

Working Paper - 1st Austrian National Report

# DETOUR – Towards Pre-trial Detention as Ultima Ratio

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Vienna, October 2016



Justice 2014  
with the financial support of the European Commission

## **DETOUR - Towards Pre-trial detention as Ultima Ratio**

1. Introduction – Pre-trial detention in context.....	3
1.1 Austria – Country, people and criminal law.....	3
1.2 Pre-Trial Detention in law – principles and developments.....	5
1.3 Pre-trial Detention and relevant aspects.....	7
2. Legal Background and prerequisites in detail.....	8
2.1 Competent authorities for arrest and further detention.....	8
2.2 Beginning, duration and end of PTD according to the CCP.....	8
2.3 Grounds for arrest and PTD.....	10
2.4 Procedural rights, defence counselling and detention hearings.....	12
2.5 Alternatives to PTD (See also Chapter 7 “Alternatives to PTD” in Practice).....	13
2.6 Pre-trial detention - Decision Making.....	14
3. Data on PTD.....	14
3.1 Data sources and methodological considerations.....	14
3.2 General information on Pre-trial detention.....	15
3.3 Structure of pre-trial prison population.....	19
3.4 Comparative View.....	23
3.5 Other detailed data on PTD.....	24
4. Research Review.....	28
5. Media coverage on pre-trial detention in Austria.....	30
6. Alternatives/ non custodial supervision in practice.....	33
6.1 Alternatives to PTD – existing measures and institutional support.....	33
6.2 Judicial directives („gelindere Mittel“ – less severe measures).....	34
6.3 Measures for Juveniles.....	35
7. The “European Element”.....	36
8. Conclusion.....	37
Glossary.....	39
Bibliography.....	42

# 1. Introduction – Pre-trial detention in context

## 1.1 Austria – Country, people and criminal law

The federal republic of Austria is a landlocked country in Central Europe, bordered by the Czech Republic and Germany to the north, Hungary and Slovakia to the east, Slovenia and Italy to the south, and Switzerland and Liechtenstein to the west. There are nine federal states headed by a governor. In early 2016<sup>1</sup> about 8.700 million inhabitants were reported as well as an increase of the population in comparison to the prior year. While the number of Austrian citizens remained quite stable (about minus 6.000) the number of foreign citizens registered living in Austria increased by about 120.000.<sup>2</sup> Therewith the percentage of foreign citizens increased from 13,3 to 14,6 percent. In bigger cities and above all in Vienna the percentage of foreigners is considerably higher (27%). About half of the foreign citizens (49%) are citizens of the European Union. The biggest groups of foreign nationals in Austria are from Germany (14%), Turkey (9%), Serbia (9%), Bosnia-Herzegovina (7%), Romania (6,5%), Croatia (5,5%) and Hungary (5%).

Based on the Austrian Constitution, Austria is established as a representative democracy with a two chamber parliamentary system, in which the separation of powers principle is recognized. Most legislative power lies with the National Assembly (Nationalrat), which is elected by general federal elections every fourth year. Matters with respect to the criminal law and its execution are federal responsibility. Austria has been a member of the European Union since 1995 and a member of the Council of Europe since 1956. It is also a member of the European Currency Union.

The Austrian legal system has its origins in Roman law and is based on the civil law tradition. All legal provisions have to comply with the provisions of the constitutional laws. Criminal justice is in the hands of the Criminal Courts and their independent judges. The principles of today's Criminal Law and criminal procedures have been coined by the outcomes of the so called "Große Strafrechtsreform" (Big reform of criminal law) which came into effect in 1974. Since then the two central codes are the Austrian Penal Code, which regulates the elements of a crime, and the Austrian Code on Criminal Procedure (CCP), which regulates the procedure for determining whether a suspect has committed a crime and whether a sanction should be imposed on him as a result. The provisions regarding the preliminary criminal proceedings on the imposition of arrest, Pre-trial-Detention (PTD) or on the carrying out of an asset seizure, house search or telephone surveillance are also regulated there. Instruments of secondary legislation supplement these regulations, like for instance the Juvenile Justice Act (JGG) which introduced specific regulations for juveniles and later on also for young adults.

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<sup>1</sup> 1.1.2016

<sup>2</sup> Statistik Austria (2016) <[http://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/bevoelkerung/bevoelkerungsstand\\_und\\_veraenderung/bevoelkerung\\_zu\\_jahres-quartalsanfang/index.html](http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/bevoelkerung/bevoelkerungsstand_und_veraenderung/bevoelkerung_zu_jahres-quartalsanfang/index.html)> accessed 25 October 2016

The following principles are fundamental to criminal law and its proceedings in Austria:

- Nulla poena sine lege (Latin for "no penalty without a law"): One cannot be punished for doing something that is not prohibited by law.
- The charge principle (Anklageprinzip): Every criminal procedure will be triggered and defined by the claims of a prosecutor.
- The legality principle in criminal matters: It is the duty of the State Prosecutor to prosecute offences of which he becomes aware whilst in office.
- The speech principle (Mündlichkeitsprinzip and Unmittelbarkeitsprinzip): Bases for the decision is only what has been presented vocally during the trial and in front of the deciding court (Statements given during the preliminary proceedings are only allowed to be accepted in limited exceptions and under specified conditions)
- The public principle: The public can only be excluded from a hearing on important grounds and in cases foreseen by law. This is for instance true for detention hearings.
- Establishment of the truth principle: The court must do everything in its power to clarify the state of affairs and should not limit itself to the examination of the claims from the state prosecutor and the defense.
- Independent Judgment Principle: The judge has to form his opinion independently without outside interference.
- The principle of the presumption of innocence: The accused remains innocent until his guilt is proven.
- In dubio pro reo principle: Considering diverse proof, some indicating guilt others indicating the contrary, an accused person has to be acquitted if doubts persist.
- The principle of proportionality: The arrest or detention has to be necessary and may not be disproportionate to the aims pursued. Deprivation of liberty is not allowed if other more lenient measures are sufficient to achieve the aims.

Austria has ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1958 and Protocol No. 6, abolishing the death penalty, in 1984. The ECHR forms a part of the Austrian constitution. Austria is also party to the European Convention for the Prevention of Torture (CPT). The Optional Protocol to the UN Convention for the Elimination of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) has been realized by an amendment to the Austrian Constitution in 2011. To be highlighted are also the federal Personal Freedom Act of 1988 ("Bundesverfassungsgesetz zum Schutz der persönlichen Freiheit") as well as the Federal Constitution of the Republic of Austria ("Bundes-Verfassungsgesetz, B-VG"), both having constitutional character, which are relevant to the criminal procedure. The Personal Freedom Act emphasises the principle of proportionality, outlines the grounds for arrest and detention as well as further preconditions, expresses the imperative for a speedy procedure, prescribes the need for review of arrest within one week as well as the regular review of detention and guarantees compensation in cases of unlawful arrest or detention.

Apart from examining the constitutionality of laws passed by Parliament and the legality of regulations by Federal ministers the Constitutional Court also examines alleged infringements of constitutional rights of individuals through acts of the administration (Art. 137 pp. B-VG). Since 1981 Austria also has an Ombudsman Board: the “Volksanwaltschaft” (148a BV-G). It is entrusted with the task of examining all alleged or presumed grievances arising in connection with the public administrative system. The Ombudsman Board may also take up matters without a prior complaint, if it has reasons to suspect an administrative irregularity. Since 2012 the Ombudsman Board and committees of experts installed by it also fulfil the task of the National Prevention Mechanism (NPM). The committees of experts regularly visit and control institutions in which people are deprived of their freedom (OPCAT- Committees). In its annual reports, conditions of detention during Pre-Trial Detention regularly have been subject to complaints. Above all conditions arising with an overcrowding of prisons have been criticized: „Cells occupied by too many people and a small size of cells have to be considered especially disturbing considering the fact that the majority of inmates is not working and hence is restricted to the cells 23 hours a day” (Volksanwaltschaft, 2015, p. 113).<sup>3</sup> The NPM has to be considered a most important institution with respect to improvements of the situation in prisons.

## 1.2 Pre-Trial Detention in law – principles and developments

According to §§ 173 pp CCP Pre-Trial Detention is the deprivation of liberty of an untried or not yet convicted person following a decision by the court. The German term “Untersuchungshaft” literally translated means ‘investigating detention’ and it actually comprises a longer period than Pre-Trial Detention expresses: Any detention during the pre-trial phase up to the end of an appeals procedure. Before Pre-Trial Detention a suspect may be arrested (“Festnahme” and “Anhaltung”) for up to two times 48 hours according to §§ 170-172 CCP. The reasons for arrest are largely the same than the ones for PTD. For arrest however a mere suspicion that the person has committed an offence is sufficient, while for PTD the suspicion has to be urgent. The arrest forms the first step towards a possible PTD and therefore it is of fundamental importance for the steps and developments ahead. Securing the proceedings is the central objective of Pre-Trial Detention expressed in the Personal Freedom Act (Art. 2) as well as in §173 CCP. This includes: Preventing the suspect or accused from absconding, preventing collusion, preventing obscuring of evidence or the obstruction of the “ascertainment of truth” in any other way, as well as prevention of new crimes of a certain gravity similar to the offence under investigation (or of the completion of the alleged offence). According to the prevailing Austrian doctrine, pre-trial detention may never be “anticipated punishment”. Of utmost importance is the principle of proportionality which is governing the law and practice of arrest and Pre-Trial Detention. It is stressed in the Personal Freedom Act as well as in the CCP, clearly aiming at the restriction of the use of pre-trial detention to a minimum and only as ultima ratio. The Personal Freedom Act stipulates that the arrest or detention has to be necessary and may not be disproportionate to the aim pursued. This provision makes clear that an adequate relation

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<sup>3</sup> Volksanwaltschaft, Bericht der Volksanwaltschaft an den Nationalrat und den Bundesrat 2015 – Präventive Menschenrechtskontrolle (Volksanwaltschaft 2015), <http://volksanwaltschaft.gv.at/downloads/k2ma/PB39pr%C3%A4ventiv.pdf>, pp. accessed 24th October 2016

between offence and detention has to be secured. Additionally, it also emphasizes that deprivation of liberty is not allowed if other more lenient measures are sufficient to achieve the aims.

The fundamental bases for today's regulations with respect to PTD has been laid out with an amendment to the CCP in 1993. With this amendment the role of the then so called Investigating Judge (Untersuchungsrichter) was strengthened. While his competencies with respect to decisions on detention have been very much restricted before, his new role was defined as the deciding authority also securing legal protection. Connected to this the actions of the involved parties became crucial for the procedures (Parteienprozess).<sup>4</sup> Furthermore this amendment introduced fixed periods within which detention hearings have to take place if the suspect is not released. Following the amendment, the numbers of detainees decreased. Another far-reaching reform to the CCP relevant to the subject was introduced with the Code of Criminal Procedure Reform Act of 2004, which entered into force in January 2008. With this reform the position of the investigating judge was abolished. Since then the competencies and responsibilities of the public prosecutor have been extended and all procedures during the pre-trial phase are driven or initiated by the public prosecutor, while all decisions on matters concerning rights of the suspect are made by a judge now called detention and legal protection judge ("Haft- und Rechtsschutzrichter"). This is of course also true for all matters with respect to arrest and detention.

In 2010 the possibility was introduced that Pre-Trial detainees may spend PTD in house arrest monitored by an electronic monitoring device. Up to now Electronic Monitoring (EM) has hardly been used for PTD (3 to 14 cases a year). It has to be stressed that EM in Austria is not defined as an Alternative the PTD but as a way to serve PTD at one's own place of living. This means that PTD carried out via EM as well has to be terminated if milder measures secure the aims. Practitioners state that EM can hardly exclude the reasons for PTD. If it does, milder measures regularly can also serve the purpose.<sup>5</sup>

With an amendment to the juvenile Justice Act in 2015 for juveniles and young adults the possibility was introduced to support release from PTD by a so called social network conference. The idea is to take advantage of the social net to create a setting for the juvenile which supports his/her integration and which supports any milder measure. So far this model is only used for young people, above all because of the notion that there is a good chance to pedagogically influence them.

An amendment to the Penal Code which came into force with 1<sup>st</sup> of January 2016 introduced a new definition of commercial purposes of (property) offenses. Up to then judges were very much free to define commercial purposes of offenses. In practice this meant that suspects were regularly charged with this aggravating element if there were indications that the suspect aimed at earning a living by property offences. As a consequence, suspects were often arrested and detained in PTD because of rather petty offences which were aggravated by this specific suspicion. With the amendment the

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<sup>4</sup> W. Stangl and I. Karazman-Morawetz, 'Die Praxis der Untersuchungshaft im Jahre 1996' (The Practice of Pre-trial Detention in 1996, Research Paper, Institute for the Sociology of Law and Criminology, Vienna, 1998)

<sup>5</sup> W. Hammerschick et alii, 'Evaluation des Elektronisch Überwachten Hausarrests' (Evaluation of the electronic monitored curfew, Research Paper, Institute for the Sociology of Law and Criminology, Vienna, 2012)

definition of commercial purposes has been regulated more precisely, excluding petty advantages and thereby excluding PTD in many of these cases. Police heavily criticized this amendment, arguing that they would lose an important means to fight drug dealing in the streets and on public places. The solution to this problem agreed on by politics introduced a new offence via an amendment to the drugs law. The offence “Dealing drugs on public places” again allows to arrest and detain drug dealers more easily (§ 27 Abs. 2a and 3 SMG -Narcotic Substances Act). Empirical information on the effects of these recent developments are not existing yet.

### 1.3 Pre-trial Detention and relevant aspects

PTD is executed at the 16 Austrian Court Prisons. The use of PTD is regularly discussed in connection with the problem of prison overcrowding. From 2000 to 2007 the overall prison population in Austria increased heavily from an average level between 6.500 and about 6.900 inmates during most of the nineties up to about 9.000 in 2007. After a decrease in 2008 the average number of prisoners in recent years has been quite constantly on a high level of about 8.900. In recent years Pre-Trial detainees on an average represented about one fifth of the total prison population. This means that PTD considerably adds to the prison overcrowding. The increase and the high number of prisoners create severe problems for the prison administration which in the end leads to deficits with respect to the conditions of live and the treatment of prisoners. The situation of Pre-Trial detainees often is particularly difficult. On the one hand they are allowed to have private things in their cells and to wear private clothes. On the other hand, they however very often spend up to 23 hours a day in their cells with little or no contacts to the outside world. If there are no substantial reasons (eg. Influencing witnesses) the judge may allow a Pre-Trial detainee to work in prison, but in fact mostly there is no work available to them. Repeatedly there is critique that PTD is used too often and lasts too long.<sup>6</sup> In fact according to official data the duration has considerably increased from an average of about 64 days in 2003 to 80 days in 2015.<sup>7</sup>

The increase of the prison population has to be viewed in the context of migration movements during the nineties and above all since 2000. As will be shown in more detail below the increase of the number of sentenced prisoners as well as the increase of the number of pre-trial detainees is due to considerably increased numbers of foreigners in both groups, while in fact the number of Austrians in PTD as well as serving prison sentences has decreased slightly. In 2015 more than half of the total prison population and 75% of the pre-trial detainees were no Austrian citizens. There has been a considerable increase of foreign suspects and convicts during the mentioned period. Foreigners in fact however also have a higher likelihood to be kept in PTD as well as to face a prison sentence. In 2015 foreigners represented 37 percent of all suspects, but 75 percent of the entrances to PTD. One may assume that non Austrians are above all more likely to be kept in PTD because of the often

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<sup>6</sup> For instance Univ. Prof. Dr. Helmut Fuchs in an interview for the daily newspaper „Die Presse“ (Vienna, 23 July 2014) >[http://diepresse.com/home/panorama/wien/3843449/UHaft\\_Zu-oft-und-zu-lange](http://diepresse.com/home/panorama/wien/3843449/UHaft_Zu-oft-und-zu-lange)< accessed 30 August 2016; ><http://derstandard.at/2000001932675/Amnesty-sprachlos-ueber-Ermittlungspannen-im-Fall-Josef-S>< accessed 22 February 2016;

<sup>7</sup> Security Report 2015 (Ministry of Justice, 2016)

missing social integration and because of often observed unfavourable social conditions. There however still remains some suspicion that foreign suspects are treated differently to Austrians.

Like mentioned before PTD is not allowed if other more lenient measures are sufficient to achieve the aims. There are no official data available on the substitution of PTD by more lenient measures, inquiries among practitioners and experts however indicate that those are rarely used.

## 2. Legal Background and prerequisites for PTD in detail

In chapter 1 the definition of PTD was already presented as well as the primary objectives and principles. This chapter will present the legal regulations and prerequisites in detail. The Austrian CCP regulates arrest (“Festnahme”) and pre-trial detention (“Untersuchungshaft”) in §§ 170-189 CCP. These sections of the law also contain provisions for the enforcement of pre-trial detention.

### 2.1 Competent authorities for arrest and further detention

The police is the authority which regularly carries out the arrests ordered by the prosecutor and approved by a judge. In cases of “imminent danger” the police however are entitled to arrest a suspect without an order by the public prosecutor, if and when a prosecutor cannot be reached in time. Other than that the public prosecutor is always the one who has to initiate each decision which is than to be made by a judge. Each arrest as well as each PTD and each prolongation of PTD has to be based on a request of the prosecutor with the responsible judge (detention and legal protection judge). Without this the judge has no bases for a decision and a suspect has to be released. The judge issues arrest warrants applied for, carries out the obligatory hearing of the detainee after the transfer to prison, is responsible for all decision to further detain suspects and carries out all following detention hearings.

### 2.2 Beginning, duration and end of PTD according to the CCP

Detention begins with the actual arrest (“Festnahme” and “Arrest”). In general the arrest is carried out on the bases of a warrant issued by the prosecutor and approved by the court (§§ 170(1), 171(1) CCP). The only exceptions are the above already mentioned cases of “imminent danger”. The arrest may last up to two times 48 hours. With the arrest legally important periods begin.

#### a) Detention at the police (First 48 hours)

- If apprehended without warrant immediately after arrest:
  - Immediately after arrest written instructions have to be provided on his rights (§ 171(4) CCP). These instructions have to be comprehensive and in a language the suspect is able to understand.



- Immediately after arrest hearing on the reasons and requirements for pre-trial detention, on the case and the suspicion
- Delivery of a written and reasoned motivation of the arrest issued by the police (§ 171(3)).
- If the arrest was based on an arrest warrant: delivery of a written arrest warrant issued by the prosecutor and ordered by a judge within 24 hours of arrest (§ 171(3) CCP).
- Within 48 hours transfer of the detained person to the prison or otherwise release (§ 172 CCP). The prosecutor has to be informed about this, if the arrest was carried out by the police without warrant. If he denies to apply for PTD, the suspect has to be released.

b) Detention at the prison (second 48 hours)

- Hearing of the detained person by a judge right after arrival at the prison
  - on the reasons and requirements for pre-trial detention
- Decision to further detain the person or to release him/her; the decision must be communicated orally immediately
- Delivery of the written decision to all parties involved within 24 hours after the decision
- The decision on the detention has to contain:
  - the facts on which the suspicion is based on
  - the grounds for the detention and why less restrictive measures are not sufficient
- Before deciding the judge may carry out investigations or order the police to do so, if it can be expected that the outcomes will have considerable impact on the judgement with respect to the suspicion as well with respect to the grounds for detention. With respect to juveniles and young adults the court may take advantage of the “Gerichtshilfe” (Court Aid) to learn about relevant aspects with respect to the person. For adults no such service is provided.
- In any case the judge has to decide within 48 hours, otherwise the suspect is to be released. It should be mentioned again, that a decision for detention always requires a request by the prosecutor.

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

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

- 2 months, if detention is ordered only because of the risk of collusion/obscuring of evidence PTD
- 6 months with respect to “Vergehen” (offenses with a maximum penalty of three years)

- 1 year with respect to “Verbrechen” (crimes that carry a maximum penalty of more than three years), which may be punished with a maximum penalty of more than 3 years but not more than 5.
- 2 years with respect to “Verbrechen” with a maximum penalty of more than 5 years

All extensions over a period of six months have to be necessary because of particular complexities or extent of the investigations, and must be limited to situations where ongoing detention seems to be unavoidable, considering the weight of the ground for detention (§ 178 CCP). Once the bill of indictment has been delivered to the court by the prosecutor, no further explicit time limits apply. Once the trial has started, a person who had to be released during the investigative phase due to the expiry of the legally allowed period, can only be detained again during the trial for six weeks (§178 (3) CCP). However, in principle, this could happen several times. After the indictment no further limits apply. The suspect however can apply for release.

Up to the amendment of the CCP of 1993 Austrian courts were frequently criticized for not properly realizing the imperative of a speedy criminal procedure and overlong detention periods. With the amendment the situation improved (Morgenstern, 2009, p. 137). The data presented above on the developments with respect to the duration of detention however indicates that the duration of PTD again has constantly increased for the last 15 years.

### 2.3 Grounds for arrest and PTD

The detention actually begins with the arrest. The grounds for arrest are largely the same than the grounds for detention, they however still have to be distinguished. Since DETOUR focuses on the PTD we restrict the presentation of the grounds for arrest (§170 CCP) to basic notions and differences in comparison to PTD.

- Different to PTD a ground for arrest may be the fact that someone was caught in the act or immediately after it, or was found with evidence indicating involvement in an offence
- Absconding or hiding
- Tampering with evidence, influencing witnesses
- The person is suspected of an offence threatened with a prison sentence of more than 6 months and there is a threat of additional similar offences to be carried out by the suspect or that he/she may continue the offence subject of the proceedings.

Different to grounds for PTD for the three grounds for arrest mentioned last a mere suspicion is sufficient. The arrest may not be disproportionate to the importance of the case. If a person is charged with a serious crime which carries a minimum prison sentence of ten years or more (murder, rape with aggravating circumstances, etc.) the suspect has to be arrested unless there are reasons which indicate that the above mentioned grounds for arrest do not apply (“conditional mandatory” ground for detention).

Grounds for detention are (§173 CCP):

- The risk of absconding or hiding (“Fluchtgefahr”).

- does not apply if a fully integrated person is suspected of a crime that carries a maximum penalty of five years, unless concrete preparations to flee have been made.
- Tampering with evidence (“Verdunklungsgefahr”);
- The need to prevent new crimes (“Begehungsgefahr”)
  - if the suspect is charged with a crime carrying a penalty of more than six months and
  - there is a substantiated risk of reoffending
    - with respect to an offence with serious consequences or
    - with respect to an offence with more than slight consequences if the suspect was already convicted because of such an offence before or
    - if already convicted because of such an offence twice it is enough that the reoffending is punishable by at least six months
  - if he is charged with repetitive forms of the same offence or
- The need to prevent the continuation of the offence that the suspect is charged with (“Ausführungsgefahr”)

Like with arrest with respect to crimes punishable with a minimum of ten years of imprisonment PTD has to be ordered unless there are substantiated reasons which exclude the ground for PTD (“conditional mandatory” ground for detention).

Different to arrest with respect to PTD the suspicion has to be “urgent” and with all grounds for detention the principle of proportionality has to be considered. In general, detention therefore is not allowed if the objective of PTD, which is mainly securing the proceedings, can be met otherwise. In this respect the Austrian Supreme Court<sup>8</sup> has developed a three-step argumentation that considers the expected sentence to be the crucial aspect:

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

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

## 2.4 Procedural rights, defence counselling and detention hearings

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

The suspect has the right for presence of counselling during first hearings (§ 164 CCP). Active participation of the counsellor however is restricted at this stage and above all according to § 59 CCP the police may supervise conversations between lawyer and suspect and to restrict this to general legal information if this is deemed necessary to avoid interference with the investigation or with evidence. Supervision may even be extended for up to two months during detention. Critics consider this regulation in contradiction to Art 6 (1) ECHR (fair trial).<sup>9</sup>

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

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

Each decision of the court on PTD may be appealed (“Beschwerde”, §§ 87 pp. CCP) to the Court of Appeals (“Oberlandesgericht”) within three days of the decision. Additionally, (after all regular remedies have been used), since 1992, a so called "Grundrechtsbeschwerde" (appeal with respect

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<sup>9</sup> E.g. Report on observations of the Austrian chamber of attorneys 2011/ 2012. [http://www.rechtsanwaelte.at/index.php?eID=tx\\_nawsecured1&u=0&g=0&t=1416259162&hash=d3e38cobeec1240325b0bd1d55b3e4ee98b1d8d4&file=uploads/tx\\_templavoila/Wahrnehmungsbericht\\_2011\\_2012\\_ohne\\_Unterschrift.pdf](http://www.rechtsanwaelte.at/index.php?eID=tx_nawsecured1&u=0&g=0&t=1416259162&hash=d3e38cobeec1240325b0bd1d55b3e4ee98b1d8d4&file=uploads/tx_templavoila/Wahrnehmungsbericht_2011_2012_ohne_Unterschrift.pdf), p. 23

to basic rights) can be addressed to the Supreme Court (“Oberster Gerichtshof”) against the decision of the Oberlandesgericht. This appeal has to argue that the decision of the Oberlandesgericht infringed the right to freedom.

As already mentioned, since 2010 the prosecutor or the suspect can apply that PTD is executed as a house arrest with Electronic Monitoring if the grounds for detention can be prevented this way and if the suspect is well integrated. Still, PTD with EM can only be imposed if no other milder measures are considered sufficient to secure the proceedings. The rules for PTD also apply for EM with the exemption that detention hearings only take place if applied for. It has to be highlighted that EM is no alternative to PTD but just another way to execute PTD. A suspect in EM can be allowed to leave the house for work and educational reasons. In practice EM is rarely used to substitute PTD. According to § 38 CPP all time spent in arrest or detention prior to the conviction with respect to the same offence has to be taken into account fully when calculating the prospective time of release.

## 2.5 Alternatives to PTD (See also Chapter 6 “Alternatives to PTD” in Practice)

Like stressed before the principle of proportionality requires PTD only to be applied as a last resort. Therefore, alternative measures to PTD always have to be given priority in order to secure proceedings (§173/1 CCP). Consequently prosecutor and court have to establish reasons why alternatives are not implemented. The only exemption to this rule is the above mentioned “conditional mandatory” ground for detention which applies for offences with a minimum sanction of more than ten year of imprisonment.

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

- formal pledge not to leave the place of residence without permission;
- the pledge not to impede the proceedings;
- in cases of domestic violence, the obligation not to contact the victim and/or to leave the house
- compliance with certain orders (e.g. not to drink alcohol);
- compliance with the order to indicate each change of domicile;
- the (preliminary) confiscation of certain documents;
- preliminary probation;
- bail (e.g. has to be ordered if the ground for detention is only the risk of absconding. In fact most often however foreign detainees would not be able to offer adequate bail)
- compliance with order to undergo medical or other treatment (consent).

## 2.6 Pre-trial detention - Decision Making

Like stressed before all decisions on detention require an application by the public prosecutor. First bases for the decisions are the reports of the police and the outcomes of their investigations. In his applications for detention the prosecutor just refers to the police reports and applies for detention mentioning the ground for detention applicable in the individual case.

Before the first detention decision the judge himself tries to investigate into the aspects relevant for the decision in the run of the hearing with the suspect. The following criterions have to be considered with the decisions:

- The suspicion that the suspect has carried out the offence has to be urgent
- One or more of the grounds for detention have to apply and have to be substantiated by the outcomes of the investigations
- PTD has to be proportionate to the seriousness of the offense, the consequences of the offence and the punishment one may face if convicted
- The principle of proportionality is closely related to the requirement that no deprivation of liberty is allowed if any or some milder measures will be sufficient to achieve the aim of securing the proceedings.

The judge has to address these criterions in each decision on detention. He/she has to substantiate why a criterion applies or why it does not.

## 3. Data on PTD

### 3.1 Data sources and methodological considerations

Statistics on the prison population and, more specific, data on pre-trial detention in Austria are provided by various sources. Statistics presented in this chapter are primarily based on national data on pre-trial detention (all provided by the Austrian Ministry of Justice), based on three different sources: 1) the annual published “Security Reports” (“Sicherheitsbericht”), 2) data provided and published on request of a parliamentary query response<sup>10</sup> and 3) until now unpublished data provided by the General-Directorate of the penal system in Austria. Additionally, international data on the prison population, including specific data on pre-trial detainees, will be added (Council of Europe’s SPACE I, International Centre for Prison Studies of King’s College London - ICPS).

With national data, pre-trial detainees are defined as the number of detainees who have not yet received their final sentence and of those who are sentenced, but who have appealed or who are within the statutory time limit for doing so. Furthermore, national data includes detainees held in prisons *before* the actual decision to apply pre-trial detention has been taken<sup>11</sup>. Thus, detainees who

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<sup>10</sup> Query Response: 2252/AB XXV. GP, 03.11.2014, 2364/J

<sup>11</sup> De jure, the status ‘pre-trial detention’ is conferred by the decision of the judge to impose pre-trial detention.

are under arrest (“Verwahrungshaft”) and awaiting a judges’ decision on imposing/rejecting pre-trial detention are included.<sup>12</sup> Regarding SPACE I, PTD-data that is published refer to the categories “untried detainees (no court decision has been reached yet)”, “sentenced prisoners (final sentence)” and “other cases” (referring mostly to persons held in forensic-psychiatric institutions) only. Therefore, it can be assumed that SPACE I data on the pre-trial prison population are calculated in the same way than the national data. Yet, when comparing data of different sources, one has to be aware of the often differing dates of the queries or the use of annual averages.

### 3.2 General information on Pre-trial detention

In the SPACE I statistics (Survey 2014), the median prison population rate of the European countries is stated with 124 per 100.000 inhabitants. Despite a result below the European Average, with 104,1 Austria is among the countries with rather high prison population rates (more than 100 prisoners per 100.000 inhabitants). Austria is also among those countries with prison population overcrowding (with more than 100 prisoners per 100 places) with 101,1. The situation is similar with respect to the rate of untried detainees: Within European countries, Austria in comparison also shows rather high rates of untried detainees per 100.000 inhabitants with 22,4. The median rate of untried detainees of European countries is expressed with 19,5. The median rate of foreign inmates in European countries according to the SPACE data is 13%.<sup>13</sup> For Austria one of the highest percentages of foreign inmates in European countries is expressed: On September 1<sup>st</sup> 2014 50,1% of all prisoners had no Austrian citizenship. With 69% foreigners in PTD, the situation is even more extreme there.<sup>14</sup>

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<sup>12</sup> Persons held in police detention and foreigners held for administrative reasons (‘Schubhaft’) are not included.

<sup>13</sup> Still, data shows wide differences from a minimum of 0.7% in Poland up to a maximum of 96.4% in Monaco.

<sup>14</sup> Marcelo F. Aebi and M. M. Diago and C. Burkhardt, SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2014 (Strasbourg, Council of Europe, 2015) 2.

**Figure 1: Processing of crime 2015<sup>15</sup>**

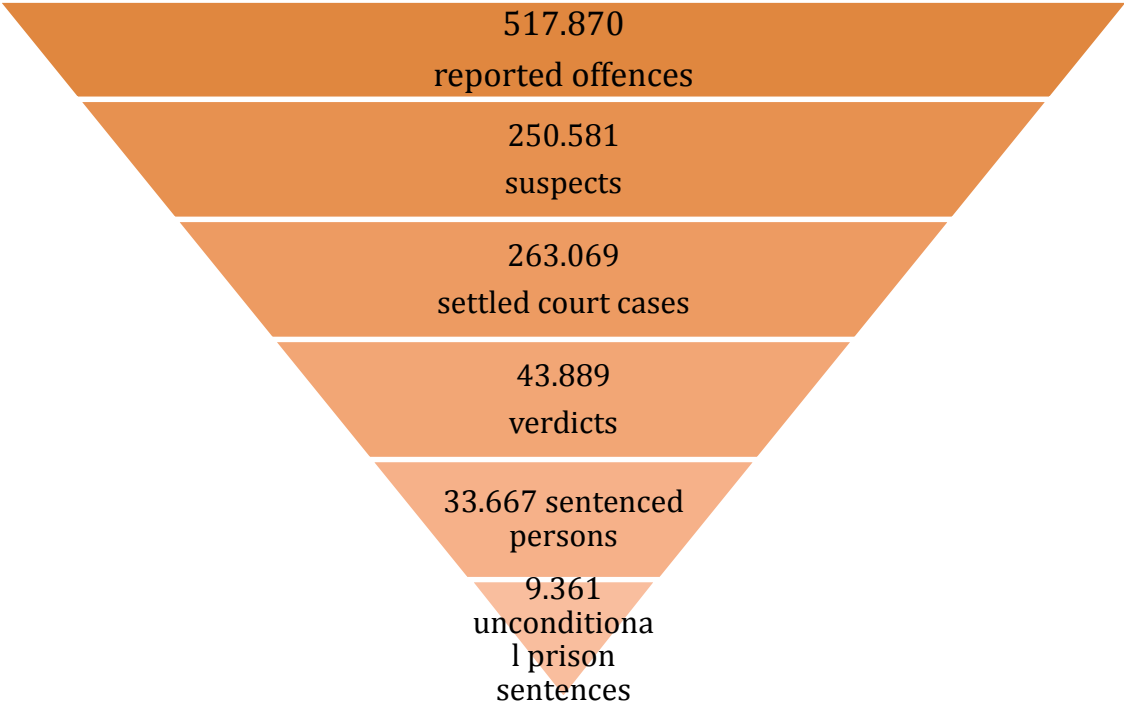
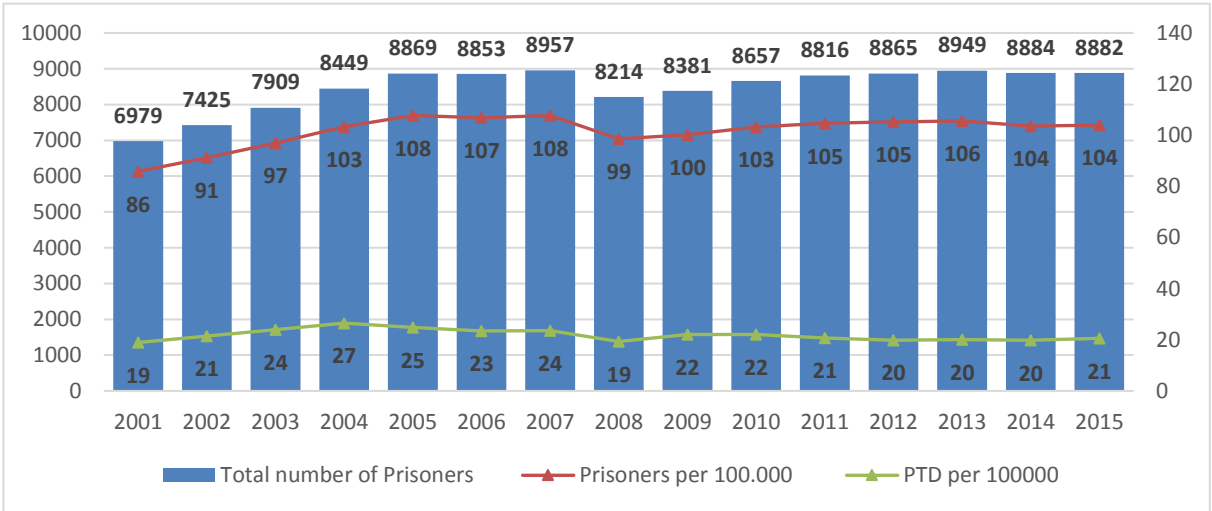


Figure 1 shows the processing of crime in 2015, starting with 517.870 reported offences, followed by 250.581 suspects and a slightly higher number of settled court cases in 2015. Yet, only 43.889 verdicts have been reached which shows that the vast majority of court cases are regulated differently (e.g. termination of proceedings, alternative measures etc.). Within the 43.889 verdicts, 33.667 persons got sentenced, but only a small number (9.361) received unconditional prison sentences.

**Figure 2: Developments – Prisoners and Prisonrates<sup>16</sup>**



<sup>15</sup> Based on the Crime Statistics 2015 (Ministry of Interior, 2016) and on the Security Report 2015 (Ministry of Justice, 2016)

<sup>16</sup> Based on the Security Report (Ministry of Justice, 2016) and on the Police Criminal Statistics 2015, annual average



In the 1990ies, the prison population was rather stable between about 6.500 and 6.900. Since 2001, the total number as well as the prisoners’ rate was on a constant rise until 2007 with a peak of 8.957 detainees then (see Figure 2). After a significant drop from the year 2007 to 2008, which is probably linked to temporary effects of legislative reforms<sup>17</sup>, the numbers rose again slightly and are stated with 8.882 detainees in total in 2015. In recent years, the total prison population has been on a rather constant high level. Considering the prison populations relative share of the Austrian population, the prison population rate follows the rise of the total prison population until 2007 (108 prisoners per 100,000 population), whereas the pre-trial detainees’ rate reaches its peak in 2004 with 27 pre-trial detainees per 100,000 population. Since 2009, the total prison rate as well as the pre-trial detention rate stay quite stable, with 104 prisoners and 21 pre-trial detainees per 100,000 in 2015.

**Figure 3: Development of the daily average number of prisoners – different kinds of Imprisonment<sup>18</sup>**

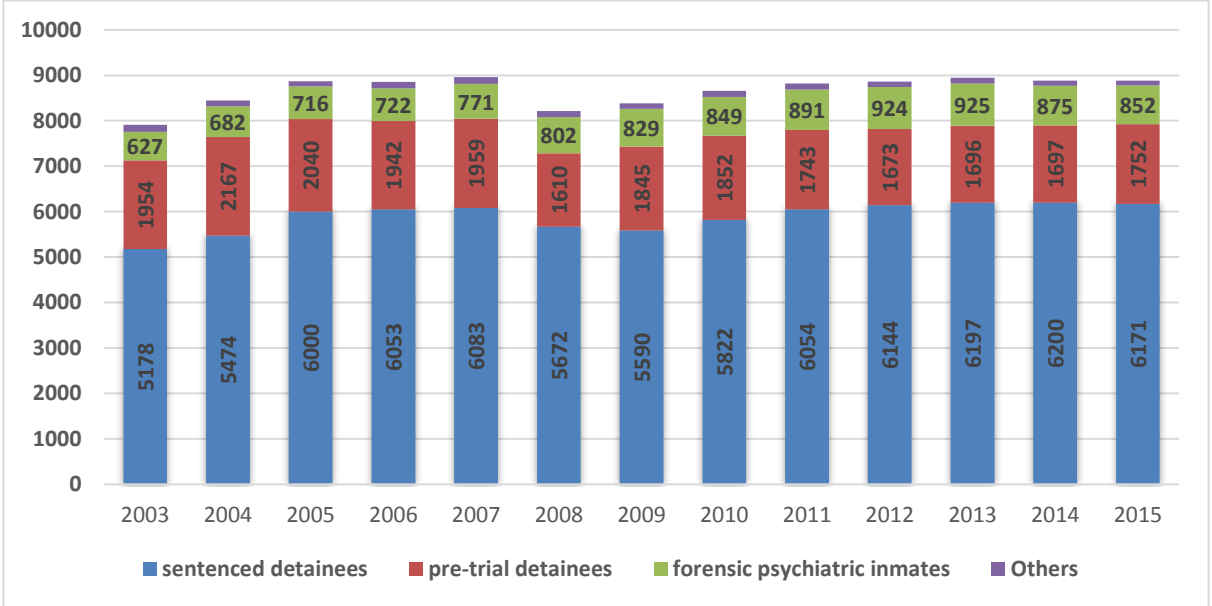
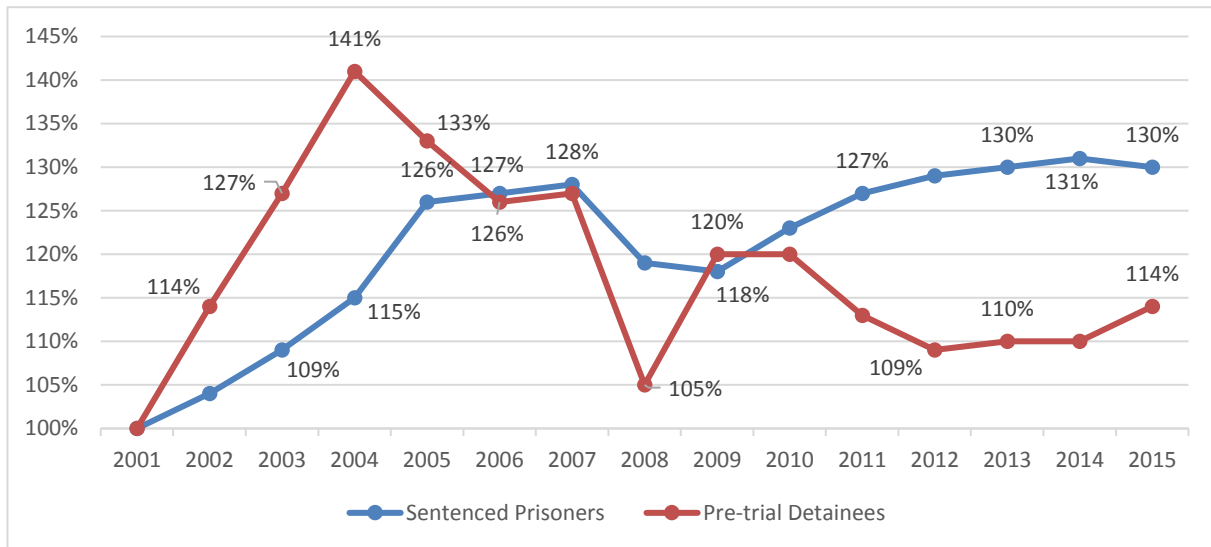


Figure 3 gives an overview of the developments with respect to the numbers of the different kinds of prisoners. The shares of different kinds of imprisonment stay relatively stable in the run of the years. However a quite significant rise of the number of inmates in forensic psychiatric institutions can be observed. In recent years this group formed about 10% of the total prison population. With an average number of close to 1.700 and up to about 1.750 pre-trial detainees this group represents close to 20% of all prisoners in recent years. In the years 2011 to 2015, the number of sentenced prisoners is quoted with numbers between 6.054 (2011) and 6.200 (2014) forming about 70% of the total prison population.

<sup>17</sup> See chapter 1; see also Christine Morgenstern, ‘Austria’ in A.M. Kalmthout and M.M. Knape and C. Morgenstern (eds), *Pre-trial detention in the European Union: An Analysis of Minimum Standards in Pre-trial Detention and the Ground for Regular Review in the Member States of the EU* (Wolf Legal Publishers, 2009) 115-147

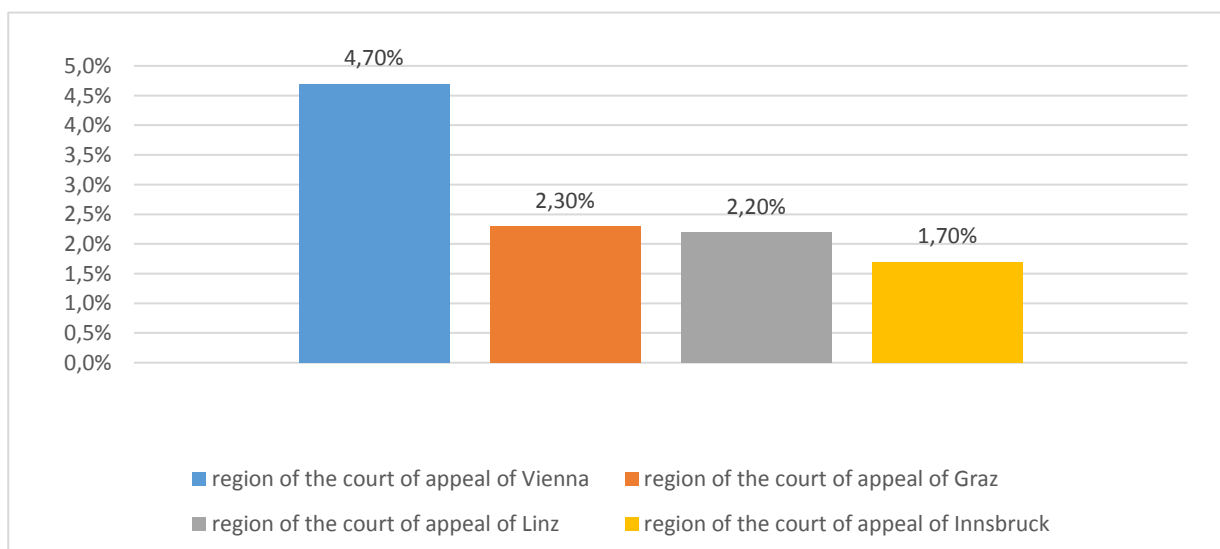
<sup>18</sup> Based on the Security Report 2015 (Ministry of Justice, 2016), annual average

**Figure 4: Developments - Sentenced Prisoners and in PTD (per 100.000 pop., in relation to 2001=100%)<sup>19</sup>**



With a closer look at the developments of the prison population rate (see Figure 4), the peak of the pre-trial detention rate in 2004 is expressed as an increase of 41% since 2001. In 2008, the pre-trial detention rate drops to almost the same value as in 2001. After a sharp increase from 2008 to 2009, in 2015 the pre-trial detention rate reaches 114% of the 2001-value. The rate of sentenced prisoners shows a more moderate and slightly different development. Their rates have been increasing until 2007 (an increase of 28% since 2001), followed by a decrease up to 2009 and rising again until in 2015 finally 30% more sentenced prisoners have been reported in comparison to 2001. As will be shown in section 2.3 in detail, the increase of both rates is actually due to the rise of foreign inmates.

**Figure 5: Regional distribution of PTD-rate in 2013<sup>20</sup>**



<sup>19</sup> *ibid.*

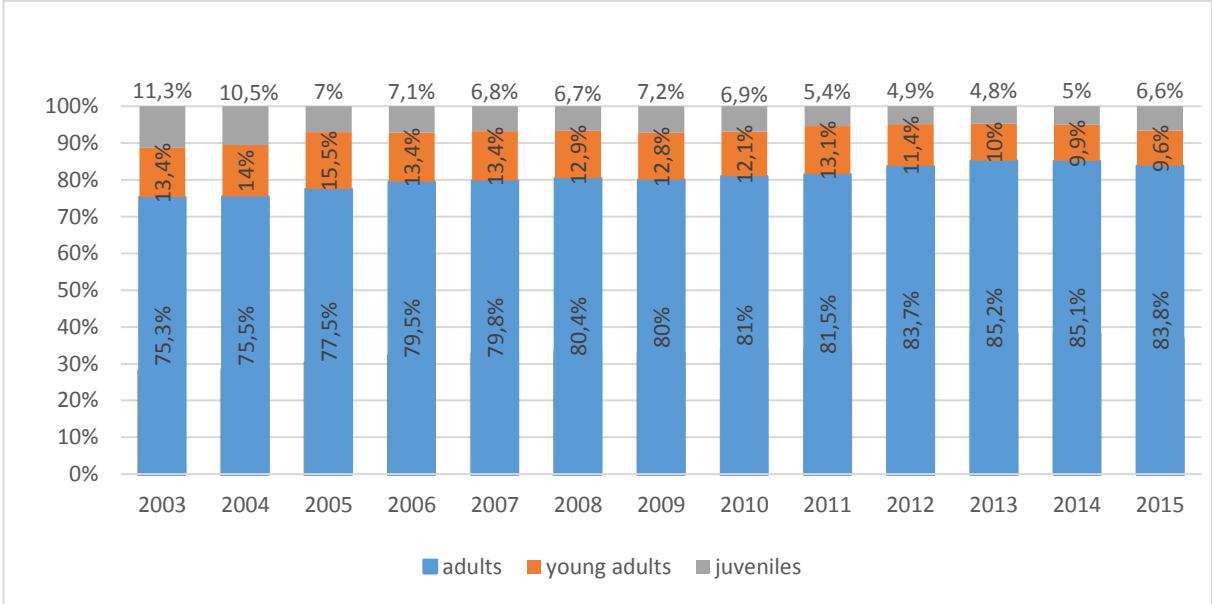
<sup>20</sup> Based on calculations (number of entries/number of suspects in 2013) from data of the IVV database, provided by the General-Directorate of the penal system in Austria in 2016 and on the Crime Statistics 2013 (Ministry of Interior, 2014).

Figure 5 shows that the pre-trial detention rates vary considerably in different regions. In particular an east (Vienna) – west (Innsbruck) divide has to be stressed, which has already been observed in the 1990ies (Hanak et. al, 1998). In 2013 an offender in Vienna had a likelihood to go into PTD almost three times as high as an offender in Innsbruck. Yet, it has to be considered that the population and crime structure also show regional differences. In Vienna, slightly more severe crimes<sup>21</sup> are committed and there are also slightly more foreigners among the suspects. These differences however cannot explain the considerable differences with respect to the detention rate.

### 3.3 Structure of pre-trial prison population

Figure 6 shows the development of the age structure of pre-trial detainees. Since 2005 a constant decline of the percentage of juveniles and young adults entering PTD can be observed. From 2005 until 2015 the total number of entries of young adults almost halved (821 entries of young adults in pre-trial detention in 2015, 1.690 entries of young adults in 2005).<sup>22</sup> Considering the fact that young adults only represent a rather small group between the ages of 19 and 21 this age group is still to be found in PTD quite often. It was only with the last amendment to the JGG (Juvenile Justice Act), which came into force in January 2016, that major parts of the specific regulations for juveniles will also be applied with young adults (§ 19 JGG). With respect to juveniles the decreasing numbers between the years 2011 to 2014 are a result of recent efforts to keep juveniles out of PTD.

**Figure 6: Pre-trial detainees – entries (Juveniles/young adults and adults)<sup>23</sup>**

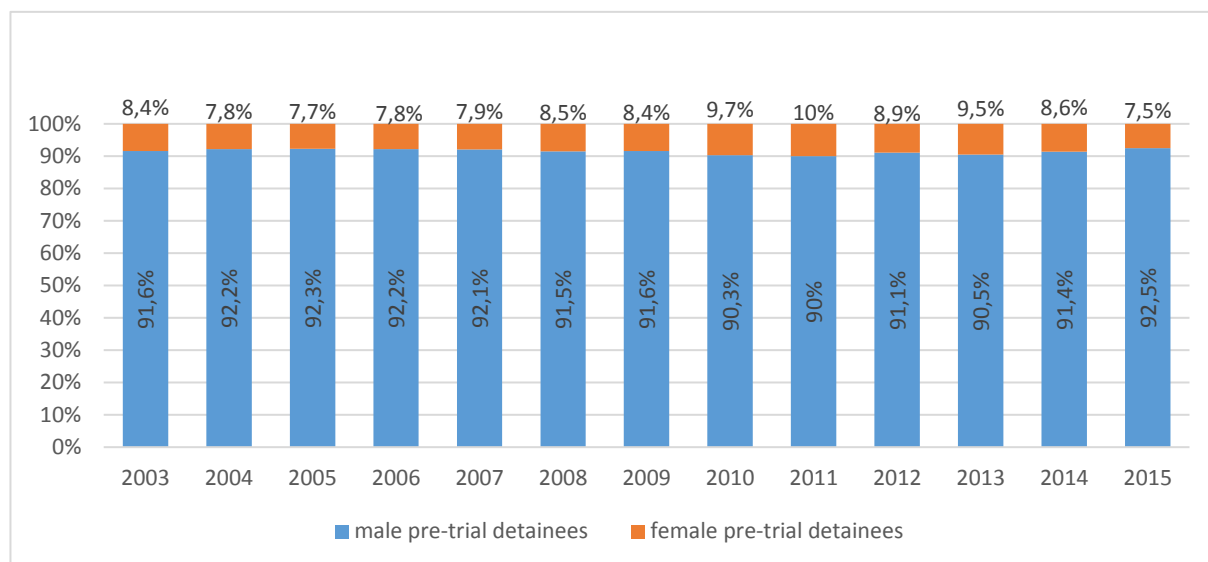


There was for instance a pilot project introducing the so called social net conferences to avoid PTD with juveniles (see Chapter 6.3. for details). In 2016 the social net conferences were introduced into

<sup>21</sup> Severe crimes ('Verbrechen') in Austria are considered offences with a possible penalty of more than 3 years  
<sup>22</sup> Unless otherwise stated, all data referring to total numbers of entries in pre-trial detention are based on data (from the IVV database) provided by the General-directorate of the penal system in Austria (2016)  
<sup>23</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)

the JGG, now also available for young adults. Already in 2015 however again a higher number of juvenile pre-trial detainees was reported. In fact, the again increasing number of juvenile entries into PTD (131 more entries of juveniles in comparison to 2014) seem to be responsible for the general slight increase of the pre-trial detention entries. From 2014 to 2015 the total entries increased from 8.397 to 8.476. Seemingly the efforts spent on reducing the numbers of juvenile pre-trial detainees in recent years lost some momentum.

**Figure 7: Pre-trial detainees – entries (male/female)<sup>24</sup>**

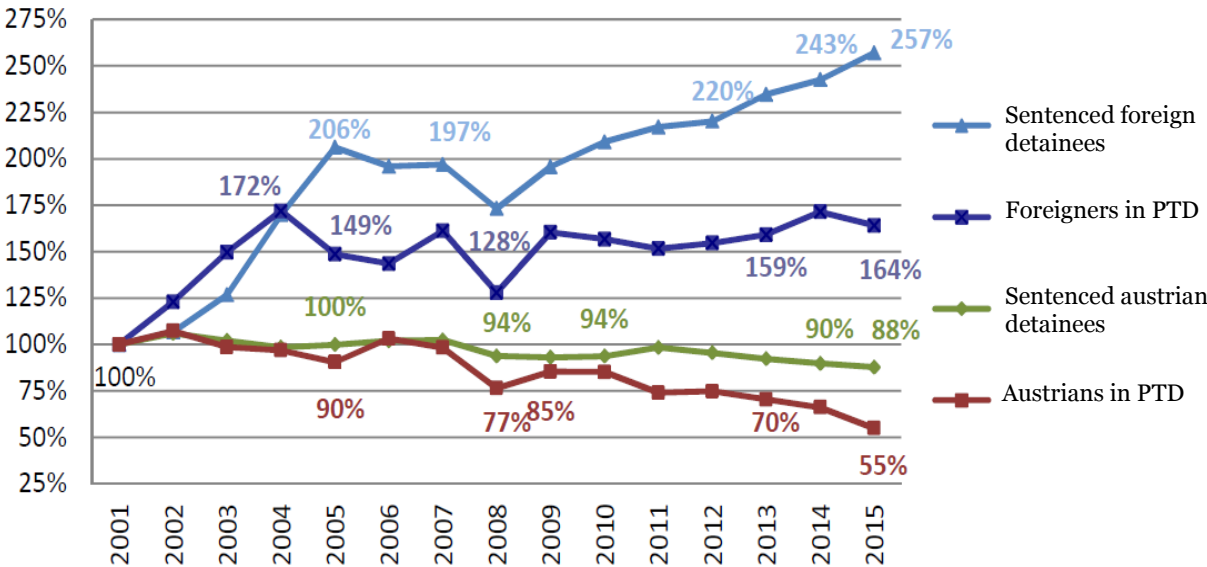


The development of the gender ratio shown in Figure 7 illustrates a relatively constant development of the female share of entries to pre-trial detention. A peak can be seen in 2011 with a 10% share of female entries (847 in total). Despite a slight increase of the number of total entries in 2015 to 8.476, the percentage of females drops to a low of 7.5% of all entries (total number of 632). Completing the picture with data from the SPACE I Statistics, the percentage of female pre-trial detainees decreased from 2012 (7,2%) to 2014 (6,0%) with a total of 115 female pre-trial detainees on 1<sup>st</sup> of September 2014 in all of Austria.<sup>25</sup>

<sup>24</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)

<sup>25</sup> M.F. Aebi and N. Delgrande, *SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2012* (Strasbourg, Council of Europe 2014); M.F. Aebi and M.M. Tiago and C. Burkhardt, *SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2014* (Strasbourg, Council of Europe, 2015)

**Figure 8: Imprisonment status and citizenship<sup>26</sup>**



As already mentioned, the increases with respect to the prison population are due to higher numbers of foreigners detained in Austria. Looking at a long-term development, the share of foreigners among all prisoners has been stated with 7% in the early 1980s, it increased in 1989 to 14% and in 1994 to a quarter of the prison population – a development that has been viewed being related to the opening of the eastern borders with the fall of the iron curtain.<sup>27</sup> Figure 8 shows some more detail with respect to the developments since 2001 considering citizenship. The number of detainees with Austrian Citizenship has been constantly decreasing since 2001. This is true for sentenced prisoners as well as for pre-trial detainees, but it is particularly remarkable with respect to pre-trial detainees. In 2015 the number auf Austrians in PTD represented only 55% of the number in 2001. The contrary development can be observed with foreigners: The number of persons without Austrian citizenship in pre-trial detention increased dramatically by 64%, the number of foreigners serving sentences by even 157%. This is a quite unpleasant development that asks for attention.

<sup>26</sup> Security Report 2015 (Ministry of Justice, 2016) 122.

<sup>27</sup> Security Report 2015 (Ministry of Justice, 2016) 109

**Figure 9: Nationality of pre-trial detainees 2015 (percentages of total number of PTD-entries)<sup>28</sup>**

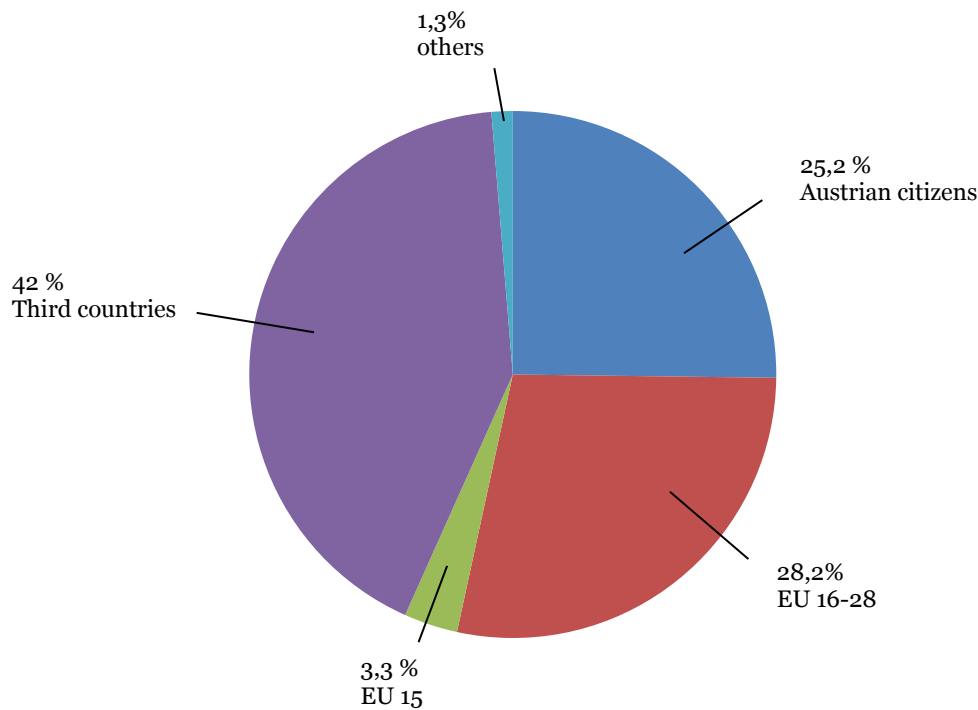


Figure 9 shows that only about 25% of all entries into PTD in 2015 were Austrian citizens. Close to one third of all entries were European citizens, however only 3% of the EU 15, most of them Germans (153 in total). Within the group of the new EU Member States (EU 16-28), Romanians are the nationality most often taken into custody in Austria (950), followed by Hungarians (470) and Slovakian citizens (368). Citizens of third countries represented 42 % of all entries into PTD in Austria. Most entries of this group were Serbian citizens (766), followed by Nigerian (491) and Algerian citizens (405).<sup>29</sup>

<sup>28</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016). The group 'others' includes stateless persons

<sup>29</sup> Security Report 2015 (Ministry of Justice, 2016) 126-127

### 3.4 Comparative View

**Table 1: Prison population (data from different sources)**

Source	Date / average numbers	Total prison population	Number of pre-trial detainees	% of pre-trial detainees of total prison population	Rate of pre-trial detainees per 100,000
SPACE I (Council of Europe) <sup>30</sup>	1 Sep. 2012	8 756	1 829	20.9	21.8
	1 Sep. 2013	8 831	1 813	20.5	21.5
	1 Sep 2014	8 857	1 902	21.5	22.4
ICPS <sup>31</sup>	1 Dec 2012	-	1 754	20.1	21
	1 Nov 2014	-	1 795	21.8	21
"Sicherheitsbericht" <sup>32</sup> National Data published by the Ministry of Justice	2012 (annual average numbers)	8 865	1 673	18.9	20
	2013 (annual average numbers)	8 949	1 696	19.0	20
	2014 (annual average numbers)	8 884	1 697	19.1	20
	2015 (annual average numbers)	8 882	1 752	19.7	21

<sup>30</sup> Based on data of SPACE I – Council of Europe Annual Penal Statistics: Prison Populations, Survey 2012, 2013, 2014 (Strasbourg, Council of Europe)

<sup>31</sup>R. Walmsley, *World Pre-trial/Remand Imprisonment List* (International Centre for Prison Studies, 2nd edn, London, 2014)

[www.prisonstudies.org/sites/default/files/resources/downloads/world\\_pre-trial\\_imprisonment\\_list\\_2nd\\_edition\\_1.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_imprisonment_list_2nd_edition_1.pdf) accessed 4 April 2016.

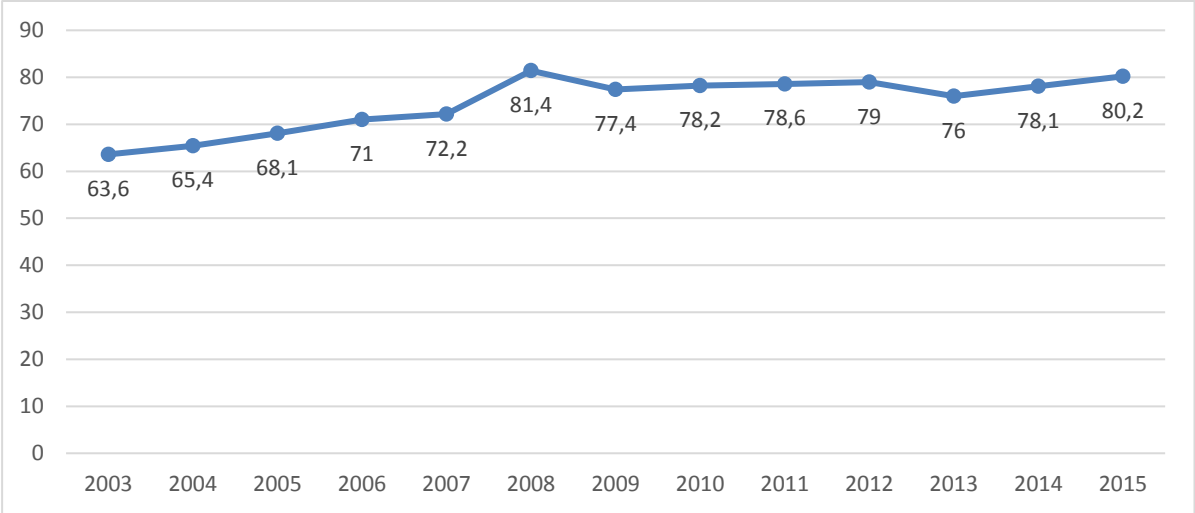
<sup>32</sup> Based on data of the Ministry of Justice, Sicherheitsbericht 2012-2015 (Security Reports from the Ministry of Justice)

In a comparative view of data from different sources we have to be aware of the fact that the numbers of detainees fluctuate on a daily basis. Hence data presented by SPACE, ICPS and the data presented annually by the Austrian Ministry of Justice will always differ to some extent. SPACE regularly refers to data for the 1<sup>st</sup> of September, ICPS to data for 1<sup>st</sup> of December or 1<sup>st</sup> of November and the Ministry of Justice presents annual averages. The comparison of the figures for the total prison population in Table 1 shows only minor differences between the SPACE data and the official data of the Austrian Ministry of Justice (Sicherheitsbericht). The numbers of pre-trial detainees however regularly show larger values on 1<sup>st</sup> of September (SPACE) than the daily average numbers (Ministry of Justice). This difference of course becomes also visible with the percentage pre-trial detainees represent in relation to the total prison population and with respect to the rate of prisoners per 100.000 inhabitants. The rates and percentages presented here by SPACE are higher than the ones presented by the Ministry. The PTD-figures published by the ICPS are lower than the ones for the first of September but still higher than the annual average.

Available data of the Ministry of Justice<sup>33</sup> for the 1<sup>st</sup> of September 2015 shows a very high number of 2.063 pre-trial detainees and 161 more than in the prior year. Both data sets, the annual average and 1<sup>st</sup> of September, show increasing numbers. Interestingly the difference between the annual average and the figures referring to the first of September is increasing in recent years. This could be due to the slight continuing rise of the number of pre-trial detainees since 2012.

**3.5 Other detailed data on PTD**

**Figure 10: Average Length of PTD (days)<sup>34</sup>**



The average length of pre-trial detention increased quite constantly since 2003 as can be seen in Figure 10. In 2015, the average length of PTD was about 13 days longer than in 2003. On 1<sup>st</sup> of

<sup>33</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)

<sup>34</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)



September 2014 there were 1.902 people in PTD in Austria. Among them, 258 pre-trial detainees have been detained for more than 6 months<sup>35</sup> - on 1<sup>st</sup> of January 2016 the number of pre-trial detainees held in remand detention for over six months was stated with 292.<sup>36</sup>

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

**House arrest with electronic monitoring:** Electronic monitored curfew does not play a significant role as a specific form of pre-trial detention in Austria as this measure is restricted to only a few individual cases each year (2013:8, 2014:13, 2015:4).<sup>37</sup>

**Suicide rate:** Compared to sentenced prisoners, the suicide rate per 100.000 is much higher among pre-trial detainees (176.6 for pre-trial detainees, 32.8 for sentenced prisoners in 2013). This may be seen as an indication for the difficult situation of pre-trial detainees who very often are restricted to the cell for most of the day and who suffer from the uncertainties connected to PTD. However, the suicide rate for both groups was decreasing from 2010 to 2013 (no current data available). In total, 3 persons held in pre-trial detention committed suicide in 2013.

**Compensation:** People who have been in custody may be entitled to compensation if they can prove that their detention was *contra legem* or that it was not justified (Strafrechtliches Entschädigungsgesetz – StEG 2005 – Compensation law for criminal cases). In 2015 altogether 146 people claimed for compensation with the Ministry of Justice. The claims of 120 people have been acknowledged fully or at least partially. Mostly the claims have been settled by compromise solutions. Since 2006 the number of claims has constantly decreased. With 294 claims in 2006 there were almost twice as many claims then 2015.

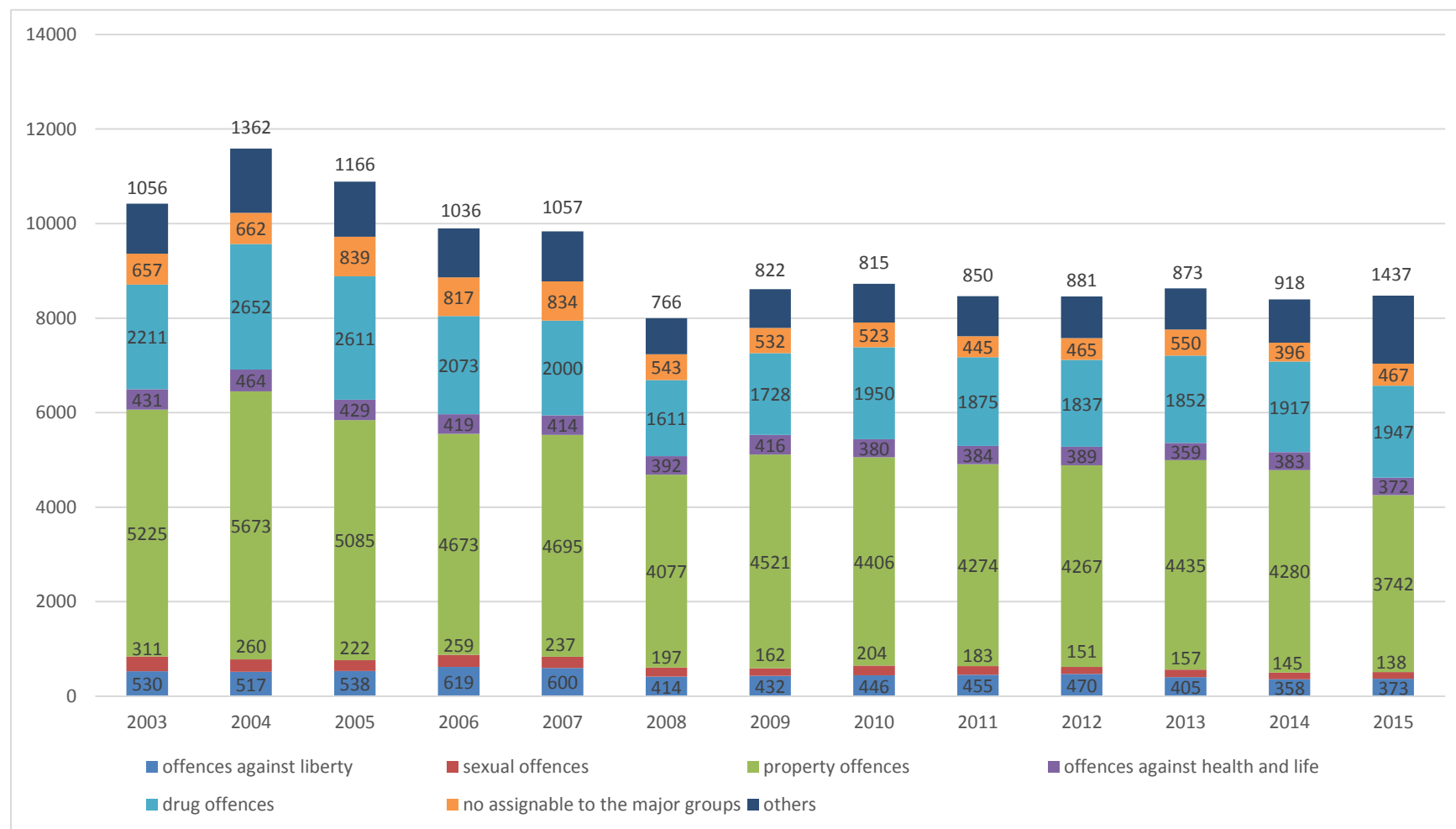
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<sup>35</sup> Based on data of the Ministry of Justice, *Query response* (2252/AB XXV. GP, 03.11.2014, 2364/J) 6.

<sup>36</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)

<sup>37</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)

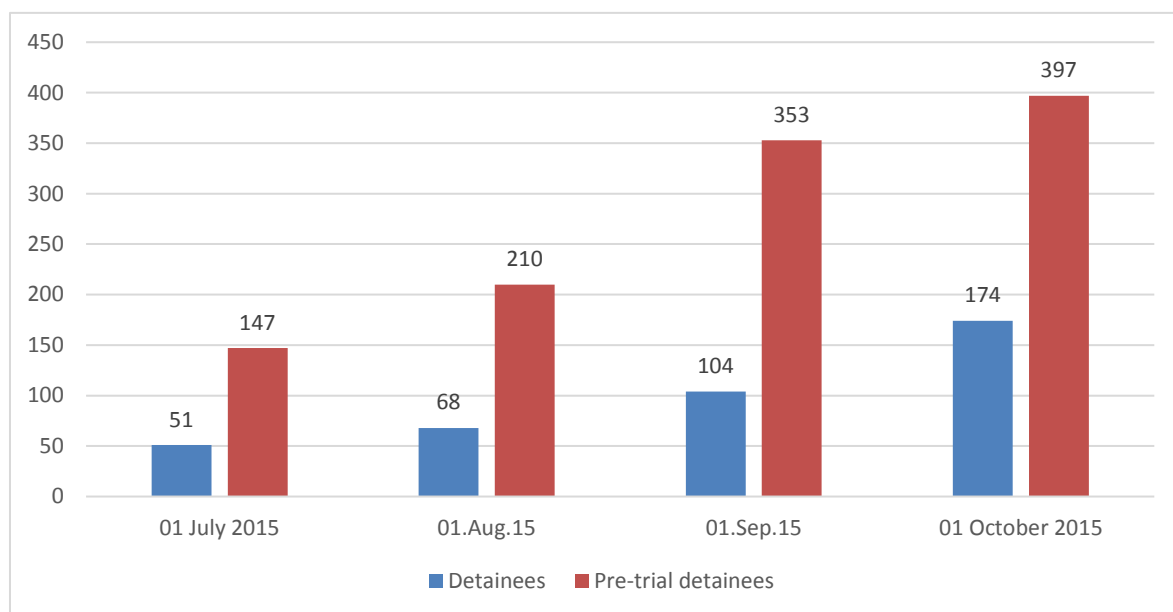
**Figure 12: Main offences of pre-trial detainees (based on number of entries)<sup>38</sup>**



<sup>38</sup> Based on data (from the IVV database), provided by the General-Directorate of the penal system in Austria (2016)

As shown in Figure 12, the main offences suspects are held in pre-trial detention refer to property offences (e.g. theft), followed by drug offences. While drug offences slightly increased, the number of property offences decreased in recent years. The smallest group of entries referring to pre-trial detainees suspected of sexual offences also decreased including 138 entries in 2015. The growing number of “others”, particularly in 2015, may be seen as a result of the increasing number of people suspected of “people smuggling” (§114 FPG – Aliens’ Police Act), which has been assigned to the category ‘others’. As shown in Figure 13, the total number of pre-trial detainees suspected of people smuggling almost tripled within 3 months in fall 2015 and is probably linked to the refugees’ movements at this time and tightening laws in this respect (see chapter 5 “Media coverage on pre-trial detention”).

**Figure 13: People smuggling – imprisoned and PTD – total number on 1st of each month<sup>39</sup>**



As a recently published research report on the delinquency of Foreigners in Vienna<sup>40</sup> points out, in 2015 the main entries to pre-trial detention of foreigners in Vienna refer to property and drug offences, whereas for Austrian citizens sexual offences and offences against health and life are predominant. In 2015, 82% of the entries for drug offences refer to foreigners (77% to third-country nationals and ‘others’, 4% to EU nationals), for property offences a slightly lower percentage of entries of foreigners into pre-trial detention in Vienna (72%) has been stated, with

<sup>39</sup> Figure based on data by the Ministry of Justice, cited in <<http://derstandard.at/2000023354047/Jeder-fuenfte-U-Haeftling-ist-Schlepperei-Verdaechtiger>> accessed 09 August 2016

<sup>40</sup> A. Pilgram and W. Fuchs and C. Schwarzl, ‘Vorarbeiten für eine fortlaufende Beobachtung der Delinquenz ausländischer Staatsangehöriger in Wien und Pilotbeobachtung für das Jahr 2015’ (‘Preliminary work for a continuous observation regarding the delinquency of foreign nationals in Vienna and pilot observation for 2015’, Research Report, Institute for the Sociology of Law and Criminology, July 2016), <[http://www.irks.at/assets/irks/Publikationen/Forschungsbericht/Ausl%C3%A4nderkriminalit%C3%A4t%202015\\_Abschlussbericht.pdf](http://www.irks.at/assets/irks/Publikationen/Forschungsbericht/Ausl%C3%A4nderkriminalit%C3%A4t%202015_Abschlussbericht.pdf)> accessed 24<sup>th</sup> October 2016

almost the same share of third-country nationals (including the category “others”) and persons with EU citizenship (each ~35%).<sup>41</sup>

The cited research on Vienna additionally highlights a polarised practice of legal sanctions: while 10% of Austrian nationals without a criminal record received a partial or unconditional prison sentence in 2015, the share of foreigners without a criminal record who received the same sanctions has been stated with 46%, which is even slightly higher than for Austrian citizens with a criminal record (40%). For other regions corresponding information is not available, we however can assume that Foreigners are in general mostly taken into custody for property offences and drug offences.

#### 4. Research Review

There is little recent literature on PDT in Austria. This is especially true for empirical works. At the Institute for the Sociology of Law and Criminology in the eighties and nineties of the last century some studies were carried out. The most important and the most recent one was the one carried out by Hanak, Karazman and Stangl in 1998. It focused on the effects of the amendment of 1993 which introduced main elements of the regulations of PTD still valid today. The amendment had actually reduced than then reported high rates of PTD. Another focus of the research was on the regional differences. The outcomes showed remarkable differences with respect to the use of PTD especially between eastern and western parts of Austria. Even when considering regional differences with respect to the structure of crime, etc. there remained a phenomenon which in expert circles became well known as the “Ost-West-Gefälle” (East-West-Decline). In the east of Austria offenders have been much more likely to be put into PTD than in the west. The new data we presented suggests that this phenomenon still exists.

Based on an extensive study already in 1999 Venier<sup>42</sup> has shown that the assumed connection between social integration and the risk of absconding may lead to discrimination with regard to poorer persons and to foreigners. The Austrian Upper court has decided in 2008<sup>43</sup> that regular residency in a member country of the European Union does exclude the assumption of the risk of absconding. With the numbers of EU citizens in PTD in Austrian prisons some doubt arises whether this is put into practice consequently. Particularly with suspects not fully integrated e.g.

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<sup>41</sup> A. Pilgram and W. Fuchs and C. Schwarzl, ‘Vorarbeiten für eine fortlaufende Beobachtung der Delinquenz ausländischer Staatsangehöriger in Wien und Pilotbeobachtung für das Jahr 2015’ (‘Preliminary work for a continuous observation regarding the delinquency of foreign nationals in Vienna and pilot observation for 2015’, Research Report, Institute for the Sociology of Law and Criminology, July 2016) 45-46.

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

<sup>43</sup> 11 Os31/08f; Feb 27<sup>th</sup>, 2008

also the threat of a long prison sentence often is used as a ground for detention despite the prevailing Austrian doctrine that an expected prison sentence is no sufficient ground.<sup>44</sup>

With respect to PTD the already mentioned amendment of the CCP 2004 actually stimulated quite some criticism of scholars.<sup>45</sup> The regulation that it may last up to four days till a judge decides on PTD was said to contradict Art. 5 of the ECHR, which requires an immediate hearing and decision by a judge.<sup>46</sup> Venier (2006) observed “alarming” signals with respect to the new definition of the ground of detention addressing the risk a suspect may commit further crimes of a similar and severe kind.<sup>47</sup> Up to then the formulation of the CCP referred to severe offenses, while the new one refers to offenses punishable with more than 6 months and thereby extending the possible use of detention based on this ground. Thereby also the principle of proportionality was said to be threatened. Szabo (2008) expressed little trust in the work of the police and the prosecutor by expecting further deteriorations with respect to PTD, because the judge now has to decide about the grounds for detention based on the investigations of police and prosecutor.<sup>48</sup> Before the investigating judge himself could take over an active role with respect to the investigations. Eichseneder (2003) criticized that there is too much discretionary power of the authorities.<sup>49</sup>

An extensive research project was carried out in the years 2009 and 2010 on the effects of the amendment to the CCP 2004.<sup>50</sup> Although PTD was no focus it was also addressed. Interesting with respect to DETOUR is the observation that 89% of the (representative) number of cases in PTD have been detained for grounds of the risk that the person might commit further offenses similar to the one being investigated, 70% were detained because of the risk of absconding. The new definition of the different roles brought about that the public prosecutor at least formally became the leader of the investigations. In practice the conclusion of the research was, that the police carry out the investigations with little involvement or guidance of the prosecutor. Arrests were reported to be carried out by the police autonomously in 75% of the investigated cases on the grounds of immediate danger. In the specific literature it had been criticized that certain orders (like the order for arrest) may be prepared and reasoned by the prosecutor in his/her

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

<sup>45</sup> This has to be seen as one of the reasons why it took till 2008 that the amendment was actually put into force

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

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

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

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

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

application which the judge only approves with a signature and rubberstamp. The assumption was that this would be a quick handling of the case, without much effort on the side of the judge, while a denial of the application would cause much more work, because it asks for explanations.<sup>51</sup> Outcome of the research was that 75% of all arrests and house searches ordered by judges did not use this short solution but elaborated individual reasoning for the cases. The new law brought about that the legal safeguards were somewhat clarified and extended. In practice however the research showed that the means to fight decisions of the courts before the trial stage were hardly used. Attorneys responded that it often would be better to talk to the prosecutor than to formally take advantage of legal safeguards.

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

## 5. Media coverage on pre-trial detention in Austria

Pre-trial detention in Austria is mentioned in the media especially in connection with one particular group of suspects: juveniles. The rape of a 14 year old in pre-trial detention by other inmates in 2013 opened a heated debate about young offenders' imprisonment in Austria and the need for alternatives.<sup>53</sup> This led to the establishment of a task force for developing alternatives to pre-trial detention for juveniles<sup>54</sup> and has been followed by a reform of the Juvenile Justice Act which came into force in January 2016 and has been extended to young adults.<sup>55</sup> Since then – among other things – alternatives to pre-trial detention can be developed within a social net conference<sup>56</sup> (“Sozialnetzkonferenz”, for further information see chapter 6) and sheltered housing will be financed by public money, if needed. Recent media coverage welcomed the

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<sup>51</sup> See A. Venier, ‚Probleme der Strafprozessreform‘ (2008) (3) Juridikum 139

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

<sup>53</sup> ‚Juveniles in prison: heated political debate‘ *Oe1* (Vienna, 27 June 2013) > <http://oe1.orf.at/artikel/344259>< accessed 14 June 2016

<sup>54</sup> ‚Pre-trial detention for juveniles: ‚Task Force‘ examines every single case‘ *Die Presse* (Vienna, 16 July 2013) > [http://diepresse.com/home/panorama/oesterreich/1430717/JugendUHaft\\_Task-Force-pruft-jeden-einzelen-Fall](http://diepresse.com/home/panorama/oesterreich/1430717/JugendUHaft_Task-Force-pruft-jeden-einzelen-Fall)< accessed 14 June 2016

<sup>55</sup> Age 19 to 21

<sup>56</sup> ‚Brandstetter wants to prevent judges on imposing pre-trial detention to juveniles‘ *Derstandard* (Vienna, 12 August 2015) > <http://derstandard.at/20000020617767/Brandstetter-will-Richter-von-U-Haft-fuer-Jugendliche-abhalten>< accessed 13 April 2016

strong decline of juvenile pre-trial detainees as an immediate result of the reforms<sup>57</sup>. While there has been a fundamental discussion about the imprisonment of juveniles and young adults followed by the demand of using alternatives to pre-trial detention for this particular group, the media has rarely covered the issue of pre-trial detention for adults. Still, there was a modest number of newspaper articles that followed the case of a German student who had been held in pre-trial detention in Austria for almost 6 months and finally got convicted of breaching the peace ('Landfriedensbruch'), damage to property and personal injury while attending a demonstration. Beyond critique about this specific case, in some articles the interviewees raised the fundamental critique that in Austria people are held in pre-trial detention too often and for too long.<sup>58</sup>

In a number of newspaper articles pre-trial detention (for adults) became the subject of discussion in connection with the demand for tighter legislation for specific offences. Partially this has to be seen in connection to the so called "European refugee crisis": in August 2015, after the bodies of 71 refugees were found inside a parked lorry in eastern Austria, there has been a major response in the media followed by the demand of fighting the organised crime of people smuggling.<sup>59</sup> Many articles concentrated on tightening the so called "people smuggling-paragraph" (§114 FPG - Aliens' Police Act), followed by raising the issue of the massive increase of pre-trial detainees accused in this respect (one out of five)<sup>60</sup> along with stressing overcrowded prisons.<sup>61</sup>

Another, most recent event-driven legislation initiative is linked to extensive media coverage about an alleged proliferation of drug trafficking in public spaces (specifically at two hotspots in Vienna) at the beginning of the year 2016. Till then courts frequently assumed even minor offences to be part of more extensive criminal activities of a suspect directed at generating a regular income. This practice was viewed to have a substantial impact on the high numbers of above all foreign pre-trial detainees. With an amendment to the Criminal Code and a restrictive definition of the term "commercial activity" this practice was supposed to be cut back. Now the police complained about this amendment being an obstacle to adequately deal with drug traffick-

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<sup>57</sup> 'Juveniles in pre-trial detention: number since october nearly halved' *Kurier* (Vienna, 05 February 2016) ><http://kurier.at/chronik/oesterreich/jugendliche-in-u-haft-anzahl-seit-oktober-fast-halbiert/179.203.153> < accessed 22 February 2016

<sup>58</sup> Maria Sterkl, 'Amnesty speechless about investigation slip-ups on the causa Josef S.' *Derstandard* (Vienna, 11 June 2014) ><http://derstandard.at/2000001932675/Amnesty-sprachlos-ueber-Ermittlungspannen-im-Fall-Josef-S> < accessed 22 February 2016; Ulrike Weiser, 'Pre-trial detention: ,too often and for too long' *Die Presse* (Vienna 23 July 2014) ><http://diepresse.com/home/panorama/wien/3843449/UHaft-Zuoft-und-zu-lange> < accessed 22 February 2016

<sup>59</sup> Christian Böhmer, 'speedier pre-trial detention for people-smuggler?' *Kurier* (Vienna, 17 August 2015) ><http://kurier.at/politik/eu/schneller-u-haft-fuer-schlepper/147.549.596> < accessed 20 April 2016

<sup>60</sup> Maria Sterkl, 'Every fifth pre-trial detainee is suspected of people-smuggling' *Derstandard* (Vienna, 07 October 2015) ><http://derstandard.at/2000023354047/Jeder-fuenfte-U-Haefling-ist-Schlepperei-Verdaechtiger> < accessed 20 April 2016

<sup>61</sup> 'Bunk beds for people-smuggler in prison' *ORF* (Vienna, 25 September 2015) ><http://wien.orf.at/news/stories/2733620> < accessed 20 April 2016

ing in public spaces by largely excluding the option to impose pre-trial detention on these suspects.<sup>62</sup> Newspaper articles described an unbearable situation for residents in affected areas and also politicians have been cited to be concerned about the open drug scene and the level it has reached<sup>63</sup>. Beyond the demand of severe penalties for people-smuggling as mentioned above, the need for a legal basis to take suspects into pre-trial detention earlier and more easily (after the first stop instead of after the third) has been stated explicitly<sup>64</sup> as the new law is hindering the police to get ‘drug dealers off the streets’<sup>65</sup>. On the 1<sup>st</sup> of June 2016 a new criminal offence for drug trafficking in public spaces came into force<sup>66</sup>. The media coverage about the developments after the law came into force was divided: some assessed the new law combined with the increased arrests/detentions as a great success for the ‘fight against street crime’<sup>67</sup>, while others condemned the alleged practices of racial profiling by the police<sup>68</sup>. Further criticisms stated that the new law is more about restoring some feeling of safety in the minds of residents as the visibility of criminal activities decreases, rather than actually combating the drug trafficking scene<sup>69</sup>.

A topic also brought up in the media concerns the over-represented group of foreigners (not only) in pre-trial detention (74% per 1<sup>st</sup> of May 2016 in PTD). Due to overcrowded prisons, the Austrian Minister of Justice has been cited that foreigners need to serve their custodial sentence in their home countries (mainly EU-countries) more often, followed by the stated need of the ‘consequent deportation of delinquent offenders’. In order to realise this aim, further collaborations with competent authorities in specific EU-countries has been announced<sup>70</sup>.

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<sup>62</sup> Michael Jäger, ‘New law interferes with the hunting of drug-dealers’ *Kurier* (Vienna, 15 January 2016) ><http://kurier.at/chronik/wien/polizei-klagt-neues-gesetz-behindert-jagd-auf-drogendealer/175.064.010>< accessed 13 April 2016

<sup>63</sup> Manfred Seeh, ‘In Vienna the open drug trafficking scene is booming’ *Die Presse* (Vienna 08 March 2016) ><http://diepresse.com/home/panorama/wien/4935055/In-Wien-bluht-der-offene-Drogenhandel>< accessed 15 June 2016

<sup>64</sup> ‘Drug trafficking: tightening will occur’ *Die Presse* (Vienna, 05 April 2016) >[http://diepresse.com/home/panorama/wien/4960026/Drogenhandel\\_Verschaerfung-kommt](http://diepresse.com/home/panorama/wien/4960026/Drogenhandel_Verschaerfung-kommt)< accessed 13 April 2016

<sup>65</sup> Michael Berger, ‘Drug dealers targeted by politics and police’ *Kurier* (Vienna, 06 March 2016) ><http://kurier.at/chronik/oesterreich/dealer-im-visier-von-politik-und-polizei/185.266.526>< accessed 15 June 2016

<sup>66</sup> ‘Drug dealer: judiciary prepares for the new law’ *ORF* (Vienna, 31 May 2016) ><http://wien.orf.at/news/stories/2777329>< accessed 15 June 2016

<sup>67</sup> ‘250.000 euros’ worth of drugs confiscated by police’ *Heute* ><http://www.heute.at/news/oesterreich/wien/Polizei-stellt-Drogen-um-250-000-Euro-sicher;art23652.1300655>< accessed 15 June 2016

<sup>68</sup> Solmaz Khorsand, ‘The hunting team’ *Wiener Zeitung* (Vienna 07 June 2016) >[http://www.wienerzeitung.at/nachrichten/wien/stadtpolitik/823401\\_Die-Jagdgesellschaft.html](http://www.wienerzeitung.at/nachrichten/wien/stadtpolitik/823401_Die-Jagdgesellschaft.html)< accessed 14 June 2016

<sup>69</sup> Thomas Trescher, ‘U6 and drug-dealers: A solution, which isn’t one’ *Kurier* (Vienna 07 June 2016) ><http://kurier.at/chronik/wien/die-u6-und-die-dealer-eine-loesung-die-keine-ist/203.045.190>< accessed 14 June 2016

<sup>70</sup> Manfred Seeh, ‘transferring detainees to their home countries’ *Die Presse* (Vienna 26 May 2016) ><http://diepresse.com/home/panorama/oesterreich/4996744/Haeftlinge-in-Heimatlaender-bringen>< accessed 16 June 2016



In summary, media reports have stated that pre-trial detention of juveniles and young adults should be avoided and alternative solutions must be found. On the other hand, punitive tendencies can be observed in the coverage when it comes to specific offences or with respect to certain groups of offenders. They can be linked to more or less specific events and are sometimes combined with a call for severe penalties for particular offences (e.g. people-smuggling) or for the introduction of new offences (e.g. drug dealing in public spaces).

## 6. Alternatives/ non custodial supervision in practice

### 6.1 Alternatives to PTD – existing measures and institutional support

An overview on alternatives to PTD was already provided in chapter 2.5. This chapter focuses on alternatives to PTD in practice and here again on the ones taking advantage of institutional support. The law allows the judges to develop individual orders open to all kinds of specific needs. Considering this we can't provide a full and exhaustive overview of social support services which may help to avoid PTD. We therefore present above all measures that appear to be most important as well as examples of measures that are so far restricted to certain groups which however may have the potential to be adapted also to others.

Ahead of time we have to stress that apart from juveniles and young adults alternatives (“gelindere Mittel”) play a minor role in Austria. It will be part of the aims of this research to identify the reasons for this. If orders require suspects to get in contact with certain institutions, participate in counselling, in therapy or similar measures it is most often up to the client to organize those things. Then it is up to them to provide prove to the court that they did follow the order. Regularly this is done by providing confirmations issued by the respective institutions.

#### *Preparation for Preliminary Probation Service § 15 PAA (Probation Assistance Act)*

The preparation for preliminary probation service may be used if the court is not sure to order preliminary probation service for a suspect. In such cases the court may request an assessment along with a statement of the probation services concerning the appropriateness of this measure. In practice, however, this option is hardly used. At this point in the research process we can only speculate about underlying reasons. In part, it may be that this legal option is hardly known among practitioners or it may be due to the fact that there is little time available for the decisions on PTD.

## 6.2 Judicial directives („gelindere Mittel“ – less severe measures)

### *Preliminary Probation Service § 179 CCP*

Preliminary probation service can be seen as a traditional alternative to pre-trial detention offered by the probation services in Austria since its inception. It may be applied if the court comes to the conclusion that the support and control by a probation officer will suffice to secure proceedings. Probation officers support the suspect on all relevant issues (e.g. housing, employment and mediation to other public services) also applying a ‘risk and resource management tool’. This tool helps to identify the main risks (including criminogenic risks) along with resources that possibly help to reduce the identified risks. In practice this measure is regularly applied with juveniles, while the courts appear hesitant to apply this measure to adults. This may be due to a prevailing view which considers probation above all a pedagogic tool and therefore less likely to succeed with adults.

### *Orders with respect to residency*

In order to secure procedures the court needs to know where and how to get a hold of suspects not detained. Additionally orders to take up residency at a certain place may be directed at stabilizing the live of otherwise or lately “unstable” or socially vulnerable suspects. This may on the one hand include homeless people or ones who are threatened of homelessness. On the other hand this may also apply to suspects e.g. in cases of domestic violence (mainly men), who have been and will be ordered to stay away from certain places like the home up to then shared with the victim (§ 173 (5) CCP). Basically, social services (e.g. for homeless people) provide shelter for those in need (e.g. in Vienna the ‘Service of Viennese Assistance to the Homeless’ – Wiener Wohnungslosenhilfe). With respect to PTD this however often may not suffice, e.g. because most of these shelters are restricted to short periods of time which may not be long enough to secure the proceedings. Foreign suspects often lack a place of living in Austria. Just offering or organizing a place to stay however often will not suffice to prevent PTD, because housing is not equivalent to social integration.

For suspects ordered to stay away from (former) home there is an accompanying counselling available at the so called “Men’s counselling Center” (“Männerberatung”) which as well may be ordered by the judge for the suspect to stabilize but also to avoid further offenses in this respect and to start working on the personal reasons for the violence. (includes psychotherapy and specific trainings for the prevention of violence)

### *Order, to abstain from alcohol or addictive substances*

With respect to offences that are linked to alcohol or substance abuse (e.g. acquisitive crime, violent offences) the court may apply the order to abstain from alcohol or addictive substances.

Social institutions relevant to this specific order may not only control the abstinence of alcohol and addictive substances by offering blood and urine tests as well as written confirmations about their results. They regularly also assist with therapies and counselling like addressed in the following paragraph.

*Order for a medical treatment, drug dependence treatment, psychotherapy, health-related measures*

Regarding drug dependence treatment, the social institution ‘Grüner Kreis’ for instance supports addicts in their rehabilitation and integration into society. Part of their treatment (which can be inpatient and outpatient care) covers also the development of a work structure and leisure activities with their clients<sup>71</sup>. This may be useful in cases, where suspects appear to have no daily structure and need support in stabilising a daily routine. For health-related measures and therapeutic offers, e.g. the so called ‘Forensic-therapeutic Centre’ (‘forensisch-therapeutisches Zentrum Wien’) in Vienna combines psychiatric (including pharmacological treatment) and psychotherapeutic support. After an assessment of the psycho-social situation of the client/patient, they may offer quick support in either way. Furthermore, psychotherapeutic/psychiatric treatment is not limited to social institutions and can be started in private practices as well, but treatments fully covered by health-insurance are limited.

Psychotherapy as well as psychiatric treatments normally pursue long-term aims. When no further order is issued by the court for specific treatments in the main hearing, there may be the risk that patients/clients drop out of treatment when it actually is still needed.

*Order, to take up stable employment/to work regularly*

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

### 6.3 Measures for Juveniles

Traditionally Juvenile Justice plays a pioneering role for innovative approaches within the Austrian criminal law system. Therefore we also present measures that are so far restricted to juveniles and young adults, which however could also be valuable with respect to adults.

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

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<sup>71</sup> <https://www.gruenerkreis.at/>

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

Another supportive measure in this respect is the nationwide implementation of *court assistance* for juveniles and young adults (“Jugendgerichtshilfe”). Their tasks relevant for avoiding pre-trial detention cover a *comprehensive investigation* (“Jugenderhebungen” and “Haftentscheidungshilfe”) on the socio-economic situation of the juvenile suspect (focusing on their resources and needs) which is forwarded to the court or the prosecutor. The aim is to get a broad and reliable picture about the juvenile/young adult as well as about relevant circumstances and needs. Furthermore, it points out specific measures which seem to be necessary either to solve specific problems or to reduce risks.

## 7. The “European Element”

The need for European cooperation in criminal matters is increasing. Today transnational aspects of crime are a daily matter in our legal systems. This is of course not restricted to European member states, but the European Union is an active player in this respect pursuing the aim to promote cooperation in criminal matters among member states. For Austria cooperation is an urgent matter not least also because of the high number of foreigners in Austrian prisons, with about a third of all prisoners coming from other EU member states.

Cooperation among European member states in criminal matters requires clear regulations, clear and functional organizational paths and not least mutual trust. Without doubt the huge differences with respect to the standards of detention in the member states are for instance a problem of practical relevance when it comes to extraditions and the execution of sentences in home countries of offenders. Although there is no empirical evidence available yet, it can be expected that the ECHR-decision in the case Aranyosi<sup>72</sup> will have effects on decisions of Austrian courts with respect to the execution of European Arrest Warrants (EAW).

The EAW appears to be of particular interest for the DETOUR-project since it can be assumed that some of the problems observed with respect to its’ implementation may also hamper the practical implementation of the European Supervision Order (ESO - Framework Decision 2009/829/JI). Austria has implemented the ESO in 2013. Up to now however no single case has been reported with Austria asking another member state to take over the supervision of an alternative to PTD.

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<sup>72</sup> ECHR C-404/15, April 5th, 2016: The ECHR decided that conditions of detention violating human rights can be a reason to deny the execution of an European Arrest Warrant.

For the year 2015 the Ministry of Justice reported 250 suspects to have been transferred to other EU-countries based on an EAW. 148 agreed on the transfer. The number of persons that have been transferred to Austria based on an EAW in 2015 was stated with 196. Both transfers to and from Austria have been rising constantly from 2008 to 2014. In 2015 a stagnation of the rise was to be observed. According to the Austrian Ministry of Justice the EAW considerably simplified and accelerated the transfer of suspects. The duration of the proceedings as well as the duration of the detention have been reduced significantly. On an average suspects spend 16 days in custody prior to the extradition on the basis of an EAW. In comparison, persons subject to formal extradition proceedings spend 43 days in detention prior to their extradition.<sup>73</sup>

Difficulties with respect to the execution of national decisions become for instance visible with requests for the execution of prison sentences in the home countries of offenders. The Framework Decision with respect to such matters (2008/909/JI) was implemented in Austria in 2012. Since then the number of requests issued by Austrian authorities have increased considerably. 296 such requests were reported for the year 2015, 276 to other member states. However only 103 requests succeeded (102 in member states). A central reason for this is the fact that procedures in the countries asked regularly take much longer than the period of 90 days expressed in the Framework Decision.<sup>74</sup>

## 8. Conclusion – Questions to be addressed in the run of the empirical research

- In comparison to other EU countries for Austria rather high rates of pre-trial detainees are reported.
  - What are the reasons for this?
  - What can be done to change this?
- What grounds for detention are the ones most often applied? Why is this so?
- The considerable regional differences with respect to PTD-rates suggest, that there is a considerable margin of discretion. What are the reasons why this margin of discretion appears to be used differently?
- Why are alternatives to PTD rarely used in Austria?
  - Is there a lack of suitable alternatives on the side of institutional offers? What additional offers on institutional support could help to secure the proceedings?
  - Would a court assistance for adults support the decisions by the courts and help to decrease the numbers of pre-trial detainees? How is this assessed by relevant actors in the PTD-proceedings?

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<sup>73</sup> Security Report 2015 (2016) 248-249

<sup>74</sup> Security Report 2015 (2016) 251

- Are the formal proceedings and the formal requirements “in favour” of PTD? <sup>75</sup>
- What are the underlying reasons for the high percentage of foreign nationals in pre-trial detention?
  - What challenges/problems/assessments are causal for this?
  - Are the grounds on detention assessed differently with foreigners?
  - Is the European Supervision Order a possible instrument to reduce the numbers of foreigners in pre-trial detention? What are conditions for the ESO to become effective?
- How is the role of defence lawyers assessed with respect to PTD?
  - The law allows for legal assistance during the first hearing at the court. In practice attorneys are hardly present at these hearings. How could this be improved?
- Is there a way to extend the use of Electronic Monitoring and if yes, how?

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<sup>75</sup> In Ireland for instance each suspect subject to PTD has a right for an alternative. If this is denied substantial reasons have to be provided. Ireland is reported to have a very low PTD-rate.

## Glossary

Untersuchungshaft	literally: “ <b>investigation detention</b> ”, but includes all stages of the criminal proceedings. Translated as “pre-trial detention”, but also “remand detention” or “remand custody” are used
Haft- und Rechtsschutzrichter	Literally translated “ <b>Judge in matters of detention and legal protection</b> ”: He/she is in charge of all decisions with respect to coercive measures during the pre-trial stage.  After the indictment the presiding judge decides on the continuation of detention
Staatsanwalt	<b>Public Prosecutor:</b> The PP leads the pre-trial phase. All decisions of the judge during the pre-trial stage have to be initiated by an application of the PP. The PP like all other authorities involved in the proceedings are obliged to act in a way that detention lasts as short as possible. If he/she comes to the conclusion that PTD has to be terminated, he/she applies with the judge to do so (the judge then has to release)
Verdächtiger/Angeklagter	<b>Suspect/accused:</b>  Pre-trial detainees can be both, depending on the stage of the criminal proceedings. “Suspect” of “defendant” are used here as umbrella terms for both concepts.
Ermittlungsverfahren	<b>Investigation proceedings:</b> The pre-trial phase or investigation phase until indictment
Festnahme	“ <b>apprehension</b> ”: The act when the police take a person into (preliminary) arrest.
Haftbefehl	<b>Arrest warrant</b> – the order to detain, applied for by the public prosecutor and issued by the judge. The police may arrest a suspect without a warrant only in cases of “imminent danger”. Before transfer to prison the prosecutor has to be informed about this arrest. If he/she declares not to apply for PTD, the suspect has to be released immediately
Verwahrungshaft	<b>The (preliminary) “arrest”</b> which starts with the apprehension. It may last up to <b>two times</b> 48 hours. Within the first phase of 48 hours the suspect either has to be transferred to the prison of the court in charge, or he/she has to be released. The

	second phase of 48 hours begins with the arrival of the suspect at the prison. Within this time limit the judge has to decide whether the suspect will be kept in PTD.
Fluchtgefahr	<b>Reason for detention - Risk of absconding or hiding:</b> Because of the kind and of the extent of the sanction probably to be expected or also for other reasons there is a risk the suspect will abscond or hide
Verdunklungsgefahr	<b>Reason for detention - Tampering with evidence:</b> Because of certain reasons there is a risk the suspect will influence witnesses, experts or accomplices, erase traces or he/she will try to hinder the search for the truth.
Tatbegehungsgefahr	<b>Reason for detention - Risk the suspect may carry out or continue the offence he/she is charged with</b>
Wiederholungsgefahr	<b>Reason for detention - Prevention of new crimes:</b> there is a substantiated risk of reoffending <ul style="list-style-type: none"> <li>- if the suspect is charged with a crime carrying a penalty of more than six months and <ul style="list-style-type: none"> <li>▪ with respect to an offence with serious consequences and against the same kind of legal value</li> <li>▪ with respect to an offence with more than slight consequences if the suspect was already convicted because of such an offence before or if he is charged with several facts or</li> <li>▪ if already convicted because of such an offence twice it is enough that the reoffending is punishable by at least six months</li> </ul> </li> </ul>
Gelindere Mittel	<b>Alternatives to PTD:</b> Any measure that serves the purpose to reach the aims detention would serve. Alternative may only be ordered if otherwise PTD would be ordered. If the reasons for PTD do not exist anymore, alternatives also have to be terminated.
Hausarrest	<b>Electronic monitored house arrest:</b> Is no Alternative but a way to execute PTD. Consequently, it has to be terminated if the reasons for PTD no longer exist or if alternatives will suffice to reach the aims of detention. The judge may allow the suspect to leave the house for certain hours work or educational reasons



Entlassung gegen Kaution	<b>An alternative to PTD - a financial surety</b> (bail) also possibly secured by another person. If granted and accepted and provided by the suspect, he/she is released.
Vorläufige Bewährungshilfe	<b>Preliminary Probation</b> carried out by probation “officers”: Actually mostly no officers anymore. Probation is in Austria provided by the privately organized institution “NEUSTART” which is contracted by the ministry of Justice officer. They are mostly social workers who supervise the execution of sentences and measures in the community, but also preliminary probation as an alternative to PTD and also to accompany other alternatives. They may also be asked to prepare information with respect to the question whether probation is suitable. This comes close to social inquiry reports.
Haftprüfungsverhandlung	<b>Detention hearing:</b> Nonpublic hearing which has to take place after certain periods of detention. If no hearing takes place within the required period of time, the suspect has to be released. It is presided by a judge, who decides whether detention will have to continue.
Oberlandesgericht	<b>Appellate court:</b> decides on appeals against decisions with respect to PTD. This court decides in senates of three judges
Gerichtshilfe	<b>Court aid:</b>  Criminal justice social workers within the court organisation. So far this exists only for juveniles and young adults. Competent also to provide information to help with the detention decision

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