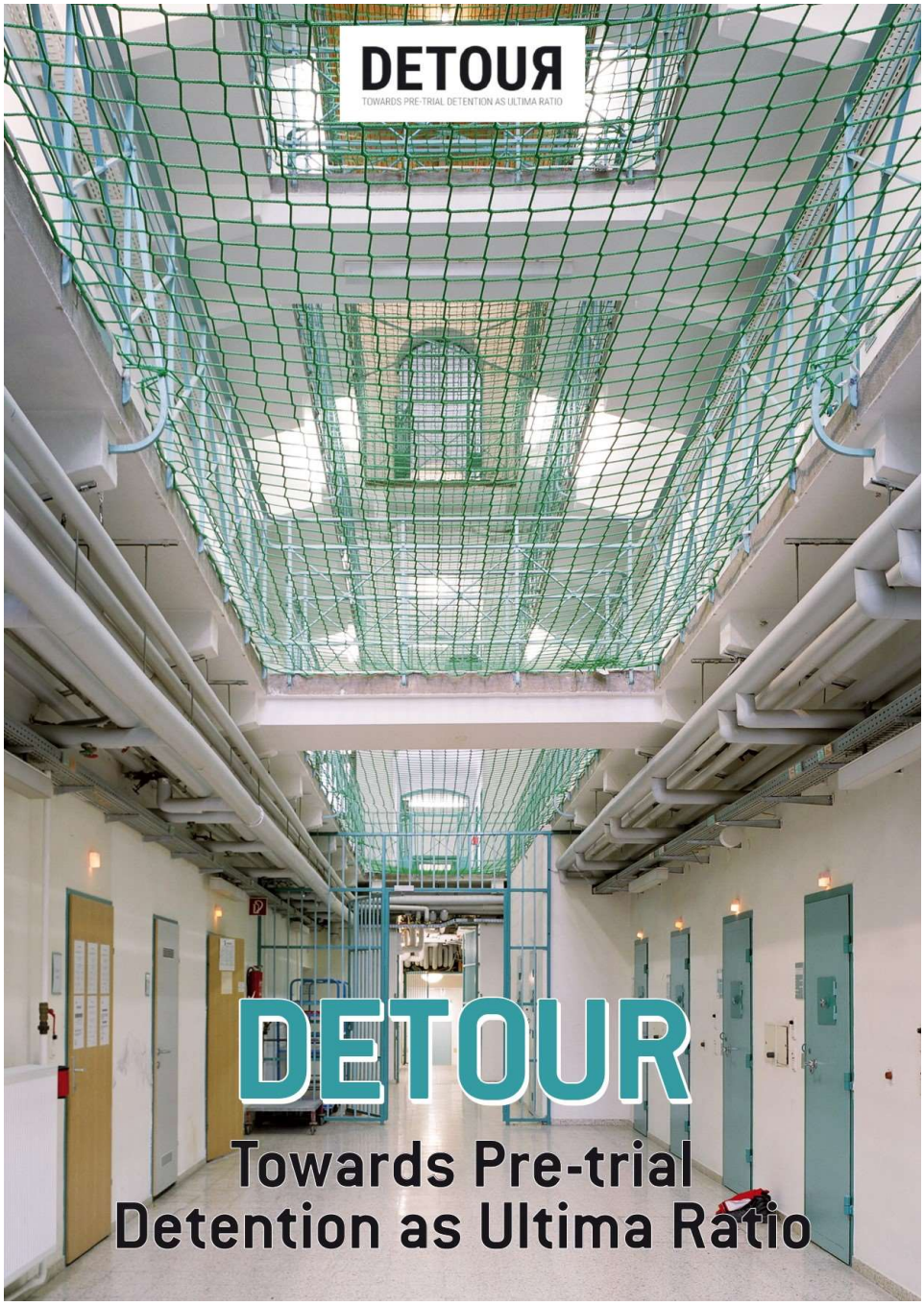

RECOMMENDATIONS

Brussels, Bukarest, Dublin, Greifswald, Utrecht, Vienna, Vilnius,

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Content

1. General recommendations

- Pre-trial detention (PTD) is defined as an exception and a measure of last resort. Strategies employing **PTD as a tool for prevention are therefore problematic**. Preventive aims threaten the presumption of innocence because they take the suspicion as a fact. Bear in mind that extensive interpretations and applications of preventive grounds threaten the ultima ratio principle and are likely to increase the number of pre-trial detainees.

- We found a certain degree of **interchangeability in the grounds for detention** and the justifications provided for them. Furthermore, **hidden and extra-legal motives** like 'pre-sentence' motives (i.e. a desire to ensure a person spends some time in prison) can influence the decisions. The ultima ratio principle may be severely threatened thereby. Understanding the longstanding nature and persistence of this practice we do not assume this can be improved sufficiently simply by directives or legal changes. This problem requires continuing **efforts with respect to awareness raising and training for prosecutors and judges**. Particular emphasis should be devoted to training for young practitioners and on the principles of the Articles 5 and 6 of the ECHR. Changing this situation requires continuing efforts including awareness raising and training for prosecutors and judges. Such activities and training can build on the reflections about practice emerging from this research and be directed towards highlighting and seeking to minimise the use of hidden motivations in decision-making, to make sure the principle of proportionality is a reality in practice, and to pay attention to fact-based assessments of risk.

- There are certain groups who appear to have a higher risk to be detained than others not least because of the "precarious social conditions" they are living in. **Criminal law cannot solve social inequalities. Its application however should try to avoid aggravating them**.

- Continuous **in-depth reflection about the interdependency between social policies, migration policies and criminal policies** has to be stimulated.

- **Public prosecutors** are of pivotal importance. Their preference often seems to be to stay on the safe side and apply for PTD. Therefore, any ambition to **reduce the use of PTD** can only be successful if prosecution agrees to **apply 'self-restraint'** in this regard. Comparative research on the role of the prosecution is advisable.

- In countries where the legal culture involves a particular **'closeness' between judge and prosecutor** PTD appears more likely to be ordered when applied for by the prosecution. Regular **reflection among practitioners** on **the roles** and **their relationship** is recommended.

- The **extent and the quality of information** available particularly with respect to the background and situation of the suspect and the social conditions he/she is living in largely determines the quality of the decisions and the variety of options. **Support by (external) social work agencies** (e.g. probation services, court aid) - **possibly including information on available and suitable measures supporting (conditional) release** - could allow for improvements in this respect. Even if such reports are not completed for the first decision this information may still be valuable for review hearings. It seems at least worthwhile **to assess** on a national level whether this kind of assistance **could help to avoid PTD more often** and what would be needed in this respect. While the costs of this kind of support cannot be ignored, the question concerning resources should not be the dominating one.

- Of utmost importance is **early and active representation by defense lawyers**. They carry a lot of responsibility for the evolvement of the case particularly with respect to **information on the suspect** and for **initiatives towards non-custodial alternatives**. To ensure an effective representation of their client's defense lawyers need to be well prepared and active. In order to be able to fulfil these requirements **early access to the files** must also be ensured. At the very least, **practical problems** in this respect must be solved.

- In the countries represented in this study we observed very different traditions in using alternatives to PTD. Often **alternatives to PTD are employed too reluctantly** and PTD is ordered in cases suitable to some kind of alternative. On the other hand, there are also **risks of applying measures which are more lenient then PTD in cases where unrestricted liberty would be justified**. There is still progress to be made in this respect. Aiming at this **research and the elaboration of suitable statistical information** is required to adequately inform the current practice, to reveal needs for developments, to **support developments** and in the end to enhance the trust of practitioners in less severe measures.

- There are **groups of suspects** for whom it is particularly **difficult to find suitable options to avoid pre-trial detention**. Most often this concerns foreign nationals with no social ties to the country of procedure but often also to their home country. There is a **need to develop options to avoid PTD more often for**

these groups. E.g. Social work projects could be initiated to find out what options would be suitable.

- According to many respondents the **reviews of PTD in practice leave much to be desired**. Nevertheless, they seem to be powerful instruments to at least shorten periods of PTD, to speed up the process and to enable all parties involved to discuss – perhaps to negotiate – alternative options. **An early review therefore is recommended, and all involved parties should be encouraged to make good use of it**.

- **Defense lawyers** in several countries often are **reluctant to file appeals** against PTD for tactical and time reasons. This however threatens the **value of the legal remedies**. Considering the different legal systems, no general solution to this problem can be assumed. Therefore, **evaluations are recommended on the national level aiming at an assessment of the legal remedies and legal adaptations which may be needed**.

- There are still judges and prosecutors who **are reluctant to release foreign national suspects** - including citizens of other EU member states - because of a **lack of trust** in cooperation or in other judicial systems respectively. Obviously there continues to be an urgent **need for opportunities for practitioners to meet colleagues from other countries, to exchange, to learn about and with each other and, not least, to aim for the realisation of common standards collaboratively**. Having experienced how difficult it can be to convince practitioners about the participation in such events it appears also important to invest into strategies in this respect and to ensure **support of the practitioners** by their and human resources departments where relevant (e.g. offer interpretation to overcome barriers in this respect; find administrative solutions to adequately deal with workload and time pressure, finding times most convenient to practitioners etc.).

- Many criminal law practitioners still do not know about the **European Supervision Order** (ESO). **Trainings and seminars** on the national and the European level should change this. Up to now hardly any information is available on the very few ESO cases reported from EU member states. In the near future hopefully more information on such cases will be available to learn about practical examples and to include these into training.

- Apart from the limited knowledge about the ESO, its little use can also be assumed to be caused by a **lack of adequate structures supporting its use** in many

countries. This may concern the required (speedy) cross country cooperation as well as alternative measures. There is a need for national but also for joint efforts to improve these structures.

- The methods of decision-making should **include an obligatory examination** of which **non-custodial measures** (conditions for suspensions) exist and how they would fit for the individual case. An order of PTD and **denials of alternative measures** should only be possible in cases for which **explicit explanations and reasons** can be given why alternatives cannot prevent the grounds for detention.

- Judges and prosecutors often perceive **public and media pressure** concerning PTD-practice. While this cannot be avoided, generally the public and media should be **regularly informed about the rule of law and the fundamental legal principles** with respect to PTD and bail. **Politicians** should leave **no doubt about the strict adherence** to these principles and fend off any pressure possibly questioning them, not least strengthening prosecutors and judges thereby.

- **More and better data must be collected and analyzed** with respect to PTD practice, the use of alternative measures and not least also about the effects of alternative measures. On the one hand information should be **accessible for judges to follow up** on further developments in individual cases (e.g. did a released suspect appear for the trial?). On the other hand, the data should also be available on an aggregated level for evaluation purposes and to **support evidence-based policies and developments**.

2. Recommendations for Austria

- Decisions on PTD sometimes may be influenced by factors which are not supposed to play a role like punitive aspects, general preventive considerations, efficiency aspects, etc. Motivations beyond the legal grounds for PTD might compromise the ultima ratio principle. Considering the severity of the interference of PTD with personal liberty, trainings and seminars are recommended not least for reflecting the practice and for awareness raising.

- The legal framework allows for an early involvement of defense attorneys during proceedings in cases involving arrest warrants. After an amendment to the Criminal Code which came into force with January 1st, 2017 more suspects now take advantage of a first legal aid via phone. It however still is a small group who ask for presence of counselling at the first interrogations. Despite information leaflets provided in many different languages also addressing the costs suspects still seem to be afraid risking high costs. Due to the importance of an effective early access to a lawyer for suspects, developments in this context should be subject to further evaluation. The implementation of the EU-Directive on Legal Aid due in May 2019 is supposed to further improve the access to a lawyer.

- The system of legal aid in Austria requires also counsellors usually not practicing in criminal law to take over such legal aid cases. While the questioned experts stressed that these counsellors regularly also do a good job they nevertheless argued for qualities of a representation by specialists.

- PTD practice in Austria appears rather harmonic. Judges mostly apply detention as requested by the prosecution and attorneys rarely challenge the decisions, most often for strategic reasons. Without challenging the principle of judicial independence, a general increase of "conflict orientation" appears recommendable not least also for the development of the legal system.

- The first decisions on PTD are often coined by the need to decide on rather little information particularly with respect to the person of the suspect and to social background information. More information in this respect has a potential to support and widen the scope for decision-making, possibly also allowing alternatives to detention more often. In criminal matters concerning juveniles the court assistance is a highly valued institution also with respect to decisions on detention. A similar service in cases of arrested adults could be helpful. Preliminary probation could possibly also

serve this purpose as well as statements of the probation services, which would be less intrusive. The time needed for such measures may however often exceed the time limit of 48 hours for the first decision on PTD.

- The detention hearings, which are run, conducted and scheduled by independent judges, are generally considered important procedural events. Nevertheless, and again, without challenging the principle of judicial independence, often critique has been expressed pointing at a restriction of many hearings to formal qualities. The time pressure for the first decisions on detention often only allows for little information with respect to the assessment of possible alternative measures. At least at the detention hearings[1] substantial information in this respect should be available, particularly if some assistance is employed. This would upgrade the detention hearings and strengthen the ultima ratio principle particularly if the hearings would focus stronger on a possible release with decisions denying release being obliged to substantiate why alternative measures are not applied.

- Judges and prosecutors regularly referred to the restricted potential of alternative measures to substitute PTD and to sufficiently exclude risks. The outcomes of this research with respect to the potential, the practicability, the effects and the limits of alternative measures however remained rather restricted. Further research particularly focusing on these aspects would provide additional insights valuable for the assessment of the diverse alternatives and with respect to possible needs for development.

- It seems that Austrian criminal law practitioners mostly don't know about the European Supervision Order (ESO). Trainings and seminars should change this. Up to now hardly any information was available on the very few ESO cases reported from EU member states. In the near future hopefully more information on such cases will be available to learn about practical examples and to include these into trainings.

[1] The first taking place 14 days after the initial decision on PTD

3. Recommendations for Belgium

- Improve access to case files, especially in early stages of the proceedings and by making use of modern technologies (digitalisation of files).
- Develop uniform instructions/regulations and practices with respect to the accessibility of case files and possibilities of consultation of suspects by defense lawyers.
- Improve communication between actors involved in the process of supervision of alternative measures (investigating judges, probation services, public prosecutors), e.g. via performant digital platforms.
- In case legislative reforms are considered as an option to reduce the use of custodial measures, prefer 'radical' options and/or conduct ex ante and post factum evaluation;
- Consider (legal) reforms to stimulate (more) use of alternative options such as financial bail and electronic monitoring.
- Be aware of potential unintended effects of (legal) reforms and policies (e.g. impact of sentence implementation policies on pre-trial decisions).
- Consider practical reforms in order to better inform decision-makers on possible alternative options in concrete individual cases, e.g. permanent presence of probation officers at the court house and/or review hearings.
- Identify 'good practices' and share experiences beyond the borders of local judicial districts.
- Strengthen social policies and promote them as valuable crime prevention strategies, and reinforce co-operation between welfare, health care and justice departments (e.g. quota for ambulant or residential care facilities outside prison infrastructure?).
- Stimulate communication and co-operation between judicial actors and the immigration office, and promote international judicial co-operation.
- Organise interdisciplinary meetings with active involvement of key players.
- Include participation of key players in the preparation and follow-up of research projects.

- Include presentations on results of scientific research projects in training programs of judicial actors.
- Enhance (active) participation of judicial actors and practitioners in relevant conferences and expert seminars.

4. Recommendations for Germany

- Better data must be collected, analyzed and made accessible to understand the development of cases. Training and seminars are needed to enable young practitioners to deal adequately with PTD matters and to update more experienced practitioners on current developments. European developments are an important feature. Training events are important for exchange and enable feedback on and reflection of own practice. While it is true that the workload of practitioners is large and they need to be updated on many different other things, PTD as fundamental interference with personal liberty merits a deeper understanding and more training.

- Cases exist where the decision-makers (public prosecutors and judges) do not base their decisions on sufficient information; it is hardly possible for a suspect to defend him- or herself in these cases. To strengthen his or her position a defense lawyer must be present in the first hearing and must therefore be appointed in all cases an arrest warrant is requested by the public prosecution.

- It is important that a review, with more complete information in particular on the social circumstances of the suspect, takes place early. This means that files must be sent out immediately and automatically, since they are indispensable for the defense in any case. It also means that the review should be scheduled *ex officio* after 10 to 14 days – this should be sufficient time for the defense to prepare but still is a time span to endure for a suspect under stress and that does, in case the warrant is lifted or suspended, enable him or her to get back to his normal life without loosing job or housing.

- To further avoid PTD without losing sight of the needs of the criminal procedure the way of decision-making should be changed: With the same prerequisites (grounds and thresholds as well as the proportionality requirement) as now for actually ordering an arrest warrant judges must examine which non-custodial measures (conditions for suspensions) exist and how they would fit for the individual case. Only when they can explain that none of these measures will prevent the individual suspect from absconding, hiding, obstructing evidence etc. an arrest warrant may be ordered. While in principle also now the judge always has to check whether milder measures

are available, at least then an explicit reference must be made to the other options and explicit reasons given why they do not suffice.[2]

- Not all practitioners and policy makers seem to have understood that a bad and unfair practice in PTD matters risks undermining the trust in and compliance with the criminal justice system by citizens suspected of an offence and also the wider public.

[2] This suggestion has been made before by the Association of Defense Counsels in 2015.

5. Recommendations for Ireland

- Recent political and media discussion concerning the use of PTD (PTD) in Ireland seems to suggest that there may be an increased use of PTD in the future. Irish policymakers should recall that there is a movement within other European countries and at European Union level to reduce levels of PTD. Careful consideration must be given to the possible effects of changes in policy and practice on the rates of PTD in Ireland.

- The extensive use of conditions, some of which are quite onerous and restrictive of liberty cannot be overlooked in an assessment of the comparatively low rates of PTD in Ireland. This system of graduated deprivations of liberty is a clear feature of the Irish system, and it is recommended that it not be taken for granted. There is a need to resist a narrative which views the decision on PTD in Ireland as one between liberty and detention simpliciter.

- There is a need for an ongoing review of PTD rates and outcomes of bail applications to monitor trends, particularly as there may be increased PTD rates in Ireland in the coming years.

- There is a need for wide-reaching review and improvements in the collection and publication of data on the outcome of bail applications and PTD rates.

- Participants in the Irish criminal justice system should take care to view conditions imposed on a person granted bail as restrictions on liberty, and ensure they are imposed in a proportionate manner.

- The emphasis on the constitutional protections of the presumption of innocence and liberty should be maintained in Irish practice.

- There should be resistance amongst prosecutors to the possible effects of media outcries concerning the use of PTD.

- A lack of housing needs to be addressed to ensure that people are not placed in PTD because of a lack of an address.

- There is a general need to address addiction problems and mental health issues amongst defendants at the pre-trial stage.

- Care must be taken, in particular for non-EU nationals, that PTD is not imposed in a discriminatory way.
- The constitutional requirement that any financial bail is set in proportion to the means of the accused person should be carefully applied in practice.
- Prosecution self-restraint on the issue of PTD in Ireland is valuable and should be maintained.
- Careful consideration and assessment of the effects of any introduction of electronic monitoring at the pre-trial stage is necessary to ensure:
    - There is a need for electronic monitoring in the Irish situation;
    - The purpose of electronic monitoring in the Irish situation;
    - The implications in terms of cost and the effect of breaches.
- In particular, concerning electronic monitoring, it is recommended that Irish policymakers recall that electronic monitoring has been introduced in other European countries with the purpose of reducing levels of PTD.
- It is further recommended that Irish policymakers pay close attention to the experiences of other countries concerning electronic monitoring.
- Defense practitioners, in particular, would benefit from more time to prepare for bail applications.
- Judges are under a great deal of time and caseload pressure and would benefit from additional background information and time to make their decisions.
- There is a risk that spending too many consecutive days hearing PTD cases can lead to frustration and fatigue, and rotation of judges on such lists is recommended.
- It is recommended that judges be supported to engage in educational and networking opportunities within Ireland and, especially, within Europe, to share practices and perspectives on their work. It is challenging for judges to be able to find the time for this activity in light of their caseloads.
- Funded and high quality legal assistance for defendants is a necessary protection for the rule of law and constitutional rights and should be maintained.

- There is a clear need for more training and information on the European Supervision Order in Ireland.

- The European Supervision Order may be particularly useful for Northern Ireland-Ireland cases and training and support for practitioners and judges on its use is necessary.

6. Recommendations for Lithuania

- Further institutional and academic promotion of PTD as ultima ratio, combined with the promotion of effective international cooperation, might further limit the imposition of PTD.

- We recommend to follow reasonably high standards of proof of the risk of absconding bearing in mind difficulties and high costs of successful hiding from justice in the area of the EU.

- We recommend to follow reasonably high standards of proof of the risk of re-offending with particular focus to the nature of previously recorded offences and also the time lapse between the previous and new offence.

- We recommend restricting the authority to impose the least severe measures (LSM - except seizure of documents) to only prosecutors and the courts and promoting the importance of diligence in reviewing the necessity of the LSM.

- It is recommended to reconsider the practices to force the provider of the bail to sign up an agreement to give up the bail money for the recovery of a fine in the light of the principle of fair proceedings.

- 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.

- It is recommended that the prosecution and judiciary critically reconsider the reasonability of use of house arrest.

- 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.

7. Recommendations for the Netherlands

- The Prosecution Service and the judge should have the legal responsibility to investigate the possibility of a suspension with or without conditions in every case. Whether a suspension is realised or not should not depend on the arbitrary activity of the defense lawyer but should be systematically investigated in every case.

- The current review of PTD by the court in chambers does not always offer an effective remedy. We favour a practice in which additional reporting by the Probation Service – aimed at exploring the possibilities of conditional suspension by the court in chambers – is the rule rather than the exception.

- Prosecutors and judges should constantly be (made) aware of all the practical aspects regarding conditions/alternatives. Limited practical knowledge on (or experience with) the possibilities of (e.g.) financial bail, electronic monitoring or the European Supervision Order (ESO) should not be to the detriment of suspects in PTD.

- We agree with the basic ideas that lead to the proposal to abolish the suspension under conditions and the introduction of the provisional restriction of liberty. However, it is not necessary to wait for a change in legislation. To reduce the use of remand detention, the question that should be considered in the pre-trial stage is not if detention should be applied or not, but what restrictions of liberty are necessary to fulfil the aims that are at stake in this stage of the criminal justice process.

8. Recommendations for Romania

- An infrastructure for electronic monitoring should be developed;
- The regulations concerning and connected to judicial control on bail should be clarified;
- It should be regulated in a more precise and clear way when house arrest and judicial control should be applied in order to avoid possible net widening effects;
- More trainings should be provided for the judiciary and for lawyers on European framework decisions, especially on the Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention;
- Awareness raising with respect to the importance of personal factors in the process of reoffending appears recommendable, for instance in trainings for judges;
- Trainings on Council Framework Decision and on the importance of the personal factors in reoffending should become a part of the National Institute of Magistracy curricula;
- In order for the judges to have access to more personal information about the defendant, lawyers suggest a risk report which could be drafted by the probation service. For the time being the National Department of Probation however views this idea outside the scope of services, not least due to the lack of resources.

9. Partners of DETOUR

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