) probation report, it's up to the (good) defence lawyers themselves to try and collect the necessary information to substantiate a request for suspension. They will call (possible future) employers and will try to get in touch with family members or doctors for written statements. They are hindered of course by the same constraints in time and information as the probation officers are. Financial compensation for the activities of lawyers during pre-trial detention is found to be insufficient. The prosecutors and judges in general take a rather passive attitude in this regard.

There is rather scarce regulation on the conditions that can be applied as an alternative for pre-trial detention in the Netherlands. The general conditions attached to a suspension of the pre-trial detention are that the suspect will comply with possible future court orders regarding the pre-trial detention and that s/he will cooperate with the execution of a possible future sentence to imprisonment. The only special requirement mentioned explicitly in the law is the financial guarantee for the fulfilment of the conditions of a suspension. Other types of requirements that can be added to a suspension are not mentioned in the law, but the CCP does not give any restrictions either. Requirements that are regularly added to a suspension of the pre-trial order are: reporting at the police station, location ban, location order, probation order, electronic monitoring, behaviour counselling and treatment for substance addiction.

These so-called alternatives are applied on a regular basis, but not on a large scale in absolute numbers. In particular practical obstacles seem to stand in the way of a wider use. The necessary information to suspend under conditions is often not available at an early stage and respondents also point to a lack of capacity for the more substantial requirements like facilities for treatment. Although we came across some respondents who support financial bail, it is still almost never applied. Respondents don't know exactly how it works and experience many practical and fundamental constraints. Although electronic monitoring as a condition to suspend pre-trial detention is used more often now than it used to be,[18] it still takes between five to 14 days to organise it and can therefore not prevent the application of pre-trial detention at the earliest stage.

## 6.7. Procedural safeguards and remedies

The most important procedural safeguard is the periodical review of the pre-trial detention after 14 days (by the court in chambers) and after 30, 60 or/and (in any case) 90 days by the court in chambers or the trial court (pro-forma hearings). As mentioned before, the hearings before the court in chambers are quite short, compared to the hearings before the examining judge. As a lot of hearings are planned in one session and the judges and the public prosecutor therefore have a significant case-load for that session, the impression is that these hearings are rather superficial. However, judges insist that they really do consider all aspects of every case. Lawyers put forward the view that if they provide the court in chambers with their pleadings in advance of the hearing, they feel that their arguments are heard.

Still, our research doesn't show that these reviews often change the fundaments of the decision (suspicion, grounds), although the fear of obstruction as a ground for pre-trial detention can become redundant overtime. The passage of time can also be of influence on the decision-making process regarding the suspension of the pre-trial detention: the interest of the release of the suspect can eventually outweigh the interest of public safety requiring immediate deprivation of liberty. However, this does raise a question: doesn't this decision implicate that the relevance of the ground(s) for pre-trial detention has become obsolete and that, therefore, the order for pre-trial detention should be lifted?

Apart from the periodical review, an appeal procedure exists before the Court of Appeal. Possibilities for appealing against a decision on pre-trial detention are limited, though. The order for remand in custody by the examining judge cannot be appealed. Only one appeal against an order for (or extension of) detention in custody by the court in chambers or the trial court is possible. Also, decisions on the request for termination of pre-trial detention and/or suspension of the execution can be appealed only once. The appeal has to be lodged at the Court of Appeal and will be heard by the Court of Appeal in chambers.

[18] Boone, Van der Kooi and Rap 2016.

Hearings are also short and the general sentiment of the lawyers seems to be that chances of success in the procedure are slim at best.

## 6.8. European aspects

The Framework Decisions on the European Arrest Warrant (EAW) and the European Supervision Order (ESO) have been implemented in the Netherlands. With regards to both instruments, experiences within our group of respondents were very limited. Public prosecutors with specific interests in the instruments provided us with a lot of practical information.

People deprived of their liberty because an EAW has been issued against them will mostly be brought before the public prosecutor in Amsterdam, who can seek a special kind of police custody and who can also decide to suspend the execution of this police custody. In certain cases a request for remand in custody will have to be made to the examining judge. The only really relevant ground for pre-trial detention in this regard is risk of absconding.

The ESO allows foreign suspects[19] to fulfil the conditions of suspension of the execution of pre-trial detention in their country of residence. The instrument has not been widely used in the Netherlands up until recently. The IRC Noord-Holland[20] has been appointed as the central authority concerning the ESO (FD 2009/829/JHA) and processes all incoming and outgoing requests. A respondent of the IRC put forward the view that the ESO is becoming more acknowledged, which leads to an increase in requests and actual executions of supervision orders. The IRC participates in the European Justice Network,[21] which also contains a judicial atlas[22] that allows the identification of the locally competent authority that can receive requests for judicial cooperation and provides a fast and efficient channel for the direct transmission of requests according with the selected measure. Requests to the Dutch authority on ESO can be mailed to wets-etm@om.nl.

[19] EU citizens.

[20] Centre for International Legal Assistance in Criminal Matters – Noord Holland, department WETS-ETM.

[21] https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx.

[22] https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry.aspx.

## 6.9. The vignette[23]

Six out of eight prosecutors say that they would definitely bring this case before the examining judge. The two other public prosecutors show some reservation and say they need more information regarding the earlier offence and the personal circumstances of the suspect. Also, most judges and defence lawyers express the expectation that this suspect would be put into remand detention. The first and most important argument mentioned is the seriousness of the offence. In particular the fact the burglary occurs at night and the presence of a young child in the house support the decision to apply pre-trial detention. Although only some judges and prosecutors explicitly mention the ground they would base their decision on, it becomes clear that fear of recidivism is most obvious in this case. Therefore, it is important that the subject was previously convicted. For most judges, the earlier conviction is enough to substantiate fear of recidivism, no matter what that conviction was for. A minority, however, expressed the opinion that the subject should have been convicted for a similar offence to substantiate fear of recidivism. Only some defence lawyers critically argue that one earlier conviction is insufficient to substantiate fear of recidivism, in particular since the probation period for the conditional sentence was almost finished at the time the burglary was committed. Respondents had different opinions on an eventual suspension at a certain stage. According to the defence lawyers the personal circumstances as presented in the vignette do not give much reason for a suspension. To submit a successful request for suspension, they would need other information, 'sick parents', 'a job interview', 'a doctor's visit'. A good probation report could probably provide them with the necessary information. Also, a confession would increase the room for a suspension, but only after the passage of some time. In case the pre-trial detention would be suspended, this would normally be under the condition that the suspect has some daily activities.

## 6.10. General outlook

There has been a heated debate in the Netherlands on the allegedly extensive practice of pre-trial detention, which has led to greater awareness. The public prosecutor's office has implemented some rigorous changes in their decision-making process. Apart from that, the crime-rate has come down, which has led to a decrease in the number of prisoners. It is likely that a combination of these factors have contributed to the decrease in the number of pre-trial detainees over more recent years. However, the very high percentage of pre-trial detainees compared to convicted prisoners didn't change as drastically.

[23] 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 year old daughter were sleeping upstairs. He got into the house by cutting the window in the front door to unlock it. The next morning, the owners discovered that precious jewellery, a laptop and money, altogether worth 3000 euro, was stolen. The police identified the suspect from cctv recordings. The suspect is currently unemployed and was sentenced two years ago to a cso/conditional sentence *(depending on the national situations*). Apparently, he is living with his parents.

Still, a slight inclination towards a more restricted application of pre-trial detention could be perceived in our research. That doesn't change the observation that Dutch law and practice leave room for broad interpretation of the grounds for pre-trial detention and that our legal culture seems to be one where it is found that pre-trial detention simply cannot be withheld in certain cases. As such there are still categories of crimes and/or suspects in which as a rule pre-trial detention is applied. In the meantime, lawyers experience difficulties in finding the means to challenge pre-trial detention: mention is made of lack of time, funds and/or timely access to relevant information.

Even when judges are in favour of releasing the suspect, they will suspend the execution rather than lift the order for pre-trial detention. That means that alternatives only become available *after* the order for pre-trial detention. There is a whole string of conditions for suspension that appear to have a positive and preventive impact on the suspect. However, our research also shows that there are many logistical and financial hurdles in the way of a broader application of these alternatives for pre-trial detention. One of the problems in this regard is the limited means that the probation service has to provide the necessary information.

A more restricted application of pre-trial detention is therefore primarily a matter of a *shift in legal culture* and a *more generous approach towards alternatives*. In November 2016, the Ministry of Justice and Security has presented preliminary plans to review the legislation on pre-trial detention. In short, these plans suggest that a procedure of 'provisional restriction of liberty' should take the place of the order of pre-trial detention followed by a conditional suspension of the execution. The envisioned provisional restrictions will be similar to the conditions for suspension used in the current system. Only if the restrictions are breached will the examining judge be requested to order pre-trial detention. However, the provisional restriction of liberty as proposed will be applicable in a far wider range of cases than the current system of suspended pre-trial detention. Reactions, therefore, are mixed. On the one hand, there is a degree of satisfaction that the government is aiming at a serious decrease in pre-trial detention orders. On the other hand, there is concern that the system could draw in more suspects, enabling some serious restrictions on people's liberty while the judicial framework lacks scrutiny and offers few safeguards.[24] It is unsure whether the Ministry of Justice and Security will maintain the proposal as it is.

[24] See the advice of the Dutch legal bar association, p. 33 (<https://www.advocatenorde.nl/juridische-databank/download/wetgevingsadviezen/426682/2>).

# 7. Romania

*Gabriel Oancea, Ioan Durnescu*

## 7.1. Introduction

Semi-structured interviews were carried out with 21 participants, comprising of judges, prosecutors, and lawyers from Bucharest. The interview guidelines, described in the DE-TOUR project for each category of practitioners, provided the basis for the interviews.

## 7.2. Basis for decision-making

- The research highlighted that the main criterion considered in the case of imposing/maintaining the preventive arrest measure is the degree of social danger of the offence, which has been confirmed by all magistrates (judges and prosecutors).
- The judges of the High Court of Justice and Cassation have introduced one more element that seems to play an important role – the amount of detriment or injury. The higher they are, the higher the likelihood of PTD is.
- Many judges emphasised the complexity of the decision-making process behind the PTD.
- In most cases they state that the decision is based on a detailed analysis.
- There are no specific groups of offenders – like foreigners, drug addicts, homeless people etc. – that are targeted by PTD.
- In the case of foreigners, the mere fact of being a citizen of another country, and therefore the assumption that this person has a high risk of evading criminal prosecution, is not enough to impose preventive arrest.
- When it comes to the decision-making process, judges seem to follow a two-step-process. First, they look at the offence and the offender: the seriousness of the offence, the manner of committing the crime, the circumstances in which the offence was committed, the personal circumstances, and the stage of the trial. The second step is assessing the risk of committing further offences. As mentioned by several judges, the risk of committing further crimes is one of the most cited reasons for imposing the PTD.
- Judges seem to evaluate the risk of absconding, influencing the witnesses, or altering the evidence.
- Most judges stressed that they take the PTD measure to ensure a good progress of the trial.
- Many judges mentioned the public expectations as one important factor in imposing the PTD. In some (serious) cases, the prosecutors use the public expectations to convince the judge to impose PTD.

- Most judges and prosecutors estimated that they have enough information to make the decision on the preventive measures.
- There is a kind of consensus among the participants in this study that PTD is balanced in practice and is dedicated especially to those who committed serious crimes (e.g. violent crimes, crimes involving hard drugs, corruption etc.) or have a long criminal history and therefore a high risk of continuing criminal activity.

## 7.3. Less severe measures

- Alternative measures to preventive arrest, according to Romanian legislation, are: judicial control, judicial control on bail, and house arrest.
- Most respondents particularly appreciated the effectiveness of the judicial control measure.
- Depending on the specificity of each case, the judge may, when imposing PTD, also impose some obligations, such as: avoiding leaving a certain territorial limit, undergoing treatment or medical care, not liaising with the injured party, witnesses or other persons involved in the criminal trial.
- Regarding the measure of judicial control on bail, its application is relatively limited.
- The reasons for this limited application of bail-out are related to several factors. Some judges consider that the insufficient application of judicial bail is due to the existence of legal provisions that are interpreted differently by the courts.
- Another reason is related to low financial possibilities of many people in conflict with the penal law: Even if decided by the judge, the bail could not be paid by the defendant.
- Regarding the institution of house arrest, the interviews highlighted a series of controversies about the perceived effectiveness of this measure, primarily by the magistrates.
- In most cases, magistrates consider that the legal provision is likely to create a situation of discrimination between house arrest subjects and defendants who have executed their pre-trial detention in the police or prisons' detention facilities.
- Magistrates consider that the house arrest measure is devoid of the afflictive character that PTD or imprisonment has.
- Another aspect correlative to the preventive measure of house arrest is the fact that the ways of verifying the defendant's compliance with the measure are, in practice, extremely limited.
- Magistrates consider that the implementation of an electronic monitoring system would be likely to contribute to providing certainty about the defendant's compliance with alternative preventive measures.

- Another positive aspect of introducing an electronic monitoring system is to increase the confidence of magistrates in the effectiveness of alternative measures in pre-trial detention.

## 7.4. The role of the actors in the decision-making process

- Most judges were aware of the suspicion that prosecutors are closer to the judges than the lawyers.
- Judges argued, based on what they do in court, that they try to give them equal treatment: they have access to the same information, they can speak in front of the court, they can ask for more witnesses etc.
- Some judges made a small distinction between ex officio lawyers and those chosen by clients. It seems that those selected by the clients themselves are more active in defending them than the ex officio ones.
- Prosecutors participating in the study evaluate their position as being equal to the position of the defence lawyers.
- The lawyers perceive that all the symbolic actions (such as using the same door to enter the courtroom, the possibility of the court to have direct communication with the prosecution, the fact that lawyers get to be told off in court more often than the prosecutors etc.) suggest that the prosecutors have more power than the defence lawyers.
- Lawyers have repeatedly referred to the fact that they do not have an equal position to prosecutors.

## 7.5. Practical Operation of Hearings and Procedural Aspects

- The interviews did not reveal the existence of informal discussions between the actors involved in solving the causes of imposing or modifying preventive measures.
- Several references were made in relation to the short period of time when the first request for the precautionary arrest warrant is to be resolved.
- Lawyers and magistrates consider that some provisions do not provide an optimal framework for the conduct of procedural activities, especially in complex cases involving organized crime networks, crimes with significant damage, etc.
- In interviews, it has been almost unanimously pointed out that the legal provisions are able to ensure the observance of human rights in the procedures related to taking/replacing the preventive measures.

## 7.6. European Aspects

- Most judges had experiences interacted with the EAW and found it very useful and already settled within the mainstream practice.

- The interviews highlighted that the judges and lawyers interviewed are not familiar with the European Supervision Order (ESO).
- Prosecutors were not informed in detail about these procedures, because the participants interviewed are not involved in this kind of procedure (ESO).

## 7.7. The vignette[25]

- Most of the judges estimated that they would apply PTD in this case.
- The main reasons would be the seriousness of the crime (burglary with people present in the house) and the concrete circumstances of the crime (during the night, by breaking and entering).
- The prosecutors also tended to apply for PTD in this case.
- According to the prosecutors' view, the risk of committing further offences seems high due to the offender's past behavior and unemployment.
- Issues such as whether the defendants recognize their guilt are not important at this stage.
- Other factors, such as the existence of a fixed address, citizenship, and whether the offender is a drug user, and has committed the same offence in the past, appear to be central to decisions on PTD.
- The room for a lawyer in this case is quite limited as the decision seems to be led by the seriousness of the crime.

[25] 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 year old daughter were sleeping upstairs. He got into the house by cutting the window in the front door to unlock it. The next morning, the owners discovered that precious jewellery, a laptop and money, altogether worth 3000 euro, was stolen. The police identified the suspect from cctv recordings. The suspect is currently unemployed and was sentenced two years ago to a cso/conditional sentence *(depending on the national situations*). Apparently, he is living with his parents.

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DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

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