PRETRIAD
Alternative pre-trial detention measures

D2.4 Interviews Report

PRE-TRIAD Project
Alternative pre-trial detention measures

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1. Change Control

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1.2 Revision History

Version	Date	Comments
1.0	29.11.2021	IRKS produced the first draft and shared it with partners for internal review.
1.1	10.12.2021	IPS reviewed and formatted the document, before sharing it with the partners.
1.2	17.12.2021	IRKS completed the review along partner comments.
1.3	22.12.2021	IPS reviewed and formatted the document.

2. Content

3. List of tables

4. Index of abbreviations and acronyms

EAW – European Arrest Warrant

EC – European Commission

ECtHR – European Court for Human Rights

EJN – European Judicial Network

EM – Electronic Monitoring

ESO – European Supervision Order

EU – European Union

FD – Framework Decision

GPS –Global Positioning System

NGO – Non-governmental organisation

PTD – Pre-trial detention

5. Executive Summary

This report presents the outcomes of 49 interviews carried out with judges, prosecutors, defence counsellors and other experts in the field of pre-trial detention (PTD) in fourteen European Union (EU) Member States. While the COVID-19 pandemic made it quite difficult to access the experts, the interviews carried out mostly in online meetings proved worth the effort. With between one and six interviews carried out per country, the central aim of this research is not to put forward comparisons. The broad base of information stemming from several countries, from different legal cultures and diverse professional perspectives, provides in depth insights into the dynamics and motives that guide PTD practices, including the (non) application of alternatives, with the latter being a focus of the PRE-TRIAD project. Special attention was also paid to the (non) application of alternatives with foreign suspects in the European Supervision Order (ESO) framework. Based on these insights, recommendations are elaborated.

The profession of the interviewee is a variable most relevant for the perceptions of PTD in law and practice, with judges and prosecutors often stating opposing opinions to other experts. PTD is a balancing act between protecting the rights of suspects and securing adequate and efficient proceedings. While defence counsellors and others point at room to avoid PTD more often, most judges and prosecutors, generally, do not see an overuse of the measure. They often refer to a practice guided by necessity indicating little room for discretion. However, the concept of necessity is hardly defined. This observation suggests a narrow perspective taken over by many judges and prosecutors, coined by an assessment of a necessity of PTD influenced by the predominant legal culture, their individual views and possibly media or political pressure demanding tough approaches.

Likewise, they present themselves largely content with the way and (mostly low) frequency with which alternatives are used in their countries. Repeatedly, doubts were expressed about their efficiency. All in all, this implies that many of them do not see much need for change. With referrals to PTD being the "safe way", their focus is on the assumed risks, paying clearly subordinated attention to the suspects' rights. If such an approach coins the practice, the *ultima ratio* principle is very much at risk.

The detention rates and the application of alternatives vary considerably in the countries covered, and the need for change differs too. There is, nevertheless, one aspect practitioners in all countries should have in common, namely a professional approach, which always questions the need for PTD. The results reveal much need for development, which is not easily stimulated. Still, there is an important basis to build on: almost all experts agreed that there is room for more and better use of alternatives. There is a need to strengthen the trust in suitable alternatives to PTD, always bearing in mind that alternatives are infringements of personal rights as well. Alternatives have to meet the requirements effectively, and their efficiency must be ensured by empirical information. Furthermore, empirical information on alternatives, their qualities, limits and needs for improvement is also needed to establish an informed practice, with a potential to trigger a more frequent application. Electronic Monitoring (EM) is an alternative appreciated by judges and prosecutors in many countries – apparently, the rather severe restrictions as well as the monitoring appeal to them. However, one should not forget that EM is a rather intrusive measure with a high risk of netwidening.

Once again, it becomes apparent that foreigners are treated differently to nationals with respect to PTD. This is aggravated by the fact that often they are treated like a homogenous group, which they are not. More effort is required to identify and promote alternatives that suitably can be applied with different groups of foreigners. The ESO can only be considered a step towards more equal treatment of foreigners. This step however is hardly used. Despite doubts about its practical implementation, almost all interview partners agree on the principal value of this tool. To make it become an active value, there is still need for serious promotion work on national and on the European level, as well as for improvements with respect to organisational structures and there continues to be a need for improvements with respect to cooperation and mutual trust among Member States.

Other aspects identified to be important for promoting the *ultima ratio* principle are strict time limits, adequate and active counselling, extending the basis for the decisions, strengthened hearings and, last but not least, clear directions in this respect by the higher national as well as the European courts.

6. Interview structure and methodology

6.1. Interviewee selection

The primary target group for the expert interviews were judges and prosecutors practising in the field of PTD, supplemented by other experts on the topic, particularly ones with a good overview on international aspects and observations (such as representatives of international organisations, defence counsellors and academics). Another criterion for the selection of interview participants was the aim of the project to include views and perceptions from diverse countries. Aiming at a total of 50 interview partners, from 14 countries, the Consortium primarily planned to take advantage of the good national and international contacts of the project partners. The partners individually contacted potential interviewees mostly by mail, informing them firstly about the PRE-TRIAD project, its aims, and the goals and the details of the interviews. Partially, first contacts also were built up via phone calls. Some potential interviewees had been recommended or connected to project staff by superiors.

It was quite challenging to find suitable interviewees ready to participate in interviews on the subject, in general. With the pandemic situation and the many people working in home office, this proved even more difficult. Many addressees did not react to emails and reminders. In the end, the partners succeeded in reaching 49 interviewees from 14 countries. However, the Consortium was forced to invest many contact attempts and considerably more time than planned for this work step. With some authorities, applications had to be filed explaining in detail the project, aim of the interviews as well as interview setting and process. The interviewees came from Austria, Belgium, Bulgaria, Germany, Ireland, Italy, the Netherlands, Romania, Poland, Portugal, France, Slovenia, Spain and Sweden.

6.2. Interviewee board agreement

All experts ready to participate in an interview were provided a form to formally express and sign their readiness to participate in an interview, to have the interview recorded as well as their agreement to the regulations with respect to anonymity, data storage and the data destruction. All agreements were collected and tranferred to IPS. With the

majority of respondents preferring anonymity, it was decided that the analyses of the interviews would be carried out anonymously.

6.3. Research attributes and interview guidelines

The conduction of the interviews was preceded by the identification and development of relevant evaluation dimensions (attributes) and the subsequent development of the interview guidelines to be used by all partners in the semi-structured interviews. These steps are largely built upon the outcomes of the preceding work steps and the connected deliverables (D2.1, D2.2.). Draft interview guidelines were discussed among the partners in mail exchange as well as in the run of an online meeting of the consortium.

The following table presents the research dimensions elaborated and the reasons for the interest in them. All in all, the interviews with practitioners and other experts in the field are considered chances to learn and to foster developments on the basis of broad knowledge and expertise.

Table 1: Research dimensions and reasoning for inclusion

Research dimensions	Reasoning
General assessment of the situation concerning PTD and alternatives	In order to reach an understanding of the practice of PTD, of related problems and dynamics, a broad basis of observations, perceptions, hypotheses and analyses provided by practitioners and other experts in the field from diverse countries is needed. Their description of the practice will allow for deeper insights not least with respect to underlying causes of the practice we observe regarding the (non-) application of PTD and alternatives in the different countries. An aspect in need of exploration in this context is the very different application of the grounds for PTD in the different countries, although defined very similarly in the law. Last but not least, there is a need to explore the awareness and views of practitioners and experts with respect to the negative consequences/costs of PTD and their thoughts on how to

	react to them in practice. Are costs of an extensive use of PTD a factor to be considered in the decision-making process.
PTD and procedural aspects	Our goal is to grasp a deeper understanding of how the questioned experts assess the decisions-making process regarding PTD and alternatives respectively. In this context, the discretion the decisions makers enjoy is a variable of presumably high relevance. Not least possible hidden motives of decisions and possible pressure on the decision-makers need some light to be shed on. Last not least, the perceived practice with respect to legal safeguards and their effectiveness ask for attention. Do they effectively secure just procedures and legal protection? This question includes the organisation, the role and the effectiveness of legal counsel.
Details on the use of alternatives to PTD and other ways to support a less frequent use of PTD	It seems that there is a widely spread generalised preference towards PTD. In most countries, alternatives appear to be not much more than exemptions. We aim at grasping the interviewee's perceptions and positions regarding alternatives and at learning what can be done to apply alternatives correctly and possibly more often. This includes questions on the availability of alternatives as well as on their quality. In this context, we also want to learn about other ways to avoid PTD more often. An alternative that received much attention in recent years is EM. What is the growing interest about? What potential of EM and what risks become visible based on experts views.
Foreign nationals, PTD and the ESO	In many European countries, foreigners represent a big group of pre-trial detainees, although it has to be stressed that this is no homogenous group. We need to learn more about ways and chances to keep the different groups of foreigeners out of PTD more often. This is closely related to cross country cooperation, mutual trust or reservations. The ESO is a tool

	presenting substantial added-value yet is little activated. We need to learn more about the reasons why the ESO is hardly applied and about ways to overcome obstacles. In this context, common standards for European Union Member States are an aspect of interest. How do practitioners and experts view the chances for legal harmonization to be a realistic goal?

The identification of relevant attributes is a fundamental step, offering guidance for the subsequent construction of the targeted and pondered questions. The following sub-section presents the research dimensions described here with the detailed interview questions formulated for the interview guidelines.

6.4. Interview questions

Combining the different evaluation dimensions enabled the Consortium to draft and determine the interview questions. Following a semi-structured interview methodology, the Consortium provided the interviewers questions and topics (i.e., the attributes/dimensions) that must be covered. Regardless, interviewers still benefited from a certain level of discretion in terms of order and inclusion of other questions. According to Harrell & Bradley (2018, p. 27), an interview is meant to "delve deeply into a topic and to understand thoroughly the answers provided". Table 2 presents the interview questions.

Table 2: Research dimensions and interview questions

Research dimensions	Questions
1. General assessment of the situation concerning PTD and alternatives	1.1 How would you describe the application of PTD and associated alternative measures in your own country? 1.1.1 Do you consider the application of PTD to be extensive or rather restrictive, and why so? 1.2 Internationally, there seems to be a widespread preference of the authorities for detention rather than for alternatives. What are the reasons for this? 1.3 What ground for detention is most often used, and why is this so?

	To what extent do you think the negative consequences of PTD should be taken into consideration in pre-trial detention practices (e.g., excessive costs, prison overcrowding; personal consequences for the detainee)?
2. Pre-trial detention and procedural aspects	2.1 For most countries, we observe a rather wide margin of discretion of the decision-makers with respect to PTD. What is your view on this? 2.1.1 We have seen in previous studies that a wide margin of discretion creates an opening for the application of 'hidden' motives' – not foreseen in the law. What do you think of this? 2.2 What is your view of the effectiveness of the existing legal safeguards? 2.2.1 Do they sufficiently secure the rights of pre-trial detainees? 2.2.2 What is the impact of reviews/hearings and appeals? 2.2.3 What is the role and the quality of legal counsel (e.g., on the application of alternatives)?
3. Details on the use of alternatives to pre-trial detention	3.1 Are alternative measures used frequently? 3.1.1 Why is this so? 3.1.2 Are you in favour of increasing the use of alternatives and why so? 3.1.3 Which actor applies for alternatives most often and who takes over organisational matters in this respect (e.g., Attorneys, Social Services)? 3.1.4 Which alternatives are used most often and why? 3.2 How do you view the potential of EM to avoid PTD more often? 3.2.1 Is EM with Global Positioning System (GPS) preferable, namely due to better possibilities for control? 3.3 What would be needed to promote an extended use of alternatives to PTD? 3.3.1 How could existing measures be improved qualitatively (i.e., regarding solutions for monitoring the alternatives)? 3.3.2 What alternatives not yet offered in your country would be valuable (e.g., social work support to the suspect to adhere to the alternative measures)?

4. Other ways to support a less frequent use of pre-trial detention	4.1 What would be the impact of additional information on the suspect during the decision-making process for possibly limiting/suspending the application of PTD (e.g., assessments or social reports provided by external services)? 4.1.1 Does this kind of information also support the application of alternative measures?
5. Foreign nationals, pre-trial detention and the European Supervision Order	5.1 In many countries, it seems that foreign nationals are under a higher risk of PTD than nationals. What can be done to increase the application of alternatives to foreigners? 5.2 What do you know and what do you think about the ESO? 5.2.1 How often is it applied in your country? 5.2.2 What alternatives are most easily carried out with the ESO? 5.3 What would be needed for a more frequent use of the ESO? 5.3.1 How could a faster administration of the ESO be achieved? 5.3.2 Can attorneys foster the use of the ESO? How? 5.4 Some scholars seem to suggest that the ESO is not widely used due to a limited trust between Member States in regard to their capacity to effectively monitor and supervise offenders while under trial. What is your view on this? 5.5 Could legal harmonisation amongst EU Member States be a suitable way to reduce PTD numbers? 5.5.1 In what way?

6.5. The interviews

Due to the COVID-19 pandemic situation, all interviews were carried out either via telephone or in video conferences (e.g., Zoom). Interviews carried out with fellow nationals of the interviewer were held in their mother tongue, and the remaining ones in English. Before the actual start of the interviews, the interviewees were again informed about the aims of the project, and particularly about the aims of the interviews, before being once again asked about their approval of the interview recording. The actual interviews were started with a rather general entrance question (see table 2) and at the

end, interviewees were invited to put forward any final comments (whatever would appear important to them with respect to the topic).

6.6. Data extraction

The conduction of each interview was followed by its immediate individual summarisation in order to ensure the veracity of the treated qualitative data. For the transcripts, the partners were provided an Excel-sheet with a line foreseen for each interviewee and columns for the individual questions. The colleagues were instructed to fill in the responses in the fields for the respective questions. All transcripts had to be provided in English. The partner responsible for the task collected all transcripts and built up a "master document", which finally included all interview transcripts. This master document was the base for the subsequent analyses.

6.7. Data analysis: introductory remarks on the qualitative data analysis

The core of this report are the following chapters presenting an overview and an analysis of the responses provided by the expert interviewees. With between one and six interviews carried out per country, comparisons are not the central aim of this research. The broad base of information stemming from several countries, from different legal cultures and diverse professional perspectives provides in-depth insights into the mechanisms, dynamics and motives that guide PTD practice, including the (non) application of alternatives. Thereby, alternatives are a focus of this research, with special attention being paid to the (non) application of alternatives with foreign suspects, particularly in the ESO framework.

All partners were involved in the analyses, through the division and categorisation of the questions' into groups, whose responses were then aggregated into chapters, which were then assigned to the partners to elaborate on. The following chapters highlight the partners responsible for what chapter. Partners were provided a short guideline for Thematic analyses[1] i.g., the methodological approach to summarise and analyse the

[1] Nowell, S.L., et. al., (2017). Thematic Analysis: Striving to Meet the Trustworthiness Criteria. *International Journal of Qualitative Methods*, vol. 16 (1), pp. 1-13.

qualitative material. The chapters are largely structured along the research dimensions described in table 1 above. The central output of this work package are the conclusions derived from the individual chapters, as well as the recommendations, both collected in Chapter 11.

Chapter 1 – General assessment of the situation concerning PTD and alternatives

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Q1.1 How would you describe the application of PTD and associated alternative measures in your own country?

When discussing the extent of the application of PTD and its underlying reasons, the majority of the judges/prosecutors did not see the application of this judicial measure to be used very extensively, or in a problematic manner. On the contrary, several of them express that it is, in fact, necessary (except in cases involving juveniles or, in certain countries, less serious offences). Many also mentioned that in order to have PTD applied less often, effective supervision measures would be needed. Lawyers and other legal experts, however, most often express different opinions than judges and prosecutors.

It is relevant to mention that this posture was somewhat transversal to all interviews, regardless of the nationality of the interview partners: most interviewed judicial practitioners conclude that PTD is only applied when necessary. They, however, hardly define this "necessity". On the other hand, some of the interviewed judicial practitioners distanced themselves from this trend and demonstrated different perspectives from the mainstream opinion of the professional category. For instance, a judge from Bulgaria (interview no. 12) recognised that PTD should be applied as a last resort and only to those who pose a threat to society; whereas a judge from Romania (interview no. 34) noted that the exceptional nature of PTD should be upheld in practice. An Irish judge (interview no. 9) particularly stressed that the presumption of bail is an important aspect taken into consideration in Ireland and that bail, therefore, is broadly used instead of PTD. In fact, Ireland is worth highlighting as a national context where the presumption of innocence, the right to freedom and the exceptional nature of PTD appear to be widely upheld, which differs in comparison to many other EU countries. This became visible in all interviews with Irish experts.

Q1.1.1 Do you consider the application of PTD to be extensive or rather restrictive, and why so?

On the question pertaining to an extensive or restrictive PTD application, interviewees are mostly reluctant to present estimates and refer to the fact that there is no detailed data available regarding this topic, in most countries. It was also noted by the interviewees that EU Member States measure PTD numbers through varying criteria, a factor which influences national statistics and impedes accurate comparative analyses. In fact, in some countries, once detainees are convicted at the first instance, they are no longer considered pre-trial detainees, while this is not the case in other countries – where the individual continues to be included in PTD-related statistics until the final verdict of the last instance. In parallel to the interviews results, it is also important to bear in mind national statistical data, like the data provided by the SPACE I report, along with other figures shared directly by the interviewees, which might help clarify the qualitative data itself, but also the overall on-the-ground context of each of the analysed countries. To that extent, the following information is organised into different categories, considering the interviewees perspectives, in relation to the available and collected statistical data.

While most of our questioned experts mention that PTD practice is to be determined by practical necessities, others present a more critical position, calling the practice extensive – namely due to the long detention periods. Unsurprisingly, this last position is most often shared by defence counsellors, but also by some judges and prosecutors, as previously shown (including the judges and prosecutors previously mentioned). Even if most interviewees note that the application of PTD has been gradually reduced in their home countries, some of the interviewees point at an extensive use of PTD in their home countries, for instance, questioned experts from Belgium and Italy.

Interviews pointing towards an extensive usage of pre-trial detention

Extensive use, confirmed by national statistical information

According to some of the interviewees, in **Belgium** PTD is not used as an *ultima ratio* measure. In fact, Belgium displays a 34,7[2] PTD rate, which is 12.2 higher than the European average. A legal expert from Belgium, for instance, explained that:

> "*There needs to be a practice of putting the burden very firmly in the prosecutors to motivate, justify and reason their motions for PTD, but also an effort next to judges too, for this to not just be rubber stamping, and that is what remains fundamentally problematic in many cases in many Member States*". (interview no. 24)

With respect to the **Italian** case, it was stated by most interviewees that there is an abuse of the application of PTD (interviewee no. 14, 15, 16 and 17). Accordingly, around 33% of the prison population are pre-trial detainees, as per interview no. 16. Yet, its use has decreased in recent years because there have been numerous ("corrective") interventions by the legislator to ensure it is better understood as *ultima ratio*, such as the introduction of remote-control devices for EM, along other evolutions. SPACE I mentions that Italy has a 31,43[3] PTD rate – somewhat lower when compared with Belgium. Regardless, PTD continues to be applied systematically and disproportionately to homeless people and foreigners.

Curiously, there were also instances during the interviews that would indicate a rather extensive usage of PTD in some of the covered countries – something which clashed with the statistics gathered by the SPACE I report, but also national studies cited by interviewees. This was the case for Sweden but also for Germany.

[2] Aebi, M. F., & Tiago, M. M. (2021). SPACE I - 2020 – Council of Europe Annual Penal Statistics: Prison populations. Strasbourg: Council of Europe. (p. 49 & 96).
[3] Ibid.

Extensive use, contradicted by national statistical data

Critical remarks with respect to **Sweden** pointed out that there are mandatory review hearings taking place every two weeks under custody, and stressed that, nevertheless, the measure would be maintained in 70% of all cases. Hence, interviewees noted that the principle of proportionality is often not respected sufficiently, leading to higher numbers of PTD cases and lengthy detention periods (interview no. 48). However, the country has a PTD rate of 18,15[4], staying below the European average.

Most interviewees from **Germany** focused on their professional role when faced with a PTD scenario. Being an investigative judge (no. 38), one of the interviewees explained that his role is to assess the prosecutor's demand for an arrest warrant. As a rule, this application is confirmed, but in a few cases the prosecutor's application for PTD is declined (his estimate is around 10%). One might expect that this would lead to an extensive application of PTD, with this systematic confirmation of the prosecutors' proposals. However, PTD rates in Germany are close to 16,3[5], remaining well below the EU average.

When it comes to **Austria**, some interviewees (e.g., no. 1 and no. 2) state that PTD is applied rather extensively, not least due to its particularly extensive application in cases involving foreigners. So, even if there are alternative measures available, they are hardly applied. Nonetheless, according to SPACE I, Austria presents a 22,33[6] PTD rate. In any case, the simple fact that Austria ranks minimally below the EU average obviously does not mean that there is no space for further action to avoid PTD more often or with respect to promoting the application of alternative measures, especially so in cases involving foreigners.

In a different line, interviewees from other nationalities clarified that PTD is restrictively applied in their home countries. Similarly to the analysis carried out so far, below the results of these interviews – compared to the available figures – are presented. Firstly,

[4] Ibid
[5] Ibid.
[6] Ibid.

we highlight the results from Ireland and Romania whose respective statistical data confirms a restrictive usage of PTD, in line with most of the interviewees perspectives.

Interviews pointing towards a restricted usage of pre-trial detention

Restricted use, confirmed by national statistical data

In fact, most interviewed experts believe that the application of PTD in **Ireland** is very moderate, even more so since the beginning of the pandemic. Interviewees mentioned that PTD is not often applied in Ireland. SPACE I confirms that Ireland has a low PTD rate (16,8[7]). The presumption of innocence alongside the presumption of bail are described as principles most highly valued and determining Irish practice. In other words, the Irish approach appears to practically emphasise the accused's rights more strongly than in most other jurisdictions and there is less attention paid to the risk of potential new offences. Despite this prevalent approach in Ireland, one of the interview partners (interview no. 6) explained that the use of PTD has been extended over the years with the risk of new offences also gaining relevance.

On the other hand, it was noted that **Romania** has witnessed a considerable decrease in the application of PTD. According to the SPACE I 2020 data, there was a -23,3 decrease in prison population (including pre-trial detainees) between 2010 and 2020[8]. Moreover, the PTD rate is 10.5[9].

Then, we point out the results from Slovenia, Spain and Poland, along with Portugal, who remains close to the EU average – even if interviewees argue that PTD is used rather restrictively.

Restricted use, contrasted to PTD rates close to the EU average

In the perspective presented by the **Slovenian** interviewees, PTD is seen as an *ultima ratio* measure. The Slovenian case and one of the Slovenian interview responses indicate what is true in general: first of all, PTD should only be applied if all preconditions are met

[7] Ibid.
[8] Ibid.
[9] Ibid.

and, secondly, PTD should only be applied if no other measure can substitute PTD. Considering a PTD rate below the European average (median EU 22,5 and 19 Slovenia), The interviews indicate that Slovenia probably could still reduce the PTD numbers, namely through using alternatives more often.

Considering the **Spanish** context, for the country as a whole, the 2020 SPACE I report indicates a rate of pre-trial detainees of 19,7[10]. The situation in the autonomous region of Catalonia – which was also described by one of the interviewees (no. 25) – is rather close to the Spanish figures, as a whole (20,4) – as per the SPACE I data[11]. It would seem that interviewees were rather content with PTD in the national and regional context: according to the majority of interviewed experts, Spain follows a trend of decrease in the figures of pre-trial detainees since the turn of the century and only in rather severe cases is PTD applied: e.g., drug-related, or domestic violence. It is interesting to note that the trial length is much shorter now, something which may also influence the length of PTD. Despite positive developments with respect to PTD-numbers, it was stressed that the Spanish criminal legislation is from the 19th century, and therefore, is in need of radical reform.

Polish experts were quite content with the Polish PTD practice stressing the solid grounds it is based on, in general. Considering the very high prison population rate (195 per 100.000 inhabitants in 2020[12]), a PTD rate largely mirroring the European average (22,4)[13] may seem comparatively little ground to worry about, but nevertheless there may still be room for reductions.

With respect to **Portugal**, it was stated that it has the legal and technical means to guarantee the application of PTD in a balanced manner. In fact, when considering the total prison population, around the turn of the century, 25% were pre-trial detainees.

[10] Ibid.
[11] Ibid.
[12] Aebi, M. F., & Tiago, M. M. (2021). SPACE I - 2020 – *Council of Europe Annual Penal Statistics: Prison populations*. Strasbourg: Council of Europe. (p.33).
[13] Aebi, M. F., & Tiago, M. M. (2021). SPACE I - 2020 – *Council of Europe Annual Penal Statistics: Prison populations*. Strasbourg: Council of Europe. (p.49 & 96).

Nowadays, is it possible to say that Portugal has had a slow but steady decrease of the number of pre-trial detainees, which recently only represent 16% of all prisoners in Portugal. Detention rates (including pre-trial detainees) have decreased by 13,1 between 2010 and 2020[14]). With respect to the PTD rate, Portugal ranks a little below the EU average (22,0 in 2020 versus 22,5[15]). One interviewee (no. 26) underlined that there is a restrictive use of PTD, stressing that even though the data may show otherwise, the application of PTD is strictly dependent on whether the criteria are met – even if the media might transmit the idea that it is used very often, due to its sensationalist approach to criminal justice-related news. Moreover, on average detainees remain under PTD for sensibly one year, before the first instance trial, as explained by the experts. This information helps us understand that, even if PTD rates in Portugal are close to the EU average, the application of PTD might in practice actually become rather extensive, due to the long detention periods to which individuals are subjected.

Lastly, we would like to highlight that, whereas in the case of the countries presented above interviewees seemed to express a relatively clearer perspective on the use of PTD in their home countries, the same was not verified in the case of the French and Bulgarian interviewees.

Differing perspectives concerning PTD application

Even though PTD should be a last resort measure, FAIR TRIALS reported that 29% of **French** prisoners are pre-trial detainees – as per interviewee no. 24. According to SPACE Data, France has a PTD rate of 31,40[16] (per 100.000 inhabitants in 2020). However, and once again showcasing the variety of perspectives within one national context, according to one judge (interview no. 49), judicial control measures (alternatives) are used very frequently in France. In any case, in contrast to this perception, the PTD rate referenced above would point us in a different direction.

[14] Aebi, M. F., & Tiago, M. M. (2021). SPACE I - 2020 – Council of Europe Annual Penal Statistics: Prison populations. Strasbourg: Council of Europe. (p.35).
[15] Aebi, M. F., & Tiago, M. M. (2021). SPACE I - 2020 – *Council of Europe Annual Penal Statistics: Prison populations*. Strasbourg: Council of Europe. (p.49 & 96).
[16] Ibid.

Interviews with **Bulgarian** experts also showcase the variety of perspectives regarding this topic. Some say that the use of PTD is not extensive, and cases of unjustified detention are decreasing, while others mention that PTD should be applied more moderately, indicating that PTD is still used too often. SPACE Data presents Bulgaria as a country with an average PTD usage of 24,6 per 100.000[17]. Obviously, it was hard for many interviewees to assess the practice in their home country in this respect.

Q1.2 Internationally there seems to be a widespread preference of the authorities for detention, rather than for alternatives. What are the reasons for this?

An aspect that was particularly emphasised during the interviews is that PTD should be viewed as an extreme measure for grave crimes, since it clashes against the presumption of innocence. Consequently, it should be used in a restrictive way. Contrary to this programmatic view, many judges and prosecutors actually presented themselves as quite content with a practice that is, at least, not fully in line with these overarching principles. On the other hand, other interviewees indicated that the dichotomy extensive-restrictive is, in fact, of little interest and use in practice. If there is a need for PTD and if the preconditions are met, PTD has to be ordered. Judges and prosecutors tend to talk about the prerequisites for PTD as if they were clearly and closely defined aspects. As we will see in the next chapter below, this is not true for most jurisdictions and judges in most jurisdictions have quite some margin of discretion. The often-cited statement of a "need for PTD" actually leaves very much room for interpretation, namely for what this means in practice.

We will come back to the so-called apocryphal grounds for detention in the next chapter. Here it is important to stress that most interviewees (no. 4; no. 22; no. 23; no. 24; no. 26; no. 27) are of the opinion that judicial authorities, when in the decision-making process, usually react under (and to) pressure from a wide array of sources. Such pressure mostly takes the direction towards an extensive use of PTD. This pressure can come from the following:

[17] Ibid., in fact, the detention rates expressed in the SPACE Data have been rising considerable in recent years. In prior reports also some inconsistencies with respect to the Bulgarian data have been addressed.

- Media;
- Public opinion;
- Political priorities;
- Possible inefficiency of alternative measures;
- High number of cases and time-consuming procedures.

Regarding the first point, it was noted that media play a considerable role in PTD practice, as it influences public opinion, often creating or intensifying social alarm – thereby feeding a substantial pressure put on the judges and prosecutors to impose PTD. According to some of the interviewees, judges have a tendency to be very careful when applying PTD, since their decisions are highly scrutinised by the media and the public, and especially so in sensitive criminal cases. From the point of view of judges and prosecutors, this can lead to a decision-making process first and foremost concerned with avoiding accountability or criticism if anything goes wrong – since, in a prevalent view, PTD is considered the safest measure for potentially preventing future incidents.

> "*Moreover, there are cases where the media and social pressure are so high, that the magistrates feel compelled to apply PTD (excessively)*" (interviewee 22).

Related to this, several responses however also assumed a demand for punitive measures from the public to which judicial practitioners (in many EU countries) react. In Portugal, for instance, there seems to be an exaggeratedly high application of PTD in cases of minor domestic violence. According to the interviewees, this appears to be largely due to the media pressure with respect to this topic, a factor which also clarifies that PTD practice is not only about the application of legal norms but also about the assessment of the preconditions for PTD – which apparently can be open to considerations not defined by the law, and that might in fact even contradict the law (e.g., interviewee 34). Associated to this issue, PTD is viewed by some of the interviewed experts as a means by which also (potential) the risk of possible new offences can be controlled, and the social order guaranteed (e.g., interview no. 18, no. 20, no. 25, no. 41 and no. 43). It is obvious that such a preventive stance carries great risks that PTD is applied extensively.

In this same preventive line, other responses referred to the priority of maintaining order by applying the measure of extreme rigour (interview no. 16). While feeling pressured themselves, practitioners feel a need to demonstrate a "tough on crime approach" to citizens, and that they are "working to make society safer". Consequently, judicial authorities often seem to look through a preventive lens. For example, interviewee no. 34, stated that "citizens should be given a sense of security", and interviewee no. 48, a judge, revealed in this sense that she very rarely decides against the prosecution's PTD requests.

Politics may be influential in this respect. "Fearmongering" and security-focused speeches from right-wing/populist parties have the potential to increase people's sense of insecurity by centring narratives on the danger of criminality and the need for swift and a "tough on crime" approach from the judicial system (e.g., interview no. 21). Positions stressing tough approaches, however, also have been contradicted in our interviews. One of the questioned experts from Ireland for instance stated:

> "*If you want to make things better, you have to be smart, rather than tough*" (interview no. 23),

referring to the Portuguese decriminalisation of drugs to illustrate this point.

Judges and prosecutors often explain a possible preference for PTD also with a lack of suitable alternatives. In Belgium, interviewees noted that public authorities either apply inefficient alternative measures, with little sensitivity to the specificities of the case, or effectively lack appropriate answers and suitable alternative measures – especially so when confronted with homelessness and poverty (interview no. 8). Thus, the solution tends to be the application of PTD after all, e.g., also after a suspect failed to meet orders. On the other hand and depending on the national context under analysis, this does not necessarily mean that there are no alternatives available, but that practitioners reveal rather little trust in them. Some questioned experts (e.g., interview no. 17 and no. 22) doubt the efficiency of available alternative measures, as they will not offer the level of control PTD does.

Even in Bulgaria, where low PTD-rates are reported, detention was said to be generally preferred out of worries that alternative measures might prove to be ineffective.

Similarly, and as stressed by a Polish judge, PTD may be useful for the prosecutor or the police to maintain the defendant in detention. This way, there are no (momentary) security concerns, and the defendant may be more inclined to confess on the hopes of being released (interview no. 31). In this kind of a utilitarian, process economical view, PTD may be preferred because it is viewed as better apt to serve and secure the progress of the investigation. The personal and Human Rights of the defendants apparently are subordinated in this view.

Closely related, it was noted that authorities might prefer the application of PTD to accelerate the proceedings, prevent delays and avoid problems and expenses with defendants who might abscond and escape justice. In fact, the short timeframes for making a decision are also often stressed. Considering often-difficult access to sparse information about defendants and their lives also from this perspective, PTD may be seen as the easier way to the detriment of alternatives.

One of the questioned experts criticised the fact that prisons are at the centre of the criminal justice system as the first resort and not the last resort (interviewee 23). This is, on the one hand, related to the fact that many judicial practitioners believe that they need to be "tough on crime". She however also cited a well-known sociological theorem: the more prisons we build, the more population is incarcerated (interview 23). On the other hand, the dominant application of PTD was also explained by a certain lack of creativity when it comes to applying alternative measures to a pre-trial detainee (i.e., creating individualised packages of alternative measures that best suit the defendant and perceived risks). Partially, it seems the little use of alternatives is not just explained with a lack of creativity but also with a reluctant readiness. As one of the questioned experts stated, there is no time for "experiments" to try to see what works better (interview 3).

Q1.3 What ground for detention is most often used, and why is this so?

This question aimed to understand the most used grounds for PTD in the interviewees' countries and at the European level. Evidently, the most often invoked grounds for detention can vary from country to country. In some Member States, PTD is

systematically imposed in drug-related offences, while in others, it is often related to white-collar crimes or corruption, or in cases that gain media attention, which may increase the pressure on judges and courts to show a tough approach from the start.

The grounds for detention defined by the law are quite similar in most countries. The ones most often referred to throughout the interviews were: flight risk, social disturbance, failure to appear in court and the risk of new offences being the most often mentioned one. The defendant's criminal record, the nature of the crime with which s/he is charged, tampering with evidence or witnesses, and securing the investigation phase are aspects considered in all countries as well. It was also said that in some cases, the behaviour of the accused person or the factual circumstances also hinders the application of different measures. Some judges (interview no. 14, no. 15, and no. 2) emphasised that PTD is only applied when strictly necessary considering the grounds legally defined. However, other experts expressed contrary opinions, noting, for instance, that

> "*the grounds are more than just legal. The problem is also cultural. In Italy, in over 40 years, the prison population has more than tripled*." (interview no. 17).

This perspective is also reflected in the increase of pre-trial detainees. In specific, the questioned experts mentioned that in Portugal, the risk of flight, the risk of disturbance of the investigation and judicial proceedings and the seriousness of the alleged offence (such as homicide or rape) are always determinant, not only at a national level but also when it comes to local cases (for instance, relatively less grave cases which still cause a great social alarm in a small village). In such cases, if a less grave offence leads to a severe disturbance of public order and creates social alarm, PTD might be considered as a suitable measure. This means that PTD is not applied due to the severity of the alleged offence but because of its impact on the community. Reportedly, these grounds are often applied even in cases with rather low prison sentences to be expected or if the accused does not have a criminal history of delinquency (which is frequent). One respondent even explained:

> "*in reality, PTD may be applied for the sake of social tranquillity.*" (interview no. 26)

Furthermore, the risk of continuity of criminal activity, especially in drug trafficking cases, appears to be an important factor in the decision-making process. Since drug trafficking is viewed as economically attractive, one of the questioned experts explained that the offences

> "*will not end until the individual has been subjected to PTD*".
> (interview no. 22)

Such a perspective is further justified with the notion that Portugal is "a gateway for drug trafficking into the European continent" (interview no. 21). These responses actually indicate a rather extensive use of PTD, or put the other way round, there may be some room to avoid PTD more often in Portugal.

Moreover, in the **Netherlands**, non-custodial measures are not applicable in cases of severe offences, such as drug trafficking. The interviews (e.g., interview no. 5) also demonstrate a certain degree of "preventive orientation", like many other countries whose reality is presented in this report. This means that the risk of new offences and social disturbance linked with severe crimes are central factors in the decision-making process. Similarly, **Austrian** experts explained that the most significant ground for detention is the risk of new offences. This is most often assumed with foreigners, who are often in rather precarious living situations, or with those accused of several offences. Hence, in these cases, judges and prosecutors perceive detention as quite the logical choice.

Belgium as well presents a prevention oriented PTD practice, however in a somewhat different wording. The grounds for detention most often mobilised are those concerning public safety. Likewise, in France, besides the protection of the investigations, PTD is perceived as a medium to maintain the public order. Countries with a strong preventive orientation tend to have rather high numbers of pre-trial detainees. Among the grounds most often invoked for PTD in **Romania** is also the risk of new offences, often assessed on the bases of the criminal record (as a heavy factor supporting the assumption that there is a risk of new offences). According to one of the interviewees, this intrusion into personal rights can be necessary to protect society:

"*We accept the risk of hindering the right of individuals to protect society, at least for a while*". (interview no. 37)

In **Bulgaria**, PTD is reported to be most certain in cases of serious crimes (murders, robberies, etc.) punishable by imprisonment of 10 years or more. Apart from that, the interviews did not present any indication of one or the other ground being applied more often than others. It was mentioned, however, that alternative measures are generally not considered first when imposing PTD, especially when involving African people – in the words of the interviewee (interview no. 30).

In **Ireland**, most attention is paid to prior failures to appear in court while on bail. Traditionally risks of new offences played hardly a role in the Irish PTD practice. In recent years the risk of new offences however gains importance and was reported to be brought forward in 70% of the serious cases dealt with by the higher courts today. At the same time, there is no doubt that PTD in **Italy** has to be seen in the context of its history and not least the mafia problem. This caused extensive detention practices and social alarm to be the main ground for detention, followed by the risk of new offences. However, it has to be added that, despite the still high numbers of detainees, recent reforms have reduced the figures somewhat, as previously noted.

In **Germany**, the danger of absconding is the ground for detention most often applied. It is interesting to note that, according to a response (interview no. 38), the real problem behind the assumed risks of absconding may be the lack of a postal address and linked uncertainties with respect to bureaucratic issues (e.g., a foreign national without permanent residence might not receive the necessary information to participate in the process and attend the trial). Remarkably, there the risk of new offences is not applied as frequently as in other countries, particularly in the neighbouring countries such as Netherlands, Belgium and Austria. Interestingly and different to most other countries obscuring evidence or collusion is the main reason to apply PTD in Sweden.

Transversally, this chapter already provided some clues to the situation of foreign nationals in the analysed EU countries. Interviewees agree that, in many countries, foreigners have a particularly high risk to be detained. However, even many of those criticising an extensive PTD practice assume little chances of reducing the application of

PTD for foreigners because most of them are not integrated into society and are perceived to pose a flight risk.

Q1.4 To what extent do you think the negative consequences of PTD should be taken into consideration in pre-trial detention practices (e.g., excessive costs, prison overcrowding; personal consequences for the detainee)?

Regarding this question, we have to stress a duality in the answers and perspectives of the interviewees. Some of the interviewed judicial practitioners tended to underline that they would not take into consideration the consequences of PTD, since this sort of appreciation would go beyond their own competencies. In turn, they point to the State as the responsible entity to consider and handle the negative consequences of PTD. Conversely, other professional groups (lawyers, researchers, NGO (Non-governmental organisation) staff, private experts, but also a few judges and prosecutors) alerted to the risks of placing people in PTD, as well as to risks related to lengthy detention periods.

With reference to the first point of view, many of the questioned experts did not highlight the negative consequences of PTD and did not offer recommendations or suggest solutions in this respect. A few of the interviewees went as far as referring to PTD as a necessary evil (e.g., interview no. 21 and 26), and that "overcrowded prisons need to be solved with non-judicial measures, such as constructing other prisons or the logistical adaptation of structures." As regards the personal consequences for the prisoner, "each citizen assumes [them] for his actions." (interview no. 15). Moreover, according to a questioned expert (interview no. 5), PTD is better for some foreign nationals and homeless individuals, implicating that the prison conditions may be better than their regular living conditions (they can work, earn more money, etc.), and that prisons are well managed. Nonetheless, contrary opinions were also manifested by other interviewees. Some questioned experts denoted that it is essential to adopt a balanced, impartial approach, and consider the consequences of ordering PTD. Therefore, the arguments that are taken into consideration can be divided into two areas:

- ***The harm that is caused to the individual***, implying that s/he is much more likely to be sentenced when in PTD and that fundamental rights can be violated, especially when being held in an overcrowded prison. Additionally, the personal consequences of

PTD for the detainee must not be neglected (e.g., unemployment, loss of housing), nor should the psychological impact of incarceration on the defendant, as per interviewee 17, along with the criminogenic effects of PTD, according to another interviewee (no. 14).

- ***From a cost-efficiency perspective***, some of the experts highlighted that alternatives are generally cheaper than PTD, and noted that insisting on outdated penitentiary policies generally leads to higher costs for taxpayers, while simultaneously aggravating issues linked to overcrowding – which in turn results in the degradation of the infrastructure, poor detention conditions, and Human Rights violations. In this sense, recidivism is more likely to happen. As such, some of the experts recognised the importance of considering the negative effects of PTD in the decision-making process, even if they acknowledge that overcrowded prisons or cost efficiency do not generally have an influence on the decision of most practitioners. Moreover, the impact of PTD on the individual's family (for instance, in case there are dependents) was also mentioned as a negative consequence meriting attention. However, for some, if the legal preconditions and other relevant factors are verified, the majority of judicial practitioners noted that the person should be remanded in custody or placed under house arrest, with EM being much cheaper.

However, and as noted, many judicial practitioners do not consider the negative consequences of PTD because, in their opinion, there are a few or almost none. In addition, many also consider that bearing in mind such negative consequences goes beyond their competencies, and should not be included in the decision-making process. In fact, they explain that the rights of the accused are well secured since there are several legal safeguards working in their favour. Against this background, some experts believe that the negative consequences deriving from PTD are not sufficiently relevant to enter the decision-making process. In effect, in some of the interviewee's perspectives (no. 38), "PTD serves to secure the proceedings", above all.

Chapter 2 – Pre-trial detention and procedural aspects

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Q2.1 For most countries, we observe a rather wide margin of discretion of the decision-makers with respect to PTD. What is your view on this?

In making decisions on PTD or alternatives, judges and prosecutors also have to consider procedural aspects. Their work has to implement the given legal framework, which means guidelines and directions but also limitations and boundaries. And one may not forget their work is often done under steady observation of media and politics.

The assessments of the margin of discretion differ. Most of the interviewees considered the scope of discretion to be large or at least moderate. Contrary to this observation, it was quite striking that all interviewees from Bulgaria (3 judges and 1 defence counsellor) agreed that there was no or not much scope for discretion. This coincides with a comparatively low PTD rate in Bulgaria (8.6 pre-trial detainees per 100,000 of the population). Dimitar Markov, Director of the Law Program at the Center for the Study of Democracy, confirmed that also in his view the low PTD numbers are caused by a relatively small room for discretion on the one hand, but also added that the strict time limits regarding the duration of PTD play a big role in this context as well.

Still, a majority of the interviewees pointed out that the discretionary power is imperative for the judge to fulfil his/her role. Because each case is unique, there is always a need for an "individual evaluation" that becomes part of the basis for the judge's decision. It was argued that this individual case evaluation cannot simply be replaced by a (possibly narrower) legal framework. This is also due to the complexity of the individual cases and the fact that judges have to form their own picture based on the questioning, hearings, personal contact with the accused, etc. – also regarding the trustworthiness of the accused. According to a Portuguese judge, for example, this process is more than a purely mathematical weighing of individual (quantifiable) circumstances (interviewee 26). Instead, a certain degree of interpretation of the judge to evaluate the case is also necessary for a good consideration, another prosecutor stated (Interviewee 28). This

process translates the law into applied law and this is a central part of the role of the judge, who appears irreplaceable in this respect.

The relationship between the legal framework for PTD and the judicial freedom of decision was also linked to the respective supreme court case law. Thus, the practice is not only guided by the written law, but the respondents stressed the importance of the supreme court rulings as guidelines for the interpretation of the law. Rather strict guidelines and a strong emphasis on Human Rights on the part of the highest courts are viewed to favour a more cautious use of PTD.

Narrow legal frameworks, time limits for PTD and influential actors

Defence counsellors among the interviewees often wished for narrower legal frameworks and strict time limits for PTD. At the same time, counsellors, in particular, pointed out that even with strict legal frameworks and interpretation requirements, the discretionary power allows judges and prosecutors to seemingly often apply the law in their spirit. Therefore, some interviewees emphasised the importance of the case-law of the Supreme Court regarding the application of PTD. It is capable of changing legal practice towards a more restrictive application of PTD. This expectation is not always met. An Austrian expert for instance criticised that the courts of appeal would not provide the guidelines for a narrow interpretation of the detention law he would hope for. Although other interview partners did not address this as explicitly, there were other responses valuing the respective legal framework and still articulating critiques on a too extensive PTD practice, which implicitly also includes the guidance by the courts of appeal. A lawyer from Belgium e.g., stated that the law in his country is very narrow, very clear and well written, and yet there is an appalling rate of PTD. He also observed that in various countries (Belgium, Poland, Italy), there has been reforms or changes to address these issues and the rates of PTD still kept increasing (Interviewee 24).

A high-ranking representative of a European authority presented himself largely content with the present legal frameworks. He argued for a narrow interpretation and application of the law in its spirit and that this would likely lead to a reduction of PTD numbers. Conversely, he interpreted the high number of such proceedings before the European Court of Human Rights (ECHR) as evidence of a rather extensive PTD practice

(Interviewee 27). In addition, he and some other interviewees pointed out that external pressure (media, public, politics) and a growing influence of populist notions can also have an influence on the judicial decision-making practice leading to a wider and more frequent use of PTD (Interviewees 27, 30, 31) – something which goes hand in hand with the insights offered by Chapter 1.

There were responses describing the margin of discretion as partially dependent on the different players. Mostly the margin of discretion is discussed in the context of judicial decisions. One of our judicial experts questioned this approach viewing the discretion to be more in the hands of the prosecutor. In his view, the question of PTD arises when the prosecution hands in a request in this respect. It is the prosecutor who decides to file an application for an arrest order – or not. Thereby "*the course has been set beforehand*" by the prosecution (Interviewee 38). In this view, the prosecutor is presented as holding a decisive position because, without his application, the suspect would always stay free. While there is some truth to this, this response ignores that in the end, the judge is the one who makes the most crucial decisions, going along with the application or not. Still, this statement points at the fact that the procedures consist of sets of interactions: inquiries, communication, applications and decisions. This also means that the other stakeholders regularly have diverse possibilities to try and direct the proceedings in a direction they favour. If they do not succeed, they mostly still have the chance to fight the judicial decision. Besides the prosecutors, it is of course the defence counsellors who are the most relevant actors in this respect. The more active they are the more chances they have to influence the decision making of the judges. As addressed in Chapter 3, in many responses, activities of defence counsellors have been described to be most important for the application of alternatives to PTD. With an active pursuance of an application for alternatives – clarifications and preparations for suitable alternatives, well-justified application, etc. – they are influential actors as well.

Q2.1.1 We have seen in previous studies that a wide margin of discretion creates an opening for the application of 'hidden' motives' – not foreseen in the law. What do you think of this?

With regard to the question addressing the practical relevance of hidden motives, the so-called apocryphal grounds for detention, the responses presented a very mixed picture. About half of all interviewees did not answer the question or presented very vague statements which neither confirmed nor denied the existence or non-existence of extra-legal grounds for detention. Ten of the interviewees clearly confirmed the practical relevance of apocryphal grounds for detention, 15 denied this. It was in particular counsellors (but also scholars) who stated that in their view extra-legal grounds for detention would be part of the possible motivation of judicial decisions, while several judges and prosecutors largely denied this. Obviously, the perspectives of the professions have a major impact on this view. Coined by their procedural role, defence counsellors on the one hand, tend to view judicial practice critically (and possibly sometimes even too critically). Judges and prosecutors, on the other hand, may possibly deny a critical practice, being concerned about the reputation of the judicial professions. The latter frequently pointed out that the involvement of the different actors in the proceedings and the possibility of appeals would ensure that the grounds for detention were handled in accordance with the law and that they were thoroughly controlled.

It must be mentioned, however, that there were also exceptions to this observation. For example, two prosecutors affirmed the practical meaning of extra-legal grounds for detention clearly expressing critique about such a practice, e.g., not sufficiently adhering to the presumption of innocence and misusing PTD as a kind of early sanction, as a means of teaching the suspect a lesson (e.g., interviewee 5). This interview partner also asked for a more open discussion of the problem. The margin of discretion that is needed apparently bears a risk to provide room for the entrance of motivations not in line with the law. Hidden motivations to use PTD as a punishment were also described by defence counsellors. Some argued that judges and prosecutors e.g., often expected unconditional prison sentences in such cases anyway, and therefore they were said to apply PTD in anticipation of the punishment (e.g., interviewees 2 and 5) .

According to the interviews, other reasons that may motivate decisions for PTD not covered by the law can be intentions to deter (particularly young) suspects by using PTD as a shock incarceration (e.g., interviewees 2, 11, 27, 46). Other responses described a hidden motivation possibly and sometimes applied to build up pressure to force suspects into cooperation or confession (Interviewee 39). In contrast PTD was also said to sometimes possibly protect suspects from vigilantee justice (Interviewee 21).

A public prosecutor explained that public and media pressure would often be a reason for the application of extra-legal grounds for detention (Interviewee 22). In such cases, or also in cases with pressure coming from politicians, ordering PTD can be a way to deal with the pressure. Possibly connected to this is another motivation which may come into play, which is the concern of judges about the responsibility for their decisions. If they have decided against PTD and in favour of an alternative measure and the suspect then, for example, flees (evades justice), destroys evidence, or commits another serious crime, judges may be blamed for this. A public prosecutor puts this quite clearly and also points out that this concern may not necessarily be objectively justified:

> *'Instead, magistrates often have fears - even if sometimes unjustified - that the person will evade justice and that they will be held accountable for that'* (Interviewee 22).

Q2.2 What is your view of the effectiveness of the existing legal safeguards?

The majority of the questioned experts presented themselves content with the effectiveness of the legal safeguards protecting suspects. Unsurprisingly, defence counsellors sometimes took a different view on this question and denied the effectiveness of the legal safeguards.

Many of the interviewees differentiated between legal safeguards on paper (in law) and their actual effectiveness and use in practice. While the majority of respondents were convinced that the legally guaranteed safeguards would protect the detainees, there were some points of criticism regarding their practical implementation (e.g., interviewee 7). In general, the fundamental rules for the application of PTD are well perceived. In our expert interviews it was particularly stressed that mandatory reviews as well as absolute time

limits for PTD have a strong importance. Some interviewees stressed the value of an early mandatory assignment of a defence lawyer, a regulation rather new for some Member States.

While the need for fast first decisions is on the one hand generally acknowledged, on the other hand the time available for this can also be a factor influencing the decisions. Two judges from Romania for instance explained that the initial decision-making regarding PTD and alternatives often has to take place under great time pressure, because, in Romania, police custody is limited to 24 hours. They argued in favour of a longer period of police custody, which would allow for a better quality of the decisions (e.g., interviewee 35).

Q2.2.1. Do they sufficiently secure the rights of pre-trial detainees?

Like stated above, an effective exercise of the suspect's rights not least depends on the availability of a competent and committed lawyer. Interviewees from Austria and from Ireland held the opinion that the legal aid systems in their home countries is not an attractive area for counsellors to work in (e.g., interviewees 1 and 6, respectively). Indeed, it was also argued by others that organisational (and monetary) aspects of legal aid may negatively influence the quality of the work of counsellors (Interviewees 36 and 44). Other interviewees also complained that suspects (especially foreign ones) have difficulties in gaining access to (competent) legal counsel (e.g., interviewee 24).

Since the use of legal safeguards often also involves higher-ranking courts of appeal, the effectiveness of legal remedies is also dependent on the jurisdiction of these higher courts. While the interviewed judges and prosecutors mostly described these control mechanisms to work well, there were also some doubts articulated, for instance by an Austrian lawyer who criticised Austrian higher courts for (in his view) not examining complaints thoroughly enough (Interviewee 1).

Part of the procedural rights of suspects is also the access to translators and interpreters. Being a prerequisite for smooth and fair procedures involving foreign suspects, this is still often quite difficult to organise for the authorities. A prosecutor explained that, in practice, this often leads to solutions lacking quality assurance (Interviewee 28).

Apart from described problems concerning procedural rights of pre-trial detainees, two defence lawyers (Interviewees 11 and 18) from Italy and Bulgaria, respectively, and a judge (Interviewee 12), also from Bulgaria, stressed deficiencies with respect to the conditions of detention (cell size, overcrowding, activities in detention, etc.).

Overuse of legal safeguards

Although the fundamental legal safeguards provided in EU Member States are generally well perceived, there were also a few voices critically commenting on their use. Prosecutors from Germany and Poland e.g., complained about an "overuse" of legal safeguards (Interviewees 42, 45 and 14). In their view detention examinations and other legal safeguards for the suspects are sometimes used without sufficient grounding causing delays and long proceedings. According to a judge, defence counsellors would sometimes "abuse" the right of defence, e.g., by seeking postponements of court sessions for inadequate reasons, largely hindering the progress of the proceedings (Interviewee 10). Extreme positions in this respect even argued that detainees would have more rights than prosecutors, sometimes hampering investigations (Interviewee 14).

Once again, the profession seems to be a variable most relevant for the perceptions of PTD in law and in practice. In fact, it is a balancing act for the written law and for the practice of law to secure the protection of the rights of the suspects at the same time securing adequate and efficient proceedings.

Q2.2.2 What is the impact of reviews/hearings and appeals?

As far as the effectiveness of detention reviews and complaints is concerned, it can be reported that some lawyers, judges and other judicial professionals explained that the reviews often do not really represent thorough examinations, but rather resemble more routinised proceedings to fulfil a formal necessity, but with little practical impact (e.g., interviewees 11 and 27). Three Austrian experts, for instance, stated that, in their view, the decisions on the detention reviews were already made in advance and that there was no serious discussion of the detention issue or of alternative measures. In their view, a strengthening of the hearings improving procedural qualities would have a potential to reduce PTD numbers (Interviewees 1, 2 and 3). Progress was reported by an expert from Portugal. In his view the effectiveness of PTD appeals has improved since an amendment

to the law brought appeals before a chamber in the court of appeals, consisting of three high ranking, experienced judges (Interviewee 21).

These statements call for a strengthening of the hearings and of the appeals procedures. On the other hand, it must also be noted that in practice an ambivalent situation may arise. In most EU countries there is either an automatism of reviews after a certain period of time or pre-trial detainees have the right to request a detention review indefinitely often (and many lawyers also use this right regularly), regardless of whether there have been fundamental changes in the suspect's personal circumstances or in the circumstances of the case. From the perspective of judges, such an automatism or the unrestricted right to request reviews sometimes may be perceived as a legally constructed overuse, because revisions of detention decisions are only justified if valid arguments can be raised challenging the reasonableness or justification of PTD (e.g., interviewees 21, 25, 26 and 28). Most judges and prosecutors rate the effectiveness of hearings and appeals highly. Some of them, however, complained that lawyers often would not bring forward new facts in the reviews they requested and, consequently. the decision on PTD would not be changed. With the experience of warrants rarely being revoked, lawyers, on the other hand, often rate the effectiveness of detention hearings as low, countering that they are not really listened to, and that no serious examination of the detention issue takes place (e.g., interviewee 4).

Despite differing perceptions about reviews and hearings being substantially dependent on the professional roles of the interviewees, and despite critiques on some aspects, the questioned experts do not question the principal importance of regular reviews and hearings. The responses do not provide a clear picture on whether regular mandatory reviews may better serve the aim to avoid (long, unneeded) PTD more often than reviews that only take place after request. There may be some advantages with regular mandatory reviews, but, in the end, the value of regular reviews as well as of requested reviews is defined in practice by well prepared and thorough proceedings, open to any outcome based on the re-evaluation of the requirements for PTD. There seems to be some room for improvement in this respect in most countries, as stated by an official of a European authority:

> "*The Recommendation of the Committee of Ministers 2013 stresses the need to re-evaluate the circumstances once a month, where the risk should be revised and a decision be made with updated justification. But this doesn't happen, and even if it is done, it's done automatically, without giving any reasons, these are slim or are not updated.*" (Interviewee 27)

Q2.2.3 What is the role and and quality of legal counsel (e.g., on the application of alternatives)?

With regard to the role of lawyers, all interviewees agreed that this has to be assessed as central or very important. This is not only generally due to the fact that suspects usually need legal assistance to effectively exercise their rights. Especially for the preparation of preconditions for the application of alternatives to PTD, lawyers are considered to play an essential role (see Chapter 3). In the view of many interviewees, the defence has the task of preparing alternative measures, as well as applying for them in the context of detention reviews (i.e. convincing the court of the feasibility of applying an alternative measure). A few voices put forward critiques about defence counsellors often not being sufficiently active in pursuing the interests of their clients (e.g., interviewees 5, 23). In fact, it is especially those who have little or nothing, who need particularly good defence counselling:

> "*[my] doubts [regarding the effectiveness of legal safeguards] are linked to the most vulnerable people involved in criminal proceedings - where the real, practical motive for applying PTD is that they do not have a place of residence or do not have means for subsistence. In these cases, we are not fully respecting Human Rights, nor the use of PTD as a last resort.*" (Interviewee 25).

Chapter 3 – Details on the use of alternatives to PTD

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Q3.1 Are alternative measures used frequently?

Aproaching the topic alternatives to PTD the interview partners had been asked about their estimates on the frequency of the use of alternatives in their countries. Several of the judges and prosecutors were rather reluctant to give an estimate, some of them pointing at the fact that no figures are available. Two thirds of those who did give an estimate referred to a frequent or increasing use. There is a lack of data, but estimates in empirical works assume a rather little application of alternatives in many countries (e.g., AT, DE, NL according to Hammerschick et al., 2017). Most of the questioned lawyers and other legal experts largely agreed that alternatives are seldom used in their countries. The lack of data in this respect is a problem and in the end there is a restricted value to these estimates, apart from the observation that the assessment of the practice again appears much dependent of the profession of the interviewee. Most responses, however, did not simply refer to the frequency of the use of alternatives, but gave some explanations in this respect. The comments of the individual respondants on alternatives altogether provide impressions of their assessment of the practice concerning alternatives to PTD. All in all, apart from single exceptions, and despite some criticism, most judges and prosecutors present themselves largely content with the way and the frequency alternatives are used in their countries.

Q3.1.1 Why is this so?

An aspect most often indicated in the interviews with judges and prosecutors and, therefore, apparently a central ground for a restricted use of alternatives is a lack of trust in the effectiveness of most alternatives to counter the assumed risks, particularly with more severe crimes. Single responses indicated concrete problems or inadequacies with respect to the monitoring of orders and alternatives respectively. Many responses however suggested that many judges and prosecutors have rather little knowledge about alternatives and their performance. This feeds the impression that the lack of trust in alternatives often lacks an empirical basis, but may be a welcome excuse for a rare

application. An argument frequently heard from judges and prosecutors in this context was the reference to PTD being the "safe way". This very much shortened view could be of major responsibility for the dominancy of PTD in the context of measures applicable to secure criminal proceedings and to avoid new criminal offences. A clear dominancy of PTD has been recognised by a majority of the questioned experts for their countries.

Q3.1.2 Are you in favour of increasing the use of alternatives and why so?

There were rather few voices among judges and prosecutors stressing advantages of alternatives (such as the reduced costs or less negative consequences to the suspect) by themselves, explicitly asking for PTD to be avoided more often, and for alternatives to be used more often. Nevertheless, most of the experts in all countries said that there would be room for an increased use of alternatives. Many of them, however, added a need to be careful or adding prerequisites that have to be met, like improvements with respect to monitoring, more resources or more options for the alternatives.

In this context some interview partners, also judges and prosecutors, explained the widespread dominancy of PTD and the subordination of alternatives with a certain mindset of the responsible practitioners or a certain dominant legal culture (e.g., interviewee no. 5), respectively. While this kind of assessment was not restricted to experts from one or the other country, all questioned Irish practitioners described an Irish practice different to that observed in the majority of the other jurisdictions, with bail being the default way. This difference has already been described by diverse works (e.g., Hammerschick, 2021, pp. 25) and the Irish practitioners actually seem to derive some pride from a legal culture they themselves distinguish with bail being "seen as a civil right" (interviewee no. 23) and with a practice that is seemingly better in line with the *ultima ratio* principle, than in many other countries. It is remarkable in the interviews that Irish judges and prosecutors spend much time to explain why PTD has to be the exception, while many of their colleagues from other countries rather explain why alternatives would not be suitable for many crimes or groups of suspects respectively. One might assume that the spectrum of alternatives is broader and more elaborated in Ireland than in other countries, but the reports do not really indicate this. The Irish practitioners, however, appear more content with the range as well as the quality and the performance of the alternatives applied there, than their colleagues in other countries.

Considering the observation that many judges and prosecutors in other countries have rather little knowledge about alternatives and their performance, a simple explantion could be that using the alternatives more often, Irish practitioners are more used to them and the frequent use also generates more experience with and knowledge on the alternatives.

Speaking of civil rights, analysing the interview material it is also quite striking that Human Rights arguments have otherwise been seldom employed in the discussion of PTD and alternatives, both by judges and prosecutors, but also by defence attorneys.

Unsurprisingly, and contrasting to the majority of judges and prosecutors, many of the interviewed defence attorneys and other experts commented rather critically on the application or non-application of alternatives to PTD in their countries. In their view alternatives are not applied as often as possible or called for. When judges and prosecutors call PTD the "safe way", some defence attorneys view it as the easier way for the decision-makers. In such views, interview partners explained that the deciders would not sufficiently inquire into possible and suitable alternatives, would prefer PTD because it means less work or that the practitioners would give in to punitive criminal policies. Some answers of these experts, however, also confirmed the importance of alternatives to effectively meet the risks. Defence attorneys regularly plead for more use of alternatives. Interestingly, however, possible risks connected to alternatives (like a net widening) hardly have been addressed by them. This sensitivity is probably strengthened once there are negative experiences in this respect.

The main risk connected to the use of alternatives to PTD is the risk of a net widening. Net widening describes the risk that alternatives may lead to the monitoring of more people. While an alternative may, on the one hand, lead to less people in PTD, it may also cause an extended use, also with people who otherwise would be released without any order or with less intrusive measures. In our interviews the risk of a netwidening actually has almost exclusively been discussed with respect to EM. In fact however, the risk of a netwidening is also given with all other kinds of alternatives to PTD. This problem was addressed by Belgian interview partners, who confirmed the reality of netwidening in Belgian practice. There, the introduction of alternatives to PTD hardly had any impact on

the numbers of pre-trial detainees, but the number of suspects monitored in some other way – most often via EM – increased dramatically (interviewee no. 7 and 24). The risk of a netwidenig could also be indicated in several responses of judges and prosecutors, who explained alternatives to be above all applicable with rather minor offences.

Another aspect addressed in single interviews possibly causing netwidening may be public pressure judges may react on. Then, alternatives serve to calm possible critiques about a release. Apart from EM, there seems to be little awareness about the restrictive or intrusive qualities of alternative measures. Of all interview partners only one legal expert pointed at this and only single others stressed that for alternatives the requirements for PTD have to be fulfilled as well.

Alternatives are in fact just one way of several to avoid or to shorten PTD. Doubting the effectiveness of alternatives, individual judges and prosecutors rather voted for a speedy process to keep PTD as short as possible (e.g., interviewees no. 18 and 40).

Q3.1.3 Which actor applies for alternatives most often and who takes over organisational matters in this respect (e.g., Attorneys, Social Services)?

In the picture mainly evolving through the interviews, the public prosecutor is the one who in the tendency aims at PTD, possibly pushed and suppported by the police, while it is above all up to the deffence attorneys to apply, prepare and fight for alternatives. It also becomes visible that the prosecutor is quite powerful in matters of PTD in general. In some systems the prosecutors can even order alternatives to detention for certain offences or in certain phases of the proceeedings on their own, like in Austria, Poland and Portugal. This legal option however is not used at all in Austrian practice and in general it seems that prosecutors mostly do not become very active in this respect. Some of the questioned lawyers ask for more activity from the judges and prosecutors with respect to the possible application of alternatives to detention, while otherwise there were also some voices asking for more activity and support of the attorneys in this respect Considering the difficult social situation a majority of suspects are living in, well functioning legal aid systems are of utmost importance. The Austrian system, for instance, has been criticised in the interviews in this respect. On the other hand the interviews also indicate that there is quite some room in most countries for judges and prosecutors to

consider the application of alternatives, to actively pursue this option and to carefully asses the needs and, if needed, the most suitable measures.

Q3.1.4 Which alternatives are used most often and why?

In most countries, no official data is available on the alternatives most often used and the observations of the respondents concerning their countries differ often. There are still some interesting outcomes of the interviews. The common alternative seemingly most often used is reporting to the authorities, mostly to the police. While this seems to be frequently used in all countries, it appears to be especially valued in countries where there is a close cooperation between the police and the judicial authorities, or where there is good trust in the monitoring of the police. According to the interviews, this is true, for instance, for Irland, Romania and Bulgaria. Some practitioners explained that this measure would only be used in cases of rather minor severity and risks, and there were also some indications that these measures bear a rather high risk of a netwidening. Considering the broad application in all countries (and ignoring the netwidening risk), reporting orders should be an alternative rather easily applied also in the context of an Europesan Supervision Order (ESO).

An increasing use is reported for EM, mostly with house arrest or the obligation to house permanence. EM will be discussed in more detail below. In some countries, like Romania, house arrest is also frequently used without any technical monitoring. Apart from Ireland, bail seems to be frequently used only in a few countries such as Bulgaria or Poland. In fact, the Irish concept of bail is different to the concepts in most other countries, where bail focuses much more on high sums of money, while in Irleand bail has a wider meaning with the monetary aspect not nescessarily central. This way, interviewees explain that bail is no real alternative for most suspects threatened by PTD, because they would not be able to afford it. Still, some interview partners also saw a potential to extend the use of bail. Single responses for instance reported about relatives collecting money in the family and therewith bailing out suspects. This way of organising bail was considered particularly effective, because hardly any suspect supported this way would harm his relative helpers.

Q3.2 How do you view the potential of EM to avoid PTD more often?

The expert interviews quite convincingly and once again showed the internationally growing interest in and demand for EM, also in the field of PTD. More than half of our interview partners were much in favour of EM, while only about a fifth presented views largely sceptical to the use of EM during pre-trial proceedings. Another fifth of the questioned experts remained either undecided about predominant benefits or disadvantages of EM in PTD-cases or did not express clear views in this respect. Worth to mention is that almost all defence attorneys represented in this survey were principally in favour of EM, but some of them, however, were also eager to stress possible risks.

Interestingly, and despite the growing attention EM receives internationally the practical knowledge about EM is not that wide spread. Many practitioners still seem to have a limited knowledge about details of the use of EM, its possible advantages and disadvantages. This is particularly true for GPS monitoring. Mostly the practitioners refer to EM carried out in connection with house arrest or the obligation to house permanence. In the Netherlands, however, a different modell is practiced, which is not focused on a general restriction of movement but rather on bans (not) to enter certain areas or districts and on the quality of always knowing where clients are/were. Both options are based on the use of GPS-technology. This sub-chapter primarily focuses on house arrest or house permanence with EM, however, also addressing the Dutch model.

The most often heard argument in favour of EM is the one highlighting the avoidance of imprisonment. Interestingly again, most times this argument has not been grounded with the importance of Human Rights or with the value of liberty, but rather pragmatic with desirable consequences: suspects threatened by PTD can stay in their familiar surrounding, stay with and support their family, keep up social ties, go to work (if granted) and avoid prison life with its diverse, possible negative effects. Several times also the (potential) beneficial effects on the prison system have been mentioned, with on the one hand less people in prison and thereby improved prison conditions and on the other hand the much cheaper costs for EM.

"*I rather have EM than more people in prison*" (interviewee no. 1). This citation can be interpreted as representative for a majority of views presented in the expert interviews,

acknowledging the qualities of EM, but also the burden connected to it. Being aware of the intrusive qualities of EM, the experts apparently do not think of EM primarily as a measure ensuring Human Rights. Personal or fundamental rights were actually mostly cited in the context of possible risks connected to the use of EM as an alternative to PTD or an alternative way to execute PTD. Above all, experts who seemed not too fond of EM in the context of PTD highlighted the intrusiveness of the measure, restricting the liberty of people in a "*prison at home*" (interviewee no. 6), while monitoring needs could be satisfied with other measures as well. A risk many of our respondents agreed on - also several of those who are in favour of EM - is the risk of a netwidening. Our Belgian interview partners actually described an additional risk of a broad application of alternatives, and EM in particular. If the conditions to be fulfilled in connection with EM are very demanding on the clients and if no social work support is offered, there is a high likelihood that the clients will fail to comply with the orders and will finally end up remanded in custody. The high numbers of pre-trial detainees in Belgium, despite a wide use of EM, are viewed to be a least partially grounded in this aspect (interviewee no. 7 and 24).

Some responses in the context of EM again indicate a problem still observeable among practitioners: professional views that do not sufficiently distance PTD from punishment. This becomes obvious, for instance, when practitioners stress a deterrence quality of EM or when they refer to combining EM with measures apt to change criminal behaviour. The border between PTD and sanctions sometimes appears somewhat blurry, when the fact that EM is a rather intrusive measure seems to be viewed as a specific quality, not least because intrusiveness is equaled with higher effectiveness. Although not explicitly said, several interview partner nurtured the impression that the appeal of EM in the context of PTD to them is at least partially due to this quality. This was expressed by comments like EM being the only strong alternative (e.g., interviewee no. 13), the most effective alternative (interviewees no. 21 and 27) or being a guarantee for control and surveillance for the authorities (Interviewee no. 28). This fits together with observations and interview responses revealing little trust of the authorities in other, less invasive alternative measures with lesser assumed efficiency, although there is no empirical information available about the compliance with and the effects of alternative measures

in most countries. EM is considered different, more efficient in this respect and therefore it is a hope for many practitioners. The ankle bracelet and the technical monitoring just by itself seemingly express a power and ability of the state to control and monitor the individual 24/7. Only in a few individual responses the limits of EM to finaly prevent escape or the possible continuity of the alleged criminal activity (e.g., interviewees no. 2, 3, 43). Not surprisingly, above all Austrian experts stressed these limits. In fact, the prevailing view among judges and prosecutors in Austria holds that EM can rarely avoid PTD in prison. If a client fulfils the requirements for EM he/she regularly also fulfils the conditions for other less severe alternative measures. This position was also heard from other nationals. As a consequence, EM, which in Austria is no real alternative but a way to execute PTD, is hardly applied in pre-trial cases.

Considering the overwhelming positive statements on EM, it is a slightly surprising how little was said by the questioned experts for which cases and for the prevention of which risks EM is suitable for. The few comments in this respect suggest its application in a range of cases, between a severity just suggesting PTD and a higher degree of severity,but not the most severe ones, e.g., murder. Some respondents addressed the problem that EM contributes to a different treatment of groups, depending on their social situation and integration (e.g., interviewee 2). In fact, the requirements to be fulfilled for EM in most jurisdictions largely excludes the socially and economically deprived.

Q3.2.1 Is EM with Global Positioning System (GPS) preferable, namely due to better possibilities for control?

Although several of the interview partners had little or no knowledge about EM with GPS, most of those who did had a rather clear view about the cases suitable for this model. The quality of the GPS-technology is above all and mostly seen with the definition of ban-zones, which may not be entered (e.g., interviewees 4, 5, 21). An example most often cited in this respect are cases of domestic violence. Interestingly, the ability to monitor all movements of the clients has only been mentioned as a major advantage in a few statements. The Dutch model introduced above places this quality in the middle of the EM-concept without house arrest or house permanence. The interviewed Dutch practitioners were much in favour of this model, also viewing the risk of a netwidening as rather reduced, since EM is very much targeted when applied. On the other hand, a few

interview partners said that Radio Frequency monitoring would be sufficient for the majority of cases, partially also referring to higher costs connected to the GPS-model.

Ultimately, possible qualities and drawbacks of EM have to be discussed considering the different national frame work conditions. This sub-chapter is closed with a short overview on additional specific national aspects and positions on EM, collected with the interviews.

The prevailing position among judges and prosecutors in Austria has already been presented. The Austrian representatives included in this survey largely confirmed this view, however indicating that there would be some more room to apply EM. Judges and prosecutors are assumed to lack information about EM, particularly about the availability of GPS-bracelets, as well as routine in the application of EM. Training and information could stimulate some more use. Little knowledge about EM was also assumed for defence attorneys. GPS was deemed useful for specific cases, e.g., if bans are required.

Most critical about EM for PTD-cases were the questioned Irish experts. EM is not offered yet and looking at the Irish responses there is obviously not much demand among practitioners, although they did not categorically oppose it. Quite uniformly, they expressed little interest in and little need for EM, pointing at the risks related to it and at the rather low numbers of pre-trial detainees in Ireland, which are considered prove that the existing alternatives suffice. German judges and prosecutors appear rather sceptical about the use of EM in PTD cases as well, above all doubting that there would be much room for application. Similarly to Ireland, the German practitioners did not present much indication that the use of EM will be extended in Germany in the close future.

The Portuguese experts, on the other hand, uniformly appreciated EM as a successful alternative to PTD, not least highlighting that it is highly trusted among judges and prosecutors. In fact, Portugal reports rather high numbers of EM in PTD cases. Nevertheless, the Portugues experts also pointed to the limits of EM. In Bulgaria, EM was just recently introduced. The Bulgarian experts were in favour of this option in PTD-cases as well. Despite the moderate numbers of pre-trial detainees in Bulgaria and an awareness that often less control is sufficient, still room for expansion was stated.

EM was also positively assessed by all questioned Italian experts. In their view, EM is used much too little, while there would be substantial room for an increased use. The main reason for a rather little use seems to be a lack of technical devices. Considering the high numbers of pre-trial detainees in Italy an investment of this kind could be part of a strategy tp push back PTD.

Finally, Romanian practitioners demonstrate much interest and high expectations regarding EM. Although the law would already allow for EM in PTD cases, it has not yet been realised and a technical system is still missing. In specific, Romanian experts expressed that EM would improve the – seemingly little - confidence of judges and prosecutors in the effectiveness of alternatives.

Q3.3 What would be needed to promote an extended use of alternatives to PTD?

Q3.3.1 What alternatives not yet offered in your country would be valuable (e.g., social work support to the suspect to adhere to the alternative measures)?

Our interviewees were also asked about alternative measures to PTD not yet offered in their countries they would deem useful. Some interview partners did not see much of a need for new or additional alternatives to be introduced. Most often, EM was mentioned. Next to EM, most often mentioned in this respect were measures involving social services and support assisting the suspects in dealing with diverse social problems, potentially also threatening their appearance in front of the court or a law abiding life. This was explained to be most helpful, because many supects live in very precarious social living conditions and are at risk of PTD not least because of this. Also mentioned, however, was a risk with such measures to violate the presumption of innocence. An interesting model and potentially, less intrusive alternative to EM was addressed by Irish practitioners. There, mobile phones are used to monitor and control clients (interviewees 8 and 9).

Q3.3.2 How could existing measures be improved qualitatively (i.e., regarding solutions for monitoring the alternatives)?

Selected observations with respect to the use of alternatives in the countries included

- **Austria:** little use of alternatives due to little trust in the alternatives, preference for the safe way PTD and a high proportion of foreign pre-trial detainees, despite a broad variety of alternatives. Chances for an increased use of alternatives broadly acknowledged.
- **Belgium:** broad application of alternatives, however in a net widening manner. Need for better informed and more focused application of alternatives and need for more resources.
- **Bulgaria:** recent increase in the use of alternatives, but still room for more, despite rather low number of reported pre-trial detainees. Need for more resources.
- **Germany:** rather little offers with respect to alternatives and also little use of alternatives. Nevertheless the numbers of pre-trial detainees are rather low.
- **Ireland:** legal culture different to most other countries with bail clearly being the default way convincingly accepted also by prosecutors. Nevertheless still room for developments, particularly with respect to the measures possible in the framework of bail.
- **Italy:** alternatives are regularly applied today and more often than before, due to rather recent reforms. In view of the very high number of pre-trial detainees, alternatives are still very much subordinated to PTD and mainly applied in rather minor cases. There is still a need for broad strategies to reduce PTD numbers, including alternatives.
- **The Netherlands:** alternatives are clearly subordinated to PTD and there is room for more use of alternatives. Lately bail has been increasingly used, often also with EU- citizens (if they or their families can afford it).
- **Poland:** broad opportunities for alternatives and alternatives are often used. Besides reporting orders bail and social guarantees are alternatives most often

used. In Poland prosecutors can impose a variety of alternatives and reportedly also do so.

- **Portugal:** rather advanced system with reports by social services supporting PTD decisions and diverse alternatives, however with a need for structural improvements/more resources. PTD still used to often.
- **Sweden:** in Sweden the main ground for PTD is the danger of a suppression of evidence. This ground however is viewed not compatible with alternatives to detention and therefore alternatives are rarely used.

Reccommendations towards an extended use of alternatives

This final question in the context of the focus on alternatives to PTD asked for what would be needed to promote an extended use of alternatives. The responses on this were quite diverse. Quite frequently, presented recommendations can be summed up as strategies and activities for improving the knowledge and information of the practitioners about alternatives. Some of the interviewees stressed a need for awareness-raising about the available alternatives and also about the consequences of PTD that have to be avoided, whenever possible (e.g., interviewee no. 11). First of all, training and educational measures have been metioned in this respect. Some responses referring to a need for information about the effects and qualities of alternatives actually asked for evaluations and research on this aspects. In fact, research is also required when some interviewees ask for measures to ensure the good quality of alternatives and continuing improvements (e.g., interviewee no. 25). Some responses in this context recommended promotion work for alternatives, assuming that more information would trigger more applications of alternatives, which in turn would convince more practitioners about the qualities of alternatives and thereby again stimulate their use.

Following up on critiques that most alternatives do not sufficiently reduce the risks PTD excludes, single answers on this question asked for the improvement of alternatives in this respect and for information or guidelines for the practitioners on what the individual alternatives can do to largely exclude assumed risks (e.g., interviewee no. 1 and 3). Part of the (good or improveable) qualities of alternative measures is their monitoring, which

some practitioners considered insufficient with most alternatives, appart from EM (e.g., interviewee no. 12 and 26). Consequently they asked for improvements in this respect.

Other suggestions directed at improvements with respect to alternatives can be subordinated to the heading "procedural recommendations". One interviewee referred to the quality of a tailor-made design of the alternatives applied in individual cases (interviewee no. 28). This is a high demand, which however was expressed in several responses stressing that the alternatives have to fit the case and the risks. In this context, several judges and prosecutors pointed at the need for more information about the suspect on which to base their decisions (e.g., interviewee no. 4, 39 and 42). Apart from organisational structures which can support this (such as reports by specialised institutions), this is best achieved if there is a good communiction and coordination between all actors (interviewee no. 24). Of course, if alternatives should fit the case, this requires a good range of opportunities, like also recommended, regularly connected with a reference to a need for sufficient resources. Last not least, lawyers regularly recommended higher demands on the justifications of why alternatives are not applied.

Little was said on the problem of the application of alternatives with foreigners. Interview partners addressing this agreed that alternatives are rather seldom used with foreigners, however, hardly any suggestions have been presented in this respect. A very general recommendation referred to the need for more and closer cooperation between EU Member States. In fact, foreigners can mean several different groups: tourists, others travelling through a country, migrants, who may have been born in the country, asylum seekers, etc. Looking at foreigners from a EU perspective, we also have to differentiate between EU nationals and third-country nationals. Obviously the practice with respect to the use of alternatives seems to not sufficiently consider these differences and their meaning for the assessment of risks to be controlled with PTD or other measures. In very simple terms, the classification of foreigner regularly leads to an assumption of a risk of flight.

Chapter 4 – Other ways to support a less frequent use of PTD

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To explore potential ways of decreasing the use of PTD, interview partners were asked to elaborate on what additional information on the suspect is usually collected and reviewed by the competent authorities, when deciding on whether to apply PTD and, to what extent the availability of more information has an impact on the choice between PTD and alternatives.

Q4.1 What would be the impact of additional information on the suspect during the decision-making process for possibly limiting/suspending the application of PTD (e.g., assessments or social reports provided by external services)?

There was a broad consensus among interview partners in support of the collection and utilisation of additional information concerning the personal circumstances of the suspect or accused. The majority of interviewees agreed that the availability of more information about the suspect or accused person during the decision-making process can help the judge to better understand the personal and social situation of the alleged offender and make a more informed decision on whether to impose PTD or an alternative measure (e.g., interviewee 4, 39, 42).

In practice, however, most interview partners shared the opinion that, despite the undisputed benefits of using additional information about the suspect or accused person, the collection and review of such information appears rather difficult to implement. Thus, the personality of the alleged offender is not always sufficiently considered during the decision-making process (e.g., interviewee no. 3).

The main reasons for the difficulties in collecting and using additional information about the suspect or accused person seem to be related to the time frame in which PTD decisions are made. Many interview partners, from different countries across Europe, made references to the timeframe of PTD decisions. On the one hand, PTD decisions are usually made at a very early stage of the proceedings (often immediately after the alleged offender is found). At this point, there is not much information about the person apart from what the police have already collected (e.g., interviewee no. 1). Although some

interview partners believed that the information coming from the police (or other investigative authorities) is sufficiently comprehensive (e.g., interviewee no. 15), others were of the opinion that it is often scarce, unless the person has already been in contact with the police (or the criminal justice system) for previous offences (e.g., interviewee no. 5). On the other hand, the procedures and deadlines for deciding on PTD are usually very short, which further limits the options to collect and review additional information without delaying the procedure and/or posing additional pressure on those responsible to provide it (e.g., interviewee no. 37). Besides, time (and resources) are also needed to verify the accuracy of the information, particularly when it comes from the suspect or accused person (e.g., interviewee no. 42, interviewee no. 46). Thus, as aptly summarised by one of the interview partners, the biggest challenge is to determine who has the necessary information, is this information accurate and reliable, and how it can be obtained within the deadlines for delivering the PTD decision (e.g., interviewee no. 25).

The interview partners were not unanimous in their opinions on who can actually provide additional information about the suspect or accused person. The different opinions are most probably due to the differences between the national legal and criminal justice systems. Some interview partners were convinced that only the competent authorities (police, prosecutors) are obliged to collect such information. Others believed that the accused person's lawyer also can (and even must) present relevant information, not least to help avoid a PTD decision against their client. It was also recommended that the additional information should be collected by specifically trained professionals (e.g., interviewee no. 21) to avoid the delivery of information that is incomplete, formalistic or otherwise unusable (e.g., interviewee no. 26).

As a source for supplying additional information, several interview partners from different countries (e.g., The Netherlands, Germany, Romania) mentioned probation and social services (as well as NGOs authorised to present social reports). The opinions in terms of the quality and impact of such information were not unanimously positive. In some countries, e.g., The Netherlands, probation reports seem to work well and a positive probation report (i.e., a report stating that the accused is more likely to observe the measures imposed on them) can convince the judge to impose an alternative instead of PTD (e.g., interviewee no. 5, interviewee no. 29). In other countries, e.g., Romania, the

situation seems to be different and probation reports, although useful in general, do not always achieve their goal, mostly because the probation services are overloaded (e.g., interviewee no. 36).

A universally valid conclusion on the role of probation and social services in the PTD decision-making process is therefore difficult to draw, especially since, due to the differences between the national legal systems, their role in the proceedings may vary substantially from country to country and, last not least, their resources may differ considerably. Nevertheless, it should be noted that probation, social or other similar services, to the extent to which they are authorised to participate in the process and are provided with adequate resources, can be a key source of information about the suspect or accused person and their potential needs to be further utilised (e.g., interviewee no. 24). This, however, depends a lot on two important preconditions: the quality of the reports and the degree to which judges actually use them. If the quality of probation reports is not good (incomplete, formalistic or biased), or they are often disregarded by the courts (which, being independent, are not bound by them), their role in the proceedings will be very much limited (e.g., interviewee no. 27)

Some interview partners elaborated on the scope of additional information, which is usually collected and reviewed. Apart from the information about previous offences or convictions (if any), which seems to be a mandatory requirement in most countries, information is also collected about the employment and family status (e.g., interviewee no. 22), housing (e.g., interview no. 32), (mental) health condition (e.g., interviewee no. 26), ongoing or upcoming medical treatment (e.g., interviewee no. 44), impact of detention on the accused person's family (e.g., interviewee no. 31), family members or relatives depending on the accused person (e.g., interviewee no. 44), etc. As a rule, the collected information is primarily used to assess the risk of continuity of criminal activity, or absconding, but some of it is also used to evaluate the potential impact of PTD on the suspect or accused person and their family, as well as for the assessment of suitable alternatives (see below). Thus, for example, PTD can be avoided if the collected information shows that the suspect or accused person is in poor health condition or is the main or only source of income in the family.

Difficulties in collecting additional information for particular groups of people were also mentioned. These include, above all, foreign nationals (for whom information might not be easily available in the country where the proceedings take place) and homeless people (who are not attached to a certain location or place of residence) (e.g., interviewee no. 44). Due to the lack of information about such persons, or the difficulties in obtaining it, such groups are exposed to a higher risk of ending up in detention, either because the judge would not have sufficient information to assess the risk of re-offending or absconding or because some (or all) of the alternatives would be considered inapplicable (e.g., house arrest could hardly apply if the person has no home).

Several interviewee partners highlighted the different ways in which additional information is collected and used, specifically when the suspect or accused person is a juvenile. Despite the differences between the national legal systems, it seems that in many countries (e.g., Austria, Romania, Bulgaria) the additional information collected and reviewed in cases against juveniles is much more comprehensive (both in terms of content and sources) and has much more weight than in proceedings against adults.

Some interview partners noted that, regardless of its overall usefulness, the additional information collected about the suspect or accused person should always be assessed objectively, should never be prioritised over the other evidence collected by the police and should not be used to justify the use of alternatives in cases, in which, according to the law, PTD is mandatory.

Many interview partners elaborated on the use of additional information when reviewing PTD decisions. According to some interviewees, due to the short deadlines of the PTD decision-making procedure, in many cases the authorities prefer to first (and quickly) detain the suspect or accused person and then collect and evaluate any additional information in the framework of PTD review procedures (or hearings). In such cases, according to some interview partners, the additional information about the suspect of accused person may lead to shorter duration of PTD (early release from detention) and sometimes even to a shorter sentence. In this way, all the information, which is relevant but not yet available at the time of the initial hearing (e.g., information from social services), can still be used and play a role at a later stage, when the PTD decision is

reviewed (e.g., interviewee no. 4, interviewee no. 14, interviewee no. 37, interviewee no. 41).

Q4.1.1 Does this kind of information also support the application of alternative measures?

As far as alternative measures are concerned, few respondents addressed the topic. Those who did, mostly shared the opinion that additional information about the suspect increases the chance for an implementation of alternatives and less use of PTD. One interview partner, however, expressed concerns that the difference may not be as significant as some would expect (interviewee no. 2). Overall, the collection of additional information is supposed to extend the bases on which the decision to impose or not to impose PTD is made. Some interview partners explained that in some cases this may also mean that the additional information may present the accused person in a more negative way, possibly supporting PTD (e.g., interviewee no. 34).

Others emphasised the importance of additional information when choosing between different alternatives. On the one hand, this information can give an indication to what extent the suspect or accused person is eligible for a certain alternative measure, e.g., EM, which in turn can influence the judge's decision on imposing PTD (the chances of getting a PTD decision are lower if the judge is advised that the suspect or accused person is eligible for a certain alternative measure) (e.g., interviewee no. 25). On the other hand, where available, the additional information can also help the judge to choose the most appropriate alternative (where more than one alternative is available) in view of the personal characteristics of the suspect or accused person (e.g., interviewee no. 23).

Several interview partners from different countries expressly noted that there are cases, in which PTD is inevitable (i.e., mandatory according to national law) and cannot be avoided no matter what additional information about the suspect or accused person is presented (e.g., interviewee no. 13, interviewee no. 14).

Chapter 5 – Foreign nationals, PTD and the European Supervision Order

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Q5.1 In many countries, it seems that foreign nationals are under a higher risk of PTD than nationals. What can be done to increase the application of alternatives to foreigners?

Most of the respondents admitted that the current penal practice across EU countries favours the application of PTD to foreigners. The reasons behind this reality are viewed to be complex and most of the time inter-related: an overestimation of the risk of flight, a lack of bonds in the sentencing, stated both in terms of social connections and housing, a low-income level among most foreigners, and so on. In fact, the situation is even worse for third-country nationals.

However, PTD is very expensive and actually not justified in many property or petty crimes. In this case, the participants in this study have suggested different solutions such as:

- Transferring the procedure (and execution of a possible sanction) to the State of regular residency;
- Apartments with supervision;
- Housing with preliminary probation or community supervision (e.g., attendance center);
- Different forms of community supervision;
- Bail;
- Ban on leaving the country;
- EM, etc.

As one can note, most of these alternatives involve housing in the issuing state. In some cases, housing could be provided by the State in the shape of attendance centers or by the NGO sector like Red Cross in Spain. However, these alternatives above all encourage alternatives to be executed in the issuing State and not necessarily in the State of residence.

For a long-term solution, many respondents have argued that, in principle, the ESO and the European Arrest Warrant (EAW) are the right answers for allowing EU citizens to

wait for trial in their State of residence while ensuring also their presence in court for trial in the issuing State. However, for the ESO to be used more frequently, obviously obstacles need to be dealt with. Some form of evaluation report or social enquiry report also are deemed useful in these cases, in facilitating the application of alternatives. The French law, for example, provides for such social reports as mandatory, but only for juveniles and young adults. Social services are, however, often not in the position to provide the desired, sufficient and reliable information in the short time given. This may be particularly true for nonresidents. Still, such information is often deemed useful, even if it may be provided only at later hearings. In other countries, all information is obtained via the police and from the defendants during the hearings by the judge. Several interviewees described the quality of this information as often being poor, indicating room for improvement in this respect.

Promoting a fair defence, efforts towards anti-discrimination and bias-free practices for all citizens were also mentioned to have a potential to improve the position of foreigners in trial. Better informing foreigners and their lawyers on their rights could make a significant difference in their treatment, according to some respondents. This implies that lawyers should be better informed about the rights of their clients and also about the available mutual trust instruments. As mentioned in this report before, for several respondents the defence has the primary responsibility for promoting alternatives (e.g., interviewees 21, 44, 49 etc.).

In most cases, these solutions were suggested to avoid the high costs of detention and for ensuring a minimum level of Human Rights for all foreign suspects threatened by PTD.

Q5.2 What do you know and what do you think about the ESO?

Q5.2.1 How often is it applied in your country?

Most respondents admitted that the ESO is still 'hardly known' and even 'less often used' (e.g., interviewees 11, 12, 13, 16, 22). Only single cases of an application of the ESO were reported from most countries. From the Netherlands actually, a decrease in the use of the ESO has been reported after there were some applications during the early years after it came into force. However, despite doubts, many respondents acknowledged the importance of such a tool for a good management of an unbiased justice: avoiding PTD more often, reducing costs for PTD, allowing the defendant to wait for trial in his/her state, therefore reducing the social and economic costs for him/her and his/her family, allowing equal treatment for non-nationals and so on.

The presented reasons behind the non-use of this Framework Decision are complex and diverse. Ireland, for instance, has transposed the FD just recently and therefore has not had much time to take advantage of it in practice. Some questioned experts indicated to prefer the use of other judicial cooperation tools, such as transferring prosecution altogether to the Executing State (e.g., from Austria, interviewees 1 and 5).

Using the ESO in cases of petty crime could be problematic: in case of a breach, the EAW cannot be used if the potential penalty is less than one year of imprisonment. In fact, using the EAW in small cases may also be disproportionate (interviewee 39). This may discourage judges and prosecutors to use the ESO. The ESO, however, was described to appear especially suitable for rather petty crimes that are dealt with in fast-track procedures, which means that preventive measures might not be necessary at all. Fast track procedures, on the other hand, make it difficult to organise ESO measures in time. Other respondents again stressed the fear that the defendant will not be available for trial despite the EAW to be an important reason not to use the ESO. Trial *in absentia* (if admissible) may impact on the quality of justice (interviewees 21, 27, 49).

Some responses described the bureaucratic paths and their lack of simplicity as significant obstacles (e.g., interviewee 26). Not least, time pressure and slow replies from the competent authorities of the executing state can additionally discourage the judiciaries engagement in cross-border cooperation:

"*Sometimes you have to wait for one year before you hear back from the executing state*" (Interviewee 30).

Not being familiar with the legal possibilities in other jurisdictions adds even more subjective constraints to cross-border cooperation (interviewee 31). Sometimes also technical difficulties may apply. For example, how can one use EM in case of a suspect living in one country and working in another (cross-border cases)? Of course, a lack of foreign language skills also has the potential to frustrate judges when intending to initiate any consultation with the competent authorities in another country (interviewee 7, 31, 41).

In a majority of countries, a prevailing "ignorance" with respect to the ESO is explained with a lack of information and, related, with hardly any training on the subject (indicated particularly by responses from Bulgaria, Spain, Belgium, Poland, Romania and Sweden). According to some responses, this may be aggravated by inertia and resistance to change (e.g., interviewee 28). Nonetheless, there were also responses that explicitly stressed a good level of information about Framework Decision (FD) 829 among the judiciary and also applications of the ESO (e.g., Slovenia).

In spite of the complex nature of the obstacles in the ESO implementation, some participants suggested useful and promising solutions with some potential to foster the use of ESO in the EU.

Q5.2.2 What alternatives are most easily carried out with the ESO?

The most 'popular' alternative to PTD that can be easily applied in most of the EU countries together with an ESO is ***reporting to an authority*** (e.g., police, probation service etc.) (e.g., interviewees 1, 2, 4, 5). Other possible obligations or restrictions were also mentioned, but only sparingly: e.g., bail, treatment obligations for drug users, the obligation to reside in certain places, EM, the obligation to inform about any change in the residence, prohibition to meet certain people and seizure of passport. Of course, these alternatives can only be ordered if available in the executing state. However, as several respondents observed, there is quite a high level of similar regulations at the EU level as far as alternatives to PTD are concerned. Here again, it becomes visible that practitioners

are very much in need of information about measures they can order to be executed in another country.

5.3 What would be needed for a more frequent use of the ESO?

When asked about solutions to put in place in order to promote the use of the ESO, participants suggested two types of measures:

- Measures that the EU could employ;
- Measures that each Member State could put in place.

Measures to be taken by the EU institutions

First of all, interviewees argued that the European Commission (EC) should put more effort in the promotion of FD 829 stressing advantages and addressing disadvantages. More efforts in promoting European cooperation in judicial matters in general would also help the application of FD 829 (e.g., interviewees 1 and 22). Apparently, many experts working in the field attest a need for improvements and would hope for a stronger lead of the EC encouraging and supporting Member States with respect to more and better cooperation. Negative experiences with competent authorities from other countries e.g., not responding to requests do not foster mutual trust. Communication between the competent authorities is critical in enhancing the use of FD 829. Reportedly the lack of information even includes not knowing where to look for the competent authorities in the executing state. If this kind of basic information is missing, there is no real starting point for the ESO to be applied. Furthermore, access to up to date information about the options available in other Member States was also suggested to assist officials to feel more confident to consider the use of the ESO. Training in the use of FD 829 and publications on the subject are also viewed as options to build up competence and confidence in the application of the ESO.

When addressing the latter topics, respondents often did not clearly differentiate whether these subjects primarily should be dealt with by the EC and connected institutions or by the Member States. This in fact indicates a need for close cooperation between the EC and the Member States, also with respect to these strategic aspects of the rollout of the ESO.

It was also suggested that more harmonisation between Member States could support more cooperation. For example, it was reported that a suspect planned to be transferred from Portugal to his home country, with EM to be applied there. Due to the fact that EM was not available in the executing State, the transfer was not realized. As addressed in chapter 5.5., the majority of the questioned experts however does not expect big steps with respect to legal harmonisation among the Member States within a close future.

Measures suggested to be taken by each Member State

Raising awareness and training for the competent authorities were the most often cited measures that Member States should take in order to promote the ESO (interviewees 3, 4, 19, 21, 22, 31, 32, 44). The training could also include language skills to support communication between involved authorities, but also concrete competencies to search for the competent authorities in the Executing State (interviewees 25, 31, 32, 36). Important to mention here is that the training should make the information easily accessible to all those involved – as one of the participants has put it:

> "*everything that appears to be complicated will be hardly implemented in practice.* " (interviewee 5)

Considering the assumed importance of lawyers/attorneys for the application of the ESO, (see below) some interview partners suggested including them in trainings on the ESO. (interviewees 13, 17, 44).

Another participant suggested that the practice could start with rather simple cases, so that the judiciary can become familiar with the procedure and get confidence in its use (interviewee 30). Building on this thought and knowing that reports to authorities are an alternative measure common to most countries, it should not be much of a problem to make use of this measure in connection with an ESO.

In general, more national effort to better prepare the countries for proper implementation of the ESO was also expected to stimulate its application. The Netherlands could be a good example of how this can be achieved. Having an International Desk – a central authority to deal with all types of transfers – was reported to help a lot in structuring and monitoring the process. With such an institution, judges

and prosecutors know about a certain place where they can ask questions and find assistance in matters with international connections. The need for a central authority with critical expertise was suggested several times by different participants (e.g., interviewees 25, 29).

Some measures to promote the ESO were addressed directly in the context of the problems assumed responsible for the little use:

- Faster and simplified procedures were viewed to have a potential to encourage the judiciary to use the ESO. (e.g., interviewee 2, 26);
- Additional resources – such as staff, translation costs and so on – could also facilitate a better use of ESO (e.g., interviewee 2, 10).

Interestingly, some participants referred to a sort of contagion effect from experiences with the application of other mutual trust instruments. For example, the refusals of authorities to surrender suspects based on a EAW due to bad prison conditions were explained to likely have a negative impact on the mutual trust, and thereby on the application of PTD alternatives connected to an ESO (interviewee 27).

Some respondents, on the other hand, took over a calming position, suggesting that the still rather new procedure of the ESO should be granted some more time to produce more outcomes (interviewee 9). With some more time passing European instruments, in general, will produce more and more beneficial effects. A respondent from Ireland put it this way:

> *'We need to think more European, rather than national. We are only at a very early stage of 'learning to trust other Member States', even more so when it comes to criminal justice. It took 10 years for the EAW to be fully functional. So, there is a need to* ***invest in furthering cooperation and mutual trust, but also trust the process****. To build trust, there needs to be communication, engagement and transparency. This must be done by the systems, which in turn are made up of people. Some people are quicker than others in developing this trust.* (interviewee 23).

Q5.3.1 How could a faster administration of the ESO be achieved?

Several respondents expect the processes of an application of the ESO to go quicker and more smoothly once the relevant information about how to apply the ESO or who to contact, etc., is better known and more easily available (e.g., interviewee 5). A higher level of harmonisation among Member States could make this process even easier and faster.

In the future, technical options may ease cross-border cooperation and transfers of suspects, which often would also reduce the time pressure. Some respondents, for instance, suggested that in suitable cases the trials may be carried out remotely (e.g., interviewee 1).

The responses of the questioned experts however confirm that the tight time limits provided by the national legislations make it particularly difficult for procedures like the ESO to be applied. Most times, they take more time than the regular (national) proceedings. Therefore, simplified procedures and fast cooperation mechanisms among the Member States appear critical for a more frequent and successful application of FD 829.

5.3.2 Can attorneys foster the use of the ESO? How?

Like already addressed in this paper, many respondents argued that lawyers should play an important role in the application of the ESO. By demanding the prosecutor or the judge to apply the ESO in appropriate cases, they are assumed in a good position to push its application:

> "*Attorneys could be more active in this respect!* " (interviewee 3)

However, it was also stated that there are some impediments for this to happen. First, most lawyers are not familiar with the possibility and also with the procedures as well. For now, respondents guess that only a handful of lawyers are familiar with this procedure, especially those involved in international cases. Without awareness about the ESO, attorneys employ other strategies they consider in favour of their clients, like providing rental contracts expressing strong bonds with the issuing state (interviewee 11). If they see little chances to avoid PTD, they often push for a speedy trial. Furthermore, without the needed information about the ESO, attorneys lack knowledge about

bureaucratical paths connected, about time aspects as well as about good strategies how to convince the court. As said before, this suggests the need to train attorneys on the ESO as well and this also suggests that involving bar associations in the strategies to promote the ESO will bring long term benefits.

Q5.4 Some scholars seem to suggest that the ESO is not widely used due to a limited trust between Member States in regard to their capacity to effectively monitor and supervise offenders while under trial. What is your view on this?

As argued by several respondents, trust among Member States provides a mixed picture (‘*There are ups and downs …*’ [interviewee 2]). There are countries that are perceived to cooperate quite well, while others are perceived to cooperate less easily (selective trust, see Montero, 2020). The level of cooperation seems to differ, depending on the instruments that are to be used and other factors that may impact the judicial practice. For example, there have been indications in the interviews that poor detention conditions in some countries, or repeated breaches of the Rule of Law in others, may severely impact on the judiciary’s intentions to use the ESO, in cases involving those countries:

> *‘I cooperate on a daily basis. Romania provides only 2m² per inmate. We don't surrender people. We have not sent people to Belgium lately. Bulgaria is difficult. At the moment, we have fights with Poland. So, there are definitely problems, if we talk about the Rule of Law and standards. Partially it gets even worse.’* (interviewee 6)

Lack of information about Member States, negative experiences, such as no responses on requests, may additionally burden the cooperation between certain Member States. In fact, many respondents have reported such negative experiences in cooperating with certain Member States. These difficulties add to a general fear of the judiciary that the ESO could delay or further complicate the procedures or even avoid the criminal liability of some offenders.

Overall, almost all respondents agreed that trust is an essential element of many European instruments dedicated to easing transnational cooperation in criminal matters and to safeguarding Human Rights. They, however, also agreed that there is much need for improvements in this respect. Some participants in the study actually expressed

serious doubts about the capacity or the will of some Member States to properly enforce the ESO. Therefore, respondents argued that adequate steps should be taken to enhance the trust between the Member States. According to the responses, measures to improve transparency in international cases, data collection and monitoring, all in all, more and more in-depth exchanges between Member States are considered promising. Often mentioned as a good example on how to promote mutual trust was the work of the European Judicial Network (EJN) with respect to the EAW.

Q5.5 Could legal harmonisation amongst EU Member States be a suitable way to reduce PTD numbers?

Q5.5.1 In what way?

Due to the wide variety of legal cultures and practices, harmonisation does not seem to be possible or even desirable for most of the respondents. Most participants rather suggested to aim at a higher level of trust in the legal order of the other Member States and not at harmonisation. As one of the respondents stated,

> *'total harmonization is not necessary, only a higher degree of mutual trust and respect for each other's law'* (interviewee 23).

For the moment, the differences in legal practice, in the length of the sentences and even in the criminalisation of certain activities are so extensive that bringing them to the same level is considered hardly possible. However, as we have seen in the run of this chapter, some respondents argued that a certain level of harmonisation could ease cooperation. To some extent, such processes take place rather silently through regulations that indirectly foster some harmonisation. Not least, the judgements of the EU Court of Justice and also the ECHR are expected to assure developments towards common standards of practice.

Very few respondents were more optimistic and argued that a future EU Penal Code is possible in a distant future, but still, they were not sure about its possible impacts on the practice of preventive measures (see interviewees 28, 30, 49).

In order to achieve moderation in the use of PTD, some participants suggested to adopt minimum standards and to promote a culture focusing on the effectiveness of

alternatives to detention (interviewee 16, 49). The EC could play an important role in disseminating good practices, creating standards and following them up as they are implemented in the Member States.

Conclusions

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This final chapter elaborates conclusions on the basis of the interviews carried out with practitioners and other experts in the field of PTD on the application of alternatives. Inevitably, the following pages will also include conclusions and recommendations already heard or read about before. It is an aim of the PRE-TRIAD project to learn about new aspects explaining PTD-practice, as well as the practice with respect to the application of alternatives. This, however, does not mean that insights already won before the PRE-TRIAD project are of any less value. On the contrary, insights elaborated before and confirmed by this research have to be considered as particularly strong evidence.

General assessment of the situation concerning PTD and alternatives

In general, a majority of the questioned judges and prosecutors does not see an overuse or a problematic use of PTD in their countries. On the contrary, we regularly heard statements proclaiming a practice guided by necessity, while the dichotomy extensive-restrictive use of PTD is generally deemed not relevant. In fact, this necessity is not explained or defined in detail. Considering the very different pre-trial detention rates among the countries included here, it becomes apparent that this necessity is interpreted quite differently. Looking at the rather low detention rates in Romania, we can assume that the necessity a Romanian judge has in mind differs quite considerably from the necessity perceived by an Italian judge. **We assume differences in the legal culture which are, however, hard to capture.** For instance, independently of the differing detention rates expressed in the data, or independently of the nationality of the interviewees, an often-observed view among judges and prosecutors indicates that PTD is considered as a safety and preventive mechanism, first and foremost safeguarding security priorities – and largely ignoring possible negative consequences that may affect a pre-trial detainee's life, but also their families, and in the end also the State as a whole. Media but also political pressure appear to be a factor strengthening or possibly even causing such approaches, with some judicial authorities expressing that only a posture of

strict and tough measures will calm the public. Especially when homeless people, irregular migrants or asylum seekers, are concerned PTD seems to be quickly ordered, possibly without the thorough assessments required in every case.

The interviews support the hypothesis that a strong prevention (security) orientation is a driver for high PTD rates. In the deliberations of many judges and prosecutors, **alternatives to PTD play a rather subordinated role**, often explained with doubts about their efficiency. While based on the picture drawn by such comments one may assume a quite uniform, rather extensive PTD practice this is not mirrored by the data published.

Besides the majority of defence counsellors who contradicted the descriptions presented above, there were however also some judges and prosecutors who did not share this view, stating that the exceptional nature of PTD should be upheld in practice. The most clear and national uniform picture of PTD-practice was drawn by the questioned Irish experts, who quite convincingly presented the **Irish PTD-practice as a practice coined by a differing legal culture, stressing the presumption of innocence, the presumption of bail, Human Rights and the exceptional nature of PTD.** This way of reasoning in this context appears exemplary.

Not all questioned judges and prosecutors presented themselves as being aware of the problems caused by PTD, but many indeed were. Regardless of this, the majority of them declined the consideration to take these problems into account when assessing the need for PTD. Some of them added that conditions of detention would go beyond their competence, and are, in fact, responsibility of the State. Here, in a similar line to the question of necessity, many judges and prosecutors indicate little room for discretion, which is not supported by the overall analyses of the interview material. **This observation rather indicates a narrow perspective taken over by many judges and prosecutors, coined by their assessment of the necessity of PTD, which is influenced by a predominant legal culture, their individual views and possibly media or political pressure demanding tough approaches.**

The fact that there is room for discretion has also been shown by the COVID-19 pandemic, which in many countries led to considerable decreases in detention numbers,

although it has to be considered that possibly crime rates also went down. Still, the declining numbers indicate that there is a potential to avoid PTD more often with or without alternatives all the while safeguarding the interests of justice.

PTD and procedural aspects

Several times in this analysis, it became apparent that the profession of the interviewees is a variable most relevant for the perceptions of PTD in law and in practice, with judges and prosecutors often stating opposed opinions to defence counsellors and other experts. **It is a balancing act for the written law and for the practice of law to guarantee the protection of the rights of the suspects and, at the same time, secure adequate and efficient proceedings.** An efficient proceeding, however, is not a relevant value by itself. Its value is deducted from its contribution to secure and protect the rights of suspects, victims and of society as a whole. An assessment of the need for PTD has to apply a **strict interpretation of the proportionality of detention**, considering the presumption of innocence.

The need for a margin of discretion of the judges is largely acknowledged by most practitioners to be able to adapt to the needs of the individual case. Some defence counsellors still vote for narrow legal frameworks and in fact, the Bulgarian legal framework has been described to allow for a rather small margin of discretion on the side of the judges. Knowing about the little numbers of pre-trial detainees there, this draws on our attention. The majority of responses in our interviews still nurture doubts that the aim to strengthen the *ultima ratio* principle will generally be served best via narrowing down legal frameworks. **There will remain not least legal cultural aspects, which most probably would counteract legal developments in this direction**. In the Bulgarian legal example, low pre-trial detention numbers are explained to be also based on **very strict, rather short time limits for PTD to expire**. Many of our interviewees agreed to this strategy, some of them thereby actually indicating that the time limits are rather long in their home countries.

The majority of the questioned experts in 14 EU Member States is **content with the law in the books** and does not call for major amendments or redirections. This is also true for the legal safeguards, although in this respect many experts pointed at a discrepancy:

Several responses **valued the existing legal safeguards on principle, however regretting that their practical meaning would remain far behind the meaning they should have**.

Considering a rather wide margin of discretion on the side of the judges in most countries, as well as that **apocryphal motives seem to be a reality in pre-trial detention** decisions at times, and bearing in mind that fact that PTD is the most severe infringement of personal rights, **strengthening the legal safeguards** appears to be a response called for. **Of central and utmost importance in this respect are the higher or appellate courts**, which have to ascertain narrow interpretations and applications of the law close to the books, strictly adhering to and strengthening Human Rights principles. This is not only important for the individual cases but also because of the **directions these decisions provide for the general practice**. Here and there, doubts have been expressed that the higher courts always sufficiently fulfil this role.

Despite partially differing perceptions about **regular reviews and hearings, the questioned experts agreed on their principal value, as well as on the need for time limits for the decisions**. At least in some countries, the interviews indicate some room for improvement in this respect. This appears particularly true when the presented perceptions described hearings as formal acts without much relevance for the decisions, which often had already been determined before. **It is recommended to strengthen the hearings** with adversarial procedural qualities, allowing and encouraging the parties to present their cases, as well as with well-prepared decisions developed largely on this basis, right at the hearings, open to any outcome.

A precondition required for legal safeguards to be effectively put in practice is an **early, easy access to competent and committed defence counsellors**. In some countries, the organisation of **legal aid has been described in ways causing doubts that the clients always receive the counselling they need** and the protection of rights they are entitled to. All interviewees agreed on the central importance of the counselling. A well functioning system of legal aid is a precondition for equal treatment before the law. Good and competent counselling is not only supposed to adequately secure procedural rights, but also to actively initiate and support the applications of suitable alternatives. This calls

for **active defence counsellors**, a description which according to some responses is not always observed. The interviews confirmed the decisive role of the judges, but, in fact, also **highlighted the importance and influential roles of the other main actors in the proceedings, namely the prosecutors and the defence counsellors**. This points at the need to regularly include them in developments and activities aiming at a strengthening of the *ultima ratio* principle and at improvements with respect to the application of alternative measures.

Some judges and prosecutors pointed at **risks of an overuse of legal safeguards**, which may cause delays and hinder the procedures. Suspects or legal representatives taking advantage of their rights actually can make the procedures more difficult for judges and prosecutors. **If, however, legal safeguards would be more restricted and would not allow for effective chances to succeed, they would hardly be of any value.** There is no way to fully exclude risks of an unsubstantiated, strategical use of legal protection tools. In fact, there are costs to legal safeguards, which cannot be avoided without risking their effectiveness.

Details on the use and the non-use of alternatives to PTD

Most **judges and prosecutors present themselves largely content with the way and the frequency alternatives are used** in their countries. Like with PTD practice in general, this implies that a majority of them do not see much need for changes or improvements. When several of them refer to PTD as the "safe way", they focus on the assumed risks possibly justifying PTD, paying little attention to risks of violations of personal rights. If this approach coins the practice, **the *ultima ratio* principle is very much at risk**. The detention rates and the application of alternatives vary in the countries covered here and, objectively, we can assume that the need for change – meaning, among other things, taking the *ultima ratio* principle more seriously – differs. There is, however, one aspect practitioners in all countries should have in common, namely **a professional approach that always questions the need for PTD**. Once again, we have to refer to the Irish way, which has realised this with the presumption of bail, actually even going one step further by making the presumption of bail a procedural principle. Rather little numbers of pre-trial detainees affirm the Irish way.

Apparently, and as confirmed by some judicial experts themselves, PTD practice is very much about dominant legal cultures. **The predominant legal cultures in many countries obviously acknowledge a dominancy of PTD** when measures may be required to secure the proceedings and to possibly prevent new offences. Considering these observations, serious intentions to strengthen the *ultima ratio* principle and to apply alternatives whenever suitable and sufficient to avoid assumed risks, **ask for strong efforts to promote a legal culture highlighting and supporting these values**. **This includes the need to develope, organise and maintain suitable alternatives as well as to provide sufficient resources, and to invest in quality management**. There is much need for development which is obviously not easily stimulated, but **the prevalent assessment of the questioned judicial practitioners that there is room for more and better use of alternatives to PTD** - despite possible scepticisms and reservations - is an important base to build on.

Many judges and prosecutors express little trust in the available alternative measures. **Little trust in alternatives appears not least to be caused by insufficient information, by little knowledge about their effects, qualities and limits** as well as possibly by insufficient monitoring or other quality aspects. Risks substantiating PTD have to be assessed carefully and have to be taken seriously. **Likewise, the requirement that alternatives have to effectively meet the risks assumed also has to be taken seriously**. If they do not meet the risks, release without any measure may be justifiable, other alternative measures may be required or as a last option, pre-trial detention may not be avoidable. **There is a need for strengthening the trust in suitable alternatives to PTD which are necessary, well planned and well carried out.** It is important to also stress that **alternatives to PTD are (more or less severe) infringements of personal rights as well**. They as well may only be applied if needed and suitable to secure the proceedings and to possibly prevent new offences. An alternative applied without a need or without the realistic quality to meet the need is no alternative, but rather netwidening, chicanery and/or waste of resources.

EM can be a valuable alternative measure or alternative way to execute PTD. **The rather severe restrictions caused by EM and its monitoring qualities make EM an alternative judges and prosecutors in many countries appreciate**. However, one

should not forget that **EM is a rather intrusive measure**, severely infringing liberty and at risk to be used in cases that do not warrant it (netwidening). Therefore the benchmark to be applied when assessing its necessity, proportionality and suitability has to be particularly strict and accurate. **The knowledge about EM among practitioners, especially about the GPS model, is mostly still quite limited**. Mostly, EM is used in connection with house arrest/obligation to house permanence. The model applied in the Netherlands using **GPS-monitoring only to control territorial bans and orders opens the view for a rather narrowly defined option**, focused on specific monitoring needs without interfering in the entire life of the clients.

In most legal systems public, **prosecutors are viewed as the authority typically aiming at PTD**, if some need for monitoring and control is observed. Notwithstanding, it **is also part of their role to assess the need and suitability of alternatives**. In practice, above all, defence attorneys are expected to fight for alternatives, to provide the information needed in this respect and to possibly take over organisational necessities. In the end, **measures to avoid PTD are neither the main responsibility of the one nor of the other side**. Most of all, there is a need for cooperation to achieve results serving the Constitutional State and valuing the personal rights of the suspects. Yet, the interviews prove that **there is a need for defence attorneys to actively pursue alternatives and to provide as much information as possible on the person of the suspect, on his/her social surroundings and needs, as well as possibly on suitable measures**. This applies even in systems where support structures are installed, which collect and provide this kind of information for the decisions, because time is always a crucial factor in PTD cases.

Other ways to support a less frequent use of PTD

According to the majority of interview partners, the collection of additional information about the suspect and the accused person is helpful for making an informed decision on whether or not to impose PTD. In view of the different roles of interviewees in the criminal proceedings (judges, prosecutors, lawyers), the general consensus in support of the collection and use of such information shows that **there is a common understanding that PTD decisions should be well justified and based on as much information about the accused person as possible**. At the same time, in practice this

is rather difficult to apply in view of the timeframe in which the initial PTD decisions are made. Hence**, it is recommended that additional information that is not available in time for the initial hearing is nevertheless collected and used, e.g., when the PTD decision is reviewed**.

It is also important to note that, as mentioned by several interview partners, the **collection of additional information requires certain resources**, which the authorities in some countries do not have. This creates some risk of collecting and presenting incomplete or sometimes possibly even incorrect information that, instead of being useful, may be disregarded by the judge. Also, looking at inquiries about possible and suitable alternatives, an option in this respect could be **the involvement of professional institutions collecting information and providing assessment and consulting** with respect to this kind of support. In some countries, the probation services also offer this kind of support, while in others, social services connected to prisons or other independent social work institutions carry these tasks.

Foreign nationals, PTD and the ESO

It is a fact that **foreigners are treated differently from nationals with respect to PTD**. This is **aggravated by the fact that, often, foreign nationals are treated like a homogenous group**, which they are not. The term foreign national includes foreigners living permanently in the host country with social ties, etc. Notwithstanding, this category also includes foreigners passing through the country, tourists, migrants in general, asylum seekers, etc. Assessing grounds for detention, the residential status should be of central importance. Yet, it is quite striking that questioned practitioners hardly differentiate in this respect, nurturing doubts that this is always adequately done in PTD practice. Admitting to some exaggeration, one might say that it seems there is a presumption of PTD concerning foreigners in general.

In some cases, differentiations may be unavoidable if for instance the suspect has no social bonds with the issuing state. The differences the questioned experts confirm, however, often go beyond such needs. **In a globalised world, we definitely have to be better able to deal with suspects of crime coming from abroad, valuing their Human Rights no less than those of nationals**.

While it is true that alternatives are often hard to apply with foreign nationals, foreign nationality does not automatically exclude suspects from alternatives. **More effort is required to identify and promote alternatives that possibly and suitably can be applied with different groups of foreigners.** Reporting to the authorities is the alternative measure most applied in all countries. This alternative should also be applicable to foreign nationals who are permanent residents of the host country. Despite some differences in the detailed organisation of the reportings, this alternative should also be realisable with the ESO.

The ESO aims to avoid PTD with EU citizens more often and to support their access to alternative measures executed in their country of residence. **The ESO can only be considered a step towards more equal treatment of EU-national foreigners**, not least because third-country nationals are not included. **This tool, however, is hardly used.** There is no official data available but the questioned experts leave little doubt in this respect and even confirm little knowledge about the ESO among the relevant actors, such as judges, prosecutors and also defence counsellors.

A respondent stressed that time is needed for a new tool to settle in and start working properly. Perhaps some of this optimism is needed, but it definitely will not suffice. Despite doubts about its practical implementation, almost **all interview partners we talked to agree on the principal value of this tool to support the fair treatment of EU non-national suspects** and to avoid unnecessary social and financial costs. Despite various obstacles and although the potential for its use currently may be rather small, the ESO still can be considered a step in the right direction.

The reasons behind the little use of the ESO are many and complex, such as:

- A lack of information and training among the involved and competent professionals with respect to the ESO;
- Insufficient trust in the executing state to properly enforce the ESO;
- Organisational structures and procedures perceived as complicated;
- Time pressure;
- Insufficient information about the alternatives available in the executing state,
- Overestimated risks of flight;

- Insufficient information about the personal or social background of the defendants;
- Insufficient language skills among the competent authorities, etc.

The responses of the questioned experts clearly express the need for combined efforts of the Member States and EU to promote the ESO. There is a need for common strategies which, besides common and adjusted activities, also provide clear guideliens on what needs to be done, by whom. **The little knowledge about the ESO among relevant professionals, for instance, is a topic definitely to be dealt with at both levels – national and EU.** The same is true for improvements and simplifications with respect to the organisation of ESO-measures and the cooperation among relevant authorities in different Member States. This includes the requirement for effective ways to enable competent authorities to respond faster to the requests of other Member States. **Coordinated and suitable organisational structures including, for instance, central bodies in each Member State providing support to the judiciary in all cross-border matters could be suitable solution.** Considering the still growing number of transnational cases, this seems a recommendable step forward.

As far as **EU institutions are concerned, they could do more in promoting judicial cooperation and joint training**. In this respect, the newly adopted Strategy on European Judicial Training for 2021-2024 may contribute significantly. Not least, there is a **need for more and improved communication between the Member States and also between their judiciary organs**. In addition to the information accessible via the website of the EJN for example, **some more details about the available measures to be ordered in the Member States, in connection with an ESO, would be valuable.**

At the **national level**, Member States should strive for more awareness about the problems related to an overuse of PTD and promote the use of the ESO. Training to the judiciary including **language skills** using their own educational networks has to be considered as a central mean in this respect. Insufficient resources may also hamper cross-national tools and cooperation. Therefore, it also has to be stressed that **well developed and well-functioning justice systems need sufficient, well trained personal resources, as well as adequate material means and structures**. In the

context of cross-border contacts, this also includes **interpretation and translation services** for the judiciary. Many respondents to our interviews considered **defence counsellors to be the main actors for the promotion of alternatives to detention also in connection with an ESO**. This would also lead us to recommend the provision of information about the ESO to this target group, to raise their awareness, as well as to train them for the use of the ESO. Possibly, this could be done in cooperation between justice systems and professional representations.

There continues to be a need to improve mutual trust among European Member states. This has to be a continuous process. Practitioners confirm that central in this respect is knowledge about the other countries, their legal systems, their legal practice, and **transparency, possibly also via regularly published data**, namely about PTD and the use of alternatives. While many of the questioned experts would welcome more harmonisation in legal matters, hardly anybody expects major progress in this respect in the close future. More optimistically, **some harmonisation was explained to happen silently through regulations and decisions** that indirectly foster it, such as recommendations by European institutions or judgements by the European courts. **It would be most desireable that the EU courts take over a stronger role in the definition of common standards**. This, of course, requires cases brought forward from the Member States.

A way forward suggested by some questioned experts, is **to test the FD 829 (ESO) on rather simple cases, easily organised, to learn from this experience and to use it more and more also on increasingly complex cases**. Many practitioner express doubts about the practical implementation of the ESO. The best way to convincingly argue the contrary is the documentation and spread of successful examples. Like any change, the use of the mutual trust instruments is a process that takes time, effort, courage and dedication. As far as this study is concerned EU and the Member States have all it takes to make this process a success.

Recommendations

The following recommendations can be deducted from the expert interviews and the conclusion. In the end all these recommendations have a common aim:

A legal culture, stressing *ultima ratio* principle, the presumption of innocence, a presumption of freedom and Human Rights, without ignoring the fact that, in certain, narrowly defined cases, measures are necessary to secure proceedings or to protect people, with PTD being the measure of last resort.

- **Strict and rather short time limits** applying to pre-trial detention decisions support a cautios application of PTD.
- **Strengthening the hearings** with adversarial procedural qualities, allowing and encouraging the parties to present their cases, as well as with well-prepared decisions developed largely on this basis, right from the start of the hearings, open to any outcome.
- **Making sure adequate defence counselling is provided:** in some countries the provision of legal aid bears risks of insufficient counselling. These systems should be reviewed and possibly adapted. A well functioning system of legal aid is a precondition for equal treatment before the law. Good and competent counselling is not only supposed to adequately secure procedural rights, but also to actively initiate and support the applications of suitable alternatives. The latter is not just responsibility of counsellors, but in lieu of courts actively considering suitable alternatives it is up to them to push things. This is also true with respect to applications of the ESO.
- **Making sure the legal safeguards are not just an option but a means to secure a detention practice in line with the *ultima ratio* principle, valuing Human Rights principles:** this calls for active defence counsellors, taking adavantage of the possibilities to appeal against decisions, but not doing so arbitrarily without substantiation. Appellate and higher courts need to give directions valuing these principles.

- **Valueing the importance and influential roles of prosecutors and defence counsellors**: this points at the need to regularly include them in developments and activities aiming at a strengthening of the *ultima ratio* principle and at improvements with respect to the application of alternative measures.
- **Promoting a legal culture valuing the *ultima ratio* principle, as well as the qualities of a sensible use of suitable alternatives:** broad information campaigns and trainings among the relevant professional groups – prosecutors, judges, defence attorneys – are recommended, aiming at awareness-raising about the *ultima ratio* principle, the intrusive qualities of PTD and personal/Human Rights. This to include information on individual available measures and alternatives, their qualities, limits and application, including recommendations and examples on what alternatives to apply in what cases.
- **Alternatives have to effectively meet the requirements:** research and evaluation are required to provide empirical information in this respect. This can be a basis to build up trustm as well as to support developments concerning alternatives. Aiming at an informed practice also requires empirical information on the individual available measures and alternatives, their qualities, limits and needs for improvement. This is also important for a continuous quality management. Needed as well is research on perhaps missing alternatives or missing features of exisiting offers, as a basis for developments. This should also include attention to measures which may be problematic, e.g., connected with a high risk of netwidening.
- **Increasing the effort to identify and promote alternatives that possibly and suitably can be applied with different groups of foreigners:** part of such efforts also have to include research on measures that are suitable, considering the diverse demands and difficulties found in cases involving foreigners.
- **Extending the bases for PTD decisions - taylormade or individualised application of suitable alternatives:** many practitioners, including judges and prosecutors, are in principle favourable to a sound and extensive basis for the decisions on PTD or alternatives. This extended basis would include information on the suspect and his social setting, along with information on possible and

suitable alternatives. For reasons linked to professional competencies, and available resources, it once again appears recommendable, also on the basis of the outcomes of this research, to install or take advantage of existing institutions, which can provide these kind of services (if not already provided). Judges and prosecutors appear often reluctant to support the use or the installment of such services, being afraid of delays of the proceedings or worrying about possible additional effort. In any case, if the ordered reports cannot be completed in time for the first decision, they at least can be used for subsequent decicions. It is also essential to be aware that, for such services to provide the information hoped for, sufficient resources have to be provided.

- **Installing social services and support for suspects threatened by PTD:** there was much agreement among the practitioners that such services would be valuable to counter the assumed risks. Possible risks concerning violations of the presumption of innocence may be controlled by clear definitions of the aims pursued.
- **Considering bail more often:** bail is increasingly used in some countries and should also be applicable with foreigners. Although the poor social background of most foreign suspects will most often not allow for bail, the organisation of support of social networks (families) can increase the chances of applicability and compliance. Furthermore it should be stressed that, e.g., in Ireland the financial aspect of bail can be very much subordinated to other orders, to also allow bail for economically weaker clients.
- **Taking advantage of Electronic Monitoring with care:** EM has the potential to avoid PTD, but it bears a high rish of being applied in cases which may not need a measure of this level of intrusiveness. In fact, the potential of EM to exclude risks is quite limited. EM applied not to control the whole life of suspects, but only to control territorial bans and orders with GPS might be a promising model in suitable cases.
- **Raising awareness on the fact that foreigners are no homogenous group and that the classification as "foreigner" does not automatically mean higher**

risks: the Human Rights of foreigners may not be valued any less than those of nationals.

- **Increasing the efforts to spread information on the ESO on the national and European levels:** besides judges and prosecutors, defence counsellors are also an important target group.
- **Evaluating and improving the organisational structures for the application of the ESO:** coordinated and suitable organisational structures including, for instance, central bodies in each Member State providing support to the judiciary in all cross-border matters could be suitable solution.
- **Providing information on alternative measures possibly carried out in connection with an ESO for each European Union Member State**: the EJN already provides valuable assistance in this respect. This should be extended.
- **Developing a database in a joint effort of the European Union and the Member States on cases with the ESO applied**: so far, hardly any knowledge exists about such cases. We can assume that examples and thereby practical knowledge have a potential to trigger more applications.
- **Continuing and increasing the efforts to promote judicial cooperation and communication between the Member States, as well as developping joint training on the EU-level**: this, of course, has to be supplemented by corresponding efforts on the national level. If an aim is to increase communication, the improvement of language skills must be considered and aimed at as well.
- **Supporting measures to increase the knowledge about the other countries:** legal practitioners should be provided chances to learn about other countries, about their legal systems, and their legal practice. Insights and transparency strengthen mutual trust. The collection and regular publication of relevant data would be very helpful in this respect.
- **The EU courts should take over an even stronger role in the definition of common standards.** A precondition for this is that Member States bring cases forward.

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Alternative pre-trial detention measures

D2.4 Interviews Report

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