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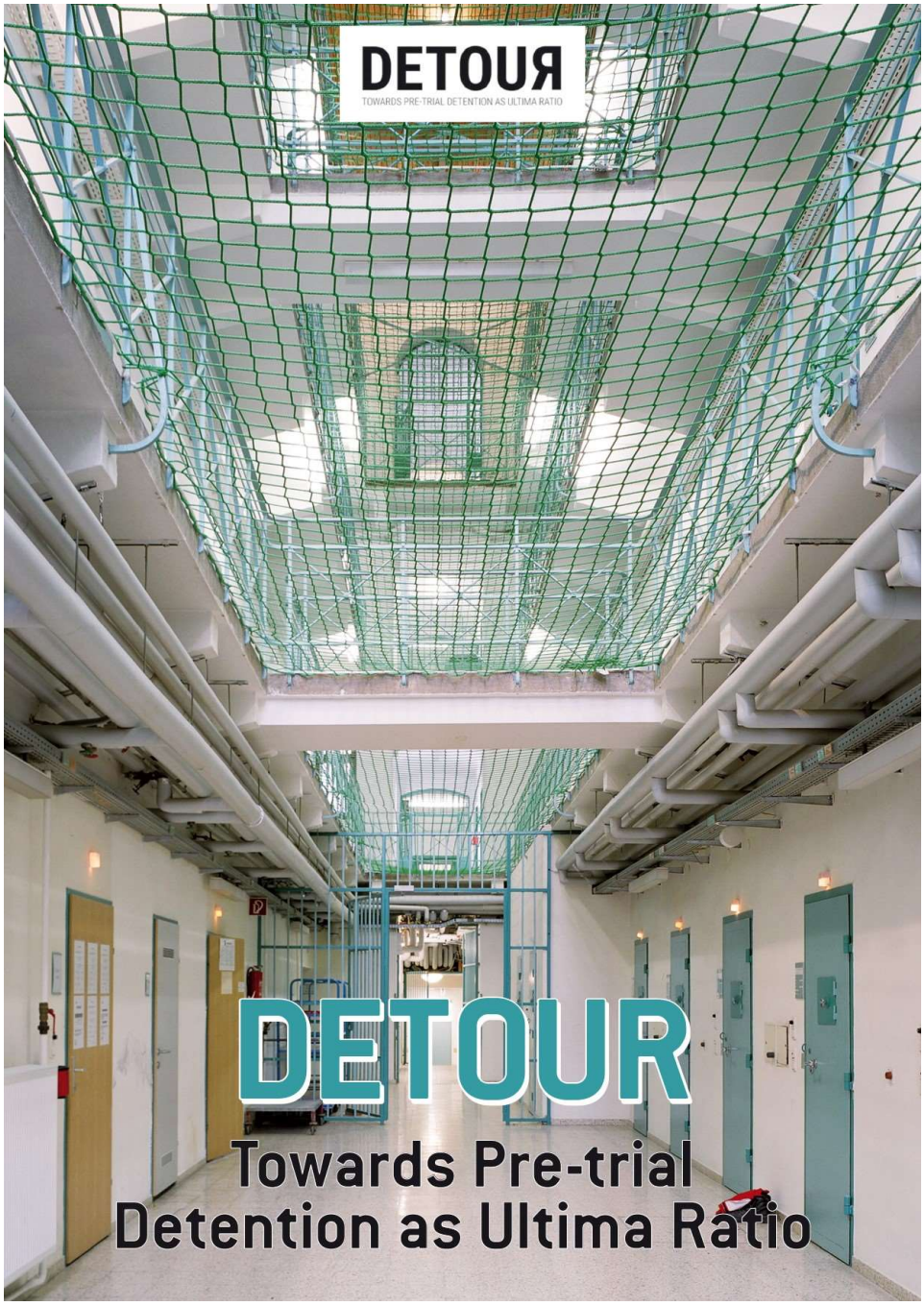

2nd *Austrian* National Report on Expert Interviews

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Content

1. Introduction

The following report is the central outcome of the national research carried out in Austria within the framework of the EU-funded project "Towards Pre-trial Detention as Ultima Ratio". While the prior national reports elaborated basic information on the subject and explored first insights to be considered in an in-depth approach, the report presented here aims at in-depth information and analyses. Bases for this are interviews carried out with different professionals working in the field of pre-trial detention (PTD), above all with public prosecutors, judges and defence counsellors, all throwing some light on the subject from different angles. Central to our approach is the main research question "Is PTD an ultima ratio practice in Austria?" Deducted from the main research question are several secondary research questions including the following:

- What developments are to be observed with respect to the use of PTD and alternatives and what factors appear to be of relevance in this respect?
- How extensively is PTD used?
- Which factors influence decision-making?
- Does the decision-making appear to be fair, well-grounded and free of discriminatory tendencies (Art 5 and 6 ECHR)?
- Is the decision-making open or bound by certain quasi-automatisms?
- Are alternatives to PTD available and are they used?
- What are obstacles to using alternatives more often?
- Which procedures in general appear to be in favour of PTD or in favour of alternatives (or of release)?
- If alternatives are used, are there indications of net widening?
- Are there any groups who are treated differently and if so, which ones and in what respect?

At the outset we can already point at the fact that the proportion of foreigners in PTD in Austria considerably exceeds their rate among all suspects of crime in Austria. Close to 75 percent of pre-trial detainees in Austria are non-Austrian nationals. The geographical situation of Austria, as well as the rather beneficial social conditions in Austria, explain to some extent why people from other countries with less favourable conditions seek to improve their situation in coming to Austria. Some of them try to do so by criminal activities. While it is generally acknowledged that proceedings in criminal matters have to be ensured and that there is a need to prevent crime, this may not harm the legitimate rights of any group. This report will particularly look at this aspect.

2. Methodology and realization of the research

Bases for the interviews were interview guidelines elaborated in a process involving all partners of the project in all participating countries. Drafts were developed and sent out to the partners who were asked for comments and suggestions for changes until the final version was approved by all partners. The guidelines had to ensure that the central questions will fit the different legal systems and that all partners will use the same set of questions. Additional questions addressing specific features of individual legal systems were added by the individual partners. Three slightly different guidelines considering the different roles were developed for judges, prosecutors, and attorneys, and additionally short guidelines for interviews with probation officers and police officers were developed on a national level focusing on their roles in the context of PTD. The guidelines focused on the following topics with a particular focus on the actual practice:

1. The national system and the practice of PTD in general
2. Aspects and factors relevant and important for decisions on PTD
3. Grounds for detention
4. Less severe measures substituting PTD and alternatives for the execution of PTD
5. The players - roles, tasks and performance
6. Relevant aspects with respect to the proceedings
7. Legal safeguards, review of PTD and legal remedies
8. European aspects including the ESO
9. A vignette (exemplary case) was presented to be discussed
10. Recommendation with respect to PTD and noncustodial alternatives

The research team aimed at altogether 35 interviews, the majority of which were to be carried out with public prosecutors and judges, and several interviews with defence counsellors majoring in criminal cases, as well as with probation officers and a few interviews with police-officers. To consider the somewhat different practice in different regions the selection procedure aimed at a largely even distribution of practitioners from four regions: The higher regional courts of Vienna, Graz, Linz and Innsbruck.

With respect to judges and prosecutors, a list of staff at the selected courts was provided by the Austrian Ministry of Justice. Subsequently, the heads of these authorities were contacted and asked for permission to carry out interviews with staff members. After approval, potential interview partners were randomly selected from the lists and contacted via e-mail, informing them about the project as well as the subjects of the interviews and

asking them for their readiness to take part in an interview. After getting very little response, potential interview partners were contacted via phone. It took many unsuccessful trials and a lot of time to finally ensure a sufficient number of judges and prosecutors from the different regions who volunteered to participate. With respect to defence counsellors, a leading member of the Austrian Society of Defence Lawyers was asked to suggest colleagues in the different regions, who were then contacted. Again, it proofed difficult to receive answers to e-mails and to subsequently get a hold of potential interview partners by phone. Finally, in each region at least one interview could be organized, and in the largest area of Vienna three. The access to probation officers was easier. After getting approval of the central management of the Austrian Probation Services (NEUSTART), the heads of the regional offices were contacted and staff members active in PTD-matters quickly volunteered to participate in interviews. Contacts to high-ranking police officers responsible for criminal matters and potentially willing to participate in interviews were provided by other high-ranking officers in the east (Vienna) and the west (Innsbruck), where two interviews could be carried out.

The empirical bases of this report are 35 interviews with experts of which 10 were public prosecutors, 12 judges, six defence counsellors, five probation officers, and two police representatives. Two interviews with public prosecutors and one with a judge, addressed officials in managing positions, aiming primarily at preparations for the following interviews. These interviews did not yet follow the later used interview guidelines and are therefore only considered in this analyses to the extent to which they addressed questions which were asked in general. Two of the judges (one in the east and one in the west) were representatives of the higher regional courts, which are also responsible for complaints against PTD.

The interviews were carried out between January and March 2017. With the exception of one interview with a police officer (which took place at the IRKS) all interviews were carried out in the offices of the interview partners. Apart from the interviews in Vienna, this meant travelling to the regions and to mostly stay there for several days in order to be able to find time slots for each interview partner.

The interviews were carried out in a semi-structured way, following the interview guidelines but leaving room for aspects and perspectives not addressed this way but considered relevant by the interview partners. All interviews with lawyers were carried out by the head of the research team, a lawyer and sociologist. Partially, he was assisted by his assistant, a sociologist, who also carried out interviews with probation officers. The individual interviews lasted between 30 minutes and two hours.

All interviews were fully transcribed, encoded, and analysed using the software for qualitative data analyses "Atlas.ti".

3. Reflections on the national system and on the practice of PTD and the use of noncustodial alternatives in general

3.1. Judges and prosecutors

In the responses of the questioned judges and prosecutors the field of pre-trial detention is mostly described as a field of continuous changes. The addressed changes hardly referred to changes in the practice of the prosecution or of the courts, but mostly to social developments and amendments to the law. These factors were explained to have an impact on the numbers of pre-trial detainees and on the perception of the pre-trial detention practice. Some of these factors cause increases in the numbers of pre-trial detainees, others may cause decreases. Most practitioners viewed the practice to have been quite constant for many years. A few statements, however, indicated that the PTD-practice has developed towards more leniency. This would not be visible in the overall picture because of the increased number of foreign suspects, who were said to regularly have a high risk of absconding, as well as a high risk of reoffending. A majority of our interview partners explained the high numbers of foreigners in PTD to be grounded in the circumstances of the offenders and the offences which would often require detention. In some responses, however, it was indicated that general preventive aspects are also of influence in such cases. Apart from general preventive aspects, which are not supposed to be considered in PTD decisions, the expert interviews in general revealed a very much prevention oriented system of PTD in the law and also in practice.[1] Only one judge explicitly considered the practice of decision making in Austria to be too detention-oriented. In fact, judges and prosecutors who commented on the PTD practice in their districts described it mostly with attributions like reasonable, adhering to the law, and/or not extensive. A few, however, indicated that such a rating depends on benchmarks which may differ.

The practitioners explained that the practice is also dependent on the individual decision makers, and the judges were mostly said to have quite some room for discretion. This would be necessary in order to be able to consider the circumstances of individual cases

[1] See chapter 4.1.2.4 and following

adequately. Despite the perceived discretion, the judges regularly referred to the central importance of the rulings of the higher regional courts, as expressed in the following quote:

> *"The background (of the decisions) naturally are the guidelines given by the higher regional court. It is of no use if I think the higher regional court and the rulings in the region are wrong, releasing everybody on more lenient measures. This decision would not last in front of the higher regional court."* (Judge 9)

In fact, the decision-making process appears to be a process very much coined by the knowledge of the practitioners about the practice and the rulings of the authorities following in the "chain of decisions". Several prosecutors explained to know about and to consider the practice of the judges at their court, and the prosecutors regularly declared the rulings of the higher regional court to be a central guideline. Interestingly, the rulings of the supreme court rarely have been addressed, which may be seen as an indicator for a very low number of PTD-cases brought before the supreme court.

In cases in which the prosecution decides to apply for PTD, judges and prosecutors agree that applications are mostly granted. Prosecutors explained this on the one hand with their assessment, which would already exclude the application of PTD in cases they view the conditions not to be fulfilled. On the other hand, some said to mostly share a common understanding with the judges concerning the application of PTD. Judges again referred to an application practice of the prosecution that is generally well grounded.

Noncustodial alternatives were mostly explained to play a rather minor role with respect to adults. Contrary, with juveniles and young adults, alternatives were reported to be applied regularly. While the detention practice was uniformly stated to differ in the different regions, particularly in the east and in the west (see below), interestingly, the seldom application of more lenient measures appears to be a fact all over Austria. The reason for this interviewees most often presented referred to the requirement that noncustodial alternatives have to (largely) exclude the assumed grounds for detention (see detail in chapter 5). Especially the ground for detention most often applied, the risk of reoffending, was regularly explained to be hard to be reduced sufficiently by lenient measures. Although seldom expressed explicitly by our interview partners, the detailed explanations provided in this respect indicate that the seldom application of noncustodial alternatives is partially connected with the high number of foreigners in PTD and their respective (social) circumstances – very often precarious social conditions, unemployment, prior records. While these characteristics are also true for many Austrian suspects, chances to substitute PTD

were expressed to be better for them than for foreigners, especially the ones having no residency in and no ties to Austria (see detail in chapter 5).

3.1.1. Migration and PTD

As already implied, a factor central to any reflection on the situation with respect to PDT in Austria is the high number of foreigners. Discussions on crime and foreign nationals tend to assume a "homogenous" group. In fact, this large group includes diverse groups, and this becomes more visible in the expert interviews. Main groups with respect to discussion on PTD are:

- Foreign nationals having a regular place of living in and social ties in Austria,
- Foreign nationals with no regular place of living in and no social ties in Austria, often also EU-nationals,
- Refugees and asylum seekers.

The first group mentioned appears to be largely treated like Austrian nationals. With respect to the other groups, some judges and prosecutors themselves addressed rumours that foreigners may be treated different to Austrians. Denying this, they explained that accusations of discrimination would overlook given facts. Not least the wealth gap between Austria and other countries, even within the EU, would attract people living in precarious social conditions, who try to improve their living conditions coming to Austria. Some of them would try to reach these standards via criminal activities. Their social situation, their offences, and their lack of ties would more often result in a requirement to detain them. A particularly high likelihood to be put in PTD is observable with foreigners assumed to be "criminal tourists". This phenomenon, on which judges and prosecutors obviously tend to react harshly, concerns foreigners who have no regular place of living in Austria and who are accused of (repeated) property offences. Particularly in the east of Austria (the region around Vienna), the PTD practice with respect to alleged "criminal tourists" appears rather harsh.

A few statements, however, indicated that sometimes equal treatment may be questioned:

- *"Of course, foreigners are detained more often. The risk of absconding is sometimes constructed because you will not find the required certain facts [on which the assumption has to be built on] on which the risk of absconding is grounded."* (Judge 7)
- *Sometimes the easy way is followed [with foreign nationals] referring to a lack of integration and the expected sentence. This does*

not always justify the severe infringement in personal rights. One has to deliberate this very well." (Judge 11)

With "the easy way", the latter interviewee referred to the easy way to secure the proceedings. In fact, procedural economics appear to be a factor which may also be influential for decisions on PTD for foreigners (see chapter 4.1.4.).

The migration movements, with many refugees coming to Austria in the recent past, were also regularly addressed in the interviews with judges and prosecutors. Assessments with respect to PTD for refugees suspected of offences may differ considerably among the practitioners. A relevant factor in this respect, for instance, seems to be the general assumption about the risk of absconding of refugees. Some practitioners stressed a lack of attachment to Austria of most refugees not granted asylum (yet) and concluded that this fact would often require PTD. Others explained that asylum seekers came here having escaped from their home countries, which would mean little options for them to move on and which again often would exclude an assumption of a risk of absconding.

Another aspect addressed by questioned experts in the context of migration, crime, and PTD were cultural differences. These cultural differences were reported to be a background for the commission of some offences by migrants, like sexual offences or assaults in the close social environment. Dependent on the overall evaluation, such offences may also require PTD.

An offence which received much public attention in the context of the recent developments with respect to refugees is illegal immigrant smuggling. In fact, the number of offenders being detained because of illegal immigrant smuggling represented a considerable part of all pre-trial detainees in recent years. Several interview partners indicated that this offence is viewed harsher nowadays than it was in the past, based on the fact that such offences caused considerable harm lately, even deaths (see also chapter 4.1.3.4.). This is a good example for the PTD practice also being dependent on social developments.

3.1.2. Legal changes with implications for PTD

A legal change much discussed and reported by the practitioners to have had a relevant impact on the PTD practice concerns the assumption of criminal offences being directed at a continuing income. The old regulation merely asked for indications that a suspect carries out an offence with the intention to earn a regular income. This qualification of offences means more severe sanctions (up to doubled higher limits) and with respect to

PTD often a stronger justification for the principal of proportionality. In 2016, a more detailed regulation of this assumption was introduced (§ 70 CC). The new regulation asks for a continuing criminal activity carried out with the intention to earn a continuing income of not just minor quantity (defined to be higher than € 400, - monthly). Additionally, it asks for

- The application of specific competencies or
- The application of specific tools which indicate a continuing activity or
- For two offences to be planned in some detail or
- For two offences to already be carried out or
- For a conviction because of such an offence.

The old regulation was reported to often have been used to ground PTD in the east of Austria especially with assumed "criminal tourists". In the west of Austria, the interviewees uniformly considered this practice an extensive interpretation of this aggravating aspect, which was not shared but rather viewed as often having been disproportional. The practitioners largely agreed that this amendment made it more difficult to ground PTD for rather minor property offences (see more detail in chapter 4.1.2.3.). Some of the interviewees, however, said that the effects in numbers would be rather small, because for a majority of the suspects in this field of crime, detention would still apply mostly because of the number of facts.

An assumption of offences being directed at a continuing income in the past was often also used with drug dealing. With respect to this field of crime, the amendment led to some political pressure initiated by the police who argued that the amendment would considerably hamper the prosecution of drug dealers, because many of them could not be detained anymore. As a consequence, only 6 months later, a new regulation was introduced in the Narcotic Drugs Act (§ 27/2a Suchtmittelgesetz – SMG). The new regulation defines drug dealing in public spaces as an aggravating factor, allowing for PTD to be applied more often. Some practitioners explained that the new regulation would not really substitute the old one, but the interview partners agreed that the new regulation had increased the application of PTD in this field of crime again. Some of them, however, viewed this approach ambivalent. They said that putting more small-time drug dealers in prison would not have any lasting effects, because there are others waiting for their jobs and after release most of them would also return to the parks. In some of the remarks in this context it became visible that the police can have quite some influence on decisions on PTD. It was reported that the police particularly pay attention to the requirements needed to be fulfilled for an assumption of a risk of reoffending. With these grounds and factors being presented in their reports to the public prosecutors in some detail, the latter reportedly tend to mostly go along with a suggested detention.

Another amendment which was considered to have a very slight decreasing impact on the PTD numbers concerns changes with respect to value limits (§ 128 CC) for property crimes. Since 2016, severe consequences are assumed beyond € 5.000,- (before € 3.000,-) and qualified severe consequences with a value of more than € 300.000 (up to 2016 € 50.000,-). On the contrary, recent amendments to the Criminal Code, introducing harsher sentences with respect to some offences against life and health, were assumed to have very little increasing impact on the PTD numbers. The majority of PTD cases concern property offences, followed by drug offences.

3.1.3. Regional differences

An aspect regularly addressed in the interviews are the considerable differences with respect to the PTD rates in the different regions. The practitioners are all familiar with this phenomenon, generally known as the east-west decline. This means that the PTD practice is said to be rather strict in the east of Austria (with Vienna in the centre) and becomes more lenient towards the west, with the district of Innsbruck being called the most liberal one. In fact, the east-west decline does not only exist with respect to PTD but also with respect to the sentencing practice, which has a direct impact on the PTD practice via the principle of proportionality. Judges and prosecutors from the (southern) district of the higher regional court of Graz consider the PTD practice in their region closer to the east than to the far west. Some of the interview partners call this phenomenon quite strange considering the small size of Austria and, according to their view, rather clear laws. Obviously, there is quite some room for interpretation. As already mentioned, the rulings of the four higher regional courts are explained to be decisive in this respect.

The Viennese practitioners explain this fact mainly by referring to a different crime structure to be observed in Vienna, being the biggest conurbation in Austria, and also close to the east. Vienna was for instance said to particularly attract criminal tourism, which has to be fought (see also chapter 4.1.3.5.). Some of the experts, however, state that the different crime structure could not explain all of the differences. A strand of explanations refers to different traditions and usages, another one to other differences between Vienna and the more rural areas of the other higher regional court, apart from the different crime structure. It was, for instance, explained that in smaller cities like Innsbruck the police would better know “their clients” and where to look for certain groups. Also, the cooperation between police and prosecution was explained to be closer in the more rural areas because most players on both sides would know each other personally, which is not the rule in Vienna. Finally, it was also suggested that the different practice may be related to a higher work load assumed on the side of the Viennese public prosecutors. This would

mean less time on individual cases which could possibly cause a tendency to be stricter to be "on the safe side".

3.2. The view of defence counsellors

The defence counsellors were quite critical with the pre-trial detention practice they observe. According to their assessment, PTD is ordered too easily. This was, above all, stressed by the attorneys from the east of Austria, while the ones from the west acknowledged the situation to be considerably less critical in their region than in Vienna. The counsellors find it problematic that judges would mostly follow applications for PTD filed by the prosecution. In their view, judges and prosecutors are too close. One of them explained this to be quite logical, considering the same way of training and professional development. Especially at smaller courts, prosecutors and judges would for instance meet at court canteens during coffee breaks and lunch. According to them, more distance between judges and prosecutors would be necessary.

In the discussions on the east-west decline some counsellors viewed this as little surprising and explained this, for instance, with little exchange of staff. Judges and prosecutors were said to overwhelmingly stay in one and the same jurisdiction of higher regional courts throughout their professional life. Also, the judges at the higher regional courts would be recruited primarily from practitioners of the region. As a consequence, the different practice would be perpetuated.

3.3. Central outcomes and conclusions

- Although social developments and legal changes are said to have had an impact on the numbers of pre-trial detainees, PTD practice per se is described to have undergone no major changes since 2000. According to some practitioners, the practice has become somewhat more lenient, which, however, does not become visible in the overall picture because of the increased numbers of foreign suspects who would require PTD more often. Since 2001, the number of Austrian nationals in PTD has in fact decreased by 45%, while the number of foreign nationals in PTD has increased by 64% (2015).
- Foreign nationals may not have a higher risk of detention per se. Certain groups of foreigners, however, definitely appear at a higher risk than others: Offenders assumed to be so called "criminal tourists"; foreign nationals who are assumed to likely try avoiding trial and conviction based on assessments of (a lack of social) ties

to Austria and of residency securing options to get a hold of them; foreign nationals (visibly) involved in drug dealing.

- The decisions of the different authorities involved in the decision-making processes appear to be coined by the known practice of the authorities following in the "chain of decisions": Prosecutors react on the knowledge about the practice of the judges and consider the rulings of the higher regional courts as central guidelines. The judges as well largely observe the rulings of the higher regional courts. In the end, judges and prosecutors refer to a largely common understanding with respect to PTD. In fact, applications for PTD brought forward by the prosecution are mostly granted by the judges. According to the questioned attorneys, prosecutors and judges are too close, indicating that the procedural safeguard based on application and decision may be weakened thereby.
- In the past, the very vague regulation of an assumption of criminal offences being directed at a continuing income also served as a ground for PTD. The new, more precise regulation in this respect is generally assumed to make it harder to justify PTD with this argument.
- An assumption of offences being directed at a continuing income was regularly employed with drug dealers (in the streets). The above-mentioned amendment led to considerable political pressure because the police argued that the amendment would hamper the prosecution of these offenders. As a consequence, a new regulation was introduced threating drug dealing in public spaces with higher sentences and thereby allowing PTD to be regularly applicated in these cases again.
- A fact with respect to PTD practice confirmed by the practitioners is the so-called east-west decline. This means that the PTD practice is said to be rather strict in the east of Austria (with Vienna in the centre) and more lenient towards the west, with the district of Innsbruck being called the most liberal one. Apart from a different crime structure, which may explain some of the differences, this phenomenon also shows that there is quite some room for interpretation in the application of PTD law. A decisive role in this respect can be assumed with the rulings of the higher regional courts being the appellate courts.

4. The basis for decision making

4.1. Judges and prosecutors[2]

4.1.1. On the decision making in general

While the individual approaches with respect to the preparations for the decision making explained during the interviews appear quite different, the process can be described as mostly rather schematic. Some of our respondents actually referred to some kind of scheme they have in mind when they start working on a case.

Central to all responses in this context was the urgency of the suspicion, which was generally described as the requirement of highest priority in the context of the decision making:

> *"If the evidence does not sufficiently prove the urgent suspicion, then I don't have to continue thinking about PTD".* (Prosecutor 5)

Our interview partners stressed that, in most cases with PTD in question, the suspicion appears quite clear and largely established, particularly in cases with given confessions. Still, some said that sometimes it can be quite difficult, especially for instance in cases of domestic violence, with dangerous threats, or also with sexual offences, if there is assertion against assertion. Prosecutors said that in such cases it is sometimes necessary to get additional information. Especially in cases with some risk at stake, judges, however, also explained that they may need to rely on incriminating rather than on exculpatory evidence at the stage of the first decision. If the evidence remains doubtful in the run of the proceedings, PTD has to be revoked. This may also happen if the defence counsel provides evidence which weakens the suspicion considerably. In some discussions, it was expressed that there is some tension between the presumption of innocence and the urgent suspicion. This however was claimed to be, on the one hand, inevitable, and, on the other hand, explained with the difference between a suspicion and the final verdict, for instance as explained in the following citation:

> *"I don't say he is guilty, but I have a strong suspicion that he is guilty. Otherwise I could not order PTD at all."* (Judge 14)

Additionally, the experts explained that the supreme court has clearly ruled that the urgent suspicion does not contradict the assumption of innocence.

[2] Altogether 22 interviews

With respect to the assessment of possible grounds for detentions, the following aspects have been regularly mentioned:

- The kind of offence(s): severity, damage, circumstances of the offence (see details below);
- The obviously dominant question concerns prior records, particularly prior records concerning offences against the same legal rights or values (see details below)
- Nationality and regular place of living – aspects of integration; see details below);
- Social conditions: Age; family (support and responsibilities); profession and education; employment status and history; financial situation – employment income, other (social) income, debts, care obligation, property; special problems like substance abuse and addiction, or gambling addiction. Have there been recent changes or changes since the last conviction (favourably or unfavourably)?

Finally, also the proportionality of a possible PTD in relation to the offence and to the possible punishment have to be checked. A prerequisite in this respect is an estimation of the expected sanction.

The different roles of prosecutors and judges becomes apparent, when judges regularly stress the importance of the personal impression for the decision, while this is rarely addressed by prosecutors. What is important here is that before an initial decision on PTD in Austria the prosecutor usually does not meet the suspect in person, only the judge does when he interrogates him/her. A few judges added in this respect that it is more difficult to assess the person of the suspect if you cannot talk to him/her in a common language. According to judges, it can have a favourable impact on the decision if suspects convincingly explain that they are sorry and that they assume responsibility for their deeds. While remorse may be a factor to be positively evaluated with respect to a risk of reoffending, no sign in this respect may add to an assumption of a high risk of reoffending. Most interview partners said that a plain confession usually does not mean much with respect to decisions on PTD, because many offenders would confess strategically. Confessions may be important in cases with a risk of tampering with evidence, and confessions are also a mitigating factor which has to be considered when the expected sentence is evaluated. An important factor related to remorse and confession is the motivation behind offences. With property offences, the motivation is most often to improve a desperate financial situation, which again is most often viewed to be an indicator for a risk of reoffending. With drug

dependent offenders, a high risk of reoffending is also assumed. Substance abusers, however, appear to have a better chance to be released on less severe measures (therapy), also because some judges and prosecutors view their motivation a little less reprehensible because it is not so much directed at gaining financial advantages.

As already addressed, both judges and prosecutors say that judges mostly go along with applications on PTD handed in by the prosecution. Still, some judges stressed that while it would be true that they mostly grant applications on PTD, they would also deny some. Prosecutors, on the other hand were said to sometimes file complaints on denied applications. For their assessments and decisions, both sides express the importance of the rulings of the higher regional court on complaints against PTD:

> "*It is no use to make decisions which may not be confirmed by the higher regional court. If I do otherwise I really have to be very much convinced about my view." (Judge 10)*

Before, we have already pointed at a different practice with respect to PTD in the different regions. Especially the east of Austria is considered to apply PTD quite often, while the west is considered more lenient in this respect. Obviously, the rulings of the upper regional courts must be an important factor in this respect.

Despite the general acknowledgment of the rulings of the higher courts, most judges explain to have a rather wide discretion in their rulings on PTD. This is explained to be necessary because the multitude of factors to be considered, not least the judgement of the person of the suspect, would ask for discretion and cannot be assessed with an overall valid scheme. The discretion seems to be of particular importance with borderline cases, for instance with dangerous threat, which is threatened with a sentence of only up to one year, but where it may be necessary to protect someone:

> *"The personal impression is very important in such cases and you learn the assessment in your practice. In fact, such decisions often could lead in both directions (PTD or no PTD) and with a good grounding both decisions would be confirmed by the upper regional court if questioned. There is also the option to put him in PTD and have a look after 14 days or six weeks. Maybe he has learned his lesson during that time." (Judge 4)*

Subject to discretionary considerations are regularly social circumstances, which particularly can play a role with respect to possible alternatives to custodial measures. While employment, for instance, is very often stated to be an important aspect possibly in favour for a suspect to avoid PTD or to be released, it was on the other hand explained to possibly also support a decision in favour of PTD. With an employed suspect the argument could

be that not even employment could keep him away from property offences, and therefore PTD would be necessary. Some of our interview partners said to be aware of a somewhat discriminatory appearance of the PTD practice. People with no or little income and an unstable social situation would have a rather high risk to be detained after an offence. However, they explained to often have no other choice in such cases because one cannot deny a high risk of a property offender to offend again if he/she does not know what to live on. Only one judge expressed concern with an extensive practice considering precarious social circumstances as "certain facts" which would necessitate PTD according to § 173 (2) CCP:

> *"This way you may one day find half of the minimum pensioners in detention, only because they have too little to live on. This is incomprehensible."* (Judge 7)

The judges in general deny reacting on public pressure, although a few said that nobody could fully exclude the possibility to get somewhat influenced by media presentations and by public discussions. In the end, judges would have to ensure fair procedures and decisions. On the contrary, some prosecutors quite clearly expressed in this context that the media would present problems with criminality and that prosecutors would have to react to those problems.

4.1.2. Central criteria for the decisions in detail

4.1.2.1. The offence

Of fundamental importance for the assessment of a possible PTD or of alternative measures is the offence. According to § 173 (1) CCP PTD may not be ordered if it is not proportional considering the meaning of the offence and the punishment to be expected, or if it's aims could be reached by alternative measures. PTD on the grounds of a risk of reoffending can only be ordered if the offence is threatened by a prison sentence of more than six months. This, on principle, excludes minor offences from PTD based on this ground if no aggravating aspects apply. The risk of absconding is excluded if an offence is threatened by a maximum sentence of five years and if the suspect has a regular place of living in Austria, is living in orderly social conditions, and has not made any preparations with respect to an escape.

Our interview partners largely agreed on several severe offences regularly leading to detention, apart from the ones threatened by a sentence of at least 10 years, for which PTD

can only be excluded if certain facts confirm that no grounds for detention are given: Aggravated robbery, severe sexual offences, and severe violence possibly including weapons, particularly in the context of families and if reoffending is to be feared. A high likelihood of PTD was also assumed by many respondents with respect to drug dealing on a commercial scale and with burglaries into homes if there are indications for an assumption of "professional" offending or for organized crime. Especially in the east of Austria, several practitioners considered burglaries into homes to be severe offences, which may recommend detention in general.

4.1.2.2. The principle of proportionality and the severity of offences

Most of the interviewees stated that, with offences with PTD in question, the principle of proportionality would mostly be fulfilled quite clearly. For instance, it was explained that for an offence threatened with a sentence of up to three years, the principle would be clearly fulfilled if one would only assume a probable sentence of about a third of the maximum. In another interview, it was added that if a suspect in such a case already had prior records, an actual sentence of more than one year would be likely and then the proportionality would be unquestionable. In this context, several respondents referred to a ruling of the Austrian supreme court, which some of them viewed as defining a rather low threshold in this respect. According to the supreme court, the principle of proportionality does not require that a sentence will most probably be an unconditional one. It suffices if the length of the sentence fulfils the principle of proportionality, no matter whether it is expected to be conditional, partly conditional, or unconditional. Still, not all interview partners agreed to this definition and a few stated to possibly avoid PTD if they would expect a conditional sentence: *"…… otherwise PTD appears like some kind of punishment."* (Prosecutor 4).
An additional argument, supporting the assumption of the principle of proportionality mostly being no problem, referred to a prevalent practice of a speedy process in cases of PTD. In the majority of cases, the critical period of six months would not be reached. Only one judge and one public prosecutor expressed some concern about a rather extensive interpretation of the principle of proportionality in practice.

Another aspect to be considered with respect to the proportionality is the severity of the offence defined by the harm and by (social) problems it has caused. In the interviews, this aspect was hardly addressed by our interview partners. The severity of the offence in this sense was mainly discussed with respect to § 173 (2) 3a CCP, the risk of severe reoffending assumed because of a bad prognosis based on the severe consequences of one offence (see the discussions on this ground for detention below).

4.1.2.3. Offences directed at earning a regular income

Up to the beginning of 2016, the assumption of criminal offences to be directed at a continuing income was an important reason considered with groundings for PTD. The old regulation merely asked for indications that a suspect carries out an offence with the intention to earn a regular income. This qualification of offences means more severe sanctions (up to doubled higher limits) and, with respect to PTD, often a stronger justification for the principal of proportionality. In 2016, a more detailed regulation of this assumption was introduced (§ 70 CC). The new regulation asks for a continuing criminal activity carried out with the intention to earn a continuing income of not just minor quantity. Additionally, it asks for the use of specific competencies or specific tools which indicate a continuing activity, or for two offences planned in some detail, for two offences already carried out, or for a conviction because of such an offence. An income of not just minor quantity is defined to be higher than € 400, - monthly.

The old regulation was reported to often have been used to ground PTD in the east of Austria and less in the west, where this practice was often viewed as being disproportional. The practitioners largely agreed that this amendment made it more difficult to ground PTD, particularly for rather minor offences, which therefore probably means that some of these suspects would not undergo PTD today. Seemingly, the handling of the new regulation is not uniform. This was particularly observed with respect to the mode of the calculation of the (possible) monthly income. Still, prosecutors and judges continue to argue with this aggravating feature of offences primarily supporting the proportionality of PTD. Quite often this argumentation seems to be used with foreigners who have no regular place of living in Austria and who are assumed to be "criminal tourists". Rather minor offences which they are often accused of (e.g. theft) would not justify PTD, if no aggravating aspects are given. With indications with respect to offences carried out to earn a regular income, the proportionality is covered. General preventive considerations are not supposed to play a role in decisions on PTD. The reactions on the phenomenon of criminal tourism, as well as statements with respect to the preventive nature of PTD (see below) indicate that in practice they sometimes nevertheless do have an influence. This observation was explicitly confirmed by some of our interview partners.

Sometimes, indications with respect to "commercial" offending are reportedly used to support an assumption of severe consequences of an offence, for example with respect to the assessment of a risk of reoffending according to § 173 (2) 3a CCP (see below). Several interview partners, however, clearly opposed this interpretation.

4.1.2.4. The grounds for detention in general – the central meaning of preventive aspects in the Austrian detention practice

The general discussion of the grounds for detention with judges and public prosecutors revealed the central meaning of the risk of reoffending for the PTD practice in Austria. All interview partners agreed that this ground is the one most often applied. The second most common ground is reportedly the risk of absconding, which is rarely assumed alone but mostly combined with a risk of reoffending. Somewhat surprisingly, the risk of tampering with evidence or to influence witnesses was explained to play a rather minor role in practice.

In the interviews, the domination of the risk of reoffending in practice was quite uniformly explained with a need to protect the whole society and endangered individuals in particular. Based on their experiences, several judges and prosecutors explicated that a majority of the offenders are people who don't offend only once, but appear in front of the courts over and over again. Furthermore, they referred to cases in which offenders present a risk to individuals, often to people in the close social environment. Considering this, and considering the need to protect the society, they viewed it quite logic that the risk of reoffending is the ground for detention most often put into practice. Some actually stated that this ground for detention would be one of the first aspects they look at, because they particularly feel obliged to avoid further offences: *"..... because I want to prevent further offences. If he escapes I will probably get him some day."* (Judge 13) When asked for the decisive aspects considered during the assessment of a possible PTD, only very few comments referred to a need to secure the proceedings, while avoiding the risk of reoffending was addressed regularly. During detailed discussions of the risk of absconding, the need to secure the proceedings was finally addressed much more often. In this context, aspects of "procedural economics" have been addressed frequently, above all by prosecutors, for instance by the one cited here:

> *"..... if he escapes, this means a lot of hassle, requests for search, police actions, international arrest warrant, etc. ..... Considering this, it is more reasonable to have the trial completed quickly"* (Prosecutor 8)

In some statements it was expressed that the legislator provides the basis for a strong preventive nature of the Austrian detention law, by defining several options to consider the risk of reoffending. One of the questioned experts explained that the legislator of the regulations in force had intended to push back the, at the time, frequent application of assumed risks of reoffending with the very detailed regulation. This obviously did not have the intended effects. Several times it was explained that the risk of reoffending would be the ground for detention more easily substantiated than other grounds, particularly if one

considers the unfavourable background of many offenders. Some practitioners expressed that there are suspects one wants to see in PTD for sure. In these cases, it was explained that the risk of reoffending would be the preferred ground if applicable, because with the risk of absconding the suspect has to be released if he/she is able to provide a financial security (Kaution). Similarly, in some interviews the possibility to ground PTD on a risk of reoffending was found to be the option with rather little risk to be overruled.

Interestingly, only very few comments on the risk of reoffending addressed the fact that PTD is only supposed to prevent further offences during the proceedings. In fact, statements on this topic indicated that the preventive considerations of several judges and prosecutors reached beyond this time frame. While all of them clearly expressed that PTD may not be an anticipation of a punishment, the repeatedly mentioned aspect of "teaching him a lesson" sometimes appeared at least close to a punitive motivation, for instance expressed in this statement of a judge (see also chapter 5.3.1.5. on the "pain of imprisonment):

> *"According to my upbringing, violence against women and children is off-limits. I am frequently confronted with husbands who beat up their wives and threaten them. In such cases I tend to detain them, 14 days, maybe six weeks, to clearly show them 'stop', this is going too far! Here I order PTD quite fast, but I am ready to release them soon on less severe measures hoping they understood."* (Judge 5)

4.1.2.5. Non-custodial measures /Alternatives

During the discussions on the bases for the decisions, several judges and prosecutors did not address alternative and more lenient measures themselves without being asked specifically. Of course, the aspects to be considered in this respect are largely the same as for the principal decision on whether PTD has to be ordered or not. The focus, however, is a different one: Factors which support release, and measures which are deemed useful to substitute PTD. Since non-custodial measures are not applied often, it seems symptomatic that alternatives are not regularly addressed in the context of the decision-making.

We have learned from the interviews that judges mostly agree on applications for PTD filed by the prosecution. Considering that some of the detainees are released by the court without any orders it appears logical that the share of offenders released on alternative measures is rather small. In other words, alternative measures could only be applied more often if judges would deny applications for PTD more often.

The responses in this respect regularly explained that there have to be lenient measures available, which would largely exclude the applied grounds for detention. Again, the ground for detention mainly addressed also in this context was the risk of reoffending. Often it was stated that it would be very difficult to substitute detention grounded on a risk of reoffending. The arguments in this respect, for instance, referred to the "unfavourable" past of a majority of the offenders, and to the precarious financial situation which was the reason for the prosecution in question and which most times remains unchanged as expressed in the following responses:

- *"If one did not learn his lesson with a prior record, then PTD is hard to be substituted, because this shows that the measures did not work." (Judge 11)*
- "*A central problem is poverty (Authors note: with respect to reoffending). Romanians for instance who commit burglaries here sometimes admit this quite honestly. In such cases it is hard to avoid detention.*" (Prosecutor 1)

Since the risk of reoffending is the ground for detention applied in most cases, this explains a central reason why alternative measures are not ordered more often. On the contrary, detention because of the risk of absconding was regularly described to be more apt to be substituted (e.g. bail, pledges, reporting to the police). In fact, this is rarely realized, because this ground is mostly applied in combination with a risk of reoffending.

The measure most often mentioned favourably to substitute PTD, based on the risk of reoffending, is employment. Considering the social characteristics of the majority of offenders in PTD it seems obvious that this option is not or hardly ever available to many of them. Drug dependent offenders, and offences directed at acquiring substances respectively, were also quite often mentioned in this context. As mentioned before, substance abusers seem to have a comparatively good chance to be released on less severe measures (therapy).

Several interview partners explained that at the time of the initial decision on PTD, less severe measures most often would not be an option yet. Diverse alternatives would ask for preparations which need some time. More often proof with respect to suitable measures can be provided and considered during the detention hearings later on.

4.1.3. Grounds for detention in detail - The risk of reoffending

Assumptions of a risk of reoffending are based, on the one hand, on the past and, on the other hand, on a prognosis of the probability of reoffending. The past can be considered based on either observations that the suspect has already offended repeatedly (if several offences are prosecuted or if there are prior records), or based on the severity of an offence which grounds the fear that he/she will offend again. According to the practitioners, this ground for detention is mostly applied based on prior convictions and on repeated offending. The severity of offences was reported to be applied more seldom.

4.1.3.1. Prior records

Prior records are reportedly one of the first aspects judges and prosecutors look at when assessing if PTD may be necessary. Criminal records are usually provided with the file by the police. These records include all Austrian convictions and convictions of EU citizens within the EU. Convictions of third country nationals in other EU member states are not included yet. Inquiries on criminal records of a suspect in other (home) countries usually take some time. According to our interview partners, this may mean that such records may not be considered until the information arrives, unless the suspect him/herself provides this information.

Judges and prosecutors largely agree that minor prior records (e.g. punished with a fine) will not lead to detention, if the newly prosecuted offence is not a severe one. Still, most practitioners view prior records as warning signals which, in the case of a new offence, did not work out and which have a negative impact on the prognosis. A rather high likelihood of PTD has to be assumed if both the prior and the new offence have been of not just a minor nature and if the offences are viewed to be grounded in "the same harmful inclination" (die selbe schädliche Neigung). This means that a suspect has carried out offences of the same or of a similar kind (e.g. assaults or other attack against life and health, property offences, but also different kind of offences if connected to a drugs dependency).

A relevant factor reported in this respect is also the time that has passed since the prior offence. Reoffending within one year is generally considered a quick relapse, and the shorter the period in-between offences, the worse the prognosis is mostly evaluated. On principle, all offences visible in a criminal record may be considered.[3] The more severe

[3] The Austrian law provides for offences to remain registered for several years depending on the severity of an offence and the punishment respectively. Or instance, a conviction with a prison sentence of 1 year remains registered for 5 years after the sentence was executed. Each new offence prolongs the period for at least as long as the the new registration lasts.

offences are, the longer judges and prosecutors consider reoffending an aggravating factor with a major impact on decisions on PTD. Parole still in force because of a prior offence (in general three years) is regularly considered an aggravating aspect. While a majority of judges and prosecutors viewed a period of two years between a conviction for a burglary and a new prosecution because of a burglary a short period, some considered this a rather long period which suggests to view the offences separately. Here, again, the quite broad discretion of the judges becomes visible, also with respect to the following considerations.

Regularly, several aspects connected to prior records have been explained to be considered apart from numbers and inclinations:

- What were the reasons and social conditions behind prior convictions (e.g. substance addiction)? Have things changed favourably or not favourably? If things have changed positively (apart from the offence), this may be evaluated positively with respect to PTD, for instance if the reasons for an offence appear different now (less condemnable).
- What sanctions were given? Has he/she already spent time in prison? Time spent in prison is mostly viewed as an aspect worsening the prognosis. On the other hand, a frequently expressed phrase was "did he/she already experience the pain of imprisonment?" This phrase, above all, indicates that a short period of time spent in prison may have a special preventive effect. In discussions, the preventive aspect of this approach was stressed, it however appears to also encompass a punitive facet.
- Is he/she on parole? What orders have been given with conditional sentences – for instance probation? If probation is in force, a report by the probation officer may provide important information to be evaluated in one or the other way. According to a frequently stated opinion, there is also a need to evaluate why orders (e.g. probation) given in connection with prior convictions did not work out. Possibly these orders are no option for the future.

4.1.3.2. The risk of reoffending according to § 173 (2) 3**c** CCP[4]

The practitioners viewed this definition of the risk of reoffending to be substantiated easily in many cases, because many offenders brought in front of the courts already have some

[4] The need to prevent new crimes, if the suspect is charged with a crime carrying a penalty of more than six months and there is a substantiated risk (assumed because of certeian facts) of reoffending with respect to an offenc against the same legal right/value punishable by at least 6 months, if the suspect was already convicted because of such an offence twice before.

prior records, mostly (also) concerning offences against the same legal rights/values. Offenders who match this definition have a high likelihood to be detained, even if the prosecuted offence was of a rather minor nature because their prognosis is assumed to be rather bad. In some responses it was added that the principle of proportionality also must be respected in such cases. Considering the aggravating factor of multiple reoffending, it was explained that the expected sentence, however, most often can be assumed to tend towards the maximum sentence and thereby the principle is mostly covered.

4.1.3.3. The risk of reoffending according to § 173 (2) 3**b** CCP [5]

This definition of the risk of reoffending has also been explained to be fulfilled quite often – a single similar prior record or several offences now prosecuted are assumed to indicate a risk of new offences with more than slight consequences. The explanations of the judges and prosecutors show that the phrase "more than slight consequences" provides a rather low threshold. On principle, offences causing bodily harm and a recovery period of more than two weeks, as well as property offences causing a few hundred Euro damages, fulfil this criterion. In practice, it appears that different to the application of § 173 (2) 3**c** CCP, the prognosis with respect to recidivism is mostly assessed on a broader basis, paying more attention to the personal and social situation of the suspects. The following quote stands for several similar ones:

> *"Just a similar prior conviction does not suffice to assume a risk of reoffending. The general situation of the suspect as well as the circumstances of the offences have to be evaluated. Additionally, it has to be considered what happened in the context of the prior offence. What happened with orders? Why did he learn anything from this experience?"* (Judge 1)

An often-mentioned aspect reveals a problem many suspects most probably face: If prior offences have been motivated by a lack of money and if this situation has not changed, the prognosis with respect to reoffending is regularly considered bad. Also, evidence with respect to several offences in combination with a prior conviction are mostly considered to sum up to a bad prognosis and a high likelihood of detention.

4.1.3.4. The risk of reoffending according to § 173 (2) 3**a** CCP[6]

[5] The need to prevent new crimes, if the suspect is charged with a crime carrying a penalty of more than six months and there is a substantiated risk of reoffending (based on the assessment of certain facts) with respect to an offence with more than slight consequences if the suspect was already convicted because of such an offence before or because he is suspected of repeated offences now.

[6] The need to prevent new crimes, if the suspect is charged with a crime carrying a penalty of more than six months and there is a substantiated risk of reoffending (based on the assessment of certain facts) with

This version of an assumption of a risk of reoffending has been reported to be applied less often than the other ones, even though no prior records and no multiple offences are required. In the interviews, this was explained by the restriction to severe offences, and by the fact that such offences would (fortunately) not occur that often. For this assumption to be justified, the law requires not only an offence with severe consequences but also a bad prognosis grounded in the offence, meaning that he/she will commit another offence with severe consequences.

The interviews showed that the definition of "severe" consequences obviously allows for quite some discretion and a different handling not least depending on the evaluation of consequences beyond the ones for the victim(s). According to jurisprudence, consequences for the whole society must also be considered here (e.g. high costs with respect to the prevention of such offences, general anxieties caused by certain offences). Burglaries into homes were, for instance, considered to fulfil this qualification by some of our interview partners, based on the possibly traumatic consequences victims may experience and because the legislator recently stressed the damnability of this offence. Others (the majority) however did not agree on this stressing that the legislator threatens burglaries into homes with higher sentences then other burglaries. Additionally, qualifying this offence as severe would mean to consider the damnability twice.

No common or clear picture evolved in the interviews on the question what damage would allow for a bad prognosis and PTD in cases of property offences based on the severity of the offence (§ 173 (2) 3a). After the last amendments to value limits (§ 128 CC), severe thefts are defined by a value higher than € 5.000, -, and qualified severe theft by a value of more than € 300.000 (up to 2016 € 50.000, -). Based on the explanations of the questioned experts it can be assumed that the value of damages has to be beyond € 50.000, and some interview partners said that the value would have to get close to € 300.000, -. With respect to offences against life and limb, for instance, aggravated assault, aggravated coercion, robbery. and severe sexual offences have been mentioned to lead to PTD because of an assumed risk of reoffending.

In the discussions with the practitioners, illegal immigrant smuggling (see chapter 3.1.1.) became visible as a good example with respect to the diverse factors that can be considered in the assessment of "severe" consequences. The explanations with respect to the severity

respect to an offence with severe consequences and directed against the same legal right as the one he/she is prosecuted for with severe consequences.

of this offence regularly referred to the considerable social "nuisance value" (gesellschaftlicher Störwert) of this offence. This aspect was above all defined by the terrible harm this offence causes on the side of the victims and by high (social) costs.

Answered differently was the question whether indications with respect to offences carried out to earn a regular income would qualify for the assumption of severe consequences according to § 173 (2) 3**a** CCP. While most respondents denied this, a few respondents answered affirmatively, referring for instance to a high "criminal energy" becoming visible in the "professional" offending, which would ground a bad prognosis.

4.1.3.5. Criminal tourism

With offenders assumed to be "criminal tourists" regularly both a risk of absconding and a risk of reoffending is assumed. Some judges and prosecutors agreed that the benchmarks with respect to the order of PTD may be different with this group of offenders leading to PTD more often (see also chapter 3.1.1.). Especially with this group of offenders, general preventive considerations appear to often have an influence on the decisions. With respect to the assumption of the risk of reoffending all variations are reported to be applied: based on multiple offences prosecuted, based on prior convictions, and based on a bad prognosis because of severe offences. As already mentioned, with offenders subsumed to this category the aggravating aspect of "offences carried out to earn a regular income" is often assumed (see chapter above), as well as severe consequences suggesting the application of PTD according to § 173 (2) 3**a** CCP. Here are two exemplary citations which explain a rather extensive detention practice with "criminal tourists". In our material there are some similar quotes:

- *"If someone is ready to carry costs and to do some planning in order to commit offences here, then this definitely suggests a risk of reoffending. What are we supposed to believe if he does not have any relations to Austria and no money. ..... Of course, they regularly talk about looking for employment, about friends, etc. It is always the same story. .....Who else than a burglar coming to Austria only for this reason should be in PTD? ....." (Prosecutor 7)*
- *With burglars from the east who had their cars packed with tools and prey I also have assumed [severe consequences according to] § 173 (2) 3**a** CCP, because these offences cause high costs and social nuisance. In this sense it may be true that phenomenons like criminal tourism lead to more harsh*

benchmarks with respect to PTD. I had expected this to be fought but nothing happened. I cannot deny that general prevention enters the picture here although it is not supposed to be considered with PTD." (Judge 13)

Other statements in this context also referred to aspects of procedural economics which may be considered:

- *"You have to detain them in order to be able to finish the trial. Here in ….. we particularly look at a fast completion of the trial."* (Prosecutor 8)
- "*If someone has no residency in Austria and if he only came to Austria to commit offences, then PTD has to be ordered in cases beyond the limits of pettiness also for practical reasons. Otherwise the main trails could not be carried out often."* (Prosecutor 9)

4.1.4. Grounds for detention in detail - The risk of absconding in detail

Some of our interview partners explained the risk of absconding to be a ground for detention which is not easily applied because the law provides for a rather high threshold (§ 173 (2) 1 and (3) CCP). This risk may not be assumed if an offence is threatened by a sentence of no more than five years and if the suspect is living at a regular place of living in Austria in orderly circumstances, unless he/she has already undertaken preparation for an escape. Additionally, § 180 CCP requires a release on bail (a financial security/Kaution) if the offence is threatened by a sentence of no more than five years and if the risk of absconding is the only ground for detention. Nevertheless, the risk of absconding appears to be applied quite frequently, mostly, however, combined with a risk of reoffending. A rather seldom use was only reported by practitioners in the west of Austria. Additionally, some judges and prosecutors explained PTD because of a risk of absconding to be much better apt to be substituted by alternative measures than the other grounds for detention. The most frequent combination with the risk of reoffending, however, inhibits that many offenders with this risk assumed are, in fact, released.

According to jurisdiction there have to be concrete facts which ground the assumption that a suspect will abscond. In the general discussions on this ground for detention it was repeatedly explained that it's application has to be evaluated along with the question, what someone would have to lose if he/she absconds. If someone is integrated here (the centre of live), with social and family relations, only the expectation of a very severe sentence is assumed to be an incentive to abscond. Otherwise, if no integration as well as no ties are visible, a rather little sentence may be an incentive to abscond. The key term regularly referred to in these discussions is "social integration".

Central to this ground for detention are procedural aspects. In the interviews it was regularly explained that absconding of offenders would mean interruptions of proceedings, missing options to deliver summons or other documents from the court, costs and efforts, as well as possibly avoidance of a trial. Interestingly, only one interview partner referred to an option to carry out the main trial to announce a verdict in absence of the suspect. This can be done in cases with possible sentences of up to three years, if the suspect has been interrogated with respect to the suspicion, and if there is a registered address where legally binding summons can be delivered.

Ensuring the proceedings is definitely a central reason for PTD stated by the practitioners. Interestingly, several of them indicated that in many cases in which this reason appears relevant they don't necessarily need to rely on this ground for detention, because regularly a risk of reoffending would also apply, which more strongly ensures detention.

4.1.4.1. Nationality and regular place of living

Although nationality has been regularly reported to be one of the first aspects looked at, several of our interview partners declared that nationality is of no interest at all. The attention payed to the nationality has been explained to be directed at a first indication of whether the suspect possibly does not have a regular place of living in Austria. If a suspect has a regular place of living in Austria, a central criterion for a possible assumption of absconding is mostly denied. This can be easily checked via the central register of residents. The control of regular places of living in other countries appears considerably more difficult.

With respect to the first decisions on PTD, the decision makers stated that they primarily have to rely on the information given by the suspects. Here, a crucial divide becomes visible among the practitioners. The majority of our interview partners explained that they have to accept the information provided by the suspects. Only if there are indications that the information is wrong or that a suspect, for instance, is not regularly living there and has been moving or travelling around, the reported place of living may not be acknowledged. However, a few respondents – mainly public prosecutors – expressed a rather different approach in this respect. They said to only accept a reported place of living if there is some evidence that the suspect is really living there. For two interviewees who expressed this view, a registered address was also considered to be merely an indication for a place of living, which may be weakened by other information on the suspect and his way of liv-

ing. Later in the proceedings, information can be requested via international legal assistance. This, however, was reported to take some time and to be particularly difficult with countries that have no central register of residency.

The central questions practitioners addressed with respect to the regular place of living were, above all, procedurals ones: Can I get a hold of him/her? Will he/she appear for the trial and what are the chances to bring him/her in front of the court if he/she does not come him-/herself? Can summons and other relevant documents be delivered? Additionally, orders mostly require a regular place of living. In this context, the importance of legal assistance and the cooperation with other countries was stressed. If the practitioners assume a good cooperation with the home country of a suspect, this may be considered favourably in the decision on PTD. The experiences and assessments with respect to legal assistance in other countries however differ between judges and with respect to different countries. Countries outside the "western world" are mostly considered difficult in this respect, but reservations have also been articulated with respect to some EU member states.

Judges and prosecutors agreed that Austrian nationals, but also other nationals with a regular residency and with indications of integration in Austria (family, employment, etc.), would rarely be detained because of a risk of absconding. The picture with respect to foreigners having no residency in and social ties to Austria is quite different. As already discussed (see chapter 3.1.1.), they appear to have a higher risk of PTD. While the majority of practitioners see this fact as being grounded in the social situation and the (offending) history of many of these suspects, a few assumed a harsher practice of PTD with respect to this group.

4.1.4.2. EU nationals and the risk of absconding

The Austrian supreme court ruled that EU nationals with a regular place of living have to be treated equal to Austrian nationals. In practice, however, opinions between practitioners seem divided in this respect– both judges and prosecutors – who say to go along with the supreme court and others who oppose this ruling as expressed in the following quotes, which represent other similar ones:

- *"I don't share the view that an EU-residency is to be considered equal to an Austrian. Despite all options to cooperate with other member states and despite legal assistance one has to consider that it becomes really burdensome [to get a hold of a suspect], if I get*

him at all. Often, we cannot verify the information provided, particularly not within the first 48 hours." (Prosecutor 7)

- *"This is a discrepancy between theory and practice. I am not supposed to detain anybody with a regular place of living within the EU. I, however, cannot control the address [at the time of the first decision]. The stories that are told are regularly the same: I am looking for work, money has been stolen……. One could assume that you can deliver summons, etc, to the reported address or that you can apprehend the suspect there. I evaluate the information provided and most times I don't believe them."* (Judge 8)

The latter quote particularly referred to suspects considered "criminal tourists". In the following citation, a judge largely agrees to the problems addressed above, nevertheless they say to follow the supreme court ruling:

> *"If he has a regular place of living in the EU the judicature says that he is not be considered at a risk of absconding per se. In practice, this however is different because you don't get a hold of them anymore. I have the experience that those people are often gone afterwards, but I may not argue this way. I cannot ground a risk of absconding this way. However, it is like this, that tools like an international arrest warrant, etc. mean a huge effort, about which I don't know the outcomes of."* (Judge 6)

4.1.4.3. Third country nationals and the risk of absconding

With third country nationals, the interviewees differentiated between countries with which a good cooperation is assumed (like Switzerland or Norway) and others. An important topic in the discussions were refugees and asylum seekers. If refugees or particularly "illegals" have no registered place of living in Austria a risk of absconding appears to be assumed often. Of course, as was regularly added, given the other requirements for PTD are fulfilled.

Again, there were considerable differences observed with respect to the approach of the practitioners. As already mentioned in chapter 3.1.1., the difference appears mainly connected to an assumed lack of attachment to Austria on the one hand, and to the notion that asylum seekers came here having escaped from their home countries and having few options now on the other hand. The following quotations express this difference - similarly expressed also by others - quite clearly:

- *"If someone does not even have a place of living within the EU, this is a strong ground for detention because there is mostly little cooperation. Asylum seekers are often registered at a quarter without any attachment. This is not sufficient to assume a regular place of living. Often, they are not there and they don't have any bonds, no social integration here. The situation they are living in here is no incentive to stay here and to accept criminal procedures and a punishment."* (Prosecutor 7)
- *With asylum seekers, no matter what stage of the proceeding, I hardly can assume a risk of absconding if they are accommodated some place. He just came here because he had to flee. In such cases I regularly deny applications by the prosecution. You cannot assume a risk of absconding if he is living in an asylum shelter. …There are people who came here because of a hardship and who behave badly. But they have to be differentiated from people who come here to deliberately commit offences."* (Judge 14)

The two positions do not fully contradict each other and there also have been positions in-between, but mostly a tendency in one or the other direction was expressed.

4.1.5. Grounds for detention in detail – The risk of tampering with evidence or of colluding

As already mentioned, this ground for detention was mostly described as being of rather little practical meaning. The cases mostly mentioned to justify this ground are crimes involving organized gangs. On the one hand, interviewees explained that PTD would be of limited use on principle because of this risk: It seldom applies; PTD does not help much, because suspects can nevertheless find ways; sometimes the risk only becomes visible later on during the proceedings. On the other hand, the little practical meaning was explained by the legal basis, which was considered to be too restrictive in some responses. Here, interviewees referred to the maximum time spent in PTD (two months) based on this ground, which sometimes can become a problem, if the risk still exist then. Other statements in this respect explained that for the assumption of this risk concrete indication or deeds have to be given.

4.2. The view of defence counsellors

4.2.1. General considerations

According to the view of the counsellors, the major criterions with respect to decisions on PTD are the offence(s), the likelihood of a prison sentence, and the proportionality of PTD, prior records - above all, records concerning the same legal rights/values subject to the prosecution in question -, the place of living and the social conditions a suspect is living in – above all, the employment situation and a sufficient income to live on.

Mostly, they state that an urgent suspicion is grounded if PTD is applied for and ordered. Nevertheless, they explain that sometimes the evidence would be weak or that it would not sufficiently support the accusations of central relevance with respect to PTD. They criticize that the judges would regularly and too often follow the application for PTD of the prosecution. In this context, it appears important to point at the majority of responses of counsellors, which stressed better chances to get a client released by questioning the suspicion and aggravating aspects asserted with respect to the offence(s) rather than fighting the grounds for detention. The practice with respect to PTD in the different regions - whether tough or "restrained" – was explained to be largely coined by the rulings of the higher regional courts. Counsellors explicated that prosecutors and judges observe these rulings (who say so themselves as well). Still, they expressed that judges have a too wide discretion in their decisions. Observing the practice sometimes would reveal different rulings on similar cases dependent on the judges in charge.

Particularly in the east of Austria, counsellors articulate the impression that the likelihood of PTD often appears mainly dependent on the assessment of the likelihood of an unconditional or partly conditional prison sentence by the court. They assume this approach may be based on punitive considerations, a view which assumes it better for the suspect not to be released if he has to return to prison anyway, and also procedural reasons (e.g. a quick closure of the proceedings and the trial). Leaving the motivation aside, such an approach may fulfil an aspect of proportionality, while it appears to not sufficiently consider the required grounds for detention. From the point of view of the counsellors, PTD was explained to be problematic not only because of the fact that a suspect is deprived of his/her liberty while still being considered innocent, but also because of the experience that suspects released from PTD tend to have better chances for less severe sanctions. We were, for instance, told about a suspect who was quite likely facing an unconditional sentence. He, however, was released from PTD with an order to take up employment. After this worked out well he received a conditional sentence.

In borderline cases, it was reported that confessions may support release, especially in cases with an initially assumed risk of tampering with evidence. It, however, was also added that particularly when with the police, suspects may experience pressure to confess via hints at the mitigating value of a confession or a better chance to be released.

4.2.2. Social situation of the suspects

Apart from severe offences, the counsellors describe a rather high risk to be detained for offenders living in rather precarious social conditions – no employment, no, or no sufficient income, debts, often drug dependencies. This is often combined with no regular residency in Austria (see below). In these cases, proof of employment opportunities is considered the best chance for release. This, however, is mostly very difficult if not unrealistic at all.

4.2.3. Offence(s) and PTD

A high likelihood of PTD, as observed by the counsellors, is with severe violence, with drug related offences - if either a large amount of drugs is involved or if selling drugs is assumed to be directed at earning a regular income. Especially in the east and also in the south of Austria, burglaries into homes appear to often lead to PTD, also with suspects who had no prior records (this actually confirms the responses from judges and prosecutors). A sensitive topic is the handling of the assumption that offences are directed at earning a regular income (§ 70 CC). As explained above, this assumption leads to more severe sanctions and thereby often to PTD in cases in which the individual offence would not justify PTD. Despite the already mentioned recent amendment to the CC in this respect (2016), the counsellors stated that this assumption is still applied extensively, interpreting the new regulation very broadly to justify PTD as well as more severe sanctions. Again, an east-west difference can be observed. For instance, it was pointed out that calculations with respect to the assumed monthly income offences may generate (§ 70 CC requires € 400, - a month) may differ, which in the view of the counsellors would hardly be in line with the law. Another example mentioned are screw drivers used for burglaries which are sometimes called special tools indicating “professional” offending as § 70 CC asks for. Property offenders having no, or no sufficient income are described to be particularly at risk of the assumption that the prosecuted offence is part of a strategy to earn a living. Most often these offenders are foreigners with no regular place of living in Austria. Some of the counsellors explained “criminal tourism” to be a fact, but nevertheless PTD would too often be applied in minor cases, with which the proportionality would not be given.

A rather rigorous practice is reported with respect to PTD for drug dealers, often of Northern African origin. After the amendment to § 70 CC, a public discussion was initiated by the police pointing at too restricted options to detain (small) drug dealers. As a consequence, a new § 27 (2) a SMG (Narcotic Drugs Act) was introduced, threatening dealing drugs in public with a higher sentence, making it easier to detain suspects again. The problem reported with this tough-on-drug-dealers approach was that it would not tackle the problem of drug dealing at all. As also some judges and prosecutors stated, the main problem is that these people have no access to the labour market. In the end, this strategy fills the prisons while there are a lot of people ready to take over the places of the ones detained in the streets. Drug dependent offenders are described to have a very high risk to be detained, above all because of the risk of reoffending if they are in need of substances or in need of money to buy these respectively. As indicated by judges and prosecutors, drug dependent offenders are described by the counsellors as a group with a rather good chance to be released on less severe measures, regularly e.g. therapy. They explain this with a broad acceptance of the possibility of "therapy instead of punishment", which is often used. With this in mind, many judges would agree to have the suspect start a therapy already during the proceedings.

4.2.4. Risk of reoffending

Not surprisingly, the defence counsellors also called the risk of reoffending the ground for detention which was most often applied by the courts. Apart from severe offences of violence or huge damage, counsellors say that first time offenders usually don't go into PTD based on this ground, unless several offences are prosecuted and if no "professional" offending is assumed. As mentioned before, the latter is reported to be quite often assumed in particular with offenders who have no regular place of living in Austria and no regular income, even if the value of damage or stolen goods is rather minor ("Criminal tourism"). All of them explained that the criterion "offence with severe consequences", which justifies the assumption of a risk of reoffending according to § 173 (2) 3**a** CCP, sometimes appears to be interpreted very extensively and partially also differently with respect to certain offences in the different regions. As mentioned before, burglaries into homes per se are often viewed as offences with severe consequences in the east and in the south of Austria, while this does not seem to be a general practice in the west. For offenders who had one prior conviction because of another kind of offence, directed at another legal right or value, assumptions with respect to a risk of reoffending are largely described the same as in case of no prior conviction.

According to the counsellors, the picture changes considerably if a suspect had a prior record because of an offence directed at the same legal right or value. If this is the case, and if it was not just a minor offence initially (like a simple theft), the questioned attorneys described a high likelihood of PTD, particularly if the prior sanction was a conditional prison sentence.[7] One of them expressed this the following way:

> **"***.....there is an automatism at the courts in the case of prior records because of offences against the same rights (which leads to PTD), no matter how long ago this has been. .... It may be that the legal preconditions are given and therefore PTD is ordered, but the actual risk is not evaluated in detail". (Counsellor 2)*

In their statements, the other attorneys agreed that the risk of reoffending according to § 173 (2) 3**b** CCP, requiring one prior record of a similar kind or several offences, is applied much to extensively.

The counsellors explained that the frequent application of the risk of reoffending is on the one hand based on the many variations the law provides for, but also on extensive interpretations by the courts not doing much evaluation of the real risk to be expected. One of our interview partners critically described the frequent application of the risk of reoffending the following way:

> *"If I have nothing else (to ground PTD on), no risk of absconding, no risk of tampering with evidence, then the risk of reoffending is the ace, which always works." (Counsellor 1)*

An explanation provided for this by one of the counsellors refers to the perception of security among people. Prosecutors and judges would react on notions of a declining perception of security. Weighting the perception of security and the protection of the people against the protection of the right for personal freedom of suspects tends to rather subordinate the latter. All agreed that the Austrian law on PTD, as well as the practice, have a very strong accentuation of preventive aspects. While this was not questioned in principle is was described as being "exaggerated". The counsellors view their own profession as being obliged to be creative and to provide the courts with information and options which support release.

4.2.5. Risk of absconding

Like judges and prosecutors themselves, the counsellors also describe a practice with respect to the assumption of the risk of absconding as being dependent on the individual

[7] In this case, the court can also rule the prior conditional sentence to be executed unconditionally.

decider. Especially in the east of Austria, a lack of a regular place of living in Austria combined with an expected not just minor sentence was reported to regularly be considered an incentive for absconding, without much additional consideration or reasoning on the side of the court. The counsellors mostly observed little differentiation between EU-nationals and other foreigners. Even if EU-nationals name a regular place of living, authorities still very often express the view that the suspects may not follow orders to appear in front of the court and it therefore would be difficult to get a hold of them. It was, however, added that there may be differentiations with respect to the home countries of the suspects. With non-resident foreigners, a risk of reoffending combined with a risk of absconding was reported to be regularly applied. Again, attorneys themselves expressed the need for attorneys to provide information and options to the courts which support chances for release.

In the west of Austria, on the one hand, it was explained that the risk of absconding would not play much of a role in practice and, on the other hand, it was stressed that the authorities would rule fully in line with the supreme court, considering regular places of living within the EU equivalent to Austrian places of living.

With respect to third country nationals from all of over Austria, a tendency was reported to assume a risk of absconding. Again, this appears dependent on the individual deciders. A majority of them was, however, assumed by the counsellors to most often apply a risk of absconding in such cases, if a suspect, for instance, is an asylum seeker registered to live in an asylum in Austria. Arguments, which point at the little chances of refugees to run away, were explained to rarely be considered.

4.2.6. Risk of tampering with evidence

The rather little practical meaning of the risk of tampering with evidence was confirmed by the attorneys. According to their observations, this ground for detention is almost never applied alone and if it is applied then mainly in cases of groups of suspects.

4.3. Comments of police officers

In our interviews, the role of the police remained not much discussed. Thereby, their role appeared somewhat subordinated. While this is true hierarchically, the work of the police is in fact the foundation for the initial decisions with respect to PTD and also central to later decisions. The police officers themselves also presented their role subordinated to the public prosecutors, stressing a good cooperation in general. From their point of view,

the prosecutors are the deciding players, who also ask for additional inquiries if needed. Interestingly, one of our police interview partners explained that, apart from immediate risks with respect to violence, severe threats, and other severe offences, the risk of reoffending is a ground for detention of little use. In his view, PTD would most often only postpone recidivism. If offenders are released from prison without preparation and assistance, mostly things have hardly changed for them and they would continue their old way.

4.4. Central outcomes and conclusions

- The personal impression a suspect leaves with the judge during the first interrogation appears to be important, particularly for the first decision on PTD when the file is still thin and decisions have to be made based on rather little information on the person and on social conditions. An assessment of the person of the suspect is, however, more difficult if there is no common language. Considering the high number of foreigners in PTD it has to be assumed that this difficulty applies to many cases.
- Judges appear to have quite some discretion in their decisions on PTD. The judiciary views this discretion as necessary, particularly with respect to the first decision, because of the time pressure and the sometimes rather little information available to decide on. Attorneys consider this discretion too extensive. PTD grounded with a risk of reoffending assumed because of the severity of an offence is not applied very often. It, however, is a good example for the wide range of discretion judges have, as well as for the possibilities to adapt to social developments. Some judges and prosecutors consider burglaries into homes to likely fulfil the required quality of a severe offence per se. Others denied this. Several interview partners indicated that illegal immigrant smuggling easily leads to PTD nowadays, contrary to the past. This is due to the fact that such offences caused considerable harm lately and have a considerable social "nuisance value" (gesellschaftlichen Störwert), which are aspects considered in the assessment of severe consequences.
- The principle of proportionality is central to the decisions. The practitioners, however, mostly consider it to be fulfilled quite easily, indicating that the requirements in this respect are not very high. Not least, the Austrian Supreme Court ruled that it is not necessary that the expected sentence will be an unconditional one. The principal of proportionality is fulfilled if the length of the expected sentence suffices, no matter whether it is expected to be unconditional or conditional. A burglary into a home is, for instance, threatened by a prison sentence of up to five years. If one would only expect a sentence of about a third of the maximum, the principal of proportionality appears to be easily fulfilled indeed.

- Judges and prosecutors report offences with respect to violence as carrying the highest likelihood of PTD. Statistically, the offences most often registered in PTD cases are, however, property offences followed by offences according to the Narcotic Drugs Act (Suchtmittelgesetz – SMG).
- The Austrian pre-trial detention practice is very much coined by preventive aspects. Available data and the expert interviews suggest that a risk of reoffending is assumed in about 90 percent of all PTD-cases. This is not least due to the rather detailed regulations with respect to the risk of reoffending as a ground for detention. In fact, these regulations and their practical application appear to mirror societal concerns with respect to security.
- Apart from the rather detailed legal regulation of the risk of reoffending, the domination of this ground for detention is apparently also grounded in the frequently provided explanation that it is a strong ground rather easily substantiated in many cases. This is not least due to the rather unfavourable (social) background of many offenders. In fact, this ground is often applied with rather minor offences with assumed "criminal tourists" who are accused of property offences aiming at a regular income.
- Closely connected to the practical dominance of the risk of reoffending, a central factor prosecutors and judges look at when assessing a need for PTD are prior records. This ground for detention is mostly applied based on prior convictions, often based on repeated offending, but rather seldom on the severity of offences. Prior records actually "trigger" many succeeding questions aiming at the assessment of a possible need for PTD, such as the time that has passed since the last conviction, social conditions the suspect was living in at the time of prior offences, the severity of prior offences, sanctions, alternative measures already applied, and last but not least the question whether prior offences concerned the same legal values (einschlägige Vorstrafen, e.g. repeated property offence or repeated assault). Carrying out a similar offence of not just minor quality within a short period of time (e.g. one year) carries a high likelihood of PTD in Austria. Repeated offending and particularly repeated similar offending in general increase the expected sentence and thereby the likelihood of PTD.
- Defence counsellors criticize the application of a risk of reoffending to be applied to extensively. While the formal prerequisites may often be fulfilled, evaluations of the real risk were said to be hardly carried out.
- With the example of the so-called "criminal tourism" it becomes clear that general preventive considerations do sometimes influence decisions on PTD, although they are actually not supposed to.
- While judges and prosecutors clearly expressed that PTD may not be an anticipation of a punishment, the repeatedly mentioned aspect of "PTD teaching a lesson" sometimes is at least close to a punitive motivation.

- The legal requirements for the risk of absconding to justify PTD were, contrary to the risk of reoffending, explained to be more difficult to fulfil, considering a rather high threshold with respect to the expected sentence and an obligation to consider bail (if it is the only ground). Still, this ground is often applied, mostly combined with a risk of reoffending.
- Although less often addressed than avoiding recidivism, ensuring the proceedings is another central reason for PTD that was highlighted. Some practitioners, however, explained that this motivation does not have to be pursued grounded on a risk of absconding. Regularly, also a risk of reoffending would apply, which more strongly ensures detention. Obviously, the ground for detention central to an application is not necessarily the one which fits the actual intended purpose best, but the one which secures detention best.
- Austrian nationals, but also other nationals with a regular residency and with indications of integration in Austria, are rarely detained because of a risk of absconding. Central to the assessment of a risk of absconding are a regular place of living, social ties, and integration. If these are given, it is regularly assumed the suspect would not easily abandon them and thereby the criminal procedures - appearance at court, delivery of summons, etc. – are ensured. Foreigners having no residency in and no social ties to Austria appear to have a rather high risk in this respect. The rather precarious social situation and the (offending-) history of many of these suspects can be assumed to be a reason for this, but there are indications that these aspects don't explain all the differences.
- Apart from the motivation to secure the proceedings, procedural economics also seem to be a motivation for PTD. We have heard arguments that it may be possible to get a hold of a European suspect in their home country, for instance with a European Arrest Warrant, but this would cause delays and hassle. In view of delays of the proceedings and of administrative difficulties it appears tempting to rather try and keep the suspect in custody.
- According to the Austrian Supreme Court, a regular place of living within the European Union is actually supposed to exclude the assumption that a suspect will abscond if there are no other indications in that respect. Austrian judges and prosecutors do not uniformly share this view. Some respondents state this would be unrealistic in practice, because a regular place of living in the EU would often be hard to ensure and suspects often may not be seizeable.
- While the term "foreigner" actually includes very different groups, we can assume that the characteristic "precarious social conditions" is true for a majority of them. It is a fact that the good economic and social conditions prevalent in Austria attract people from poorer regions. Some of them try to find their luck here with criminal activities.

Suspects who are socially integrated apparently have a better chance to avoid PTD, while others living in vulnerable conditions, engaging in criminal activities for poverty reasons are increasingly the ones in detention, even because of rather minor offences. Criminal law cannot solve social inequalities. The application of the criminal law however should try to avoid aggravating social inequalities.

- The risk of tampering with evidence or to influence witnesses plays a rather minor role in practice, not least because of the rather high-level criterions.

5. Non-custodial alternatives

5.1. Introductory remarks and main observations

The ultima ratio principle, meaning pre-trial detention should be applied as a last resort, also entails the availability of a range of less severe measures. The Austrian law provides a non-exclusive catalogue of alternatives. It is open to the courts to impose a range of other conditions intended to meet grounds for detention. The CCP lists the following different applicable alternatives (§173 (5)):

1. The formal pledge not to flee or to hide until the final sentence nor to change the place of domicile without consent of the public prosecutor;
2. The formal pledge not to attempt to hinder the investigation;
3. The formal pledge to refrain from any contact with the victim and the order not to approach a certain domicile and its immediate surroundings or to violate an already imposed protection order, including the removal of all keys to that domicile;
4. The order to take domicile in a specific location or with a specific family, to avoid a specific domicile, a specific location, or a specific company, to refrain from alcohol or other intoxicating substances, or to pursue a regular occupation;
5. The order to notify every change of domicile or to report regularly to the police or another institution;
6. The preliminary confiscation of identity documents, driving documents, or other documents;
7. Preliminary probation;
8. The deposition of bail;
9. With the consent of the defendant, the order to undergo a withdrawal treatment, any other medical treatment, psychotherapy, or any other health-related measure.

No (empirical) data is available on the use of less severe measures. Nonetheless, it can be noted that the use of non-custodial alternatives appears to be the exception rather than

the rule, at least if the research focus is on adults. The interviewed practitioners estimated the share of suspects that are released with less severe measures to be around 5 to 15 percent. This number relates to all cases decided on by the judges. However, according to the interviews, we have to assume that there are decision-makers who do not consider non-custodial alternatives at all in their daily practice.

Mostly combinations of non-custodial alternatives in form of pledges and/or obligations are given. The view of practitioners on less severe measures varies considerably. For each non-custodial alternative, arguments in favour were presented, as well as positions which explained why specific measures are deemed of little use. Generally, more arguments were presented pointing at limits and problems of non-custodial measures. The fact that judges mostly approve applications for PTD also appears to be grounded in reservations about alternative measures. On the contrary, explications on the practical use of non-custodial alternatives suggested that lenient measures are sometimes imposed although the judges don't actually consider them effective or useful. This, however, has to be seen as an indication for a possible net-widening.

In the context of explanations of problems of the practical use of lenient measures, some decision-makers (more or less explicitly) referred to advantages of the suspect being detained. While the prosecution focused more on the need to secure the proceedings, practical problems of supervising lenient measures were addressed mainly by judges. Both professions agreed that the risk of re-offending is especially hard to be met with non-custodial alternatives. Overall, it appears that the need to secure the proceedings, the protection of the society, along with a background of a general thriving for a maximum of security appears to dominate the decisions.

In the following section, a selection of relevant less severe measures is discussed individually before general aspects are addressed.

5.2. Less severe measures in detail

5.2.1. Preliminary probation

Generally speaking, the interviewed prosecutors and judges mainly agreed that "preliminary probation" plays a more relevant role for juvenile and young adults than for adults. Most of the interview partners didn't explicate this position, but according to a few statements, it seems to be due to the fact that probation is seen as an educational measure more appropriate for this age cohort. Still, some interview partners stated they consider

this measure as being useful for adults as well, mostly as an additional measure to support the suspect, for instance in finding a job. Furthermore, more general support for the suspect to "get his/her life together" was stated in favour for this measure. One of the judges[8] explained they automatically order preliminary probation no matter whether they release the suspect or impose pre-trial detention in the first decision. When imposing pre-trial detention after the first interrogation, this measure allows them to have a "contact person" who provides information during the first detention hearing after 14 days. However, this practice seems to be the exception. Most practitioners state to usually consider less severe measures during the first detention hearing or later.

Regarding a rather reluctant use of preliminary probation, the following reasons were stated:

- It takes too much time until probation gets appointed and is able to actually work with the suspect.[9] Furthermore, the time it takes until probation is able to have a supportive effect on the suspect after the first contact was also mentioned as problematic, especially by referring to the usually short time frame of the pre-trial proceedings.
- In cases where the suspect allegedly committed another offence while being on probation supervision, this measure is not viewed to be expedient as it apparently didn't keep the offender from re-offending before.
- In cases of non-national suspects with no residency in Austria, this non-custodial alternative was viewed to be of no use in several responses (see also section "lenient measures for everybody?"). For instance, the unknown or limited future stay in Austria, a lack of integration, and a lack of access to other supporting measures were being referred to.
- Also, language barriers were explained to often exclude probation with foreigners.[10]

A single, rather extreme, position presented by an interviewed judge rejected this measure categorically. The judge stated to rule out probation a priori as they consider the officers being "softeners" ("Faserschmeichler") further explaining that they are not "tough" enough and not able to provide "clarity" towards their clients (Judge 13).

[8] It may be added that this judge mainly deals with juvenile cases.

[9] A probation officer countered this argument by stating that it only takes 1 - 2 days for the probation officers to start working once the measure has been imposed.

[10] However, the opposite was reported by a judge who stated to never have experienced language barriers to be a problem for imposing this measure.

5.2.2. Financial security (Kaution)

The order to provide a financial security or guarantee is obligatory in cases in which the risk of absconding is the only ground for detention and concerning offences threatened by a maximum sentence of 5 years respectively. In practice, however, this ground for detention is rarely applied solely and interviewees mainly agreed that this measure does not play a relevant role in practice. Mostly, practitioners stated that this lenient measure is not of much use in practice because of the economic background of their suspects or they referred to experiences that the suspects "mostly never pay". Still, some interviewed decision-makers countered this position by stating they are obliged to relate the amount to the suspects' economic status and to the severity of the offence. Another argument opposing the use of this measure questioned the measure in general, because it wouldn't keep the suspect from absconding.

5.2.3. Formal pledges

Formal pledges were mainly viewed as having a more symbolic nature with rather little impact. Still, they were reported to be applied. For instance, practitioners described them as being "toothless" or "non-efficient" because, as a prosecutor put it, "*you rarely get as much lied to as you get in court*" (Prosecutor 2). Another prosecutor stated they would rather not apply for PTD than just releasing suspects with a pledge to behave well. If formal pledges are considered, they are mainly ordered along with other measures:

> *"They are ordered in passing. I don't think much of it, but it's mentioned in the law, it doesn't hurt anyone and therefore it just gets done"* (Judge 5).

5.2.4. Seizure of documents

The seizure of documents does not seem to play an important role as an alternative to PTD in general. In the interviews, this has been mainly discussed via cases in which a stated risk of absconding was countered with the seizure of traveling documents sometimes combined with financial securities. Sceptical voices problematized a lack of appropriateness. For instance, practitioners described the seizure of traveling documents as being "outdated" (Judge 14) in "times of Schengen" (Prosecutor 9) within a "Europe without borders" (Prosecutor 6). However, the opposite position has been brought up also, stating that the risk of absconding is the only ground for detention that can be countered adequately, for instance by the seizure of traveling documents.

5.2.5. Domicile/location orders

Domicile or location orders, including orders to avoid specific locations or domiciles, were stated to be imposed especially in cases of violence in the close social environment, sometimes along with a "contact ban" with respect to specified persons. Some practitioners also mentioned this order to be used with drug-related offences, for instance to avoid specific public places. However, concerns regarding limited possibilities to control the compliance of the suspect were stressed.

5.2.6. Reports to the police

Mostly, this measure is imposed to meet a stated risk of absconding.[11] Another position, however, viewed it as being a good tool to meet a risk of reoffending as well, because of the preventive effect regular contacts with the police would have.

Interestingly, a prosecutor mentioned to sometimes consider this measure without involving the court. This response brings up the fact that the law provides for the option to release suspects from police detention with orders imposed by the prosecutor. The use of this option, however, appears to be the exception. In fact, this statement was the only one reporting about such a practice. Other prosecutors referred to the law allowing them to do so, but they would not use this option in practice.

5.2.7. Order to seek employment

The order to take up employment or to actively seek employment was reported to be one of the most relevant conditions and to be considered quite frequently. In fact, this measure is the one most often mentioned in the context of the risk of reoffending, the risk which was explained to rarely allow for PTD to be substituted. Employment was explained to potentially counter this risk, especially in cases of property and drug offences.

Some of the interviewees mentioned to even accept registrations at local job centres and confirmations that the suspect attended appointments there. Another option reported in this respect is the order to deliver a confirmation of a future workplace. Two factors seem to be crucial in this regard: the suspect's unemployment status in connection with his/her motive for offending. Most of the judges and prosecutors argued that if a suspect commit-

[11] In Vienna, the police is not the authority to be reported to but the service centre of the public prosecution.

ted an offence because of financial difficulties (while being unemployed), taking up employment could lead to a change of his/her economic status, which then could counteract the motivation to commit new offences. Some also referred to positive "side-effects" of this order by providing a daily structure.

However, many practitioners also expressed scepticism about employment guarantees the suspects are able to offer: "*Everybody I'm detaining has a job tomorrow*" (Judge 6). Most of the mentioned scepticism relates to employment guarantees that were offered "all of a sudden" after the suspect has been unemployed for a long period of time[12] or refer to experiences with "false guarantees" they have been confronted with. Hence, reviews and verifications of the guarantees were stated to be relevant in this regard by many practitioners. Some practitioners also referred to structural constraints regarding this non-custodial alternative. For suspects without a permanent residency in Austria or for suspects without a legal status, this option is largely excluded. Additionally, a general lack of employment opportunities or low salaries[13] have been addressed as being problematic in this respect, especially for the suspects they are usually dealing with.

5.2.8. Medical/therapeutic treatment

Besides anti-aggression therapies, the order to undergo a withdrawal treatment with the suspect's approval is another relevant condition that is mostly viewed to be a useful tool if there are indications that the suspect is addicted[14] and committed the alleged offence (mostly drug-related or acquisitive offences) in order to finance his or her own addiction. One of the prosecutors explained that pre-trial detention can be substituted if you are "*fighting the basic driving force (…), the addiction, with an appropriate treatment*" (Prosecutor 4). Some stated that addicts who are suspected of a drug-related offence have a higher chance to get a non-custodial alternative than other suspects.

Although many of the practitioners shared a positive view on withdrawal treatments as a non-custodial alternative scepticisms and problems were also articulated. Concerns were mentioned regarding the limited time-frame within the pre-trial proceedings: To get accepted by a therapeutic institution and to start a treatment takes time. Furthermore, the treatment itself takes time and this excluded that option in the view of some interviewees

[12] For instance, a judge rather drastically assessed most of the provided confirmations as being „*not worth a damn*" ("die meisten [sind] einen Dreck wert" – judge 8).

[13] A low salary would not counteract the motive to commit further (property) offences.

[14] Addictions mentioned refer mainly to narcotic substances, but also gambling addictions have been mentioned in this regard.

in some cases. As a consequence of long waiting lists and organizational requirements, some mentioned that this measure becomes relevant during the first detention hearing at the earliest. Additionally, it was stated that the suspect needs to get clean before he or she can start a withdrawal treatment.[15] Furthermore, language barriers and suspects having no social insurance were called constraints for considering this measure.

5.3. Challenges regarding the use of non-custodial alternatives

The following challenges regarding a rather reluctant use of alternatives were mentioned in the interviews. As the assessments differ, especially between the different roles of judges/prosecutors and defence attorneys, they are addressed separately.

5.3.1. Judges and prosecutors

5.3.1.1. Time pressure

In Austria, judges have 48 hours to decide whether to impose pre-trial detention, which places them under quite some time pressure. Many judges stated that the preparations and the organization with respect to alternatives would take some time. They have to think them through or review them and until then "*the case is already dealt with*" (judge 8). Though most of the interviewees agreed that it is more likely someone is released during the first detention hearing after 14 days, for some cases this time-frame was also stated to be too tight to release a suspect with non-custodial alternatives. Along with referring to mostly fast proceedings in pre-trial detention cases in general, practitioners stated that indictments are often issued by the prosecution fairly fast. This means the investigation proceeding formally ends and the main proceedings starts (§ 210 (2) CCP). Along with this, another judge ("Hauptverhandlungsrichter") takes over the case[16], which additionally shortens their active time-frame, as problematized in the following quote by an interviewed judge:

> *"Sometimes, after a short period of time, an indictment is issued by the prosecution, then the file is gone, then I can't react anymore. (…) If I would have more time and the file would be with me for a longer period of time, then I could do it (*impose less severe measures*) more often"* (Judge 6).

[15] For the imposition of an order to undergo a withdrawal treatment, the suspect needs "*a clean urine, a confirmation to start a treatment in written form, and of course the suspect's approval*" (Judge 4).

[16] The exception are cases in which the prosecutors' request for the imposition of pre-trial detention is issued along with the indictment. In those cases, the judges who decide on the imposition/rejection of pre-trial detention are essentially the same persons that pass a judgement in the trial, which could also be observed in the file-analysis.

5.3.1.2. Workload

Some judges also referred to their workload as being one of the reasons for a rather seldom use of non-custodial alternatives. For instance, one interviewee stated they think less severe measures are not imposed that often in Austria because,

> "*you have the workload, you don't get rid of the file that easily, and there is a risk, that he* (the suspect) *breaches* (the conditions) *nevertheless.*" (Judge 2)

In relation to the workload, but focusing more on procedural aspects, some prosecutors also stated that it would be better for the investigation if the suspect is detained. In this context, a prosecutor for instance said,

> *"we are interested in maintaining pre-trial detention if there are grounds for detention, because it certainly makes the work go easier and there is no risk of colluding respectively"* (Prosecution 1)

Another one mentioned to not be in favour of alternatives to pre-trial detention because of the experience gained over the years. They stated it's also about *"how to lead criminal proceedings efficiently."* (Prosecution 6).

5.3.1.3. Monitoring measures

A lack of options to control less severe measures, along with a lack of certainty that the suspect will comply with orders, doesn't commit another offence, or abscond, are the main reasons that were assessed as being problematic by interviewed practitioners:

> *"If the suspect is detained, I can easily control it (…) but when I release him (…) I have no influence anymore"* (Judge 9).

Many interviewees mentioned practical problems involved in organising and monitoring less severe measures. For instance, one interviewed judge came up with the example that the order to refrain from alcohol seems useless to them, because no one would be able to control it properly. They further stated it would only make sense in combination with unannounced inspections, but this would hardly be possible to arrange in practice. Though less severe measures were generally assessed as being "basically a good thing" by the interviewed judges, critical remarks referred to some alternatives partially being "impracticable" or "not verifiable" or simply not "appropriate" to counter risks, mainly because of insufficient options to control them properly. In some of these practitioners' narratives, a desire to maintain a high level of control over released suspects becomes visible. According to their views, the available alternatives mostly don't fulfil this requirement sufficiently and they consequently hardly apply them.

5.3.1.4. Perceived lack of effectiveness

Another relevant factor regarding the reluctant use of less severe measures, correlating to the section above ("monitoring measures"), is the perception of some measures not being effective. This seems to have quite an impact on the use of less severe measures in practice. As already mentioned in section "less severe measures in detail", some pledges as well as some other measures are seen as being symbolic in nature rather than having an effect reducing risks. For instance, a judge explained that they consider less severe measures to be not effective at all. They called them "*theatrical rumblings*" ("Theaterdonner" – Judge 13), meaning they appear to be some kind of scare tactics which have rather little effect. Also, the questioning of specific orders as being "*unworldly*" (Prosecution 5) suggests that the use of less severe measures is a matter of preference and of assessments on "what works" and what doesn't. However, if decision-makers conclude that obligations don't work in practice and are releasing suspects with conditions attached, this has to be seen as an indicator for net-widening. For instance, a judge stated that in cases in which they consider a release of a suspect, they write down obligations "*for the sake of having something written down*" (Judge 13). When considering less severe measures to not be useful at all in such cases, the question, why not release the suspect without any conditions attached, comes up. However, an a priori rejection of specific measures was rather the exception than the rule in our interviews. Preferences for specific measures or reluctance to use them derive from perceptions of workload and/or practical problems regarding the supervision of specific conditions.

5.3.1.5. The pain of being imprisoned

A common phrase, which regularly appeared in our interview material is the German phrase „Haftübel verspüren". Translated literally it means that the suspect felt "the pain of being imprisoned". The underlying assumption is a preventive one which is supposed to counter the risk of re-offending, especially with suspects who experienced imprisonment for the first time: The assumption is that if a suspect felt the pain of being imprisoned, this may keep him/her from committing further offences. Therefore, he/she may be released with more lenient measures only after having spent some time in prison:

> *"he spent one, two days in prison, maybe this has shown him the seriousness of his situation a bit … and he figures out, I did something wrong, then this will probably be taken into account in the decision" (Judge 14).*

In this respect the suspect's impression on the judges is relevant. Several practitioners expressed the view that "detention has a powerful impact on most people" (Judge 2), and if they perceive this impact on the suspect this could lead to a release – mostly mentioned after a time-frame of 14 days. Similar positions are expressed in the following statements:

- *"He is detained for 14 days to feel the first pain of being imprisoned, and then we release him with lenient measures and then we have a look. If he abides, it is okay."* (Prosecutor 1)
- *"This is also frequently stated by the accused themselves, a forced turning point (*is*) a healing shock (…) if there is a forced interruption (*of multiple offending*) (…) then the thinking process starts"* (Judge 6)
- *"Release them after 14 days or after 6 weeks, saying, now it's enough, now he understood"* (Judge 4)
- *"He sits there and I think, now he got it"* (Judge 13)

However, referring to a suspect's developed "understanding" through this experience of being detained, it often remains unclear in the interviews what this means in detail and, furthermore, what this means for suspects who refuse to testify or claim to be innocent. While preventive motives are highlighted, this way of reasoning appears to be close to punitive aspects: *"the pain of being imprisoned (…) he has spent some time in prison, that will be a lesson."* (Prosecutor 7).

5.3.2. Defence attorneys

With respect to the use of less severe measures, defence attorneys play a central role. The interview partners mainly agreed that the initiative for the use of less severe measures is brought up mainly by the defence. Counsellors are reported to also play an important role in preparing and organising specific measures, for instance by involving the social environment. For instance, getting information about a suspect's social environment and living conditions, in order to know how to counter grounds for detention, is mainly done by defence attorneys. Therefore, the burden to come up with suggestions and measures which allow to retain from ordering or extending pre-trial detention is mostly put on the suspects and their attorneys. In this respect, the interviewed counsellors mainly agreed that a lot of "creativity is needed" on their side to find appropriate measures. They themselves observed a lack of activity in this respect.

Most of the attorneys interviewed agreed to have good experiences with preliminary probation and employment guarantees. However, they also referred to the structural constraints already mentioned by stating that in some cases the latter is hardly an option due to the suspect's educational status and rather limited job opportunities. Additionally, this order needs time (as well as the order to undergo a therapeutic treatment) which means it can't be fulfilled quickly.

Among other things, the time factor was mentioned to be problematic by interviewed defence attorneys. In fact, it's quite exceptional that they are present at the initial hearing. In most cases, they get appointed after the decision on pre-trial detention has already been made. However, they also problematized the way legal aid is organised in Austria. This system means that sometimes attorneys may be appointed with rather little experience in criminal matters. Defence attorneys also pointed out, though fast proceedings have to be assessed as good for their clients, it limits the possibilities to actively fight pre-trial detention.

5.4. Lenient measures for everybody?

With a share of 75% of all entries to pre-trial detention in 2015, foreigners[17] are over-represented in pre-trial detention in Austria. With respect to pre-trial detention and non-Austrian nationals, many interviewees made remarks which reveal further constraints which are related to a reluctant use of less severe measures, especially for this group of suspects.

5.4.1. Lack of residency

In cases in which the suspect has no permanent residency in Austria, non-nationals who live abroad, or with no registered residence at all, most interview partners agreed that less severe measures are not of much use, because they cannot ensure to get a hold of the suspect to secure the proceedings. As presented before, a higher risk of absconding was especially stated in cases with no proven residence status and if they are perceived to not be socially integrated in Austria. Relating to the need to be creative mentioned above, an attorney stated that they once contacted a police station in Germany to offer the possibility to report to this station on a regular basis to counter a risk of absconding.

5.4.2. Language barriers

Some interviewees told us, that if the suspect speaks very little or no German at all, they do not consider certain measures due to language barriers, like therapeutic treatments or probation. Some social institutions are able to offer support in other languages, but not in every language that may be needed. Still, the possibility to impose those measures is ruled out a priori by some of our interviewees. For instance, regarding therapies, an interviewee

[17] However, they are no homogenous group but rather only legally defined by non-citizenship.

stated that foreigners are never being considered as they "*can't send along an interpreter*", and further stated that they do not "*even know how this works practically"* because *"applications never arrive*" (Judge 4). This, however, reveals not only constraints that may be due to a lack of institutional offers, but also a shared practice which rules out a specific group of suspects from the use of less severe measures in the first place.

5.4.3. Personal impression

Another crucial factor with respect to decisions on less severe measures reportedly is the personal impression judges gain on the suspects during interrogations. This appears particularly important considering that judges don't have much information on the suspect available at this stage of the proceedings. Some pointed out to sometimes struggle to get a clear picture of the suspect if only a "mediated communication" is possible with an interpreter. This was explained to be particularly problematic for the needed assessment on whether the suspect will comply with orders. Furthermore, it was assessed to potentially hinder the exploration of the motivations behind offences, another aspect important to be considered also with respect to alternative measures.

5.4.4. Legal status

Asylum seekers in particular (though not exclusively), face specific challenges with respect to institutional support to avoid pre-trial detention. For instance, without having access to the labour market, the order to take up stable employment or to register at the public employment agency cannot be met or will not be ordered in the first place.

5.5. Breach of conditions and consequences

As there is no official data on the use of less severe measures in Austria, there is also a lack of official data with respect to the number of breaches of conditions in the pre-trial proceedings. According to the interviews, however, breaches of conditions happen rather seldom and most of the interviewees stated that lenient measures, when applied, "*work well*". In cases where the court and the prosecution are notified about a breach of conditions, the prosecution can issue a new arrest warrant and application for pre-trial detention. This, however, is hardly done in practice as well: "*there must be a massive breach of conditions or a committal of a new offence in order for pre-trial detention to be imposed again*" (Prosecutor 9).

However, many practitioners pointed out, that they would not know whether the suspect complied with specific orders in any case. On the one hand, this was related to limited possibilities to control them properly (e.g. if the suspect drinks alcohol despite an order to abstain from it). On the other hand, some interviewees stated that it can take time until a notification of a breach of conditions is forwarded to them. As the case is transferred to another judge as soon as an indictment has been brought forward by the prosecution, many mentioned they will not always be informed about possible violations and don't actually know whether the suspect complied with the orders until the trial.

5.6. Electronic monitored curfew orders

In Austria, electronic monitoring (EMC) is a specific form of pre-trial detention rather than a non-custodial-alternative. The time spent under electronic supervision will be deducted from the time someone has to spend in prison after the final sentence. EMC, however, does not play a significant role in Austria. In 2015, there were only 4 cases of EMC in pre-trial proceedings. EMC was assessed as rather insignificant in practice in the interviews: Some of the interviewees said, "*they don't know a single case*" (Attorney 6) and some even called it a "*dead letter*" (Judge 4). Framing EMC as being a "dead letter", however, also implies it is not considered as being an option in daily practice at all. This was also mentioned explicitly in our interview material:

- "*I have to admit, I don't consider it*" (Judge 10)
- "*That's a dead letter, no one is applying for it*" (Judge 7)
- "*Frankly speaking, I have not even tried*" (Attorney 1)

However, our interviews also include a few practitioners who stated they once imposed it, for instance in an "*exceptional case*" (Judge 4), or who just mentioned the practice in general, having heard about cases at their court (Prosecutor 2). Either based on personal experiences or assumptions, the following challenges and problems were mentioned in the context of EMC in the interviews:

No applicability: Similar to the narrative already mentioned in 5.3. (Challenges regarding the use of non-custodial alternatives) and to the introductory quotes, EMC is viewed as not being effective to counter grounds for detention by many of the interviewees: "*it's not an appropriate instrument for the supervision of a person*" (Prosecutor 1). In fact, many said they cannot think of any constellation in which EMC could be considered. This, however, implies it is ruled out a priori by some of our practitioners, because it is assessed as not being effective, appropriate or useful.

Dependency on preconditions: Many interviewees stated that EMC is difficult to impose because a lot of preconditions have to be fulfilled. For instance, one interviewee stated that the imposition of EMC "*often fails due to what you need at the basis, which is a daily structure, to have a permanent residency, to have a permanent employment*" (Judge 6). However, many also agreed that if they fulfil all these preconditions, a release with or without lenient measures becomes more probable. Another precondition that was referred to as being a potential barrier was that in some cases it cannot be implemented due to "*technical reasons*" (Judge 6). However, the judge did not elaborate on which specific challenges go along with the technical implementation of EMC. Furthermore, persons who could be affected by the electronically monitored suspect (including persons at the workplace) need to be interviewed and agree to this measure.

Workload/Time consuming: Relating to the fulfilment of preconditions, a lot of interviewees referred to that EMC is "*an enormous organisational effort*" (Judge 8). According to many interviewees, EMC is assessed as bearing no relation to its utility: "*it's tremendously laborious and I can't see any outcomes that can't be achieved in other ways*" (Judge 13). Along with the workload due to preconditions that have to be fulfilled, some interviewees problematized that EMC takes time to come into effect. To clarify the general conditions of the suspect, interviewing the potential "affected environment", and reviewing whether it can be technically realised was assessed to be too time consuming, especially in the pre-trial proceedings. Particularly in these cases, EMC can be considered due to the fulfilment of all basic conditions, "*pre-trial detention usually doesn't take that long, so that it is not reasonable to apply it*" (Judge 6).

Lenient measures: According to the interviews, EMC does only apply in cases where more lenient measures apply. As a consequence, most of the interviewed decision-makers stated that they would rather consider imposing common lenient measures than thinking about imposing EMC: "*if lenient measures are enough, then I don't need electronic monitored curfew*" (Judge 14). In this context, some practitioners referred to EMC as being a "*hybrid*", which is not perceived as being useful, because the decision is either for pre-trial detention or a release with/without lenient measures. This assessment, however, may also be due to the above-mentioned workload and cost-benefit-calculations in this respect.

Lack of experience: As already mentioned in the introduction, some interviewees stated that they have no experience with EMC and do not consider it in their daily practice at all. Having no experience on how to deal with this measure was also stated to be a reason for a rather reluctant use: "(Electronic monitoring) *is still the unknown entity. No one*

knows how it works, what he has to do (...). And everybody is rather afraid to deal with it, because pre-trial detention, to detain, we know how it works, we know how it proceeds. But in such cases, in which we don't know, we rather avoid it I suppose" (Judge 9)

The assessments on whether EMC could be a good tool to avoid pre-trial detention more often were divided. A few interviewees stated that it would be a good tool and should be considered more often. Most of the others, however, referred to the preconditions a lot of suspects simply do not fulfil: "*one thing is clear, a large number of delinquents won't benefit from it*" (Attorney 1). Furthermore, some stated that the use of GPS models would not change anything as well. A possibility to clarify the overall situation of the suspect faster and technical improvement was mentioned to be needed for an increased use by some practitioners.

5.7. Central outcomes and conclusions

- There is no empirical data available on the use of lenient measures in Austria. Estimations by practitioners about the share of suspects that are released with less severe measures (cases decided by the judge) were stated around 5 to 15 percent. However, our interview material suggests that there are decision-makers who do not consider the use of non-custodial alternatives at all in their daily practice.
- Austrian laws list a non-exhaustive list of lenient measures. Mostly, a combination of non-custodial alternatives in form of pledges/obligations are given. According to the interviewees, the order to seek for employment or to take up employment was reported to be one of the most relevant conditions, others also referred to medical/therapeutic treatment. Preliminary probation is frequently ordered for juveniles, but rarely applied for adults.
- A rather reluctant use of non-custodial alternatives is reflected in the interviews. Though the view of practitioners on less severe measures varies considerably, most of them focussed on limits and problems of less severe measures. These are a perceived lack of effectiveness, along with problems to monitor or control them properly, time pressure in the pre-trial proceedings, and the workload they entail. At the same time, advantages of a suspect being detained were referred to ("Pain of imprisonment"). Furthermore, many practitioners stated that the risk of re-offending can hardly be met with non-custodial alternatives, if at all.
- At the time of the first decision, the information available on the social situation, the place of living, and other aspects possibly relevant for the application of alternative measure was said to often not suffice to support release. Later, when more

information is available, it was sometimes stated that the circumstances and the suggested alternative measures could not fulfil the requirements. However, most interviewees agreed that non-custodial alternatives will mostly be applied at a later stage of the pre-trial proceedings. In this context, defence attorneys play a relevant role with respect to the use of less severe measures. They are the ones who are expected to come up with appropriate suggestions as well as preparing and organising them.

- Mechanisms of exclusion became visible for non-Austrian suspects in the context of the use of lenient measures. These are, for instance, constraints on the use of lenient measures that arise from the legal status of foreigners (e.g. no access to the labour market) and a lack of residency in Austria (e.g. the assessment that lenient measures are not of much use for these suspects). Language barriers were mentioned to be another exclusion criteria by referring to constraints for institutional offers in foreign languages as well as not considering those options a priori.
- Electronic monitoring as a specific form of PTD does not play a relevant role in Austria. Most practitioners stated they do not consider it at all in their daily practice. Regarding a rather reluctant use (or an almost non-existent use) of this measure, practitioners referred to its preconditions that need to be fulfilled, to the workload it entails, and its non-applicability for many suspects. Thus, in practice the decision is either made for PTD or a release with lenient measures.

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

> *"You can't imagine how the role you take over shapes your behaviour. I was sitting on the side of the defence, watched my colleague as a judge, exactly knowing how I would act as a judge and then acted differently in my role of defence nevertheless and focussed on other things" (Judge 11)*

As suggested by the introductory quote, the various professional roles can be understood as a "part that needs to be played" entailing specific expectations and duties in this respect. Thus, one should not forget that various professional roles are also constituted by legal conditions and regulatory frameworks. As a prosecutor puts it,

> *"(*There is a) *funnel effect. The coarse filter is the police, but it is a filter. What they do, how they do it, it is just a filter. And the second one is us (*the prosecution)

and the third is the court and the fourth is the appellate court. And on every level, which is structurally predetermined, something drops out" (Prosecutor 7)

More generally speaking, focussing on the different professional *roles* of involved actors implies structural conditions along with established practices. Moreover, the different roles do not act in a vacuum or isolated, but are intertwined and relate to each other. However, there seem to be regional differences, local practices, and a specific "genius loci"[18] as an attorney put it. Within this framework, however, a considerable margin of discretion becomes evident. As already elaborated in chapter 4 (The basis for decision-making), the "*human element*" (Attorney 6) provides for diverse approaches: "*Many of the questions need to be weighed up, which is done differently by different persons*" (Prosecutor 7).

Considering this, the following remarks focus on the different roles, their interdependency, and resulting consequences for the pre-trial proceedings.

6.1. Role of the police

In Austria, the police can arrest suspects for up to 48 hours on their own without needing permission of the judge or the prosecution. Thus, they can be seen as the initial actor or the "first filter" respectively before the prosecution or the courts get involved. Their main role regarding the pre-trial proceedings is preparing and delivering the basis for pre-trial detention. With the prosecution being the head of the investigation, they can order the police to carry out further investigations. Thus, those two players do have to cooperate and work together in order to further the investigation. In this respect, prosecutors mainly stated, they "*have to work together well*" (Prosecutor 2). Others referred to having "*relatively good relations*" (Prosecutor 5) with the police. However, having good relations or even personally knowing the police was mainly stated in smaller regions in Austria. This points to possible regional differences regarding their working relationship.

The prosecutors denied the rumours that the prosecution may feel "obliged" to fulfil expectations by the police. However, there are examples in our interviews, in which prosecutors reported about specific expectations. Referring to the new offence "drug dealing in public spaces", a prosecutor described a change in practice along with specific expectations. While they did not focus on rather minor offences of drug dealing before, "*concerted actions*" were carried out that required the prosecution to take action:

[18] A location's distinctive atmosphere, influenced by the persons who reside there.

> "(In those cases) *the appropriate grounds for detention have already been prepared by the police. That means they have put emphasis on the number of people in the vicinity, so that the facts of the new (…) offence are ensured. You particularly look at whether he sold several times to substantiate the risk of reoffending. They did not attach importance to that before and now they focus on it, because one wants to have these people in prison. On the side of the prosecution there has been a re-evaluation, because at first, we thought we don't have to imprison [*them*], but when the risk of reoffending could be reasoned, then we also applied for pre-trial detention (…) It's also a backing for the police, because they arrest them without a warrant and then they want a (*prison*) committal from us.*" (Prosecutor 2)

Related to drug dealing offences as well, another prosecutor mentioned specific practices of cooperation with the police:

> "*Especially for drug related offences, (…) you have a cooperation which is almost too close. The police got used to it (…), they call us and within 10 minutes they have an order, granted by the court. Not necessarily in written form. (…) this is going to work only as long as the police is reasonable. That it is substantiated, that I don't need everything in written form. (…) Usually during on-call duties, he doesn't send me anything, he tells me (*the case*) on the phone and I really take it as face value.*" (Prosecutor 5)

This quote points to a certain reliance on the information provided by the police. Hence, a "mutual trust" between the two players is required as it is expressed in the following statement:

> "*Basically, you have to trust that what the police tells you on the phone is in accordance with reality. (…) you also receive the protocols, mostly a certain time after you've been told on the phone. And in our case, it usually fits*" (Prosecutor 4).

However, there are indications in our interview material that the reliance on oral reports by the police is not generally practiced. For instance, the same prosecutor told about a Viennese colleague, who mentioned this practice would be "*unthinkable*" (Prosecutor 4) in Vienna.

In our interview material, the role of the police is not referred to very often by interviewed judges. However, in a few interviews, judges referred to seeking direct contact with the police, e.g. by asking, "*if there are any news*" (Judge 4) with respect to the state of the investigation or by asking when the final report will be submitted. However, an attorney rather drastically criticised a "*phalanx between police and judges*" (Attorney 2). They

observed (especially with respect to specific offences) an "intensive communication" which also influences the assessment of the judges regarding the urgent suspicion:

> "*That's a huge issue, that those verbal reports and assessments of the police to the state of the investigation is influencing the court's decision*" (Attorney 2).

As the two interviewees who were quoted operate in the same rural region, this could indicate regional differences in this respect. According to our interview material, it seems that the possibilities for this form of exchange between the judges/prosecution and the police are eventually more common in rural areas and are not practiced (at least not to that extent) in urban areas of Austria.

The role of the police was referred to most critically by interviewed attorneys. According to most of them, the police plays an important role with respect to confessions of suspects:

> *"In practice, the pressure, which is exerted towards the arrested suspect in order to either confess or to get remanded in pre-trial detention, plays a relevant role"* (Attorney2).

Some problematized that informal talks between the police and the suspects before the actual interrogation are not documented. Furthermore, some attorneys stated the need to record the interrogation itself instead of relying only on protocols. This becomes especially relevant as the confession plays an important role during the pre-trial proceedings (see also chapter 4, the basis for decision-making).

6.2. Role of the prosecution

> *"[…] detention is one of the last inherent court decisions. Here he [*the prosecutor*] is definitely not the head of the proceedings, it's impossible without him, because without his application, there is no detention, but as soon as he files an application, he is a passenger in quotation marks*" (Judge 14)

Referring to the funnel effect in the course of the proceedings, the prosecution can be seen as the second filter. They filter the cases they are notified of by the police and initiate the actual pre-trial proceedings by filing an application. However, no statements can be made about the proportion of cases rejected by the prosecution. Usually, the prosecution does not encounter the suspect before the initial decision on pre-trial detention is taken. Considering that they are sometimes represented by a trainee during the detention hearings, this may also ring true during the course of the proceedings. Thus, the prosecution mainly works and decides on the basis of information that is provided by the police. Nevertheless, being the head of the investigation, the prosecution can order the police to carry out further investigations. In cases in which the objectives of detention can be met with more

lenient measures, the prosecution can (and should) order non-custodial alternatives before applying for pre-trial detention (§ 172 (2) CCP). However, most of our interview partners mentioned that this is almost never the case which will be elaborated in the subsequent section.

According to their legally defined role and the introductory quote, the interviewed judges and prosecution mainly agreed that the prosecution is the head of the investigation and the court the "dominus litis" with respect to decisions concerning detention. There have also been assessments that the role of the prosecution can reach beyond this. Some prosecutors explained, that they have to "*get along with the decisions*" and therefore, they may "*put things on the right track"* according to their opinion (Prosecutor 4). This view was exemplified by the following statement:

> "*If we think therapy is the better lenient measure substituting pre-trial detention, then we often tell the defence attorney to organise a therapy*" (ibid).

However, according to our interviewees, the focus of the prosecution tends to be on the imposition/extension of pre-trial detention rather than its avoidance with less severe measures. In fact, many interviewees countered the statement that the prosecution plays a pro-active role when it comes to the use of less severe measures: "*if you convince the prosecution, he (*the suspect*) is released*" (Attorney 3). According to some interviewees, this regularly does not happen because the prosecution simply withdraws the application, rather than filing a complaint if the suspect gets released.

Furthermore, many interviewed judges expressed that the prosecution appears to be more active in the direction of imposing pre-trial detention or extending it rather than towards the use of lenient measures:

- "*If there are any requests (*by the prosecution), *then they usually request the imposition of pre-trial detention*" (Judge 2)
- "*The prosecution is on the safe side and simply applies for the extension of pre-trial detention. That's my impression*" (Judge 10)
- "*I have the impression they are taking a hard line in cases of doubt*" (Judge 2)

This stated tendency of the prosecution to be in favour of the imposition/extension of pre-trial detention rather than its avoidance with less severe measures was mainly explained with their role of being the applicant:

> "*Eventually, the prosecution is not in a decision-making position. (…) there is the conscious or subconscious attitude, well, I only apply according to my role, there is somebody else who decides anyway*" (Judge 11)

Particularly young prosecutors, who are still obliged to have their applications reviewed by a senior prosecutor, were assessed to possibly tend to the "*safe side*" (Judge 6). Defining pre-trial detention as the safest option, however, implies that the use of non-custodial alternatives is assessed to be a rather "risky business".

Finally, some interviewees problematized that in detention hearings, the prosecutor in charge is frequently represented by a trainee, who "*usually doesn't know the file at all*" (Judge 10). In this respect, some interviewees pointed to a seemingly common practice: in hearings, usually trainees do not issue any statements and only apply for the extension of pre-trial detention for reasons previously stated. This view was also shared by an interviewed prosecutor: "(The trainee) *will say, we apply for the extension. In this respect, it matches the rather strict role the prosecutor is taking*" (Prosecutor 4). However, one should not forget that relevant decision-making regarding a potential release of pre-trial detainees (with or without lenient measures) tends to take place outside the courtroom rather than being negotiated in the hearings. The role of detention hearings as well as the role of informal talks in this respect will be discussed separately in chapter 7 (Procedural aspects – practical problems).

6.3. Role of the judges

Unlike the prosecution, judges have the authority to decide with respect to the imposition/extension of pre-trial detention. As an attorney put it, they "*pay attention to legal safeguards and proportionality, but aren't part of the investigation*" (Attorney 5). Furthermore, again different to the prosecution, they are also the ones who meet the suspects in person during the first interrogation. Therefore, the impression of the suspect was stated to be relevant with respect to their decision-making by interviewed judges, especially regarding their first decision on the imposition/rejection of pre-trial detention.

Though judges and prosecutors may to some extent focus on different things according to their professional role, many interviewees noted that there is a "*broad consensus*" (Prosecutor 5) in many respects. This is especially expressed in the following quotes of interviewed prosecutors in which they are stating that judges follow their applications to a large extent:

- "*For the past 10 years I'm doing this and not in a single case I got a negative decision with respect to specific applications, (…) never ever. Because we simply see it pretty similar to the judges*" (Prosecutor 5)

- "*If we have grounds for detention and we are stating the reasons, then in 99% of the cases the judges use those grounds for detention and are able to substitute it with lenient measures in individual cases only*" (Prosecutor 2).
- "*In 95% of the cases I apply for the imposition of pre-trial detention, pre-trial detention will be imposed. Even more often*" (Prosecutor 4)
- "*Our assessment when to apply for pre-trial detention is more or less in almost all cases congruent with the assessment of the court*" (Prosecutor 7)
- "*The majority of the applications are granted in accordance with the application*" (Prosecutor 6)

Judges mainly agreed that they usually follow the applications ("*there are not many cases (…) where I don't impose*" – Judge 9). However, many of them mentioned, that this should not be seen as an automatism and stressed that they are taking their role seriously: "*I follow them if they comply with the relevant laws and reject them if they aren't"* (Judge 13).

Criticism expressed by interviewed attorneys refers to the two professions "*acting in agreement*" (Attorney 2), their relation being "*too close*" (Attorney 1) and therefore, "*more distance, professional distance would be highly desirable*" (Attorney 1). However, regional differences were pointed out. For instance, an attorney stated, that there seems to be a more distant relation between those two professions in Vienna. Due to the size of the court and the high fluctuation of the prosecutors there are less possibilities for "*personal encounters*" in contrast to smaller courts: "*in the canteen (…) where at 10 o'clock coffee is drunk and lunch is taken, judges and prosecutors, everybody together … simply definitely too close" (*Attorney 1*).*

Another issue brought up in the interviews relates to the fact that judges mainly have to rely on the information they receive. Along with this, a tendency to follow suggestions by the prosecution was problematized:

> "*He has to rely on the information the prosecution is providing. And if the prosecution, with an application of extension, more or less suggests it's necessary that he (*the suspect*) stays in pre-trial detention, our investigation takes longer, what else is he supposed to do*" (Attorney 5)

Moreover, some attorneys problematized that judges may not be fully "*up to date*" as they may have little time to prepare for the hearing and tend to get the file shortly before it. Judges see this differently, as expressed in the following quote: "*I regard it as my duty to look at the allegations and the grounds for detention in the files prior to detention hearings*" (Judge 1).

6.4. Role of attorneys

In Austria, pre-trial detainees have to be represented by an attorney during the pre-trial proceedings. Usually, attorneys will be appointed after the imposition of pre-trial detention has already been taken by a judge. Along with this, their possibilities to actively engage in the very beginning of the pre-trial proceedings are limited. As the interviewees mostly referred to the role of the attorneys in terms of their "level of engagement", the following section will focus on this topic. The question if and how defence attorneys actively engage in the pre-trial proceedings (e.g. to make use of legal remedies), however, was answered quite differently. Most of them relate to strategic considerations along with structural constraints:

Limited time: As already mentioned in the introductory remark, a limited time frame to engage in the pre-trial proceedings was problematized by interviewed defence attorneys. They usually get appointed after the imposition of pre-trial detention with the consequence of limited possibilities to fight pre-trial detention:

> "*After the imposition (…) until you get appointed days have passed, sometimes a week, then you have to get access to the file, talk to the client, for all of this you may have one week until the first detention hearing*" (Attorney 2).

However, some interviewed judges and prosecutors problematized that some attorneys did not talk to their clients before the first detention hearing.

Protracting the pre-trial proceedings: Interestingly, a lot of judges and prosecutors stated that a common argument by defence to not file complaints relates to the fact that they do not want to protract the pre-trial proceedings. This, however, was problematized by stating that the decision with respect to the question of detention by the upper court will be dealt with independently and does not affect the length of the investigation proceedings:

> "*If an attorney talks his clients out of filing a complaint (…) with the argument, the whole thing will then be delayed, then it's always the question, do I have to get engaged and tell the attorney that nothing will be delayed.*" (Judge 5).

It has to be mentioned that filing a complaint against pre-trial detention has the consequence that the limits for detention hearings, which usually take place after 14 days, are cancelled, as the higher regional court has one month to decide on the appeal. However, only one attorney in our interview material came up with the argument that they sometimes do not want to unnecessarily protract pre-trial detention in cases the indictment "*is just around the corner*" (Attorney 5). Therefore, focussing on speedy proceedings and the trial seems to be another strategic consideration: "*With respect to detention there is the*

option that you try to get to the trial soon" (Attorney 3). However, some attorneys stressed it is "*always positive for the further proceedings to get the client out of pre-trial detention*" because, according to their observations, the final prison sentence "*will decrease rapidly in length*" (Attorney 2).

Prejudicial effect of the appellate court ruling: Many of the interviewees pointed out that filing a complaint against pre-trial detention is a rather risky matter. They mentioned it might have a "*prejudicial effect*" (Prosecutor 4), especially with respect to the urgent suspicion that might be confirmed in the ruling. Hence, it bears the risk the ruling "*sets the course*" (Judge 6) and may also "*give direction for the trial*" (Prosecutor 7). The higher regional court may assure "*they don't decide on guilt or innocence, rather than on the suspicion, but it does have an influence*" (Prosecutor 4). This view was also shared by defence attorneys:

> "*If you file a complaint against detention and you lose, it's more or less over. […] this is why I do it very rarely and I think every complaint I filed, I won. I only do it in cases I'm sure.*" (Attorney 3)

'Knowing the rules' and the common practice: Correlating to the quote above, many interviewed defence attorneys mentioned they know the ruling practice of their courts and higher regional courts. Therefore, the decision to actively fight pre-trial detention was also assessed as being a "*matter of a realistic evaluation of the possibilities*" (Attorney 2). Furthermore, an "excessive engagement" of defence attorneys who try to fight pre-trial detention "*to the bitter end*" (Judge 14) was perceived negative by judges:

> "*That's something that only annoys people. (…) he (*the attorney*) shouldn't get on my nerves with 17 applications. (…) Apart from annoying everybody and being a tease at the trial, I have not won anything*" (Judge 11).

Cost-benefit calculations: Besides the assessment whether appeals could be successful or not, cost-benefit calculations were mentioned to be a relevant factor with respect to activities in the pre-trial proceedings:

> "*There are also economic considerations (…) how much activity is also covered. Can I afford expert opinions (…) do I even have the possibility, that's the question*" (Attorney 5).

Less severe measures: With respect to the use of less severe measures, defence attorneys can be seen as the key players. Usually, they are the ones who come up with suggestions and measures which could counter grounds for detention along with organising and preparing them (also see chapter 5.3.). However, the view on how much attorneys engage

actively in this respect is divided. Criticism refers to the fact that attorneys tend to state the "set phrase" to apply for the use of lenient measures "as a matter of form" without mentioning specific ones in detention hearings: "*he (*the attorney*) should name one and not just make the sweeping statement 'lenient measure'*" (Prosecutor 4). However, this statement also reveals a broadly shared view that the responsibility to come up with appropriate measures lies with the attorneys: "*if it isn't addressed, (…) then the court won't deal with it in the decisions*" (Prosecutor 4). On the contrary, some practitioners counter this view by stating that attorneys usually "*substantiate their requests*" (Prosecutor 9) and sometimes also come up with concrete suggestions or documents like employment guarantees. However, it seems crucial whether judges have the impression it is "*serious or […] just an empty rhetoric*" (Judge 10).

6.4.1. Legal aid versus chosen lawyer

The large majority of defendants in Austria are represented by legal aid. The consequences of this were assessed quite differently by our interviewees. Some interviewees problematized that, with the way legal aid is organised in Austria, sometimes attorneys with rather little experience in criminal matters get appointed. Some practitioners stated legal aid lawyers would sometimes show particular effort. The wide range of assessments by interviewed practitioners on this topic and the resulting ambivalence in this respect will be addressed in the following section.

High level of activity: Some interviewees shared the impression that legal aid attorneys tend to go to great lengths and are sometimes even assessed to be keener to file appeals than chosen lawyers. This, however, was mainly traced back to their liabilities towards the chamber: "*legal aid files appeals more intensively than chosen lawyers, because (…) they fear that they will be reported to the chamber because of a bad representation*" (Prosecutor 9). However, not knowing the practice of the court, e.g. what actions make sense and which do not, was also mentioned to be a reason for legal aid being more active than chosen lawyers.

Time of the appointment: In contrast to chosen lawyers, legal aid is usually appointed after the first decision on pre-trial detention was already taken. Insofar, defendants with a chosen lawyer, according to some interview partners, have the great advantage that they are already represented in the first interrogation by a judge. Though there are possibilities to get access to legal aid before the decision on the imposition/rejection of PTD is taken, a reluctance on the side of the defendants to exercise this option along with barriers in

this respect were observed by interviewees (see also chapter 7, Procedural aspects – practical problems).

Allocation system/lack of expertise: Many interviewees problematized the appointment system of legal aid, as it would entail that attorneys with rather little experience in criminal matters could get appointed:

- "*Partially, it's really deplorable (…) what certainly has to do with the system of legal aid*" (Prosecutor 5).
- "*On average, attorneys (*on legal aid) *do not always have the tools or don't know everything that's possible*" (Judge 7)
- "*Chosen lawyers are criminal lawyers and therefore they know the practice (…) and legal aid can be anybody, seldom it's handed over*" (Judge 8)

However, there was a single statement in the interviews not perceiving this to be a problem (anymore), because attorneys, who don't have the expertise in criminal law can ask colleagues who are experts in this area to take over the case: "*the law firms which only have experts in civil law almost don't exist anymore*" (Judge 13). As a lot of interview partners problematized a possible lack of expertise on the side of attorneys, one has to assume that not every lawyer experienced in criminal law passes on their cases to colleagues. However, one statement criticised a rather rigid allocation system:

> "*I have no expertise in social law and labour law, I don't even have books here. But I have to take the case if I get appointed. I called the chamber, said I know nothing about it, give me a case in criminal law, that's something I can do, let's change. That's not possible. As a lawyer you have to be able to do everything*" (Attorney 6)

In the context of a possible lack of expertise as a consequence of this allocation system, the following topics were brought up by our interviewees:

- **Workload**: Having no experience in criminal law may imply an increase of the workload: "*many of my friends, they know nothing about criminal law, really nothing. For him it's a tremendous effort and he's happy if he needs to do as little as possible. And every appeal is an effort.*" (Attorney 6) Particularly for attorneys with rather little experience in criminal matters, cost-benefit considerations may play an even more relevant role with respect to activities in the pre-trial proceedings.
- **Compensation**: In cases where they encounter attorneys who are not experienced in criminal matters, some judges mentioned they try to compensate the lack of expertise: "*if you pick up such a legal aid, you have bad luck. Then you have to develop some kind of additional duty of care, which you would not have with a*

good lawyer. (…) there are really some, who are lousy. Then of course you can't let the poor suspect pay for that" (Judge 5)

6.5. Central outcomes and conclusions

- Prosecutors are the inducing actors, who initiate the processes by requesting PTD. This role appears to be connected to a tendency to favour PTD, although prosecutors on principle also have to pursue exculpatory factors.
- In fact, prosecutors regularly perform a filtering function. In the interviews they stressed to carefully assess the information provided by the police, regularly filtering out cases brought forward by the police which, to their assessment, do not justify PTD.
- Once the decision to apply for pre-trial detention is made, they tend to be in favour of its extension during the course of the proceedings. This impression was nurtured by indications that prosecutors mostly tend towards "the safe side", which, according to their understanding, regularly means detention.
- In the interviews, this approach was legitimized by the procedural division of labour, with the judge being responsible for an evaluation of the application and for the decision. This way, the prosecutors see themselves as being on the "safe side".
- Judges mostly follow the applications of the prosecution. When questioned about this fact, judges explained that the applications would mostly be well grounded. Both judges and, especially, prosecutors referred to a high level of shared assessments. All in all, the professional relationship between these professional groups appears rather harmonic. Attorneys view prosecutors and judges as being too close, indicating that the procedural safeguard based on the system of application and decision making may be weakened thereby.
- The defence counsellors consider themselves the actors who have to ascertain fair procedures and limited use of PTD. They, however, also assess their chances as being restricted: Despite the principal right of suspects to ask for the presence of an attorney during the first interrogations at the police and at the court, in most cases, counsellors are only involved in PTD cases shortly before the first detention hearing. Chances to successfully file complaints against PTD decisions were assessed to be limited.
- Counsellors are also the ones whose initiative is generally expected when it comes to the question of alternative measures. The experts reviewed the performance of attorneys in this respect to be sometimes improvable. On the one hand, short notice and often little time available were said to make it difficult to check the options

and to prepare and organize alternative measures. On the other hand, attorneys were said to need more creativity with respect to possible alternatives. No generalizable differences were reported by the questioned experts with respect to the quality of representations of state paid and privately paid attorneys – estimations refer to state paid attorneys being active in about 90 percent of all PTD cases. The fact that the system of legal aid regularly obliges attorneys without experience in criminal matters to represent in such cases, however, was regularly criticised by all expert groups.

7. Procedural aspects - practical problems

7.1. Judges and prosecutors

7.1.1. The first decision on PTD

Time pressure obviously is a factor which has a major impact on the proceedings towards first decisions on PTD. Although the given deadlines sometimes can mean considerable pressure, particularly during on call duties (Journaldienst), the questioned prosecutors agreed that they usually have no problem to adhere to them. Beginning with an apprehension, it is up to the prosecutor to decide whether PTD will be applied for and whether a suspect is transferred to prison. This has to be done within 48 hours. The basis for this decision, however, is provided by the police. On principle, the public prosecutor is the leader of the investigations who could involve him/herself in all investigations. In practice, this hardly happens, and all investigations are carried out by the police. This also means that the public prosecutor decides on PTD-applications mostly based on investigations of and reports from the police.[19] In the interviews, the prosecutors largely expressed contentment with the work of the police in this respect and the material provided. Especially after apprehensions carried out by the police without warrants[20], prosecutors reported that they are regularly informed by the police via phone right away to save time. Also, the following course of action is regularly discussed and initiated this way, with the written reports and investigations following right afterwards. They say that they usually fully rely on the information provided by the police both on the offence as well as on the

[19] Apart from cases in which an apprehension and an application for pre trial detention is the result of ongoing pre-trial proceedings.

[20] In cases of imminent danger (§ 171 CCP).

person of the suspect. Especially at courts in more rural areas, the prosecutors emphasized that the cooperation with the police in this context builds on personal contacts and trust, which largely works out well. Practical problems regularly addressed by prosecutors are criminal records as well as prove of the place of living with foreign nationals not living in Austria. It usually takes some days to acquire this information, exceeding the period required to be adhered to in cases of possible PTD. The following statement of a prosecutor stands exemplary for several similar ones expressing a requirement for prosecutors to deal with the information available:

> *".....you have to work with what you have. That is the task we master well in general, which also means to organize needed information. In general, this works well." (Prosecutor 7)*

If the information provided by the police does not suffice right away, the police is asked for further investigations and supplementations. The examples of criminal records and prove of the place of living of foreign nationals often being missing at this stage of proceedings indicates that prosecutors sometimes may need to carry out assessments with a lack of information in this respect. In a few responses, prosecutors explained their trust in the first decisions on PTD by referring to the fact that the decisions are, in the end, based on assessments of three professional groups: the police, the prosecution, and finally the judges who actually decide. Additionally, it was stated that in cases of suspects being put in PTD acquittals would very seldom happen.
Although the questioned judges declared to mostly get along well with the given time limits as well, they more often referred to factors and circumstances which can make it difficult, especially if several of these factor cumulate: written reports from the police arriving late; availability of interpreters for rare languages; high numbers of committals during on call duty (Journaldienst); restricted access to prison during night shift or weekend hours; missing information; and required presence of legal aid during interrogations.

Viennese judges, for instance, said that on average the actual time at their disposal to prepare decisions on PTD would mostly be only 24 hours.[21] Judges in Vienna were also said to have less time available to dedicate to each case than judges in the other regions. In the provinces, judges were also said to sometimes be informed about committals of suspects to be expected ahead of time by the prosecution. This was explained to support work organisation in general and preparations for the individual case respectively.

[21] Judges have to decide on PTD within 48 hours after a suspect has been transferred to (court) prison.

When asked about the quality of information they usually have to build their decisions on, PTD judges stressed that the fundamental requirements with respect to the suspicion and the grounds for detention have to be fulfilled. The information provided by the prosecution/police was said to suffice in general. Some responses, however, also indicate that at the time of the first decision some weaknesses of prove may be acceptable. For instance, it was explained that the prove for the required suspicion may not be fully satisfactory at the stage of the first decision. Often, there would not be enough time to already have all witness statements important for the assessment of the offence and of the offender. If this would not be improved in the run of the following investigations, the suspect would have to be released. Especially in cases in which someone may be in danger while the alleged offender denies any threat (e.g. domestic violence), decisions can be very difficult. Once more it was stressed in this context that the personal impression a suspect leaves with the judge at the interrogation can be crucial. After all, it was explained that the first decision on PTD is a temporary one, which will be reviewed in regular intervals.

On principal, judges could carry out supplementing investigations themselves, but the practitioners agreed that there would hardly be enough time to do so. Judges reported to sometimes directly address the police themselves with respect to needed information. Especially at the smaller courts, this appears to be quite a common practice.

Some of the interview partners said that at the time of the first decision information about social conditions, about social networks, and other aspects relevant for the possible application of noncustodial alternatives are often still missing. Therefore, there is a tendency that, at the time of the first decision on PTD, suspects are rather released without any alternative or kept in custody. Not least because of the need for detailed information and because of organizational requirements, release on lenient measures appears to mostly happen later, in between detention hearings or in detention hearings.

As mentioned before, defence counsellors play an important role with respect to release on noncustodial alternatives and with respect to release from detention in general. At the time of the first decision on PTD, however, only very few suspects are represented. On principal, suspects are entitled to legal representation in PTD cases and recent developments aimed at a 24-hour access to legal representation.[22] In practice, this was reported to have not yet caused major changes. [23] Concluding on the reports of the practitioners, it

[22] It has to be noted that counsellors are not allowed to intervene in the interrogations.

[23] It however has to be pointed at the fact that the addressed amendment only came into force with the beginning of 2017. The interviews took place between January and April of 2017 when there was only little experience with the new regulation. In November 2017 the Austrian Ministry of Justice published

seemed likely that there are information deficits which cause suspects to abstain from legal representation. Above all, the question of the costs of representation appeared likely to create confusion. First legal aid is on principal chargeable, however, if a suspect is granted legal aid later on, the costs of representation within first legal aid (at interrogations at the police and at the first hearing at the court) are covered as well.

The questioned judges and prosecutors expressed differing opinions on the opportunity of early representation of suspects. On the one hand, there were views denying advantages of representation during the first interrogations. The representatives of this opinion stressed that the counsellors would only know little about the case or the file respectively at this stage. According to their view, this would consequently mean that counsellors would primarily advice suspects to remain silent, which would not always be in their best interest. The other view expressed by judges and prosecutors called the principal opportunity for suspects to be represented at the first interrogations a good thing. Their assessment, however, was that this is not working properly yet, and some of them also deemed it very difficult to provide good advice with the little information available to the counsellor at this stage of the proceedings.

7.1.2. Later decisions on PTD

The data collection within the DETOUR-project indicated that once PTD is ordered, there is a high likelihood that the suspect will stay in detention throughout the proceedings. Confronted with this observation, the practitioners largely agreed. However, it was regularly added that this is not due to a lack of review of prior decisions or grounded in a persistence on detention. Several practitioners actually viewed the regular continuation of detention as a logical observation and as a consequence of a thorough assessment of PTD in the very beginning. Apart from very long durations of PTD, which might question the principal of proportionality, judges and prosecutors explained that release would in most cases only be an option if relevant factors with respect to the suspicion or with respect to the grounds for detention would change in the run of the proceedings, e.g. because of new information. Changes with respect to the latter can also be based on alternative measures which are assumed to reduce the risks that ground detention. According to the practitioners, in the vast majority of PTD cases such changes do not happen and therefore detention is continued in most cases. Considering that in the run of the proceedings successively more information on social circumstances, networks, and supporting factors is collected, this also means that this information mostly does not sufficiently support release. Once

a press release highlighting that the use of the newly introduced first legal information for arested persons provided by attorneys via phone has increased by four times in comparison to the times before.

more, these answers show that with adult suspects alternatives to detention have to be considered the exception. At the time of the first decision on detention, the practitioners state that there regularly is not enough information available that could support release. Later on, when more information is available, it is regularly said to not sufficiently support options of alternative measures.

7.1.2.1. Communication outside the courtroom and detention hearings

The expert talks very clearly showed that activities towards release most often take place outside the court room. Counsellors contact prosecutors and judges before the next detention hearing to find out about the chances for their clients to be released as well as measures which would support release, and to provide information possibly supporting release (e.g. also evidence weakening the suspicion). It was, however, important to some judges and prosecutors to clarify that such "informal" talks would be no bargaining but a sharing of information particularly with respect to options for release. Despite an obviously widespread practice of exchange of information outside the courtroom, a few judges and prosecutors indicated to prefer the "formal" way:

> *"..... there is a procedure for that ..... There is a detention hearing, there he can issue his statements."* (Judge 13)

If the prosecution agrees, detainees are regularly released as soon as new information supports release or as soon as appropriate measures have been realized and proven to the court. Regularly, this was reported to happen before the next detention hearing. As a consequence, detainees are rarely released after preparations and discussions during detention hearings or, to put it another way, detainees mostly stay in prison after detention hearings. This gives rise to the impression that the detention hearings might, above all, be formal requirements without much meaning for the decisions on PTD and its continuation respectively. Confronted with this impression, several judges agreed, partially declaring some discontentment with the detention hearings. Apart from the fact that most investigations, clarifications, and discussions are already done prior to the hearings, they said that the impression of it being a formal requirement is not least due to the fact that the police and the prosecution pay little attention to the detention hearings. The prosecution, for example, is most often only represented by some substitute of the prosecutor in charge (e.g. often a trainee).[24] These substitutes are, on the one hand, mostly not informed about the latest status of the investigations[25] and, on the other hand, they always apply for

[24] There are regional differences in this respect. This is above all true for the bigger courts.

[25] In this respect the judges did not see much of a problem, saying that they have to study the file in advance anyway.

the continuation of PTD no matter what the latest developments in a case were. If the judge decides in favour of release they give no declaration, saving the option for the prosecution to file a complaint. Considering this routine procedure, the prosecution appears to primarily aim at PTD or its' prolongation respectively.

Despite some critique in this sense, nevertheless, important functions of the detention hearings were stressed by the practitioners. First of all, the detention hearings were said to be important to draw attention to the detention periods, which have to be observed. Despite the reports that in most cases the detention hearings would not bring up any new information, they were nevertheless explained to be important in this respect: If something new comes up, the detention hearing is the given occasion for exchange and discussions among the parties. Seldom, but sometimes, expert witnesses have to be questioned on matters of relevance for PTD decisions. If this is the case this also has to be done during detention hearings.

7.1.3. Speedy process

Both judges and prosecutors explained that the procedural practice in recent years in PTD cases is very much focussed on a speedy completion. In many cases, the indictment was reported to be completed before the 2nd detention hearing (six weeks after committal).
A practice employed by some public prosecutions grounded with a speedy process are the so called "direct indictments" (direkter Strafantrag). This means that the indictment is already handed in with the application for PTD. As a consequence, it is not the judge responsible for detention and legal protection who is in charge of PTD, but the judge presiding the trial. While some prosecutors referred to an obligation to do so if a case allows for it, several judges questioned this practice. According to the judges there are, above all, two reasons which would suggest avoiding this practice:

1. There is a threat that indictments are completed prematurely, which could burden the trial;
2. If the judges responsible for the trial preside trials all day long they can easily run into severe problems to adhere to the deadlines required to be observed with respect to PTD. According to the interviewees, there are public prosecutions which abstain from bringing in direct indictments to avoid this kind of pressure on the judges.

7.1.4. Applications and rulings

The law allows for some leeway with respect to the formal requirements that need to be fulfilled regarding applications and rulings. Applications for PTD filed by the prosecution have to address the offence, the suspicion, and the grounds for detention. The practice of the prosecution obviously varies quite considerably, with some authorities explicating applications into a lot of detail while others keep them at a minimum by stating the grounds for detention and by referring to the reports and the outcomes of the investigations of the police.

Judges have to fully explicate the first decision about PTD in writing. The following decisions on PTD can be documented in a reduced way, largely skipping reasoning and justification, if the involved parties declare to abstain from filing complaints. According to the interviewees, it seems that most judges take advantage of the option to only write reduced decisions. Some of these judges explained this to be necessary because of their heavy workload. Others, however, explained to nevertheless fully explicate their decisions. They said to do so for documentary as well as for transparency reasons.

7.2. The view of defence counsellors

7.2.1. The first decision on PTD

A central topic addressed by the counsellors in this context is the fact that only in a minority of cases are the suspects already represented from the very beginning of their apprehension. In most cases of PTD, counsellors only meet their clients shortly before the first detention hearing. They too agreed that the new regulations introduced to support early representation of apprehended suspects have not had major effects so far. The attorneys assumed a need for organizational improvements in this respect, but there were also voices suspecting that the clients may not be informed well enough about their possible access to representation at the police and at the courts. An assumption articulated several times referred to possible worries of the suspects to face high costs which would cause them to abstain from taking advantage of early representation, although most of them would be entitled to legal aid: “Why would anybody abstain from taking advantage of early legal support”, sums up some of the questioned counsellors’ view expressed in this respect. [26]

[26] Again we have to point at the fact that the new regulation in this respect was only in force shortly at the time of the interviews.

The counsellors uniformly declared an early representation to be of high value to the suspects but also to the legal system:

- Apprehension and interrogations were described to be exceptional situations for most suspects which would ask for support.
- Presence of counsellors at interrogations would improve the standards of interrogations and secure correct approaches and information.
- Sometimes (not always), it was said that it may be beneficial for the suspect to be advised to remain silent.
- Sometimes, grounds for detention can be better fought if a counsellor has been involved early on (e.g. fighting a risk of absconding assumed with EU citizens who have a regular place of living in their home country by organizing proof in this respect).
- Early involvement of counsellors was said to support (early) release on lenient measures, because they would be able to check and organize things in this respect early on.

7.2.2. Later decisions on PTD

The questioned counsellors were very critical towards the chance of pre-trial detainees to be released again once PTD has been ordered. In some responses, the continuation of PTD was described as a kind of automatism, which is hardly changed if no fundamental changes with respect to information on the offence, the suspicion, or on the grounds for detention can be proven. Consequently, the chances for release on non-custodial alternatives were described to be humble in cases of adult suspects. The best chance to be released was assumed in cases in which the suspicion is weakened, and in cases in which the detention already lasts long (close to the duration limits - 6 months, 1 year or 2 years).

It was explained that judges sometimes would argue in favour of a continuation of PTD, referring to advantages of a speedy trial and to little use of release from PTD if the suspect very likely would have to return to prison after the verdict. The counsellors, however, criticized these arguments, stressing the harm and problems PTD can cause. In particular, they said that release from PTD is often considered favourably in verdicts, while a continuation of PTD may have negative effects on the verdict. In this context, some of our interview partners criticized a practice often observed which would mean that suspects are kept in PTD until the end of the trial. After the trial they would be released right away with a sentence adapted to the time spent in PTD: *"This is quite unbearable, and this happens also with rather minor offences."* (Counsellor 2)

7.2.2.1. Communication outside the courtroom and detention hearings

The counsellors confirmed what had already been reported by judges and prosecutors: Central to preparations for release and to activities in this respect are contacts between counsellors on the one side and judges and prosecutors on the other side outside the courtroom, prior to detention hearings. The attorneys explained that their first aim would be to discuss the chances for release with judges and prosecutors and to find out about the conditions the court would ask for if release should be granted. If things work out, the counsellors said clients are often already released prior to detention hearings.

The questioned counsellors were quite critical about the detention hearings. Regularly, it was said to be clear from the very beginning of the hearing, that the detention will be continued. They described the detention hearings to mostly be formal events which last only a few minutes without substantial discussions or a substantial review of the reasons of PTD, as expressed in the following statement:

> *In detention hearings it is usually already clear what is going to happen before it actually starts ..... it is a 5 minutes formality* (Counsellor 3)

They however did not only blame the court for this. In a few statements, counsellors also explained that defence attorneys often would remain too passive during detention hearings. It was, for instance, explained that evidence could be heard during detention hearings, but counsellors would hardly take advantage of this possibility.

Despite their critical view on the practice of the detention hearings, the counsellors described the detention hearings to be important for the observations of the detention periods and for them to learn about very recent developments possibly not yet documented in the files.

7.2.3. Speedy process

Efforts reported by judges and prosecutors to carry out proceedings in PTD cases fast were confirmed by the counsellors. However, they said the speedy process would sometimes cause poor investigations, which later on would cause delays during the trials.

7.3. Central outcomes and conclusions

- Prosecutors and judges in general consider the time from apprehension until the first decision on PTD sufficient to prepare the decision (48 hours until the transfer to prison and for the application, and another 48 hours for the first interrogation and the decision on PTD). Still, sometimes the basis for the decision - as a rule

provided by the police - may be scarce. Judges say that fundamental requirements with respect to the suspicion and to the grounds for detention have to be fulfilled. For the first decision, however, some uncertainties have been said to be acceptable considering the review already takes place after 14 days.

- Some prosecutors view the fact that three authorities are involved in the assessment of PTD to be a procedural tool to secure good quality decisions (police, prosecutor, judge).
- In cases of PTD, suspects have to be represented by defence counsellors. At the first interrogations at the police and at the court before PTD is ordered, suspects have the right to have a counsellor present. In fact, presence of a counsellor at this stage is the exception. At the time of the interviews there apparently were still organizational problems with respect to the 2017 newly introduced "first legal aid". Suspects were for instance assumed to not sufficiently be informed about the costs. Late in 2017 a quadruple increase of the use of the newly introduced first legal information via phone was reported by the Ministry of Justice. Considering the importance of an effective early access to a lawyer for suspects, developments in this context should be subject to further evaluation.
- Among judges and prosecutors, early representation of suspects is not viewed uniformly positive, and even the ones in favour address problems of representation because of the little time available to prepare. They are afraid that this may primarily lead to suspects remaining silent. Counsellors, on the other hand, stress the importance of early representation for the suspect as well as for ensuring the standards of the rule of law.
- It appears that with the first decision on PTD, suspects are either released without any order or kept in custody.
- At the time of the first decision, the information available on the social situation, the place of living, and other aspects possibly relevant for the application of alternative measure is said to often not suffice to support release. Later on, when more information is available, it is regularly said to not sufficiently support options of alternative measures. Obviously, alternative measures are not applied easily.
- Once PTD has been ordered, it is likely to be continued. Repeals primarily take place because of substantial changes concerning the suspicion or the grounds for detention. Attorneys criticize this practice talking about an "automatism" of continuing PTD.
- Exchange of information on possibilities to apply alternative measures between counsellors and the judiciary as well as preparations in this respect mostly take place outside the courtroom. If the prosecution and the court agree on release on

non-custodial measures, release regularly takes places immediately outside detention hearings.

- Not least because of this, detention hearings appear to be, above all, formal requirements, which are rarely concluded with a release of the suspect. Despite critique suggesting improvements to be made, detention hearings are considered important procedural events which not least highlight the detention periods.
- Attorneys particularly criticize the practice that suspects are often kept in PTD until the end of the trial and then released after the verdict with a sentence largely adapted to the time spent in PTD.
- All experts questioned agreed that there are efforts towards a speedy process in cases involving PTD. Some judges and prosecutors actually considered it better to have a speedy process then to release a suspect who then has to return to prison to serve the sentence. Attorneys oppose this approach, highlighting the negative effects of PTD.

8. Procedural safeguards and control

At this point it has to be stressed that some aspects regarding procedural safeguards have already been addressed in chapter 7. Above all, the detention hearings are considered central in this respect (see chapter 7.1.2.1). Chapter 8 focuses on the aspect of control.

8.1. The view of judges and public prosecutors

As already mentioned, some of the prosecutors interviewed in the context of the DETOUR project described the process towards decisions on PTD as a chain of (informed) decisions by diverse actors – police, prosecution, judge. According to their view, this process on itself ensures good quality decisions. These prosecutors apparently consider these steps a system of control. For the sake of completeness the fact that judges mostly grant applications for PTD brought forward by the prosecution has to be stated again.

There is not data available on numbers of complaints filed against PTD decisions. According to the questioned judges and prosecutors, complaints seem to be filed rarely. Complaints are seldom filed by the suspects and their representatives and seemingly even less often by the prosecution. Prosecutors state that they sometimes do file complaints and indicate that they would not always file complaints if they do not agree with a decision but

if they assume wrong assessments. A majority of respondents explained that judges would go along with most of the applications of the prosecution anyway, and that judges and prosecutors would most often share understandings with respect to the application of PTD. Not least, both judges and prosecutors referred to the directive function of the rulings of the higher regional court. These responses implicate that prosecutors obviously see a rather seldom need for complaints against decisions on PTD because the practise is mostly viewed to follow synchronized paths.

When asked about reasons for the low number of complaints filed against PTD decisions by counsellors, judges and prosecutors explained that attorneys would know about the prevailing PTD practice and the rulings of the higher regional courts respectively. Consequently, they would not file complaints without expecting a good chance to succeed. Obviously. these chances are not very good because the judges presented themselves to be confident about their practice, referring to low numbers of PTD-cases successfully complained about with the higher courts.

Apart from the apparent slim chances to succeed with complaints against PTD, judges and prosecutors said that complaints would carry some risks which attorneys would rather avoid:

- The higher regional court may make statements about the suspicion, which can have prejudical effects on the verdict;
- In case of a denial of the complaint, PTD may last even longer than otherwise because the new detention period only starts with the judgement of the higher regional court;
- Some practitioners also referred to an alleged risk of a delay of the trial. However, it remained unclear why there should be such a risk. On principal, a complaint filed with the higher regional court does not hinder the trial, provided that a copy of the file is produced to be sent to the higher regional court. This should not be much of a problem.

Additionally, some practitioners said that many detained suspects would rather stay in prison than be released and then having to return to prison after the verdict. However, it did not become fully clear to what extent this was an assumption or based on actual statements of suspects. They themselves were clearly in favour of this view, also referring to the benefits of a fast trial and to the fact that the time served in PTD is deducted from the sentence.

According to judges and prosecutors, complaints are mainly filed by attorneys if there is reason to question the assumed suspicion. The converse conclusion is that the grounds for detentions are seldom fought. Complaints against PTD were also said to be more often filed by attorneys in cases in which PTD already lasting very long (approaching the duration limits - 6 months, 1 year or 2 years; see chapter 7.2.2.), if the principal of proportionality can be questioned.

All in all, the practice with respect to complaints about PTD presented by judges and prosecutors creates a picture of widespread "harmony": The parties involved know the rules and the prevailing practice, act accordingly, and only question it if there are well-grounded reasons which are worth possible risks. Consequently, PTD is not actively fought very often. In one of the interviews it was put like this:

> *"Mostly the decisions are not wrong..... we don't have a culture of conflict oriented defences like they do in Germany."* (Prosecutor 7)

Interestingly, complaints directed at the Supreme Court claiming that a detention violated personal rights were not addressed by judges and prosecutors in this context. It can be assumed that such complaints happen very seldom, which again suggests rather little practical relevance of these complaints.

8.2. The view of defence counsellors

In the interviews with counsellors, they themselves said that complaints are not filed often. They confirmed the considerations addressed by the judges and prosecutors with respect to the risks mentioned above and with respect to the chances complaints could have (see chapter 8.1.). In their descriptions another risk was addressed: If you file a complaint with little grounding, it may become more difficult do convince judges and prosecutors about options for release later on. According to them, the decision on whether to file a complaint or not is a strategic one, considering the chances, the risks, and the level of suffering of the suspect. The picture drawn by the attorneys differs quite considerably from the one drawn by judges and prosecutors. This picture is not coined by a "harmony" of views among the involved parties, but by very little chances to successfully fight detention. According to the view of the attorneys, the prosecution and the judges at the courts of first instance are too close, following a rather rigid practice guided by the higher regional courts which leaves very little chances for change:

> *"..... you try it two times, three times, possibly the full way up all instances. If it does not work out you leave it."* (Counsellor 3)

If there is a chance to succeed, the attorneys clearly express that it is their duty to file complaints and on principle to be ready to carry a case up to the supreme court. Not least, release from PTD can also have a favourable effect on the verdict. In the following quote, complaints are obviously not only seen as important in serving the individual suspect but also important for the legal system and culture in general:

> *"If anybody can promote standards it is the defence attorney. Because the judicature will not change without the attorney putting the finger in the wound."* (Counsellor 1)

8.3. Central outcomes and conclusions

- Complaints against PTD decisions are rather seldom.
- Judges and prosecutors think this fact express that the PTD practice is largely functioning well.
- Counsellors, on the other hand, view this fact critically. They explain to only file complaints against PTD if there is a good chance to succeed. Otherwise, the risks connected to a complaint would be too big. The dominancy of the prevailing PTD practice in the different districts, not least determined by the rulings of the higher regional courts, was described to leave little chance for complaints questioning this practice.
- In the end, PTD appears to be questioned too seldom in Austria. Judges mostly go along with the applications of the prosecutors and attorneys seldom file complaints, not least because of their knowledge about the prevailing practice and their assessment of having little chances to succeed.
- Considering the rather wide discretion especially judges have in their decisions, a more conflict-oriented approach seems recommendable for the development of the legal system as well as for the quality control. Counsellors definitely play an important role in this respect.

9. European Aspects

9.1. Assessments of European cooperation in general

In the interviews, European aspects were rarely mentioned. In cases where the interviewees referred to experiences with judicial cooperation in cross-border cases, it was mostly

in connection with the European Arrest Warrant. In this respect, the practitioners mostly assessed the cooperation to "*work well*" in general (Judge 13). However, some stated that the cooperation differs, depending on the countries involved. For instance, many mentioned they work together well with Romanian and Polish authorities as expressed in the following statement: "*those are the countries where you get someone with a European Arrest Warrant within (…) let's say 8 to 12 weeks*" (Judge 4). Furthermore, the cooperation with German authorities was assessed as being "*uncomplicated*" (Judge 5) as there are no language barriers. However, difficulties when requesting judicial assistance were stated as being complicated in other countries: "*With England and France, (…) it's often complicated and it takes a lot of time, if you get a reasonable response at all*" (Judge 6).

9.2. Assessments of the European Supervision Order

A research focus within the DETOUR project is the European Supervision Order (ESO) and its use in practice. Austria implemented the ESO (Framework Decision 22009/829/JI) in 2013. Since its implementation, no ESO case was reported in Austria. Therefore, and unsurprisingly, our interview partners could not refer to personal experiences in this respect. In fact, the vast majority of them stated they never heard of it. The assessments of the ESO were driven by deep scepticism on its feasibility: "*The idea doesn't sound bad, but I think its feasibility is essential*" (Judge 14). Some practitioners also rejected the idea of the ESO a priori by stating it would be "*senseless*" (Prosecutor 7) or even "*nonsense*" (Attorney 6), because this tool was not found to be workable.
However, along with the rather sceptical assessments, the following challenges were identified by interviewed practitioners:

9.2.1. Administrative burdens and time pressure

Most of the interviewees stated that the ESO may imply huge administrative burdens. That is, for example, if they do not know a contact person or if there are no direct contacts to the authority in charge in the respective EU-country. In this respect, also language barriers and translation workloads were assessed as too time consuming and to further complicate an exchange of information. Some interviewees mentioned quite explicitly that they do not want to expose themselves to the potential additional workload the ESO may imply:

> *"There are more important things than to saddle myself with additional work and with tremendous efforts and delays (…) I'd rather follow the acceleration order and deal with the case next week and the thing is done"* (Judge 11)

Along with administrative and bureaucratic burdens, many interviewees referred to the time pressure within the pre-trial proceedings. The practitioners mentioned the usually fast pre-trial proceedings and therefore questioned "*whether these efforts will pay off*" (Judge 13) or whether they are "*manageable*" (Judge 14) at all:

> "*If I have to fill in a form, which needs to be delivered, then has to be dealt with there, then has to be delivered again (…) I see the problem, whether it can be dealt with quickly.*" (Judge 1)

By referring to the usually quick pre-trial proceedings and time limits, the imagined ESO procedure was assessed to be "*less practical and not feasible"* (Judge 1), especially for pre-trial detention cases. In this context, many interviewees also referred to their experience when dealing with cross-border cases. In some interviews, this lead to the conclusion that the cases could not be dealt with quickly enough: "*When I consider how the contact to Italian authorities is dragging sometimes (…) I can't imagine that it can work*" (Judge 4).

9.2.2. Risk of absconding

Another common narrative in our interview material is the assumption that the suspect – once released – would abscond and avoid the criminal proceedings. The interviewed practitioners (mainly prosecutors) often stated, that even if the cooperation with judicial authorities in the European Union works fine, they cannot imagine that the suspect would show up for trial:

- "*How can it be guaranteed that he comes back to trial, that's something he most likely won't do. That's totally unrealistic.*" (Prosecution 7).
- "*I doubt the willingness of the suspect to confront himself with the criminal proceedings in Austria*" (Prosecutor 6).

Hence, a good cooperation with law enforcement authorities within the EU would be "*of no use*" (Prosecutor 6), because the assumed consequence of a release would be "*to look for him (*the suspect*) in Europe or worldwide*" (ibid). In this context, a risk assessment (also see chapter 5) becomes quite evident:

> "*Having somebody here with a strong suspicion that he committed an offence, how the prosecution will put themselves at risk, that they have to look for him afterwards again" (Prosecution 6).*

Though most of the practitioners mentioned they have good experiences with the European Arrest Warrant (EAW), some also referred to the "*tremendous effort*" (Judge 6) it entails. Along with mentioning a "*Europe without borders*", this measure was not assessed to be useful by others (Prosecutor 6) and therefore, the EAW could not guarantee that the suspect would show up for trial.

9.2.3. Different standards/lack of information

Many interviewees doubted that the ESO could work. referring to differences in judicial systems in the various EU-countries. Some of those statements were made without elaborating what specific differences and in what way they are assessed as being problematic: "*If you look from the North to the South, that's simply too different, also from the East to the West*" (Judge 4). Others referred to the fact that the "*penitentiary system*" as well as "*probation and other measures are structured completely differently*" (Judge 6). Along with different standards, a lack of information about possible institutional offers for lenient measures in other EU-countries were assessed to be a barrier:

> "*I don't know if there is a drug-therapy in Poland that he (*the suspect*) can get access to, who is going to pay etc. This means I would need to have that information before*" (Judge 8)

9.2.4. Lack of control /lack of effectiveness

Similar to the concerns that were mentioned regarding a rather reluctant use of less severe measures, many interviewees referred to a lack of control in possible ESO-cases: "*What would be my concerns, well, simply efficiency and control*" (Judge 9). In this context, a lack of knowledge about how effectively the prosecution or the court in other countries are able to implement and control lenient measures were mentioned as concerns. As already mentioned in chapter 5 (Non-custodial alternatives), one reason for a rather reluctant use of lenient measures within Austria is a perceived lack of effectiveness. Therefore, it is not surprising that the question of "control" and "efficiency" becomes even more urgent in cross-border cases. Relating to this, a judge expressed it quite pointedly:

> "*Even within Austria it is a problem to use lenient measures effectively. And if the whole thing results in ordering lenient measures which are supposed to be effective across borders within the framework of pre-trial detention, then I don't think that there is a willingness or there are application scenarios, where you could do that*" (Judge 9).

9.3. Central outcomes and conclusions

- European dimensions were rarely referred to in the interviews. However, in the context of the European Arrest Warrant, many practitioners assessed the judicial cooperation with other countries in cross-border cases to work well.
- Cross-border cooperation in general is assumed to work well, especially with countries with a traditionally close cooperation, like Germany. The experiences

with respect to international cooperation in general as well as with other European countries differ considerably. In most cases, this cooperation is considered cumbersome.

- Most of the interviewed practitioners did not know about the European Supervision Order.
- The main challenges to put the ESO into practice, as expressed in the interviews, relate to administrative and bureaucratic burdens that may come along with it (translation efforts, having no contact person in the countries concerned). Along with administrative burdens, many referred to the requirement for a speedy process within the pre-trial proceedings which would be more difficult with the ESO. Further scepticism referred to an assumed risk of absconding. Though most practitioners stated the European Arrest Warrant works well in practice, many assessed this instrument as not being able to guarantee that a suspect will show up for trial. Different standards and availability within the European Union, relating to the judicial system as a whole, as well as with respect to supporting measures, were additional concerns expressed.
- The reservations with respect to the application of alternative measures within Austrian state-borders appears considerably intensified when cross-border cases are addressed (see chapter 5 – Non-custodial alternatives). In this respect, the question of how a suspect's compliance with orders can be controlled and monitored adequately was particularly highlighted and problematized. The experts largely questioned the practicability of supervision measures ordered to be carried out in other countries.

10. Responses to the Vignette

10.1. The view of judges and public prosecutors

10.1.1. Additional information asked for by the respondents and aspects considered for the decisions

The responses to the vignette in general underline the fact that the ground for detention most often used in the practice of the Austrian courts is the risk of reoffending. In almost all of the interviews with judges and prosecutors, the first additional information the respondents asked for referred to the prior conviction and, above all, to the question whether this conviction referred to the same protected right or value than the offence

prosecuted now (e.g. if both offences have been burglaries, but also if the first offence was another property offence). This indicates that the respondents particularly examined the risk of reoffending in the definition of §173 (2)/3b CCP, so this question needs to be answered positively if this ground is considered to be applied. In relation to this, details about the prior conviction have been regularly asked for, above all: How long ago? How sever was the prior offence? What was the sanction in detail (how many months)[27]? Have orders been given and, if yes, which ones? Has probation been ordered? In the latter case it was also stressed that a report by the probation officer would be a valuable source of information. Finally, the question whether the suspect has possibly been to prison before came up once (PTD because of the first offence – Did he experience the pain of imprisonment before?).

Repeatedly, the questions of our interview partners aimed at examining the overall social situation of the suspect. Many times, these questions concerned the work situation (How long has he been unemployed for? Are there any perspectives with respect to employment? E.g. is he registered as looking for employment) and the financial situation (debts, social welfare income, financial support from the parents), both in particular exploring the motivation of the suspect to offend (Is there an ongoing precarious social/financial situation to be observed, which could be a central reason for the offence?). In this context, some also asked whether the (social) conditions of the suspects' life have changed since the prior conviction (favourably or not)[28].

Considering the information given in the vignette (that the suspect is living with his parents), most respondents assumed at least fairly good integration and a steady place of living. Some, nevertheless, asked for more information on his social integration, a few asking whether the place of living is in Austria or whether he is living with his parents constantly or just temporarily. A few said that when working on a case the nationality would be one of the first aspects they would look at, because foreign nationals often do not have a place of living in Austria and/or a lack integration here.

[27] The general period of supervision in the context of conditional sentences is 3 years. If the prior conviction happened two years ago, the supervison period would still be open, and the suspect is at risk of the conditional sentence becoming unconditional.

[28] If the conditions have developed unfavourably, this could be considered an aspect strengthening an assumption of a risk of reoffending.

Only some of the respondents addressed the urgency of the suspicion and the proportionality, and assumed there is no more information needed in this respect.[29] Left unquestioned was the proportionality of pre-trial detention possibly ordered if grounds for detention also apply. They explained that burglary into a home is threatened with a prison term of 6 months to 5 years. Considering the "open" conditional sentence, one prosecutor emphasized that the proportionality can hardly be a problem. Only one judge and one prosecutor questioned the proportionality in principle. According to their view, a conviction two years ago and the rather minor damage done by the new offence would recommend having a closer look at the general social conditions, which may be in favour of release.

In some individual responses, it was explained that the possibility of an offence expressing the intention to make a living on burglary would be examined. It can be said that this aggravating factor was mostly denied. There were different evaluations of the fact that glass had been cut while entering the house. Most of the respondents said a simple glass cutter would not suffice to assume special abilities or special means the law is asking for (§ 70 CC), and only a few contradicted this. But even if this would be assumed, it still was considered questionable if the value of the stolen good would fulfil the legal definition in this respect. Another possibly aggravating aspect is the fact that, in the vignette, people were sleeping in the house while the burglary occurred. The majority of respondents denied this fact to be of relevance for the decision on PTD, referring to the (rather new) legal regulation which threatens burglary into homes with a more severe sanction. Some added it may be different if he, for instance, knows about the little girl in the house and if he expresses that he would not care being confronted by the girl. A few, nevertheless, considered this fact an aspect which may add unfavourably in the discretionary decision.

Another question asked by the interview partners referred to the possibility of a drug related offence, especially whether there was an addiction which may have been a motivation for the offence.

With these introductory aspects it already became clear that the individual approaches of the respondents with respect to the examination of a possible PTD vary considerably. The individual criteria considered do not differ when we compare the responses of judges and prosecutors. There, however, have been differences in responses that appear to be related to the different roles of judges and prosecutors. Several prosecutors stressed the fact that they have rather little information at the stage before the initial decision on PTD. This

[29] The police indentified the suspect via CCTV.

means the need to go along with this information and sometimes to rely on assumptions. Here, interesting differences between individual prosecutors became visible. There were some who, for instance, clearly stated that a regular place of living asserted by a suspect without any real proof would hardly be considered. Others expressed that it could not be a general approach to assume that declared regular places of living would not be true and would not fulfil the requirements when there is a need to get a hold of the person. This observed difference is partially influenced by the so-called east-west difference in Austria, which refers to a harsher practice with respect to criminal law in the east than in the west of Austria.

Judges regularly stressed the importance of the personal impression of the suspect. As mentioned before, prosecutors usually do not meet the suspect in person before the initial decision on PTD in Austria. Judges, however, have the opportunity to get their own impression of the person when interrogating him/her before the first decision.

10.1.2. Grounds for PTD - Responses following the assumption that the prior conviction was because of a similar/the same offence

While there were some differences with respect to the degree the respondents might consider denying PTD under certain specific conditions, the majority of the responses were quite uniform among judges and prosecutors: Seven of eight interviewed prosecutors and 10 of 13 judges[30] were quite clearly expressing the view that PTD would apply in this case. Comparing judges and prosecutors, the diction is seemingly connected to the different roles. Prosecutors often talked about the chance to substantially ground an application in order to succeed with an application for PTD. Judges, on the other hand, often talked about how they would decide in that case but frequently also in terms of "then it is not looking good for him" or "then I would have to order PTD".

As indicated earlier, the vast majority views the requirements with respect to the risk of reoffending according to §173 (2)/3b CCP as being clearly fulfilled if the prior conviction was because of a similar or the same offence:

- Burglary into a home is considered an offence (Verbrechen) with more than slight consequences: This kind of burglary is threatened with a prison term of 6 months to 5 years. Additionally, most prosecutors and a few judges referred to the fact that the legislator just recently differentiated between burglaries into homes and other

[30] The interviews carried out with two heads of authorities (at one court and at one public prosecution) have not been counted with respect to this interview topic. The vignette has not been discussed with them in detail.

burglaries threatening the first with a more severe sanction. The reason for this is the impact a burglary into a home often leaves with victims because of the intrusion into the private sphere, possibly even causing traumata.

- Reoffending within an "open" supervision period of an unconditional sentence: The main argument explained in this context is the fact that the prior conviction seemingly did not leave much impression with the suspect. "The same mischievous inclination"[31] became apparent by the new offence was an often-mentioned response. The respondents made clear that this aspect weighs heavier the closer the new offence was to the prior one. In the given case, a majority of interview partners referred to the open supervision time of three years, but also to the assessment that even two years would not be a long enough period to separately view the two offences.

  Considering a two years period since the first offence led some of the respondents to hint at chances that the suspect might go free, if the social conditions would appear favourably, as expressed in the following citation:

  "I*f the burglary, for instance, happened in December and in January he started an employment after a long period of unemployment and if this works quite well ..... I rather have him at work finally trying to get integrated into the system then destroying this employment (Judge 13).*

  Similar responses explained the importance of developments of the suspect. If his (unfavourable social) situation has not changed since the prior offence or became even worse than there would be hardly any room for release. However, if the general situation has improved (despite the burglary being a relapse) some said there might be a chance that he will be released.

  Details in these responses referred to less severe measures, for instance, to orders which may have been already given in the context of the first conviction and the suspension of the prison sentence respectively. If the suspect, for instance, already had a probation order, several respondents indicated that probation obviously did not work and therefore would have to be questioned as a useful order. For the sake of completeness, we report that less severe measures/alternatives to PTD were said to probably only apply after the first detention hearing (if they apply at all) when more information is available on the suspect and grounded and proven alternatives have been suggested.

  Again, we have to stress that judges regularly point at the importance of the personal impression.

[31] This wording following the definition in § 71 CC is often used in applications for PTD and in decisions.

- Bad prognosis based on the aspects explained above: The fact that the suspect was unemployed was stressed several times as an unfavourable fact. Unemployment would be an indication that the suspect has no access to legal ways to make money and this can be considered a risk factor with respect to reoffending.

Particularly interesting are the responses of those who expressed the view that PTD probably would not apply (two judges and one prosecutor). Their reasoning was quite similar. All three of them addressed the two years since the first conviction. Even though the new offence happened within the supervision period of three years, they said there was a long time during which the suspect behaved well (In fact, the period since the first offence must be even longer, because the proceedings also take time). Based on this, their conclusion was that you cannot simply assume that he will offend again if there have not been any aggravating circumstances, like indications that the burglary is part of a (new) plan to regularly earn a living this way.

Despite the fact that it was only a minority who denied PTD while considering the assumption that the suspect was already convicted because of the same or a similar offence, the outcomes show that there is quite some leeway for the decision on PTD. This becomes particularly apparent in the answer of a judge who refused to give a judgement:

> *"This is a discretionary judgement. You can argue in both directions. A risk of reoffending can be assumed but it does not necessarily apply. In the end, the personal impression can be decisive in this case, particularly a responsible appearance of the suspect." (Judge 14)*

The judges and the prosecutor who denied PTD in this case were all from courts in the west of Austria.

10.1.3. Grounds for PTD - Responses following the assumption that the prior conviction was because of another kind of offence

The responses to the vignette considering the assumption that the prior conviction was because of another kind of offence (e.g. an assault) predominantly exclude the possibility to order PTD, given that there is no evidence with respect to a risk of absconding or with respect to a risk of tampering with evidence. Judges responded uniformly, with only one judge discussing the principal option to consider a risk of reoffending based on the assumption that the severity of the offence makes it possible to consider PTD according to §173 (2)/3**a** CCP[32]. While the vast majority of prosecutors also stated that there would be

[32] The need to prevent new crimes if the suspect is charged with a crime carrying a penalty of more than six months and there is a substantiated risk of reoffending (based on the assessment of certain facts) with

no grounding for PTD considering the circumstances, two prosecutors were convinced that a risk of reoffending would also apply without a prior conviction because of an offence against the same/a similar right according to §173 (2)/3**a** CCP. The cited regulation requires two central aspects to be fulfilled when applying this definition of the risk of reoffending. On the one hand, that the offence in question is considered a severe one. On the other hand, that there is a substantial risk - assumed because of "certain facts" - that the suspect carries out the same/a similar offence with severe consequences. Both prosecutors argued that the offence must be considered a severe one, since the legislator only recently stressed the damnability of burglary into homes on principle, and because the burglary was carried out during the night, accepting the possibility to meet someone in the house, and finally because the way the burglary was carried out also suggests a quite professional approach (using a glass cutter). In their view, the prognosis is bad because of the way the burglary was carried out, suggesting a "high criminal energy".

With these explanations, they contradicted their colleagues and the judges who denied these arguments, arguing the following: The legislator particularly condemned burglary into homes allowing for a more severe sanction, but this does not qualify for assuming severe consequences just because of this offence. According to the law, a damage of € 3.000,- is not considered severe consequences. One might think of considering the use of a glass cutter a hint towards making a living on burglaries – "professional" offending is threatened with a more severe sentence, which would support the assumption of severe consequences. Additionally, "professional" burglaries are considered to cause particularly high damage to the society (sozialer Störwert). They all, however, denied that a glass cutter just by itself would suffice to support this assumption.

10.1.4. Grounds for PTD – Risk of tampering with evidence

Discussing the vignette, the respondents regularly addressed the risk of tampering with evidence, referring to their regular approach when working on a case, which includes to consider the possibility of each ground for detention. They all agreed that the vignette gave no indications that there might be a risk of tampering with evidence.

10.1.5. Grounds for detention – Risk of absconding – The importance of a regular place of living in Austria

respect to an offence with severe consequences and directed against the same legal right as the one he/she is prosecuted for.

The vignette referring to the suspect living with his parents caused the vast majority of interview partners to not consider a risk of absconding unless there are other indications that the suspect would escape (e.g. if he tried to escape in the run of the apprehension). Considering cases in which the risk of reoffending would apply, some interview partners commented that this would suffice to keep the suspect in PTD, and then a possible risk of absconding would be of less interest.[33] A few prosecutors, however, asked for more information with respect to the regular place of living, the country of this place of living, and the integration of the suspect in Austria.

If the suspect would be a foreign national living with his family in Austria and therefore is assumingly integrated here, the respondents all agreed that no risk of absconding could apply, again, unless there is evidence that he would try to escape. Given this assumption, the nationality would not be considered. The criterion to be checked in this respect is the question whether this person is sufficiently attached to Austria, to family here, possibly to a work place, etc. If this attachment exists, it would be a hard thing to leave behind when absconding.

Quite controversial were the responses considering the possibility that the regular place of living is outside Austria, even if this is in another EU member state. In fact, there is a divide between those who consider a regular place of living in another EU member state equivalent to a place of living in Austria, and others who questioned this or tended to order PTD (also) because of a risk of absconding. Regularly, a ruling of the Supreme Court has been addressed, which explicitly declared regular places of living in other EU member states as equivalent. Obviously, many practitioners nevertheless assume a risk of absconding with EU nationals, arguing that most times the regular place of living cannot be proven sufficiently. In this context, it was mentioned that several countries do not have a central registration system, like Austria does. In practice, this ruling may have limited meaning, because most often the risk of reoffending is also applied with foreigners, often in combination with the risk of absconding. The problem for practitioners becomes visible in the following citation of a judge:

> *"In practice, it unfortunately is a little bit different. Not everyone with a registered place of living in an EU member state lives there. It is fine to say that he has a registered place of living, but in practice when I try to bring him to court he regularly will not be there. That is an assumption that is based on*

[33] The file analysis also showed that the rsik of reoffending is the ground of detention most often applied (around 90%). In practice, most often a risk of reoffending is assumed, combined with a risk of absconding with foreigners.

experience. Still, in fact I cannot argue this way and I cannot base a risk of absconding on this." (Judge 6)

The final argument of this judge has been found in several interviews with judges and prosecutors.

Others, however, state to apply PTD in such cases, and a few add that this would not be any different for homeless Austrian nationals, who cannot prove a regular place of living. The latter was often explained to comply with the law because the formulation of the risk of absconding according to §173 (1) CCP does not require concrete signs that someone will escape. It is sufficient if the expected sentence and other circumstances can be viewed as an incentive to abscond. In fact, only two interview partners (a judge and a prosecutor) questioned the assumption that the expected sentence would be sufficient to assume an incentive to abscond (they also questioned the proportionality of PTD considering the expected sentence). Some prosecutors applying the risk of absconding in such cases explicitly referred to procedural aspects*:*

"With a suspect not socially integrated in Austria, often the risk of absconding applies, and with those it is also hard to substitute PTD. ..... (also with EU-nationals), despite possibilities to transfer prosecution and similar cooperation agreements it does make a difference if a suspect can be brought in front of the court by the police if he does not appear there himself. Doing this via legal and administrative assistance in other countries is much more troublesome. ..... Especially during the first 48 hours we can hardly control whether a reported place of living is real, or if he does only name some place. This happens from time to time. Naturally, if he does not have a place of living within the EU this is even more reason to apply the risk of absconding, because the cooperation with authorities in other countries is often even more difficult." (Prosecutor 1)

The assumed cooperation with authorities in other EU-countries obviously is an aspect often considered. It appears that, for instance, a German national may have rather good chances to be released, because in some interviews the cooperation with German authorities is assumed to work well.

The last sentence in the citation above expresses an often-observed approach: Third country nationals have an even higher risk to undergo PTD because of the risk of absconding. While there were some interview partners who assumed that, for instance, refugees or asylum seekers would most of the time not fulfil the requirement of a regular place of living and would often be viewed as not sufficiently integrated, a few others were opposed

to this view. According to the following quote there often would be no need to assume a risk of absconding with asylum seekers living here in a legally acknowledged shelter:

> *"..... he came (to Austria) just because of the reason that he does not want to escape anymore."* (Judge 14).

Another added:

> *"....., where should he go. I don't believe that a refugee would go back to war zones where he came from because of such a prosecution nor that he would want to live as a 'submarine', meaning that he would lose all (legal) options."* (Prosecutor 4)

10.1.6. Considering the possibility of a drug-related offence

During the discussion of the vignette we also asked whether it would make any difference if the offence would be a drug-related offence. While a few expressed the view that this does not make any difference at all, most respondents pointed at differences. A few statements indicated that the motivation of a drug addict could reduce the element of "enrichment", the majority of responses referred to the possibility that a drug addiction would often support the assumption that the suspect finances his addiction this way and that there is a risk of reoffending. On the other hand, it was often stated that there might be a good chance for release with a less severe measure if the suspect agrees to attend a therapy. A few respondents remarked that a drug addict may have a slightly better chance to be released on noncustodial alternatives, including a therapy, because in these circumstances a therapy is an option to reduce the risk of reoffending. One response referred to the likelihood that a drug addict might also go free after a conviction because of an application of the option "therapy instead of punishment". In these cases it may appear recommendable to start the therapy right away, abstaining from PTD. For other cases with a risk of reoffending, the substitution of PTD was explained to be more difficult.

10.1.7. Alternatives/Less severe measures

It seems quite symptomatic for the use of noncustodial alternatives to PTD in Austria that only a few interview partners addressed this option by themselves while the vignette was being discussed. Alternatives to PTD are not often used with adults in general in Austria. When alternatives to PTD are addressed by the interviewer, public prosecutors often responded in a way that indicated that alternatives to PTD are primarily an option to be considered by others or a responsibility of others (defence counsel and judges). The law defines the assessment of options in this respect also as part of the tasks of the prosecution.

When asked about the possibility to avoid PTD by using alternatives, interestingly, many respondents reacted by first stressing the difficulty to apply less severe measures if the suspect had a prior record of the same kind and if the risk of reoffending was the central ground for detention applied. If the prior record referred to another kind of offence, they regarded the use of alternatives as being less difficult. This appears somewhat contradictory, because in the latter case most of the interview partners stated, during the discussion of the vignette, that PTD probably would not be ordered at all. What becomes clear here is the fact that according to the explanations of most judges and prosecutors, it is rather difficult to substitute the risk of reoffending with an alternative measure. Regularly, they explained that an alternative to PTD has to reduce the ground for detention applied. For the substitution of PTD in case of the risk of reoffending, options are explained to be rather restricted. With the case vignette, we identify one of the probably central reasons for the little use of alternatives: The ground for detention applied in most cases is the risk of reoffending. If prosecutors and judges assess that this risk is very difficult to be prevented with noncustodial alternatives to PTD, the use of alternatives understandably is quite limited.

The alternative most practitioners deem useful to tackle the problem of reoffending is an order to take up employment. Often, they report to observe a lack of money to be the central reason for burglaries and similar offences. Employment would not only reduce the time to get "stupid ideas" it would also provide the needed money. In practice, this is often difficult, because the suspects have no connection to the labour market. Dependent on the overall assessment of the suspect and his (social) situation, orders to seek employment and to provide proof about this are also used. Some of the respondents, however, stressed that they would critically assess proves of employment, because it sometimes appears questionable that a suspect who has not worked in a long time all of a sudden provides proof of employment.

Other less severe measures that were suggested a few times to possibly be applied in this case, also in combination with proof of employment, were preliminary probation and the order to remain living with the parents. The judges, again, stressed the importance of the personal impression of the suspect, whether he shows readiness to take over responsibility for the offence and his overall social situation when assessing the option of less severe measures. A few respondents denied the application of less severe measures in the case of a similar prior offence on principle, stressing that the suspect had not learned his lesson with the conditional sentence. A position also presented in this respect referred to the practice to carry out the trial within a very short period of time, which would serve the

procedure as well as the suspect better. Several times, preliminary probation was said to be no option if the suspect already was on probation before, because it obviously had not worked.

Judges and prosecutors expressing a readiness to apply noncustodial alternatives - even in the case of a previous similar offence, if the personal impression and the social situation would allow to do so and if appropriate orders can be identified - regularly assumed that this would most probably only happen at the first (after 14 days) or a subsequent detention hearing. At the first hearing of the suspect, and with respect to the initial decision on PTD, the needed proof for alternative measures most times could not be presented yet. Additionally, a few respondents said that the pain of detention experienced by then ("er hat das Haftübel verspürt") may be assumed to have an effect of specific deterrence on the suspect. This deterrence effect can reduce the risk of reoffending.

For the sake of completeness, we also asked what the chances for alternatives would be if the suspect was a foreign national and if the regular place of living (with the parents) was not in Austria. This would apparently reduce the chances considerably. As presented above, several respondents would assume a risk of absconding. If only the risk of absconding would be assumed, a financial security (bail – Kaution) would have to be applied. If, however a risk of reoffending would be assumed, chances for a foreign national not regularly living in Austria to be released on noncustodial alternatives appear very low.

10.2. The view of defence counsellors[34]

Defence counsellors mostly report to only get involved during the preparations for the first detention hearing (14 days after the initial decision on PTD). If they get hired early, for instance by relatives, and if they are then able to participate in the first interrogation by the judge, they say this will in general improve chances for release.

Interestingly, most of the respondents tend to first question the urgent suspicion. This probably is related to the observation that four out of six interview partners of this group state that chances to fight the grounds for detention generally would be rather slim. They add that there must be good reasons for fighting the suspicion. A video recording would not necessarily mean good and sufficient evidence. Experience has revealed that the quality of recordings often is not good enough to unquestionably identify persons. If a suspect is additionally able to provide an alibi, the suspicion will be sufficiently weakened.

[34] Altogether six interviews.

A particularly low chance to get the suspect out of prison and to succeed with complaints was assumed by the respondents in the case of the prior conviction being based on the same/a similar offence. Contradicting the judges and prosecutors of his district, a counsellor primarily active in a western Austrian district talked about indications with respect to a risk of reoffending which would trigger an automatism. He and three of his colleagues expected that the courts may even assume a risk of reoffending in the case of the prior conviction having been based on some other kind of offence.[35] On the one hand, they explained this by a tough approach by the courts on burglaries in private homes, and on the other hand, by the possibility to view the use of a glass cutter as well as the lack of income of the suspect as indicators for the assumption that the suspect wanted to earn a living on burglaries into homes.[36] Assuming such an approach by the courts, two of the interview partners expressed that they would definitely file a complaint in this case.

Considering that the regular place of living of the suspect would not be in Austria, all counsellors interviewed assumed that the courts would most probably apply a risk of absconding. Especially according to the experience of the counsellors in eastern regions of Austria, this would also happen if the place of living is within the European Union. Some, however, added that this may be dependent on the country of residency. Germany, for instance, or also Switzerland, might be countries judges and prosecutors view favourably in this respect, while Romania and other "new" member states may be viewed differently. If PTD would only be based on the risk of absconding, a financial security (bail-Kaution) should apply.

If PTD is ordered, counsellors would try to apply for the use of noncustodial alternatives in any case. In the case of a similar prior conviction, chances for the use of alternatives would be rather small but still worth a try, especially if the social circumstances can be shown to be favourable and especially if proof of a workplace can be provided. Some of the respondents said to get involved themselves in organizing less severe measures and the needed proof, primarily by getting in contact with the social environment of the suspect. Several statements in this context expressed the need for creativity to provide measures and proof that fit the ground(s) for detention. Apart from alternatives, it can also be important to convincingly show harm or disadvantages caused by detention, for instance children in need of care and supervision or the importance of the search for em-

[35] An option most of the judges and prosecutors actually denied in this case.

[36] Referring to §173 (2)/3**a** CCP

ployment to support a family. It was also stated that the prevention of the risk of absconding is easier to be substituted than the risk of reoffending. Mostly, it was assumed that chances for release would only be realistic after the first detention hearing (after 14 days), because the organization of alternatives and of proof in this respect would take some time. In any case, chances for release were described as very much dependent on the individual judge.

Rather good chances to get the suspect released on less severe measures were assumed by counsellors in the case of a drug related offence and with proof that the suspect would undergo a withdrawal therapy.

10.3. Central outcomes and conclusions

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

11. Final remarks and conclusions

The overall picture of the situation and practice of PTD in Austria reveals some aspects worthy of some more attention and discussion. While the research outcomes did not reveal “dreadful” observations, there nevertheless seems to be some potential for improvements which would serve the ultima ratio principle. One of the judges we talked to explained that PTD practice was also a matter of individual attitude. Because of this, it is of

central importance to repeatedly sharpen awareness about the severity of the infringement of fundamental rights by PTD.

One of the main developments and problems with respect to PTD is the considerable increase of foreign national detainees. Since 2001, the number of Austrian nationals in PTD has decreased by 45%, while the number of foreign nationals in PTD has increased by 64% (2015). Foreign nationals may not have a higher risk of detention per se. Certain groups of foreigners, however, appear at a higher risk than others: Offenders assumed to be "criminal tourists"; foreign nationals who are assumed to likely try avoiding trial and conviction based on assessments of a lack of social ties and of proven residency; foreign nationals (visibly) involved in drug dealing.

Austrian PTD practice is very much coined by preventive aspects. This is not least due to the rather detailed regulations with respect to the risk of reoffending as a ground for detention. These regulations and their practical application mirror societal concerns with respect to security. However, the domination of this ground for detention also appears grounded in the frequently provided explanation that it is a strong ground rather easily substantiated in many cases. This is not least due to the rather unfavourable (social) background of many offenders. In fact, this ground is also applied with rather minor offences involving assumed "criminal tourists" who are accused of property offences aiming at a regular income. Counsellors criticize the risk of reoffending to be applied too extensively. While the formal prerequisites may often be fulfilled, they said that evaluations of the real risk are hardly carried out, indicating that the principle of proportionality may not always be sufficiently considered. The so-called "criminal tourism" is an example which makes it clear that general preventive considerations do sometimes influence decisions on PTD, although they are not supposed to. Furthermore, while judges and prosecutors clearly stated that PTD may not be an anticipation of a punishment, some of them addressed the notion of "PTD teaching a lesson". Although this motivation is mainly driven by preventive concerns, it nevertheless appears close to a punitive motivation.

Securing the trial is a central and acknowledged ground legitimizing PTD. Connected to this, and sometimes problematic, is a motivation for PTD aiming at the efficiency of the proceedings. In such cases, again the principle of proportionality may be threatened. We have heard arguments that it may be possible to get a hold of a suspect in his home country with a European Arrest Warrant, but that this would cause delays and hassle. In view of delays of proceedings and of administrative difficulties, it appears tempting to rather keep suspects, who would not necessarily have to be detained, in custody. According to the Austrian Supreme Court, a regular place of living within the European Union is supposed to exclude the assumption that a suspect will abscond if there are no other indications this way. Austrian judges and prosecutors, however, do not uniformly share this view. Some

called this unrealistic, because in practice a regular place of living in the EU would often be hard to be ascertained and suspects may not be seizeable. Foreigners having no residency in and no social ties to Austria are regularly assumed to have a rather high risk of absconding. The rather precarious social situation and the (offending-) history of many of these suspects do not only ground a risk of reoffending but often also a risk of absconding.

While the term "foreigner" includes very different groups, we can assume that the characteristic "precarious social conditions" is true for many of them. Suspects who are socially integrated apparently have a better chance to avoid PTD, while others living in vulnerable conditions, engaging in criminal activities for poverty reasons, are increasingly given detention. Criminal law cannot solve social inequalities. The application of the criminal law, however, should try to avoid aggravating social inequalities.

Having a look at the partner countries in the DETOUR-project reveals considerable differences with respect to the grounds for detention most often applied. Despite a very similar legal tradition to Germany, for instance, the risk of reoffending plays a subordinated role there, while the risk of absconding is the ground for detention most often applied. Looking at the aspects which have been reported to be considered in the assessment of the grounds for detention in the partner countries, it appears that quite often these aspects are the same for the risk of absconding as well as for the risk of reoffending: Prior records, the seriousness of the charge, the expected sentence, a lack of work, a lack of income, a lack of social or family ties, and even a lack of residency may not only be used to ground a risk of absconding but also a risk of reoffending. In fact, the grounds for detention appear to be exchangeable to some extent. A few Austrian practitioners explained that a risk of reoffending may be the main ground for detention, even in cases in which a risk of absconding is considered the primary risk, because this ground ensures detention more strongly.

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

regularly said that the presented circumstances and the suggested alternative measures would not fulfil the requirements. With the predominant highlighting of flaws of alternative measures, PTD appears to present the "safe side". To some extent, the reservations with respect to alternative measures appear to be due to a lack of information on the suspect and on the conditions he/she is living in, as well as on suitable alternative measures. For juveniles, the court assistance (Gerichtshilfe) is a supportive measure providing such information. Maybe, a similar institute would also be helpful for adults.

In cases of PTD, suspects have to be represented by defence counsellors. At the first interrogations at the police and at the court before PTD is ordered, the suspect is entitled to have a counsellor present. In practice, this, however, is reported to be the exception. Apparently, there are still organizational problems in this respect, which should be solved. Suspects were, for instance, said to often be unsure about the costs of "first legal aid". Counsellors stress the importance of early representation for the suspect as well as for ensuring the standards of the rule of law.

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

Once PTD has been ordered it is likely to be continued. Repeals were reported to happen mostly if substantial changes concerning the suspicion or the grounds for detention are detected, which, reportedly, does not happen often. Attorneys criticize this practice, talking about an "automatism" of continuing PTD. Exchange of information on possibilities to apply alternative measures between counsellors and the judiciary as well as preparations in this respect were explained to mostly take place outside the courtroom between hearings. If the prosecution and the court agree on release on non-custodial measures, the release regularly takes places immediately and without a detention hearing. The detention hearings appear to be formal requirements, which are rarely concluded with a release of the suspect. Despite some critique and stated desires to increase their meaning, practitioners considered detention hearings important procedural events which not least highlight detention periods.

Efforts towards a speedy process in cases involving PTD were quite uniformly presented to be general practice. In this context, a few judges and prosecutors explained it would be better to realize a speedy process then to release a suspect who then has to return to prison to serve the sentence. This approach ignores the problems and negative effects of PTD. Attorneys particularly criticized the practice that suspects are often kept in PTD until the end of the trial, and then released after the verdict with a sentence adapted to the time spent in PTD.

The empirical outcomes create a rather harmonic picture of PTD practice in Austria, with applications of the prosecution mostly granted by the judges and little questioning of decisions. Complaints against PTD decisions are rather rare. Attorneys viewed this critically, however, they explained to only file complaints against PTD if there are good chances to succeed. Otherwise, the risks connected to a complaint would be too high. The prevailing PTD practice in the different districts, guided and strengthened by the rulings of the higher regional courts, would provide little chance for complaints questioning this practice. Apart from a control option, a tool serving a legal culture directed at a continuing development also remains seldom used. For instance, considering the rather wide discretion judges have, a more conflict-orientated approach seems recommendable for the development of the legal system as well as for the quality control.

Considering the increase of cross border cases, the European tools and recommendations as well as the rulings of the ECHR European dimensions were, quite surprisingly, rarely addressed in the interviews. The European Arrest Warrant (EAW) was described to work well by now. Cross-border cooperation was explained to especially work well with countries with traditionally close cooperation, like Germany. Mostly, cross-border cooperation was, however, explained to be rather cumbersome. All in all, major parts of cross-border cooperation in criminal matters - even within Europe - still appear to be far away from well-functioning routine procedures.

The scepticism towards major parts of cross-border cooperation also becomes visible with respect to the European Supervision Order (ESO). In fact, Austrian practitioners mostly have not heard about the ESO before. Some practitioners commented positively on this option. The prevalent reactions, however, were sceptical, quickly referring to administrative and bureaucratic burdens which would go along with the implementation. Furthermore, different standards within the European Union with respect to the judicial systems as well as with respect to supporting measures and their availability were concerns expressed. Close to a third of pre-trial detainees in Austria are EU-citizens. This means that, on principle, there should be some potential for release on alternative measures within Europe. In practice, not only will structures for cooperation be needed, but also trust in the cooperation and in standards fulfilled by measures provided in other member states.

11.1. Recommendations

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

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

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

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

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

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

- The detention hearings, which are run, conducted and scheduled by independent judges, are generally considered important procedural events. Nevertheless and again, without challenging the principle of judicial independence, often critique has been expressed pointing at a restriction of many hearings to formal qualities. The time pressure for the first decisions on detention often only allows for little information with respect to the assessment of possible alternative measures. At least at the detention hearings[37] such substantial information should be available, particularly if some assistance is employed. It would upgrade the detention hearings and strengthen the ultima ratio principle if the hearings would focus stronger on a possible release with decisions denying release being obliged to substantiate why alternative measures are not applied.

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

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

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