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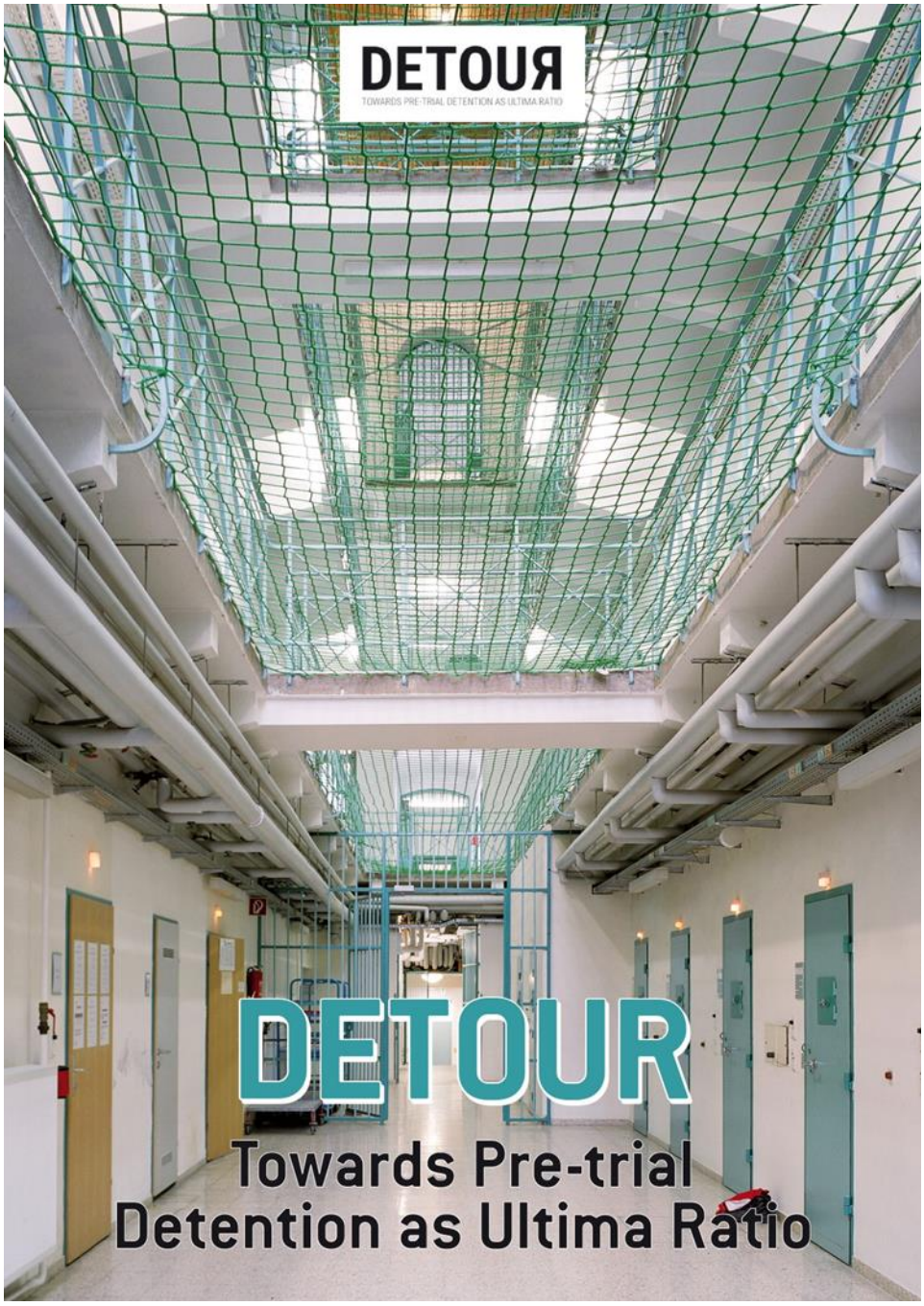

2nd *German* National Report on Expert Interviews

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1. Introduction

This report contains the **main findings of the empirical research** carried out in Germany within the framework of the project "Towards Pre-trial Detention as Ultima Ratio", funded by the European Commission. The legal basis for pre-trial detention - both domestically and on the European level – and a review of research, statistics and jurisprudence have been detailed in the **1st National Report**.[1]

In this **second report** we present our answers to the main question of this study - **"Is pre-trial detention in practice used as a means of last resort (*ultima ratio*) in Germany?"** It is based mainly on interviews carried out with professionals working in the field of pre-trial detention (PTD): with public prosecutors, judges and defence lawyers. These in-depth interviews addressed several aspects that represented the **project's secondary research questions**, such as:

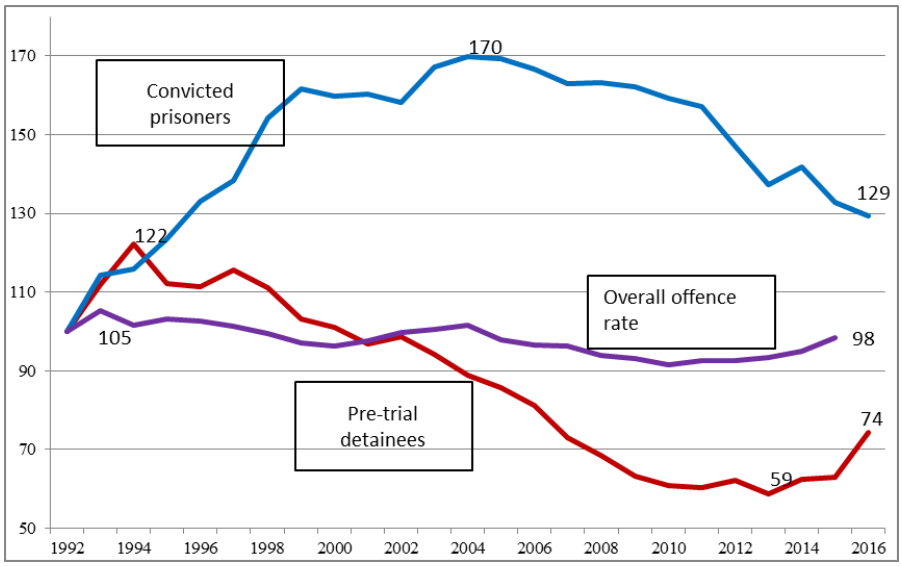
- How extensively is PTD used according to individual experience?
- What developments can be observed with respect to the use of PTD and alternatives and what factors appear to be relevant in this respect?
- What factors influence decision-making?
- Who plays what role in decision-making?
- Which procedures apply, are they suitable to avoid PTD to the largest extent possible?
- Are alternatives to PTD available and are they used? What are potential obstacles?
- If alternatives are used are there indications of net widening?
- Are there any groups who are treated differently and if so, which and in what respect?
- In how far do European aspects play a role for PTD practice and could cooperation within Europe or internationally help to avoid PTD?

Apart from our common starting points as represented by these secondary research questions, we were interested in some **German specifics**: As explained in more detail in the 1st National Report on Germany, for nearly 20 years the number of pre-trial detainees in Germany was decreasing significantly, leading to a **relatively low rate** of pre-trial prisoners (per 100.000 of the population) in a European comparison (14 in 2014, 16 in 2016). The early 1990s were marked by sharply increasing figures. While the overall number of detained persons almost continuously rose until 2004, peaking at about 81.000 detainees and reaching its low in March 2013 with 63.317, the number of

[1] http://www.irks.at/detour/DE%201st%20National%20report%20031116.pdf

remand prisoners hit a turning point already in the mid-1990s and descended slowly, but steadily until 2011. **Peaking in 1994 with about 21.700 remand prisoners, the number was halved twenty years later (31 August 2013: 10.560 as the lowest number since the reunification).** The share of pre-trial detainees then fell below 17%. **Since then, we find increases** – a moderate of 1,7% with regard to the overall numbers, **a more expressive one with regard to pre-trial detainees (31 March 2016: 13.389, representing an increase of 20,4% within three years).** The remand share now is 21%. As illustrated in fig. 1, crime trends can only be part of the explanation, as the sentenced prisoner rate developed differently.

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



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

No statistics for the share of pre-trial prisoners of all suspects are available, but the statistics on outcomes of procedures (*Strafverfolgungsstatistik*, literally. "Penal Law Enforcement Statistics") indicate how many persons getting a verdict by the courts. They also provide data for persons judged in a certain year who were in pre-trial detention. Although the relevant periods differ, at least for the purpose of a rough cross-sectional observation one can generate a rate from these two figures (pre-trial-rate). **In 2014 2,8% of all persons convicted or acquitted had been in pre-trial detention.**

Foreign suspects, however, could not profit from this development, both their share and their absolute number have increased and **they outnumber Germans in pre-trial detention** (2015: 55%). Moreover, within the last three years the overall number of pre-trial detainees rose significantly. These were the statistical starting points for our German interviews.

Additionally, we wanted to know how a relatively **recent reform, the mandatory assignment** of (state paid, if needed) defence lawyers once PTD is ordered, was assessed by our interview partners. A third particularity was the **traditional scarce use of alternatives** to PTD (suspension of the arrest warrants under conditions, see 1st National Report, p. 24 pp.) we were interested to discuss. Finally, we wanted to know whether our interview partners had particular complaints about procedural issues or reform ideas.

2. Methodology

2.1. Theoretical basis

The common **normative background** for PTD as a deprivation of liberty in Europe is the European Convention on Human Rights and its basic values and guarantees. They have their equivalents in domestic constitutional provisions or domestics statutes such as the codes of criminal procedure and are theorised in European and domestic legal studies.[2] These human rights related issues formed part of our theoretical basis as a **"rights-based" approach**, seen from the suspect's view and her/his right to liberty and personal freedom.

Criminologically our research approach is informed by **interactional theories**[3] that look at social constructions of deviant behaviour and the actors in these processes, namely the judicial personel (*Rechtsstab*).[4] With regard to organisational-psychological aspects we looked at research on the interaction within the "court room work group".[5] We also built upon ideas that the "process can be the punishment", or can be perceived as punishment by the defendant.[6] Finally, and in line with the human rights based approach, we took into account the research that established a **"procedual justice theory"** within criminology,[7] focussing on perceived **fairness** during the process.

[2] For Germany for example *Morgenstern* 2017; *Stuckenberg* 1999, further references can be found in the 1st National Report, p. 12 p.

[3] Labeling approach, *Becker*, Outsiders, 2nd edition 1973; for Germany and in particular critcal research on institutions *Sack* 1968, Neue Perspektiven in der Kriminologie, in: F. Sack & R. König (eds.), Kriminalsoziologie, 431-475

[4] *Max Weber* coined this term (*Weber*, Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie, 1922), and in this context we are interested in bureaucratisation and rationalisation of legal procedures.

[5] *Eisenstein* and *Jacob*, Felony Justice: An Organizational Analysis of Criminal Courts, 1977

[6] *Feeley*, The process is the Punishment, 1979

[7] *Tyler*, Why do people obey the law, 1990, 2nd edition with new afterword 2006

2.2. Research methods

2.2.1. A qualitative and comparative research design

During the preparation of the study we decided to use a **qualitative approach** for our study. Setting this course had two reasons: First, we could not expect to gather comprehensive and representative data within the given timeframe of two years and second, we feared a quantitative approach (for example an online or written survey) would be less flexible in a comparative study conducted in 7 (quite different) European jurisdictions.

Therefore, we opted for a **two-phase approach**: In an **explorative phase** we looked into a number of **files**, mainly to see how arrest warrants and other decisions on PTD actually look like, and we **observed** "detention hearings" to get an impression on how different actors influence the decision-making on pre-trail detention. The data gathered in this phase were not analysed as such but were **used to develop interview guidelines**. They are, however, sometimes used in this report to illustrate findings from the interviews. **In-depth interviews** in the second phase thus were the **core part of our research.**

Comparative empirical research needs particular preparation because its tools need to be adapted to **different legal and cultural circumstances** – in **Germany** for example with regard to the federal structure. Problems arise in particular from the fact that **different languages** (6 in our case) are used and many translation problems have to be solved throughout the project. The necessary ongoing discussions between the project partners on the one hand and the respective translation efforts by the researchers on the other hand offered the possibility (or rather: forced us) to **constantly reflect on content and methods of our study – an approach that is paradigmatic for qualitative research** and should, as we hope, provide for valid results. As an **innovative tool,** we developed and used a **case vignette** to be able to compare reactions to the same scenario by interview partners across countries (more on which below).[8] The elaboration of this vignette already was a task in itself as it needed to be an ordinary case, leaving enough room for different kinds of decisions, which would work in all jurisdictions.

2.2.2 Interview guidelines and the use of a case vignette

The interviews were conducted in accordance with a **set of guidelines** that were drafted as a result of our exploratory findings in permanent **mutual exchange** via au-

[8] For vignette methodolgy in a comparative criminological context see *Maguire* et al, European Journal of Probation 2015.

dio/video conferencing and e-mail. They were discussed at a Steering Group Meeting for the DETOUR project in Bucharest in September 2016; a final version was approved by all partners in October 2016. These guidelines provided the overall framework for questions but left enough flexibility when matters needed to be clarified; a participant directed the researchers towards a relevant topic or wanted to speak about particular experiences. They had to ensure that the **central questions would fit the different legal systems and that all partners will use the same set of questions**. **Adaptions**, however, were possible to cover specific **features of national systems**, it was therefore agreed that partners could amend or modify certain parts as long as the central dimensions were covered. We **ended with an open question** as to whether participants thought we had forgotten important points or whether they had recommendations. Some interview partners had aspects to add – which were very diverse – but most did not.

The dimensions captured were:

1. The national system and the practice/development of PTD in general
2. Grounds for detention (covering the legal grounds)
3. Factors relevant for decision-making on PTD (covering factual aspects)
4. Less severe measures substituting PTD and alternatives for the execution of PTD
5. The actors - Roles, tasks and performance
6. Procedural aspects
7. Legal safeguards, review of PTD and legal remedies
8. European aspects, incl. cooperation within the EU
9. Reactions to the case vignette (a burglary scenario)
10. Reform aspects and recommendations

The **case vignette** mentioned above was used either in the beginning or the end of the interview. Such a concrete case scenario enabled us to compare reactions of our interview partners not only in general terms but related to specific decisions in a specific burglary case that was regarded as example for everyday practice in all countries. In the **German interviews, we started with the vignette**, which was helpful to immediately dive into the subject (see for more details below 10). Before starting the actual series of interviews, a **test interview** was conducted with a public prosecutor in November 2016 to check for an adequate length of the interview, the tangibility of questions and the appropriateness of the case vignette and to find a good concluding question for the interview. Not much had to be changed after this test.

2.2.4. Ethical issues and data protection

Interviews were digitally audio-recorded with the participants' consent. Three interviews were not recorded; one because it was conduced in a café and the background noise was problematic. Two others were conducted in a prison and it would have been difficult to get the allowance to bring a mobile phone for recording. The interviews therefore were transcribed by hand as completely as possible. Participants were assigned a participant number to safeguard confidentiality. Interviews were transcribed and de-identified to remove any features e.g. location, nature of work etc which might identify a person. Any identifying information about cases was also removed.

2.3. Conducting the research

2.3.1. The first steps: file analysis and observation

For the **file analysis planned** we had asked for **closed files** from cases of the years 2015 and/or 2016 in which arrest warrants had been issued against the defendants and these arrest warrants had been challenged (regardless if successful or not). We approached three public prosecution Agencies in Berlin and Mecklenburg-Vorpommern, but received a positive answer only from one. Because of these severe access problems (more on which below) we were able to look only into **9 files covering 14 suspects**. These files partly were voluminous and covered offences from shoplifting to attempted murder. They were all from the same region but different practitioners were involved. We therefore only caught a glimpse of file practice. This glimpse, however, corresponded to older research: the arrest warrants were short and often crude and formulaic. We were able to study the files in our office, so we could write notes directly on the computer into a **matrix (developed with and used by all project partners).**

We were also able to observe **22 different "detention hearings",** some of which were first hearings in an ordinary procedure, some were hearings in a specific speedy procedure and some were review hearings. With the consent of all persons (facilitated by the judges without problems) we took **fieldnotes in the hearings (using a matrix developed with and used by all project partners)** and later transcribed them and stored them electronically.

2.3.2. Access and recruitment for interviews

Overall, access was more or less **difficult** in the different regions. In the explorative phase we had to apply for access both to files and to detention hearings (they are not public in Germany), which was problematic since in **different Federal States** different authorities are competent for different parts of the judicial system.

In the relevant application letters with our data protection concepts we had already explained that we were additionally **looking for interview partners**. In Mecklenburg-Vorpommern this resulted in two courts and one PP Agency not only approving the two exploratory steps but also providing names of practitioners to contact for interviews. One public prosecution Agency, however, did not react at all within the period foreseen.

In Berlin the initial establishment of contact to judges using the official way (via the High Court) was cumbersome, but once provided with individual names of judges and their telephone numbers appointments were easily made. Access to the public prosecution Agency, in contrast, was very difficult; while in principle our research was approved, the Agency categorically excluded to help with making contact to potential interview partners and hampered the fieldwork since the individual interview (once found) partners had again to ask for allowance to speak with us (despite the general approval already existing). We had to take recourse to personal contacts who then communicated our search to others. One contact was made in the observation phase. We tried to make an appointment with the director of one of the prisons in Berlin where pre-trial detainees are accommodated (partly because we had heard of overcrowding there) but were denied access for that purpose by the institution responsible for organizing and facilitating research (*Kriminologischer Dienst Berlin*).

In the other regions contacts were based on earlier professional exchange, one judge was contacted via a professional organisation. He himself was so kind to ask for the necessary approval for the interview by his superiors (superiors exist for judges only for this kind of administrative matters), so we avoided the usual lengthy procedure.

Access to defence lawyers was less formalised and therefore easier in all regions, we found many interview partners by contacting a professional association, others we contacted because they had published on PTD or we had met them during conferences. All of them in principle agreed on being interviewed, on a few cases no appointment could be made due to other commitments and timing problems.

2.3.3 The sample

Interviews were conducted with **33 individuals** (see appendix 1) between November 2016 and September 2017. 21 interviewees were male and 12 female. 18 of those interviewed work in Berlin, 2 in Hamburg, 5 work in North-Rhine-Westphalia and 8 in Mecklenburg-Wester Pomerania (Mecklenburg-Vorpommern, MV). While we tried to cover different parts of Germany, and managed to include a rather rural region with very few foreigners (MV) and the biggest city Berlin, where many foreigners live or stay, we cannot claim to have covered for example the north-south divide sometimes described in

regional analyses. The limited **regional distribution** means that it is difficult to make general statements for Germany.

We interviewed **12 judges** (5 of them work exclusively investigation judges), **10 defence lawyers** and **8 public prosecutors**. **3 interviews** were conducted **in a prison** with the prison director, a prison governor responsible for PTD and a prison social worker from a project "Avoiding detention" ("Haftvermeidungprojekt"); the project with a specific aim to avoid or rather shorten PTD is unique in Germany, this is why we chose the respective prison. It should be noted that probation officers do not play a role for PTD decision-making in Germany, nor do other institutions of criminal justice social work (with the exception of court aid for juveniles, but since we did not cover specific questions of the juvenile justice system, they were not important for our study).

In general, we talked to **very experienced practitioners**, only one was an absolute beginner (with a working experience of less than three months). 4 judges, 7 lawyers and 5 public prosecutors were working in their professions for more than 15 years, some of them nearly 30 years. While in the judicial professions some had worked in other roles, they all were involved in questions of PTD decision-making.

The interview partners had **different fields of work** – while most of them dealt with everyday street crime, some were responsible for very serious cases or exclusively had to do with drug-related crimes. Some of the lawyers interviewed were used to work with complex economic crimes and therefore had to do with a very different clientele. Our impression was that many of the interview partners, in particular triggered by the vignette, had typical cases in mind when answering – these typical cases varied accordingly and may have influenced the interview as a whole.

2.3.4. Reflections on interviewing

The majority of the interviews **took place at the workplace of the participants**. They lasted between **45 and 90 minutes**, most of them around one hour, all of them were conducted by the principal investigator, *Christine Morgenstern*. Despite the sometimes problematic access that showed also some reluctance from the interview partners (either because they were overworked or because they were not sure what to expect), all interviews were **very open** and usually the interview partners showed a lot of **interest in the questions**, sometimes serious discussions with a lot of personal engagement developed. Only in a few instances, we had the impression that the answers were formalised or the respondents tried to avoid to give their personal opinion (for example saying "some judges say this" or "one should do that").

The **interviews had a dual nature** – first, they were **expert** interviews in the sense that we wanted to learn about specific practices or rules and needed explanations to understand these mechanisms. Secondly, however, we tried to elicit **personal assessments, attitudes and values**. To avoid being simply instructed about the legal prerequisites and also to be open about the scientific background of the main researcher, she introduced herself and the project and included that she had worked for a long time on PTD. This, according to our impression, was helpful to conduct the interviews "on par" with the practitioners and elicited honest and elaborate answers. It is, however, not a typical situation for qualitative interviews and bears a certain risk of bias, perhaps neglecting aspects or asking in a suggestive way **"among peers".**

Three workshops with practitioners we organized in Berlin, Brussels and Vienna also helped to interpret first results we had received from our fieldwork – in the German case in particular during the workshop in Berlin in April 2016 where we got feedback from German participants (mainly lawyers) that fed back to our interview guidelines.

2.4. Data Analysis

Interviews were **transcribed** by the research assistant of the Project, *Eva Tanz*. The transcription is transcribed *verbatim* but does not contain pauses, interjections and only in significant cases laughter is indicated, the recorded oral speech therefore is adjusted slightly (*geglättet*) to provide for a coherent and understandable written text. The transcripts were coded by the researcher and the research assistant. Themes arising and the application of codes were discussed between them. Codes were re-analysed to group together in themes (for the German codelist see appendix 2). The coherence of coding was doublechecked with searches for specific keywords in the coded material. A **thematic analysis** was employed, with the structure of the questions guiding the analysis, but also allowing themes to emerge from the data. **F4 software** was used for coding and analysis. Research reflections, fieldnotes and memos are kept as part of the recorded data.

2.5. Presenting the data

The overarching themes from the data are reported on in the following sections. We use and present fairly many **direct quotes** (in italics) from the interviews to enable all colleagues to use them for comparative purposes.[9] We were not able to translate all the interview material, but **translated these quotes** we thought to be exemplary and/or

[9] In this report, the German original is included in footnotes to enable the German-speaking colleagues to see and work with the original text.

illustrative. Here we had the problem of **colloquial speech** that is hard to translate and, if translated very close to the original, perhaps not understandable. We therefore tried to stick to the original words as far as possible but sometimes adapted German colloquialisms or tried to find English equivalents to keep the subtext and informal aspect of the communication.

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

3.1. Development over time

Since we interviewed many very experienced practitioners, many of our respondents were aware of the **decline of prison numbers in the last two decades** (see for more details the 1st National Report, p. 13 pp.). Only a few times, however, explanations were sought for this general development – one lawyer assumed that the **sensitivity for the suspects' rights has increased,** another that it had to do with a **younger generation of judges** being more liberal (even if both still thought that detention was ordered too often):

> *"I do have the impression that the readiness to issue arrest warrants among courts is reduced significantly, and also the readiness to suspend arrest warrants in situations where a trial has led to a conviction to perhaps even four or five years [and this decision has been appealed], has increased. […] There I think the judges are somewhat more sensitive today, […]."*[10] (32, lawyer, 39, in a similar direction 12, lawyer, 131 who said that this positive development stopped two years ago; sceptical but with the same tendency as regards younger judges 5, lawyer, 145 and 9, lawyer, 120)

Most respondents were unaware of **significantly increasing numbers of pre-trial detainees in the last three years,** obviously because this did not influence their day-to-day work. Some lawyers, however, when asked for recent developments referred to a harsher practice towards certain groups of migrants (for example 26, lawyer, 130; 12, lawyer, 130; for more details below 3.3 and 4.2.6). In particular those interviewed in prison confirmed this and reported significant changes and even overcrowding that had been unknown for several years:

[10] *„Ich habe schon den Eindruck, dass unter den Gerichten heute die Bereitschaft Haftbefehle zu erlassen, auch schon signifikant zurück gegangen ist, und auch die Bereitschaft zum Beispiel in Situationen, wo also eine Hauptverhandlung mit einem Urteil ausgegangen ist, vielleicht sogar mit einer Freiheitsstrafe von vier, fünf Jahren, dann Haftbefehle außer Vollzug zu setzten, dass das gewachsen ist. […] Da glaube ich sind die Richter schon etwas sensibler heute […]."*

„I think there is a shift in paradigms for the last 3 to 4 years. I think the pre-trial detention law is applied more harshly."[11] (25, prison social worker, 6; confirming 27, prison director, 14; referring to overcrowding in prisons in another region 12, lawyer, 13)

3.2. Current incidents and their influence on the penal climate

Some incidents in the recent past played an important role in many interviews. The **"Cologne incidents"** on New Year's Eve 2015 were extensively covered by the German and even discussed in international media.[12] During the 2015/2016 New Year's Eve celebrations, mass sexual assaults and numerous thefts were reported in several German cities, mainly in the city centre of Cologne. Suspects were mainly North-African man, often asylum seekers, and later, referring to another incident, dubbed by the police in a tweet "*Nafris*" (which stands for "North African" but perhaps also for "*Nordafrikanische Intensivtäter*", North African Repeat Offender). Linked to the "refugee crisis", meaning the many asylum seekers coming, among others, from these countries, the incidents sparked a public outcry and are a recurrent theme in German (criminal) politics ever since. Also in our interviews "*Köln*" and "*Nafris*" were frequently used as cyphers, mainly to explain a harsher penal climate (see above 3.3. and below 4.2.6.), as a lawyer put it concisely:

"Reason to detain? Nafri!"[13] (26, lawyer, 133).

Another incident was repeatedly commented on and in many interviews served as illustration for **increasing media pressure on justice personnel**, mainly on judges: In **a case of 2011**, a 17-year-old had brutally and without reason beaten up a man that suffered severe injuries. The attack was captured on CCTV and shown over and again in the media, particularly in the internet, the public outrage was enormous. The judge responsible did not issue an arrest warrant because he could not see a ground for detention – the suspect had confessed and lived with his parents. He found himself (pixelated, but recognizable) on the front page of the local issue of the notorious *Bild-Zeitung*, the biggest tabloid in Germany, and was insulted as "*Gutmensch*" ("do-gooder"), with the newspapers commentator arguing that these kind of decision may well lead to people taking the law into their own hands.[14] A second judge came under **similar attack** by the

[11] *„Ich denke, das ist so ein Paradigmenwechsel seit 3 bis 4 Jahren. Das U-Haft-Recht wird faktisch schärfer angewandt."*

[12] They even have their own wikipedia-entry not only in the German but also in the English version: https://en.wikipedia.org/wiki/New_Year%27s_Eve_sexual_assaults_in_Germany (accessed 31 October 2017).

[13] *"Haftgrund? Nafri!"*

[14] See for more details Morgenstern 2017.

media in autumn 2012, again after a brutal and out-of-the blue assault of passers-by in Berlin, when he suspended the arrest warrant for one of the suspects, again with his picture shown in media outlets.

The way the **judges were personally affronted** not only by tabloid media, but also – even if it was in a more civilized tone – by quality media and finally also politicians was taken seriously by many of our respondents (of all regions) and **left a bitter impression not only on the judges but on the whole group of professionals:**

> *"I also have the feeling, it's a shame, that the press plays a big role. I think that no judge [is unimpressed], this has actually happened several times in Berlin, 'this judge has let him out' with picture on the title, not even pixelated. This really is very ugly, I think."*[15] (12, lawyer, 131)

It also became clear that **targets of local criminal policy change** and these changes might influence the practice of PTD. In Berlin for example, several interview partners referred to certain hot spots where mostly African men sell drugs – hardly having a chance of avoiding PTD (21, PP, 72 and 225; similar 8, PP, 161, see more below 4.2.6).

3.3. Constitutional safeguards and basic principles

As explained in our 1st National Report in some detail (p. 6 pp) **constitutional guarantees and human rights aspects** were very important to shape the legal prerequisites for PTD and have been constantly strengthened by high court jurisprudence and particularly by decisions of the Federal Constitutional Court.

These fundamental guarantees, namely the presumption of innocence, the ultima ratio and the proportionality principle, **played a minor role in the interviews**. We did not explicitly ask for them but had – at least in German case as they for example play an important role in the university education of lawyers - expected that they would be used to explain certain practices by our interview partners. While this reservation in a way was welcome because it showed that the interview partners did not try to hide behind grand - but sometimes vague – ideas and ideals, it nevertheless was slightly surprising that for example the 'presumption of innocence' as basic principle and often used buzzword was hardly ever mentioned. If the **presumption of innocence** was mentioned at all, it was meant to illustrate a restrictive practice, either claimed for the respondent him- or herself:

[15] *"[…] ich habe auch das Gefühl, leider Gottes, das auch […] die Presse eine große Bedeutung hat. Ich glaube das kein Richter [unbeeindruckt bleibt], ist ja in Berlin öfter passiert "Dieser Richter hat den so und so rausgelassen" mit unverpixeltem Titelbild. Das ist schon sehr hässlich finde ich."*

> *„I am rather reluctant. I think detention is a very serious decision. And a serious interference with a person's life. We have the presumption of innocence, the arrest warrant interferes with it, and this is why the detention decision is the last one you have to take."16* (17, judge, 174; similar, with reference to the necessary speedy procedure 29, judge, 163)

or, in contrast, missed by a defence lawyer:

> *"This sensitivity, that you factually take a measure, the toughest measure that can be used against someone who has still the presumption on his side; this feeling I do miss."*[17] (30, lawyer, 184)

Only one interview partner used it with a more specific - and very interesting - focus when reflecting on non-custodial alternatives:

> *"You just have to see that many of the conditions that request a lot from people, would violate the presumption of innocence, if you inflict too many restrictions on them."*[18] (24, lawyer, 104)

In addition, the **principle of 'ultima ratio'** was mentioned every now and then. One judge, for example, explained how she always tried to take the time needed to decide:

> *"I decide upon something that is an ultima ratio, a deprivation of liberty, and I have the responsibility for this decision in the end."*[19] (22, judge, 23)

Despite this lack of explicit mentioning of the basic principles in particular **proportionality considerations did play a role and formed the underlying context of many statements**, for example with regard to length of proceedings or with regard to the expected sentence (see for more details sec. 4.2. and 5.2). This is illustrated for example by the statement of a public prosecutor referring to the education and training of young practitioners with regard to PTD:

> *"I think that only this question of reasons to detain makes it clear for many [legal trainees] what responsibility they will have to take when they start their working life. And if they are good, they will understand why we have this system, why we have the division of power, why a state claims he can lock up others, fellow citizens, and what particular task it is*

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[16] *„Ich bin eher zurückhaltend. Ich halte die Haft für eine sehr schwerwiegende Entscheidung. Und einen starken Eingriff in die Lebensführung eines Menschen. Wir haben eine Unschuldsvermutung, der Haftbefehl greift ein, deswegen ist die Haftentscheidung die letzte, die man da zu treffen hat."*

[17] *"Dieses Gefühl, dass man ja eigentlich eine Maßnahme, die härteste Maßnahme ergreift, die gegen einen für den noch die Unschuldsvermutung gilt eingesetzt werden kann, also dieses Gefühl vermisse ich schon."*

[18] *„Man muss ja auch mal sehen, dass Vieles an Auflagen, das von den Leuten was verlangt, gegen die Unschuldsvermutung verstoßen würde, wenn man denen zu viele Beschränkungen auferlegt."*

[19] *„[…] ich entscheide etwas über was eine ultima ratio ist, nämlich eine Freiheitsentziehung, und ich habe dafür am Ende die Verantwortung."*

to care for them in pre-trial detention or later when they serve they sentence."[20] (19, PP, 243)

3.4. Personal attitudes and developments

We asked our interview partners how they would **assess their own practice** (and suggested labels such as 'hardliner', in German we used "*harter Hund*", or 'a liberal', 'excessive' or 'restrictive') and whether their practice had changed. Some avoided a clear statement (as we had expected) but some were quite open. Probably more of them who actually answered the question thought of themselves as **being tough** or strict. Interestingly, **in some cases this was not reflected in their decision-making in the vignette** (for example 2, PP, 230 and 31, judge, 180). Others referred to certain groups of cases where they thought they are 'hardliners', in particular cases of particular brutality (for example 29, judge, 135). Others thought of themselves as liberal, in particular when they mentioned situations in which they were criticised (14, judge, 184).

Some also reflected their **personal development**, often explaining (contrary to the thought that younger judges and PP were more liberal) that they have become "milder" with more experience (7, judge, 101, see quote below), or, as one judge put it, stricter in actually applying the legal safeguards (14, judge, 182). One PP explained that she resisted pressure from the outside better since she was more experienced (23, PP, 137).

A problem that became evident in several contexts to be the detachment of the ongoing process for many public prosecutors and also those judges only involved in the pre-trial phase (see also below). They only had a **feedback** on how things worked out when they actively asked for it – some conceded this problem (4, judge, 274; 7, judge, 201-204), some told us that they indeed tried to get feedback with regard to the development in interesting cases (4, lawyer, 113; 10, judge, 109; 15, judge, 209, the latter two said that mostly they get negative feedback when something did not work out as planned). One judge mentioned beneficial events where general feedback and **professional exchange** was possible:

„My practice has changed. Ten years ago I was the toughest here… But during training events and conferences, contact to defence lawyers and their impressions of me and other detention judges, the stories behind their clients that they sometimes could not tell properly – that is im-

[20] *„Ich finde nämlich gerade an dieser Frage der Haftgründe und dann auch der Verhältnismäßigkeit wird eigentlich vielen erst deutlich, mit welcher Verantwortung sie konfrontiert werden, wenn sie im Berufsleben sind. Und wenn sie gut sind, dann erkennen sie eben auch, warum wir dieses System haben, warum wir die Gewaltenteilung haben, warum sich ein Staat anmaßt andere, nämlich Mitbürger, zu verschließen und welche besondere Aufgabe es eigentlich auch für den Staat ist, sich dann in der U-Haft oder sich später dann in der Strafhaft sich um sie zu kümmern."*

portant, […]. That had great influence, I challenged my own work more, thought about some things…"[21] (7, judge, 101)

Lawyers were also quite critical about **missing feedback for the judges** and a certain 'deformation professionelle':

"One should not be investigating judge for too long, and also as a public prosecutor one never sees positive developments." [22] (24, lawyer, 74)

In this context one lawyer suggested that the **professional careers should be more permeable**, and that courts could partly consist of former lawyers or lawyers who for a certain time become judges, to make **changes in perspective** possible (32, lawyer, 230).

Apart from the missing personal feedback several interview partners also thought that it would be necessary to **collect comprehensive information** on the results of the proceedings **to compare them with earlier prognoses** of detention judges on the expected sentence, the risk of absconding and other issues. This kind of feedback was thought to be helpful in showing that these risks are systematically overrated and could lead to more courage of detention judges to decline requests for detention or to suspend arrest warrants.

3.5. Prison Issues

Prison issues were not part of the research questions, nevertheless they are of importance when the practice of PTD is **assessed generally**: As mentioned in our 1st National Report (p. 19) overcrowding in pre-trial prisons or wings has become an issue in some German regions in the last two or three years. It is also recognized for Germany that living conditions in PTD are worse than for sentenced prisoners for various reasons,

[21] *„Meine Praxis hat sich verändert. Ich war vor zehn Jahren noch der härteste hier, […] Aber auch natürlich durch die Fortbildungstätigkeiten, den ich entwickle, den Kontakt mit den Verteidigern, deren Schilderung, wie sie mich wahrgenommen haben, wie sie Haftrichter generell wahrnehmen, welche Geschichten sich hinter ihren Mandaten zum Teil versteck haben, die sie aber nicht darstellen konnten, oder denen es nicht gelungen ist, sie darzustellen…Individuelle Verstrickung, bis hin zum Unschuldigen, der also verurteilt wurde, rechtskräftig, aus ihrer Sicht unschuldig. Das ist schon, das spielt eine große Rolle, […] Aber das hat einen großen Einfluss, dadurch habe ich meine Arbeit ein bisschen mehr in Frage gestellt, auch mal über ein paar Sachen genauer drüber nachgedacht."*

[22] *„Jemand sollte nicht zu lange Ermittlungsrichter sein, und auch als Staatsanwalt sieht er ja keine positiven Entwicklungen."*

apart from the new over-occupancy problems with shared cells, namely because there is not much to do and they are often locked up most of the day in their cells.[23]

We did not ask for prison problems or other concerns regarding the factual detention enforcement. Nevertheless some interview partners referred to this kind of problems. Defense lawyers often do not care about the living situation of pre-trial prisoners – they are not well defended with regard to prison problems because lawyers focus on procedural issues (self-critical 32, lawyer, 225 who said that this is a *"field of work neglected by the defence"*). Another lawyer explained his practice of visiting the clients at least every two weeks but said that most other colleagues don't do the same (18, lawyer, 88) - indeed nobody else mentioned a similar approach.

3.5 Concerns and reform requests

We heard **no explicit requests for a general legislative reform**, rather suggestions for **some changes in detail** that would have to effected or facilitated by the legislator. When we asked for reform ideas in one case, we even got the passionate answer by one judge

> *"I sincerely wish that **the legislator does not mess around** with pre-trial detention!"*[24] (14, judge, 315 and repeated in 321).

Also from the answers by other practitioners we got several suggestions for single reform issues (namely earlier obligatory assignment of a defence lawyer, see more below 6.5), but even defense lawyers did not scandalize the current practice on the whole. Some also said that currently there is **no lobby for reform projects** (for example 1, lawyer, 25; see also the 1st National Report, p. 14).

In several interviews, however, we felt **frustration with lacking resources** that were also seen as a sign of **lacking appreciation** of judicial work: Three judges referred to the budgeting of the courts and public prosecution:

> *"[…] we just know that there will not be more money in the judicial budget […] it just shows the value the judiciary has."*[25] (13, judge, 326; 14, judge, 328; 15, judge, 178)

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[23] See for more details Morgenstern 2017; these findings were also confirmed by the prison staff interviewed who also said that they could often not separate sentenced from unsentenced prisoners as the law demands.

[24] *„Ich wünsche mir, dass der Gesetzgeber nicht daran rummacht."*

[25] *„[…] wir wissen doch, dass wir das nicht erreichen könne, dass mehr Geld in den Justizhaushalt gesteckt wird. […] es zeigt ja schon den Stellenwert, den die Justiz hat."*

Others argued similarly, but with a more practical focus. In particular missing equipment, dilapidated cells for suspects that had to wait for their hearing in the court building or the fact that the judiciary is waiting for several years now that electronic files are introduced were mentioned (for example 31, judge, 313). During a day of observations it was easy to notice that there was even a problem of transporting the paper files speedily from one office to the other unless the judges or PP did it themselves, often many heavy boxes of them.

Another resource-related issue was **missing institutional support by the court aid** that was mentioned several times with regard to **juveniles**, in two cases also better opportunities for closed accommodation that could help to avoid PTD was requested for them (for example 2, PP, 259).

Central outcomes 3

- Many of our respondents were aware of the decline of prison numbers in the last two decades but rarely explanations were sought for this development – suggestions referred to increased sensitivity for the suspects' rights or a younger generation of judges being more liberal.
- Most respondents were unaware of the recent growth of the number of pre-trial detainees. Some referred to a harsher practice towards certain groups of migrants or thought an increased pressure by media and politics contributed to this development.
- Specific recent incidents connected to an inflow of migrants were also sometimes made responsible for a harsher penal climate affecting also PTD practice.
- Several interview partners from all regions referred to cases where judges were personally affronted by the media and/or politicians, this clearly left a bitter impression on the whole group of professionals.
- With regard to personal attitudes and developments a lack of feedback and interprofessional exchange became evident.
- Prison issues were sometimes mentioned to illustrate the recent problems of PTD but interestingly also as a field that lacks awareness by defence lawyers.
- No major reform requests are obvious, but a lot of practical (and sometimes legal) problems need to be solved according to our interview partners. Several interview partners bemoan a lack of adequate resources; this lack is also seen as missing appreciation for judicial work.

4. The basis for decision-making: Legal grounds and factual motives

4.1. The legal grounds

4.1.1. Introductory remarks

As we have explained in our 1st National report (p. 8 pp.) Sec. 112 (1) of the German CCP holds **two cumulative prerequisites** for pre-trial detention: There needs to be a strong (literally an "urgent" or "exigent") **suspicion** ("dringender Tatverdacht") that the suspect committed the alleged offence, and there needs to be a **ground** to remand him or her ("Haftgrund").

Sec. 112-113 CCP list four of these grounds to order pre-trial detention:

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

Among these, ***the risk of absconding*** **is by far the most often applied,** accounting for 93% of all impositions of pre-trial detention in 2014, either standing alone or, less frequently, in combination with another ground (Annual Criminal Law Enforcement Statistics ["*Strafverfolgungsstatistik"*]). Slightly less then 8% of all PTD cases were those of the risk of tampering with evidence and only 6% were those of the risk of repetition. The last ground, the gravity of the offence, was applied only in very few cases (369 cases absolute).

4.1.2 Flight and the risk of absonding

Also in our sample, nearly **all respondents stated very clearly that the risk of flight is the ground for detention the most often applied by far** (nobody rejected this assumption but in some interviews this quantitative aspect did not come up; see for example interviews 1, lawyer; 2, PP; 3, PP; 4, judge; 5, lawyer; 6, PP; 7, judge; 10, judge; 11, PP; 18, lawyer; it was also confirmed by prison staff interviewed [interviews 25, 27 and 28]).

While the sec. 112 (1) CCP summarises the provisions as "Fluchtgefahr" (risk of flight), the exact wording includes the term "*sich verborgen halten*" (to go into hiding). This

usually is understood as any attempt to live within Germany in a way that makes it impossible for the authorities to find (and communicate, in particular to summon) a person. The **risk of absconding by definition of the current jurisprudence is a higher probability of the suspect staying away from the criminal procedure than of taking part in it.** Procedural theory demands that the justice professionals attribute possible obstacles and motivating factors for absconding to the defendant. This attribution – a **prognosis** - is supposed to rest upon professional expertise, but criminology, as the proper science, in fact does not supply any reliable findings on that.[26] In spite of that, legal-theoretical works provide a highly elaborated catalogue of requirements for an appropriate and thus lawful judicial prognosis for the individual's risk of absconding. This catalogue uses the numerous incentives and obstacles to abscondence such as interpersonal bonding (relationships, children), personality related criteria (illness, mental instability, behaviour in previous criminal procedures, contacts abroad) and offence related criteria (type of offence, expected sentence). It should therefore allow for a comprehensive check of the circumstances.

Research so far, however, showed that the justices professionals, in particular the courts, do not cope very well with these requirements as the *Haftrichter* focus regularly on **only very few criteria.** All empirical research (see for an overview 1st National Report, p. 29 pp.) paints a rather negative picture on the reasoning of local court decisions on pre-trial detention. This negative picture is backed by corresponding harsh criticism by the higher regional courts in review decisions (Interviews judge13 and 14 were conducted with two of these judges).

When reflecting the reasons for this **dominance of the "risk of flight"** some interview partners hinted at the legal construction that makes **the ground the easiest to operate.** Indeed the legal prerequisites for the risk of repetition are more elaborate (see below 4.1.2.) and the risk of tampering with evidence often is harder to prove factually. So this is why "in the end usually it then is the risk of absconding." (4, judge, 143; with a similar wording 9, lawyer, 47).[27] Apart from this we can also tentatively conclude that this is a **question of a certain legal culture or rather tradition**, as most respondents that did not reflect on the reasons of this dominance at all. Often they did not even mention explicitly what legal ground they usually use (or expect judges to use) because for them it seemed to be self-evident that – in particular with regard to our case example, see below section 10 – we would talk about the risk of absconding.

[26] For references please refer to the 1st National Report; with an up-to date study Wolf 2017.

[27] *"[…] meistens ist es dann eben doch die Fluchtgefahr", referring to the difficulties to substantiate the risk of repetition.*

With regard to the mentioned factors that motivate this ground of detention we got some operative definitions from our respondents without actually having explicitly asked for them. This illustrates the construction, the main motives relevant and the aim pursued by using this ground. One judge simply expressed the need for PTD emphasising the **legal aim of an arrest warrant**:

> *"So, it in first instance secures the trial and in second instance the execution of the sentence. This means,* ***when I have to fear that there will be no trial at all*** *with whatever result, I principally* ***have to keep him here****".*[28] (15, judge, 79)

A remark by a public prosecutor shows that therefore a ground for detention always has to be found, the risk of absconding being one, that *"one could then construct"* (23, PP, 27 referring to the case vignette).

Others reflected on the **problems of forecasting** certain behaviour

> *"With the risk of absconding it is a balance between the expected sentence*[29] *and the personal circumstances. I have to predict and this prognosis in the end cannot be checked. If I let him inside, we will never know if he absconded and if I let him out and he bunks off…. There are such cases, but not very often…"*[30] (10, judge, 146; comparably 13, judge, 258)

The dominance and the poor reflection of the factual risk of absconding consequently also **prompted criticism**, mainly by lawyers, who pointed to the **stress and financial burden of actually fleeing or living underground:**

> *"I think that maybe 10% of all people that actually are taken into custody because of a risk of flight would actually bunk off. The don't abscond, or many do not abscond. It is maybe a bit different if you have people that have families abroad in southern European, they of course can go to Kosovo or wherever. But most of the people do not go into hiding, because flight is an unbelievable stress. Financially, the fewest have the possibility really to go into hiding. You can imagine this on a lower level, living with*

[28] *„Also der dient ja in erster Linie erstmal zur Sicherung des Verfahrens. Und in zweiter Linie der Sicherung der Strafvollstreckung. Das heißt, wenn ich befürchten muss, dass es überhaupt nicht zu einer Verhandlung mit welchem Ergebnis auch immer kommt, muss ich denjenigen grundsätzlich eher hier behalten."*

[29] On this term "Straferwartung", see more below 4.2.1.

[30] *„Bei der Fluchtgefahr ist es eine Abwägung zwischen der Straferwartung und den persönlichen Verhältnissen. Ich muss eine Prognose stellen und diese Prognose ist letztendlich gar nicht überprüfbar. Wenn ich ihn drin lasse, werden wir nie wissen, ob er abgehauen wäre und wenn ich ihn rauslasse und er haut ab… Es gibt solche Fälle, aber nicht wahnsinnig oft… ."*

a pal, not escape like in a movie, but simply not being at home. But also this is permanent anxiety, most people don't stand this."[31] (5, lawyer, 116)

Critical remarks can also be found in several other interviews (for example 9, lawyer, 137 and 185; 20, lawyer, 153; more cautiously 6, PP, 241). As will also be seen when looking at the gravity of the offence (see below 4.1.5 and 4.2.1.), some practitioners that deal with more severe cases may have a **more relaxed or more liberal view** and compare the **risk of flight of "normal people" to that of certain groups of suspects, here referring to gangs and organised crime**:

"These are people that have possibilities that normal people don't have, connections to other organisations, they simply can hide out for two years, without their whole life going to pieces. […] Risk of absconding means a predominant probability that the suspect goes away from the place he is now. For the ordinary mortal usually does not have the financial means and also not the logistic competence to do such a thing. But who has such an organisation behind him, for example you belong to the 'Chapter XY' and you can easily be accommodated in Amsterdam or even further away, without being noticed, because you do not have to register, you do not have to look for work, […] you can just dive into the milieu, the way you have done it in Berlin, you can do it simply in Paris or Amsterdam ore wherever in the world. Surely this is a clear criterion, and this will rightly be considered."[32] (13, judge, 103, 107)

4.1.3. The risk of tampering with evidence (Verdunkelungsgefahr)

[31] *„Ich glaube, dass höchstens 10% der Leute, die wegen Fluchtgefahr in Haft genommen werden, wirklich abhauen würden. Die hauen nicht ab, oder viele hauen nicht ab. Ist vielleicht ein bisschen anders, wenn du Leute hast, welche die Großfamilien im südeuropäischen Ausland haben, die könnten dann natürlich in den Kosovo oder so wohin gehen. Aber die meisten Leute tauchen nicht unter, weil Flucht ein unglaublicher Stress ist. Finanziell haben die wenigstens die Möglichkeiten, wirklich abzutauchen. Man kann sich da ja auf einen niedrigeren Level vorstellen, dass man bei Kumpels wohnt und so, nicht auf der Flucht wie es im Film ist, sonder einfach nur nicht zu Hause ist. Aber auch das ist eine ständige Angst, ein ständiger Druck, das halten die meisten Leute gar nicht aus."*

[32] *„Das sind Leute die haben Gelegenheiten, die normale Menschen nicht haben, Verbindungen zu anderen Organisationen, die können einfach auch mal für zwei Jahre irgendwo untertauchen und weiterleben, ohne das ihr ganzes Leben in die Brüche geht. […] Fluchtgefahr bedeutet ja die überwiegende Wahrscheinlichkeit, dass sich jemand hier von dem Ort an dem er sich jetzt befindet entfernt. Für den normal sterblichen Menschen der hat in der Regel nicht die finanziellen Möglichkeiten und auch nicht die logistischen Kompetenzen so etwas zu machen. Wer aber so eine Organisation im Hintergrund hat, d.h. man gehört zum Chapter XY und man kann mal eben auch nach Amsterdam oder auch noch weiter weg untergebracht werden, ohne das man da sofort auffällt, weil man sich einfach nicht anmelden muss, man muss keine Arbeit suchen, […] man kann einfach ins Milieu eintauchen, so wie man das in Berlin gemacht hat, kann man das dann eben in Paris oder Amsterdam oder auch sonst wo auf der Welt. Klar ist das ein festes Kriterium, was auch mit Recht berücksichtigt wird."*

When on the basis of "certain facts" the accused's conduct gives rise to the strong suspicion that in freedom he would destroy, alter, remove, suppress, or falsify evidence; improperly influence the co-accused, witnesses, or experts; or cause others to do so (sec 112 (2) no. 3 a), b) or c) CCP), the judge may order an arrest warrant because of the risk of obscuring evidence. Our respondents agreed that this ground plays a small role in practice and regularly gave us only single examples for certain problems or groups where this ground would be used; most said that **in their practice it is "rare"** (for example 18, lawyer, 87; 19, PP, 150) or plays "no role" (2, PP, 143; 3, PP, 124; 4, judge, 137).

A special constellation mentioned in Berlin were some drug cases when the suspect had swallowed the drugs, and the public prosecution used this ground as "new tactic", but the judge who told us about it had doubts that this approach was lawful (4, judge 137). Others referred to particular milieus, namely with regard to organised and gang crimes, where witnesses could be threatened (10, judge, 76; 13, judge, 105; 14, judge 106). In our 1st National Report (p. 10) we mentioned that often this ground for detention is criticised in practice because the distinction between lawful defence and unlawful influencing witnesses or otherwise tampering with evidence. This thought was echoed in only one interview (30, lawyer, 39), when the lawyer interviewed said that in certain cases

> *"… when we [meaning his client] are silent, we have the risk of obscuring evidence; as long as we don't say anything, we have that."*[33] (30, lawyer, 75)

This remark perhaps is understandable as he often deals with cases of economic and tax crimes (30, lawyer, 75, 107-111) and the authorities fear that files or data could be destroyed.

4.1.4 The risk of repetition (Wiederholungsgefahr)

The risk of ***repeating or continuing an offence*** (sec. 112a CCP) has a strong preventive connotation and is, because it was **initially meant to be a ground for "unbearable" risks of repeated serious offences** only, harder to apply because **more legal restrictions exist** (see our 1st National report, p. 10 p.). The alleged offence must be committed "repeatedly or continually" (sec. 112a CCP), so one suspicion and one conviction before would not be enough. The offence in question also has to be one listed in that section 112a CCP.[34] This list has become long due to many amendments, but it still

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[33] *„Wenn wir schweigen, haben wir Verdunkelungsgefahr; so lange wir nichts sagen, haben wir die."*

[34] The suspicion must relate to a sex offence or stalking (174, 174a, 176 to 179, or pursuant to section 238 subsections (2) and (3) of the Criminal Code) or there must be a suspicion that the suspect has "repeatedly or continually committed a criminal offence which seriously undermines the legal order" such as terrorist offence, a violent assault, aggravated theft, fraud, robbery or other serious economic crimes, arson or a serious drug offence (pursuant to section 89a, pursuant to section 125a, pursuant to

does not include minor offences. The fact that fraud and aggravated theft are included in this list nevertheless opens § 112a CCP up to a wide range of criminal cases.

It also must be established that the suspect poses an imminent risk, more precisely that "certain facts substantiate the risk that prior to final conviction he will commit further serious criminal offences of the same nature or will continue the criminal offence". This requires a **relatively clear prognosis with regard to the seriousness of both the offense in question and those to come** (there must be several!) and also with regard to the similarity of the offence possibly committed in the future. This risk has to be **substantiated by facts**.

According to § 112a (2) CCP this ground is not applicable if one of the other grounds mentioned (flight, risk of absconding, risk of tampering with evidence) are applicable, that means the law explicitly has meant it to be **subsidiary**. This is why in principle the application for an arrest warrant must primarily refer to these grounds; in case a public prosecutor wants to use the latter ground s/he must explain why the others are not suitable in the specific case. Nevertheless some respondents told us that they *"tick several boxes"* (4, judge, 148; 26, lawyer, 46; 8, PP, 80 with reference to her own practice; very critical 15, judge, 154-156 who says that he in these cases *"effaces"* the subsidiary ground). The public prosecutor mentioned argues that this practice means 'to be on the safe side' and that the judge is not bound to her reasoning anyway.

The respondents agreed that this ground indeed **is applied a lot less frequently** than the risk of absconding (2, PP, 143; 3, PP, 124; 4, judge, 137; 15, 141), because *"it simply is subsidiary"* (4, judge, 142) and because it is ***"so difficult to handle"*** (30, lawyer, 39). In our 1st report we had noted that in research it was assumed that despite not using the ground for detention openly, its preventive aim very often plaid a role when other grounds are used. Although this still seems plausible for us, we could not find clear evidence in our interview records. Perhaps the remark

> *"the problem of addiction that I talked about or when police says we have another four file numbers, these are the sort of information that are spread between the lines and these are actually cases where the risk of repetition shines through or sometimes even is spelled our explicitly"* [35] (26, lawyer, 46).

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sections 224 to 227, pursuant to sections 243, 244, 249 to 255, 260, pursuant to section 263, pursuant to sections 306 to 306c or section 316a of the Criminal Code or pursuant to section 29 subsection (1), numbers 1, 4 or 10, or subsection (3), section 29a subsection (1), section 30 subsection (1), section 30a subsection (1) of the Narcotics Act).

[35] *„Die von mir angesprochene Suchtproblematik oder wenn die Kripo dann sagt, wir haben außerdem noch vier Tagebuch Nummern, was so die Informationen, die so zwischen gestreut werden, das sind tatsächlich Fälle,wo dann die Wiederholungsgefahr auch mal durchscheint oder auch mal ausgesprochen wird."*

shows that the risk of repetition is not always spelled out clearly but just ***"shines through"*** – obviously **when the arrest warrant is based on a risk of absconding**. That this does not become clearer perhaps can be explained with the fact that in Berlin we talked to many judges that only deal with the pre-trial stage (Ermittlungsrichter) and really mainly think about the procedure in question and less about results and criminal careers. Two respondents hinted at some **outside pressure to apply this ground more often,** namely from the police (9, lawyer, 47) and politics (7, judge, 251), in particular with regard to **burglary cases.**

While also practitioners from Berlin told us that this ground was indeed sometimes used and occasionally pondered on it with regard to the vignette (for example 5, lawyer, 69-71; 7, judge, 40; 8, PP, 74; see also below section 10), there was a visible **regional divide**: In Mecklenburg-Vorpommern foreign suspects are an absolute minority (see for more details below 4.2.5), **locals are *"rooted to the soil"*** (*"bodenständig",* 23, PP, 21 and 27) and the **risk of flight seems to be less easy to argue for**. The risk of repetition therefore plays a somewhat more important role in our interviews there (which does not mean that the role in practice must be huge, one lawyer assessed its ratio only 10%: 18, judge, 29). One public prosecutor emphasised that one relevant conviction is not enough to apply this ground and therefore would not consider it spontaneously in the case in our vignette (23, PP 21). Others – without going into details – more often talked about this ground. They did so either in relation to the vignette, of course depending on previous convictions, or with regard to their practice (17, judge, 48; 19, PP, 17-28; 24, lawyer; 18, lawyer, 39; 31, judge, 24).

4.1.5. The gravity of the offence (Haftgrund der Schwere der Tat)

The law formulates the gravity of the offense as sole ground for detention whereas the Federal Constitutional Court has interpreted it, to be in conformity with the constitution, in a way that one of the other grounds for an arrest warrant at least may not be excluded. According to some studies,[36] in several of the cases where this ground was applied, the suspicion on which the arrest warrant was based on later could not be substantiated and the defendant was convicted for a minor offence. It is assumed that the gravity of the offence sometimes is overstated to have an additional reason to apply for/order detention.

We found support for that approach in one of our interviews (18, lawyer, 67), and in one file we studied. Because this ground usually is connected to **capital offences and they are rare, we hardly talked about this ground in the interviews**. It nevertheless

[36] Please refer to our 1st National report, p. 11, for details.

was mentioned in one case example given by a lawyer where she had managed to get her client out and his arrest warrant suspended after several months (but before the conviction) in a case of attempted murder (5, lawyer, 139). We can also find two hints to the fact that the restriction for the ground made by the FCC in practice is not respected (15, judge, 181) and, referring to her field of work:

> *"I have the capital offences. There we have special grounds, so I don't have to make so much of an effort, if I may say so. In 112 section 3, the ground for detention follows just from the offence."*[37] (23, PP, 129)

4.1.6. "Apocryphal" (extra-legal) grounds

In German criminal justice research and in **criminal policy debates** the expression of **'apocryphal' grounds for detention** is often used. Under this heading many different extra-legal motives for applying for or ordering detention are discussed. Although this expression is so widespread only few respondents actually used it (9, lawyer, 45; 13, judge, 286; 20, lawyer, 225-227; lawyer; 30, lawyer, 81 and 95). The respondents either named certain examples (see below); others thought of them as one possible scenario when dealing with the vignette implying an anticipated sanction *("now he just has to see what follows"*, 9, lawyer, 45). A judge, however, insisted that an arrest warrant that retrospectively may look disproportionate or otherwise wrong is not always intentionally chosen for such an apocryphal reason, but could also be simply a mistake (13, judge, 286).

Several respondents, mainly lawyers, conceded that these **apocryphal reasons** to order detention exist, usually as **part of a multifactorial process**, so **no clear pattern of an abuse** can be seen. We did not see fundamental criticism in that regard with the exception of the lawyer mentioned who said they, in practice, were "dominant" (30, lawyer, 81).

The question of getting a **confession** or to "wear the suspect down" by detaining him or her often is discussed in the literature as hidden reason to order detention. This was **not** mentioned explicitly in our interviews. Some hints to such a practice, however, could be found when it was mentioned that a confession in cases where evidence yet is not sufficiently available and the investigation has to go on, is very welcome. It may be "offered" by the defence and may then avoid (further) detention (see below 4.2.4. for more details).

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[37] *„Ich habe ja die Kapitaldelikte, also Mord und Totschlag ohnehin. Da haben wir besondere Haftgründe, da brauche ich mich ja insoweit nicht besonders anstrengen, wenn man das so ausdrücken darf. Aus 112 Absatz 3, da ergibt sich ja aus dem Delikt schon der Haftgrund."*

When talking about extra-legal motives for PTD, various examples were given. Our interview partners named motives and factors such as

- **media influence** and fear of being harassed by media or politicians (for example 32, lawyer, 75-77, 13, judge, 104; see below 6.6. for more details);
- certain local or event-based **politics** (again see 6.6. for more details)
- psychological reactions taking certain circumstances of the offense into account (namely with regard to the **victim's feelings**, 9, lawyer, 75; 26, lawyer, 31);
- a certain **disciplinary function** was sometimes seen as reason to detain and as an opportunity for defendants to counter these reasons:
  "This you can't prevent in the end, that you have this kind of arguments. It may be one of the opportunities for the defence to intervene, that you say, sorry, but only because you are annoyed you cannot lock him in."[38]
  (20, lawyer, 227)
- Also **crisis intervention** with regard to vulnerable suspects was mentioned as apocryphal reason (15, judge, 136-138 mentioning drug addicts with acute health problems and homeless people in winter who *"accept sometimes happily"* to be detained; similar 25, prison social worker, 51), one lawyer remembered a single case where an drug addict had mainly been kept in detention for an acute detoxification and conceded that even this was legally wrong, he thought is was justified in that specific case (26, lawyer, 164).
- More frequently, with two lawyers mentioning it explicitly, it was argued that judges sometimes simply want to **have the suspect available**, regardless if really a risk of absconding can be substantiated (1, lawyer, 21; 20, lawyer, 224). In this way the overestimation of the risk of absconding could be seen as latent apocryphal reasoning.

4.2. Important factors

4.2.1. The expected sentence

4.2.1.1. The expected sentence as stimulus to abscond

Arguably the most prominent factor for decision-making in our interviews was the **expected sentence**. As explained in our 1st National report and mentioned above, this factor usually serves as **a tool to assess the probability that the suspect absconds**. The line of argumentation is that when a **"perceptible" ("empfindlich")** sentence is to be expected and other factors that hinder the suspect to abscond or go into

[38] *„Das wird man letztendlich glaube ich nie verhindern können, das solche Punkte drin sind. Das ist dann eher so ein bisschen eine der Interventionsmöglichkeiten von Verteidigern, dass man dann nochmal sagt, Entschuldigung, nur weil Sie verärgert sind, können Sie den nicht einsacken."*

hiding, namely a stable family and a job, are absent, the risk that s/he does not stand trial increases. The keyword here is "*Fluchtanreiz*" (literally "flight stimulation") and the interviewed persons agreed that there has to be a prognosis of what will be the result of a conviction (*"prognostic sentencing"*, 32, lawyer, 71; *"What would be the outcome for me. This actually is very important."*[39] 22, judge, 79). One judge resumed the issue like that:

> *„Otherwise, and this is also argued for by the defence, it naturally also depends on: What will be the result? For example the thought, if someone can be sure that he will get a suspended sentence, would he really go into hiding? You could say then well, perhaps he does not want to be convicted at all, not even to a suspended sentence, if he can avoid it. But of course the expectation of an unconditional prison sentence is a great stimulus to abscond, no question. But fixed rates do not exist."*[40] (15, judge, 79).

Two others put it shorter:

> *Interviewer: „Keyword 'expected sentence', what role does it play?"*
> *Interviewed person 2: "The higher the expected sentence, the higher the risk of flight…"*
> *Interviewed person 1: "… and the quicker pre-trial detention."*[41] (16 and 17, judges, 91-94)

While it is explicitly acknowledged by some of our interview partners that the **expected sentence may not be the sole argument to base a decision** on, we can see that it nonetheless plays the **central role** when the risk of flight is considered:

> *„What you could construct then is the risk of flight, because of the expected sentence, although **properly this is not acknowledged as sole indication of flight by the high court jurisprudence**. It is often practised, that **one says, high sentences are to be expected, a***

[39] „Was würde da bei mir ungefähr rauskommen. Das ist eigentlich schon sehr wichtig. "

[40] *„Ansonsten, das wird auch von Verteidigern gerne angeführt, kommt es natürlich auch darauf an, was wird wahrscheinlich rauskommen? Zum Beispiel der Gedanke, wenn einer so gut wie sicher sein kann, dass er eine Bewährungsstrafe bekommt, wird er sich tatsächlich dem Verfahren entziehen. Dann könnte man sagen, möchte vielleicht überhaupt nicht verurteilt werden, auch nicht zu einer Bewährungsstrafe, wenn man es vermeiden kann. Aber natürlich ist die Erwartung einer unbedingten Freiheitsstrafe mit Inhaftierung ein großer Fluchtanreiz, ist überhaupt keine Frage. Feste Sätze von der Höhe her gibt es eigentlich nicht."*

[41] *Interviewer: „Stichwort Straferwartung, was spielt das für eine Rolle?" - Befragte Person 2: „Je höher die Straferwartung, desto höher die Fluchtgefahr." - Befragte Person: „…desto schneller die Untersuchungshaft."*

risk of flight is there. But rather you should have more indications."[42] (23, PP, 27)

When asked **how this factor is operationalised**, another PP indicated that it needs to be seen in the **context with various other factors** (answer in the context of the vignette, see also below 10.2):

> *"I check what offence do we have, what legal consequences foresees the law, look at previous convictions, the circumstances of the offence, the motives, the value of the goods he wanted to get, whether it's an offence committed to finance an addiction, behaviour after the offence, meaning: confession, something like 'I have everything under my bed at home, I don't want it anymore', these could all be circumstances that you weigh for or against the suspect."... Interviewer: "So you basically do what you would do when you are pleading?"... "Yes, notionally."* [43] (19, PP, 77-80)

When we tried to find out what **length of sentence** the practitioners had in mind for their decision to apply or order PTD or what the lawyers thought would be such a **threshold** (quantifying a "perceptible" sentence) in their experience, we got **very diverse answers.** Apart from those that said that there is no fixed rate at all and that it always depends on the circumstances of the single case, others at least gave an impression on what their quantitative ideas are for "never" or "always" PTD.

[42] *„Weil das einzige, was man sich dann konstruieren könnte ja die Fluchtgefahr wäre, wegen der zu erwartenden Strafe, was ja so pur ohne weiter Anzeichen für Flucht eigentlich höchst richterlich auch nicht anerkannt ist. Es wird of praktiziert, dass man sagt, hohe Strafen sind zu erwarten, Fluchtgefahr droht. Aber eigentlich müsste man da weitere Anzeichen haben "*

[43] *"Ich prüfe, welcher Tatbestand ist erfüllt, gucke, welche Rechtsfolge der Tatbestand vorsieht, sehe mir die Vorstrafen an, die Tatumstände, die Motivation, der angestrebte Wert der Beute, frage Beschaffungskriminalität, Vorgehen, Nachtatverhalten, sprich Geständnis oder einräumen, ‚ich habe das alles zuhause bei mir unterm Bett, ich will das jetzt da nicht mehr' oder tauchen die Sachen eben wieder auf, das könnten ja auch Momente sein, die man mit in die Waagschale zugunsten oder zum Nachteil des Beschuldigten legt." - Interviewer: „Man macht im Grunde genommen das gleiche wie für ein Plädoyer auch?" – „ Ja. Gedanklich."*

Table 1: Different detention thresholds[44]

6 months		As general practice in the PP Agency to apply for an AW according to 2, PP, 111; 3, PP, 48 (both, however, had different thresholds for themselves)
	as the lower threshold to mark disproportionality: "never sentence above 6 months cannot be expected"	31, judge, 110
1 year		2, PP, 27; 16, judge, 94; 17, judge 95; 21, PP, 70; 22, judge, 79
When offence is "Verbrechen"[45] **according to the Criminal Code**		19, PP, 82
When an unconditional prison sentence can be expected	Sometimes it was argued the other way round: when there is still a chance to have the sentence suspended, PTD could be disproportionate	5, lawyer, 36; 6, PP, 83; 29, judge, 49; 23, PP, 78; 15, judge, 79; 19, PP, 55
At least 2 years, usually in connection with regard to the possibility of suspension (up to sentences of a max. of 2 years the prison sentence can be suspended)		9, lawyer, 75; 10, judge, 68; 11, PP, 47 and 180; 23, PP, 79; 31, judge, 112
3 years		4, judge, 25; 26, lawyer, 73
4 years	Both respondents referring to high court jurisprudence	29, judge, 78; 5, lawyer, 36
5 years	When 5 years are the statutory minimum arrest warrant quasi-automatic; application to suspend "nearly futile"	3, PP; 130; 11, PP, 181; 18, PP, 42; 21, PP, 74; 23, PP, 79;

[44] Sometimes respondents gave different thresholds, arguing for example that they would *usually* consider an arrest warrant (or expect) it from two years of expected sentence, but *certainly* chose (or expect) it when the statutory minimum is five years.

[45] According to sec. 12 of the German Criminal Code, „Verbrechen" (~felonies) are those offences that carry a minimum sentence of 1 year. Such a sentence still could be suspended, but the definition nevertheless marks a categorial difference.

Interestingly the respondents sometimes referred to high court jurisprudence (7, judge, 62; 30, Lawyer, 96; referring to different thresholds) although our theoretical research showed that there is **no uniform case law** and at least recent decisions have strongly argued against such a fixed threshold.[46] One judge stated:

> *"There is no such thing as a 'pain level'. The public prosecution agency would like to have that, I think also some of the judges, just because this balancing is ever so wearisome. If you had that, you could say, above two years there is always risk of absconding, then we would not need to bother any further. But that this is absurd is obvious, still there are efforts and requests brought to us, but we now could give you a thousand examples why this is not correct and not right. And we definitely not have that."*[47] (13, judge, 85)

Nevertheless many seem to feel **attracted to certain thresholds**, ranging between six months and five years, given with different explanations.

Interestingly, within the group of public prosecutors - who trigger the procedure with their application - a **significant range of opinions** was represented: While one said that in "his house" (meaning the Public Prosecution Agency in Berlin, which is the largest of its kind in Germany with more than 300 public prosecutors) many colleagues would consider to apply for an arrest warrant whenever a prison sentence of at least six months seemed possible. This would be done regardless of a possible suspension of the sentence and was encouraged by the Public Prosecutor General as head of the office (3, PP, 48). The PP interviewed himself, however, would not consider this an adequate threshold: More important to him were the social circumstances, only if the offence committed carries a statutory minimum of five years, like for aggravated robbery, he would hardly see a chance to avoid pre-trial detention (3, PP, 130). He also said that he feels no pressure to apply according to this **"house policy"**, nor did this transpire from the response of one of his colleagues who said that she would normally not apply for an arrest warrant when she expects a prison sentence below two years that can be suspended; and that for her the fact whether a person would - according to her prognosis - actually end up in prison was decisive. Another PP agreed to this and also underlined the five-year-threshold, but

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[46] See 1st National Report, p. 9 for details.

[47] *„Es gibt keine Reizgrenze. Die Staatsanwaltschaft hätte das gern, ich glaube manche Unterrichter hätten das auch gerne, weil einfach diese Abwägung im Einzelfall so furchtbar anstrengend sein kann. Wenn man das so hätte, dann könnte man sagen, ab zwei Jahren ist immer Fluchtgefahr, dann brauchen wir uns gar nicht weiter zu bemühen. Das das absurd ist liegt auf der Hand, aber es gibt trotzdem Bestrebungen oder Wünsche die an uns herangetragen werden, aber wir könnten jetzt tausende Beispiele nennen, warum das nicht stimmt und warum das nicht richtig ist. Und das gibt es definitiv nicht."*

> *"[…] those serious robbery stories, where you have five years at least that are imminent. There it is done actually very often although I still have a bad feeling about it, because we know that jurisprudences tells us that you need more for the risk of absconding. But still for these five years for aggravated robbery this risk of absconding is assumed without looking for more evidence for risk of absconding."* [48] (23, PP, 79)

It has to be acknowledged that most respondents obviously **do not work with fixed thresholds** and that much depends on **other circumstances** of the case. Nevertheless the **"significant" or "perceptible" sentence** that is to be expected often plays the **decisive role** in the motivation for an arrest warrant and can explicitly be found in the reasoning (see also below 7.5). This factor therefore may influence the decision-makers more than they are aware of – this at least could be assumed from research that underlines the importance of so-called **anchoring effects for judicial decision-making**. The answers compiled above, giving such a huge range of different assessments of a sentence severe enough to stimulate flight, are in any case an indicator for an incoherent and somewhat irrational judicial practice.

4.2.1.2. The expected sentence as proportionality consideration

As indicated above some respondents interpreted the question about the expected sentence in a way that this consideration serves **(also) as a proportionality threshold**: In particular the six-months threshold (that plays a role in statutory law, sec. 113 CCP) or the consideration that the expected sentence could be suspended – either in general according to the law or with regard to the specific case – were important to these interview partners (see above table 1).

Important restrictions, however, transpired, as expressed by a judge:

> *"For trivial offence it [the arrest warrant] is out of the question. Except you have definite indications for flight or rather such a situation of neglect, that means no social bonds, that you have to say you can't seriously conduct the proceedings at all [without arrest warrant]."*[49] (31, judge, 112)

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[48] *„Ansonsten ist es sehr schwierig, diese schweren Raubgeschichten, wo fünf Jahre mindestens angedroht sind. Da wird es eigentlich ziemlich oft gemacht, obwohl ich da immernoch Bauchschmerzen habe, weil wir ja wissen, dass die Rechtsprechung uns sagt, wir brauchen zu der Fluchtgefahr noch mehr. Aber oft wird dennoch bei diesen fünf Jahren bei schweren Raub auch ohne groß sich weiter konkrete Anhaltspunkte zu einer Fluchtgefahr zu erarbeiten die Fluchtgefahr angenommen."*

[49] *„Bei Bagatelldelikten kommt es nicht in Betracht. Es sei denn, sie haben eindeutige Hinweise auf Flucht, beziehungsweise eine derartige Verwahlosungsssituation, das heißt keine festen sozialen Bindung, dass sie sagen müssen, sie können das Verfahren gar nicht ernsthaft durchführen."*

Also another judge made clear, that even when no prison sentence can be expected he would, taking the example of juveniles coming from third countries, not abstain from ordering PTD:

> *"They get an arrest for some days,*[50] *they get at most a suspended sentence, if at all. But I cannot conduct the proceedings when I do not lock them up, because then they are gone."*[51] (15, judge, 142)

This means that **proportionality considerations** are at least for some **overridden by the commitment to secure the proceedings and actually enforce the law**, ultimately therefore also for reasons of **general prevention** (similar 2, PP, 278 and 4, judge, 113 for certain groups of foreign offenders; 8, PP, 161 for certain drug offences; 13, judge, 267; 14, judge, 270).

4.2.2. Previous convictions

Once previous convictions or at least one relevant former conviction can be found in the suspect's record his or her **chances to avoid PTD diminishes**, this became very clear when our respondents reacted to the vignette (see below 10.2 and 10.4). Additionally

> *"a relevant **breach of probation** is **the best that can happen from the viewpoint of enforcement agencies** in that moment when you want to get an arrest warrant.* [52] (8, PP, 74).

Another also assessed the situation explicitly as "better" with regard to the foundation of an arrest warrant when there is a relevant previous conviction (21, PP, 49).

This situation is based on the assumption that one previous conviction often means that there actually are even more (obviously sometimes our vignette was interpreted that way) which makes it possible to argue not only for the **risk of flight** (because for repeat offenders sentences are higher) but also for the **risk of (further) repetition** (8, PP, 74; 19, PP, 74; echoed as concern by 5, lawyer, 50).

In any case, the **previous conviction is "highly important"** (23, PP, 27; similar 26, lawyer, 46; 30, lawyer, 39). Our respondent's answers whether it has to be a conviction for a **similar offence** were not uniform: The majority thought it was of particular relevance (9, lawyer, 45; 13, judge, 58; 17, judge, 47; 19, PP, 17; 29, judge, 47; 31, judge, 59). Two public prosecutors made their statement in connection with the vignette (see below

[50] 'Arrest' is a specific sanction in the German juvenile justice system that may last up to four weeks and is executed in closed institutions but not prisons.

[51] *„Sie bekommen ein paar Tage Arrest, oder höchstens eine Bewährungsstrafe, wenn überhaupt. Aber ich kann das Verfahren nicht durchführen, wenn ich sie nicht einsperre, weil sie dann weg sind."*

[52] *„Ein einschlägiger Bewährungsbruch ist aus Strafverfolger Sicht das Beste, was in dem Moment passieren kann, um einen Haftbefehl zu erwirken."*

10.2) when they said that without relevant previous conviction (another burglary or similar offence) they would not apply for an arrest warrant in the case as we described it (11, PP, 47; 21, PP, 48).

Some, however, thought that the fact that there is another conviction alone makes an arrest warrant more likely (for example 18, lawyer, 38; 24, lawyer, 38). Others thought that it was particularly the fact that in the vignette the alleged offender was breaching his probation conditions (literally a "**probation failure**", "Bewährungsversager") was the decisive point (1, lawyer, 96; 3, PP, 83; or that a decision depended on the lapse of time between former and current offense in question (for example 13, judge, 58).

Virtually all respondents were referring to the fact that one previous conviction or, even more so, several **convictions would aggravate the sentence that can be expected** in most cases (except for very diverse offences and/or when the lapse of time between the convictions is 3 to 4 years). This, in turn would – in the logic of German doctrine and practice – contribute to a potentially higher risk of absconding because for the suspect the stakes then would be higher.

4.2.3. The nature of the offence

The interview guidelines included a question whether the nature of the offence played a role when deciding on PTD. The answering pattern may partly be explained by different experiences and responsibilities throughout the career, as some practitioners that deal with more severe cases may have a more relaxed or more liberal view than those who see less serious but, for example, specifically persistent offences (see also above 4.1.2).

Interview partners were generally reluctant to name certain offences as triggering almost naturally an arrest warrant, for example:

> *"That you say, this or that kind of offence and people are always locked up? No, no way."*[53] (15, judge, 81; similar 32, lawyer, 81)

Many nevertheless did give examples when according to their experience or own practice an arrest warrant was at least **very likely**. Apart from the capital offences (see above 4.1.5) and those **offences that carry a statutory minimum of five years of imprisonment** the most frequent example for detention-prone offences were **sex offences**, in particular when children were the alleged victims (for example 5, lawyer, 93; 18, lawyer; 13, judge, 97; 24, lawyer, 53; 29, judge, 80; 30, lawyer, 99). One PP explained that these offences "carry the risk of re-offending in itself" (23, PP, 81); one lawyer said

[53] *„Das man sagt, also diese Art von Tat und diese Leute werden immer eingesperrt? Nein. Auf keinen Fall."*

that he experiences that PTD almost automatically is ordered with regard to sex offences, despite the allegations often being "*out of the whole cloth*" ("*erstunken und erlogen*", 18, lawyer, 67). This is in line with current German research on acquittals after PTD that shows higher rates than in other areas.[54]

Apart from this, the answers were quite **diverse**: Several interview partners referred to "brutality" (16, judge, 97), life threatening injuries (4, judge, 91); or "violence against weak victims" (6, PP, 85; 29, judge, 137) or gave the example of aggravated robbery (31, judge, 114). Others referred to *"intensified cheating" ("erhöhter Täuschungscharakter"*, 7, judge, 66) or the professional or commercial nature of the offending, related to fraud and cybercrime (23, PP, 131) or organised offences (6, PP, 85). One PP said that for him it was important if "public security was affected" (8, PP, 105) and gave the example of some brutal attacks against bystanders in the tube. This was echoed by another who said that for her it played a role if "all sorts of people, tourists and old people" were affected and gave the example of increasingly frequent thefts of handbags (2, PP, 289).

As can be seen below with regard to our case vignette (10.4) burglary in a dwelling as an offence that also in Germany currently plays a role in political debate (with a recent reform in the Penal Code, increasing the minimum prison sentence to 1 year), for some this had special importance, but most respondents said that it did not.

4.2.4. The confession

As mentioned above, getting a confession could be an (extra-legal) reason to order detention or to keep someone there. The **subject did not come up spontaneously in interviews**. When we asked for the effect a confession already made at the police station could have with regard to the decision-making, it was usually argued that it would help to avoid detention in certain cases when the ground for detention is the risk of absconding or the risk of tampering with evidence (this only came up twice: 15, judge, 63; 22, judge, 59). A confession is deemed irrelevant for the risk of repetition (see below).

Some said that it is welcomed by judges because it ***"makes their work easier"*** (1, lawyer, 102) or

> *"I take to someone who makes our lives easier"*[55] (16, judge, 16 [laughing]).

Three more answers showed that judges particularly **like to hear a confession when the suspicion yet has to be proven sufficiently** (29, judge, 51; 31, judge, 51 and

[54] Stelly/Thomas 2017.

[55] *„Wer uns die Arbeit erleichtert, der ist mir sympathisch".*

again very critical 30, lawyer, 66). These answers hint at an abuse (or apocryphal reasons, see above), using PTD for more practical reasons.

Other welcomed a confession as a **sign that someone would take responsibility** for his/her behaviour and therefore also **stand trial** – and thus diminishes the risk of absconding (3, PP, 85; 6, PP, 66; 7, judge 42; 11, PP, 49; 21, PP, 53; 22, judge, 55). Other respondents also referred to the risk of absconding but connected the confession to the expected sentence – according to German doctrine and practice, nearly automatically a confession leads to **mitigating the sentence**. In this logic the **expected sentence would be lower** once a confession is in the world and therefore also reduce the risk of flight (7, judge, 42; 8, PP, 82; 12, lawyer, 53; 32, lawyer, 53).

Nevertheless this would, according to some specifications, only help in cases of **less serious crimes** (18, lawyer, 44; 19, PP, 55) and was for example doubted with regard to the burglary case in the vignette (32, lawyer, 53). One public prosecutor emphasised that it has favourable effects only when it is an **early** confession (8, PP, 82), two judges stated that it must be a **coherent** and **complete** confession (16 and 17, judges, 63-64).

Some of the lawyers also said they normally would **advise their clients not to confess**, at least not in an early stage, namely when they are brought before the judge shortly after arrest, even if this could help to avoid pre-trial detention:

> *"What you would not do is saying, okay, now I [meaning: the client] will confess. That the judges would sometimes join in, that they say yes, if he now confesses I will let him out. That naturally you don't do."*[56] (5, lawyer, 52).

Their argument was that at that point of time they were not able to fully understand the situation and that they needed to plan their tactics for the case and discuss it with the client; before that they would need access to the files (see also below 6.5). This practice met with understanding by the other practitioners (for example 19, PP, 55). Nevertheless some lawyers said that in a later stage it was helpful to be able to "offer" a confession for **strategic reasons** - to reach a suspension of the arrest warrant (9, lawyer, 48; similar 12, lawyer, 53; 26, lawyer, 48).

Some respondents from the courts said that getting a confession for them in many cases was **irrelevant** with regard to the decision-making in pre-trial detention matters. They argued that it would not change the relevant ground for detention, in particular the risk of repetition (these answers came from Mecklenburg-Vorpommern, again showing that here more people spontaneously think of this ground to detain than elsewhere, namely

[56] *„Was man ja nicht tun will, ist sagen, ich gebe jetzt Geständnis ab. Das würden ja Richter manchmal mitmachen, dass sie sagen, ‚ja wenn er das jetzt alles einräumt, dann lass ich ihn auch raus'. Das machst du natürlich nicht."*

referring to the vignette; 23, PP, 54; 19, PP, 54, 24, lawyer, 40). Or they argued that often these confessions were **only tactical**, echoing what was said by the lawyers, and that they therefore were sceptical (4, 60-62; 15, judge, 50).

4.2.5. Personal and social circumstances (mainly housing, family ties and employment)

For assessing both the risk of absconding and the risk of re-offending the social circumstances are important aspects. As mentioned in our 1st National Report and above 4.1, legal-theoretical works and high court jurisprudence provide an elaborated catalogue of requirements for an appropriate prognosis. This catalogue uses numerous **"stimuli" and "obstacles"** to flee or go into hiding such as interpersonal bonding (relationships, children), personality related criteria (illness, mental instability, behaviour in previous criminal procedures, contacts abroad) and offence related criteria (type of offence, expected sentence).[57] A handbook for defence lawyers, who have to deal with the problems in their everyday practice, sums up this catalogue in the advice for colleagues "to make the suspect visible as a human being beyond his or her existence in a file."[58] An illustration of how these **factors are actually operated is also given by the reactions to our vignette** (see below 10.4).

While the importance of personal circumstances was not denied by our respondents, in practice they seemed to concentrate on aspects of **housing** – mainly that the authorities would have a **reliable address to communicate with the suspect** (most important criterion: 3, PP, 130; 11, PP, 175; 19, PP, 17) - and, less importantly, to family bonds and to being employed.

As regards the risk of absconding often the term of **"loose living conditions"**, literally "living circumstances easy to loosen" ("leicht lösliche Wohnverhältnisse") was used by our interview partners (for example 8, PP, 22; 22, judge, 61; critical about these stereotypes 5, lawyer, 26; 9, lawyer, 53; 20, lawyer, 35). This is a typical term that would never be used in everyday language and is not a technical juridical term either - just a **buzzword used in a stereotype manner,** often without further explanations and often also without actually having investigated the living circumstances. When asked about what they would accept as permanent address, the respondents reacted differently. While some (for example 2, PP, 57; 11, PP, 64; 29, judge, 27; 31, judge, 86) were content with a so-called **registered address** ("Meldeadresse"),[59] others would rather em-

[57] See 1st National Report, p. 9.

[58] Schlothauer/Weider 2010, p. 228.

[59] In Germany every inhabitant has to register with the authorities, so in principle the local authorities know exactly who lives where. These informations are used for fiscal purposes and community

phasise the **factual living circumstances,** regardless of the administrative status (for example 3, PP, 52; 13, judge, 56; 10, judge, 44; sometimes this would be illustrated by 'having more than one jacket there', 'having a toothbrush there', for example 15, judge, 29-31; 9, lawyer, 53). This became also clear in relation to the vignette, where it was discussed whether living with the parents could be a proper permanent address for a young man and how this would be investigated (see below 10.3. and 10.4).

A specific question that came up in the discussion was whether hostels or **accommodation for both refugees and homeless persons** would be acceptable as permanent address. The answers differed: While the general view was that it counts whether there is evidence that a person actually lives there, some showed more readiness to accept it (4, judge, 64; 10, judge, 52; 26, lawyer, 60 with regard to judicial practice in his experience), while others tended to see it as non-permanent or too loose, arguing that it was very easy for the suspect to leave

> *"[…] even if he really would be there often, such a hostel accommodation, that I myself do not have to pay for, but that has been assigned to me, there is nothing so to say that keeps me from beating loose. This really is the decisive thing. […] If I have something that costs me nothing, where I have no furniture, that I have not furnished myself, that I do not have to pay for, then I can say I file a new application somewhere else and then I get a new place in a hostel. […]"*[60] (15, judge, 54; with a similar tendency 3, PP, 152; 7, judge, 46; 8, PP, 42; 11, PP, 66)

It also became clear that the PP and judges not only had **different inclinations to actually investigate the living circumstances** (see more about investigation duties and bad practice below 7.4) but also that the consequences of unclear living circumstances were different: While some would then accept the address given (arguing in a quasi "*in dubio pro reo*"-approach, for example 11, PP, 297; 31, judge, 86), others would rather do the opposite – if they do not have positive information about a permanent address or a job they sometimes seem just to assume that there is none (for example when they do not have evidence in the files that the police found a toothbrush etc. …, 15, judge, 31; do not know about a job, 10, judge, 160). In other cases such an assertion by the suspect often seem to be rejected as irrelevant claim (for example 15, judge, 83; 22, judge, 87) as long s/he cannot prove it, which sometimes happens only at a later stage, when the defence lawyer brings a copy of the relevant documents.

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planning, but also for registering voters etc. The law enforcement authorities have access to this information.

[60] *„[…], selbst wenn er sich häufig dort aufhalten würde, ist ein Wohnheimplatz den ich selber nicht bezahlen muss, sondern den ich gekriegt habe, sozusagen fast nichts zu sagen, was mich wirklich davon abhält, abzuhauen. Das ist ja wirklich das Entscheidende."*

Bleak social circumstances, in particular homelessness or drug abuse, were identified by some as a particular problematic feature of their work (for example 6, PP, 194; 7, judge, 243; 20, lawyer, 159). One judge explained:

> *"For example, you have a homeless shoplifter, it is in the nature of things that he has no permanent address, but he is not homeless* because (his affirmation] *he does not want to be arrested, but because he has no place to live anymore. So this alone is not enough for me, then you rather, even if it sounds absurd, argue with the risk of absconding because at some point he will want to abscond, if it becomes more and more, because he has to expect a longer time in prison. For some it may even be a good option at that time of the year because they then have a roof of their heads. But I am not saying that they really are set on doing this."* [61] (15, judge, 136)

This statement is not only contradictory and legally not feasible, it also shows the **helplessness and rationalisation of extra-legal motives** (indicated already above 4.1.6) that play a role in cases of social misery.

Apart from this, stable social circumstances worked favourably against detention, usually the **importance of employment** was emphasised (10, judge, 80; 4, judge, 96). One public prosecutor in so far echoed leading jurisprudence (see also 1st National Report) when she explained her internal reasoning:

> *"But now, if he has one [job] and a family, you just have to imagine a little, would he now, if we release him, would he abscond? If you say he has children, family, a permanent job, why should he flee? If there is no really serious punishment imminent?"*[62] (11, PP, 81)

Similar statements have been made by others (for example 10, judge, 42). Some, however, argued differently:

> *„Social bonds are more difficult, sometimes it is argued by the defence, 'but he has a wife and three children' […] yes, but he had them already when he committed the offence and this has not prevented him from doing so. So you can conclude that he, to a certain extent, does not care and*

[61] *„Beispielsweise, sie haben einen obdachlosen Ladendieb, da liegt es in der Natur der Sache, dass der keinen Wohnsitz hat, aber der ist nicht deswegen obdachlos, damit man ihn nicht verhaften kann, sondern weil er keine Wohnung mehr hat. Das alleine reicht mir nicht, da muss man dann eher, auch wenn das ein bisschen absurd klingt, Fluchtgefahr [annehmen], das heißt der wird sich dem Verfahren entziehen wollen irgendwann, wenn es immer mehr wird, weil er damit rechnen muss, dass er für längere Zeit inhaftiert werden. Für manche ist es um diese Jahreszeit vielleicht eine günstige Option sozusagen, weil er dann regelmäßig zuerst mal ein Dach über dem Kopf hat. Aber ich will jetzt nicht sagen, dass manche es direkt darauf anlegen…"*

[62] *„Aber wenn er einen [Beruf] hat und Familie hat, man muss ein bisschen sich versuchen vorzustellen, würde der jetzt, wenn wir ihn entlassen, würde der flüchten? Wenn man sagt, er hat Kinder, Familie, festen Beruf, warum sollte er flüchten? Wenn ihm jetzt nicht eine ganz schwere Strafe droht?"*

of course I can also keep the contact to my family when I go into hiding and visit them stealthily […]"[63] (15, judge, 83; in very similar words 29, judge, 83; see also below 10.3)

Stable, "middle-class" social circumstances, however, are something many suspects cannot claim. Some lawyers therefore said that they often argue that in particular **those who do receive unemployment benefits or other social transfers were particularly unable to abscond,** because they would financially not be able to lead a life in the shadows; and they would also not be able to receive their benefits when gone into hiding (for example 5, lawyer, 26; 18, lawyer, 85; 24, lawyer, 85). While these respondents said that very often these arguments would fall on deaf ears, one judge confirmed them (29, judge, 60-61 who added that jobless alcoholics usually can be found by the police easily in certain places when they are not at home) and also one lawyer said that sometimes judges can be convinced along these lines (9, lawyer, 76).

Other arguments regarding the social situation that sometimes could help avoiding pre-trial detention were a **"sad story" or "a sobbing mother"** brought to the first hearing (9, lawyer, 79; using exactly the same expression: 24, lawyer, 19) or the fact that the suspect is responsible for a relative in need of care (2, PP, 208; 4, judge, 96).

4.2.6. In particular: Nationality and contacts abroad

As mentioned in our 1st National Report, **statistics show a serious overrepresentation of foreign nationals** in remand detention in Germany, this overrepresentation was confirmed by all interview partners except from those from Mecklenburg-Vorpommern (where the demographic situation is just different). During my observations in one Berlin court where the smaller and easier cases are handled, often in a speedy procedure, equally my impression was that by far the most suspects were non-nationals. When I asked the public prosecutor responsible for this court, she also estimated that about 90% of all suspects she sees there are foreigners (2, PP, 308). A similar situation can be found in North Rhine-Westphalia, where more 56% of pre-trial detainees were foreigners already in 2013, even more than in the German average. This was confirmed by the director and a governor of the prison visited (25, prison social worker, 9; 27, prison director, 15: 57% at the time of the interview). In Mecklenburg-Vorpommern, however, this is completely different: Here, the question of how to deal

[63] *„Soziale Bindungen sind schwieriger, es wird mitunter angeführt vom Verteidiger „Ja, der hat doch Frau und drei Kinder!" […] ja, die hat der bei der Tatbegehung ja auch schon, das hat den aber auch nicht daran gehindert. Also kann man davon ausgehen, dass ihm das insoweit ein Stück egal ist und dann den Kontakt zur Familie kann ich natürlich auch halten, indem ich untertauche und die heimlich besuche."*

with foreign suspects does only play a minor role (16, judge, 60; 17, judge, 83; 23, PP, 21; 31, judge, 190).

In the discussions it became clear that there are **different groups of foreigners** and that primarily the questions of a **(missing) permanent address and (missing) family bonds in Germany play a role**; as this judge typically said:

> *Interviewer: "Nationality and residence status… What role does this play?" Interviewee: "Nationality per se does not play a big role, but I would ask: 'Do we have him available for our proceedings?' In this context that is the only really relevant."*[64] (16, judge, 73-74; similar 11, PP, 62)

Similarly one public prosecutor linked the overrepresentation less to the foreign citizenship than to the question of how to contact the suspect and said that it was **less a problem of foreigners, more of a certain clientele**[65] (6, PP, 33 and 246; similar 20, lawyer 66). Some lawyers, however, thought that foreigners regardless of belonging to a certain group have generally a higher risk of being detained (18, lawyer, 58 "they all go in"; 26, lawyer, 62; 30, lawyer, 47). The question of particularities of EU nationals will be discussed in more detail in section 8 of this report.

Several respondents indicated that the so-called **"travelling offenders"**, that are hard to get hold of, would not have a chance to avoid PTD (3, PP, 81; 4; judge, 113; 9, lawyer, 63; 13, judge, 264; 21, PP, 30). These "travelling offenders" often do come from other EU states (Poland, Italy, Romania and Bulgaria were mentioned) but the interview partners assumed that even if they have an address there they do not actually live there and therefore could not be contacted under this address:

> *"These are people that may have an official address in Romania that they can give us, where perhaps the parents still live, that are, however, on the road for years. That kind of people you cannot let go, because you know they are gone. And even if they have this address in Bulgaria, Romania or wherever, they are definitely gone then. To travel further, go into hiding and continue to try their luck somewhere in Europe."*[66] (13, judge, 264; similar remarks 2, PP, 59; 15, judge, 64; 16, judge, 74; 21, PP, 30).

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[64] Interviewer: *„Nationalität und Aufenthaltsstatus… was spielt das für eine Rolle? … Befragte Person: „Die Nationalität per se eigentlich keine große, sondern ich würde fragen ‚Haben wir den hier zur Verfügung für unser Verfahren?' In dem Zusammenhang ist das dass einzig wirklich Maßgebliche."*

[65] „ Es ist glaube ich in erster Linie kein Ausländerproblem, es ist ein Klientelproblem."

[66] *„[…] das sind eben Leute, die zwar eine Meldeanchrift in Rumänien uns angeben können, wo vielleicht sogar noch die Eltern wohnen, die aber seit Jahren unterwegs sind. Solche Leute kann man nicht laufen lassen, weil man weiss, die sind weg. Und selbst wenn sie eine Meldeanschrift in Bulgarien, Rumänien oder sonst wo haben, die sind dann definitiv weg. Und reisen weiter und versuchen weiter ihr Glück untergetaucht klarzukommen in Europa."*

For **non-EU-residents in Germany** (for example from the huge Turkish community in Germany) both the question of social bonds and a permanent address are important (for example 10, judge, 242; very positive in this regard 4, judge, 113 who talked about "particularly positive experiences" with foreigners living in Germany for a long time).

A group that usually would be detained are, however, those foreigners that have an **insecure residence status or that are already illegally** in the country (where, for example, a deportation order exists). Here, it is argued, the **stimulus to go into hiding is very strong and hard to be rebutted** (for example 1, lawyer, 114; 32, lawyer, 57). This allegation was not confirmed by a public prosecutor who said that the authorities responsible for deportation would have to ask the criminal law enforcement agencies if a criminal case was open and then no detention would take place, so that there was no fear that they would "lose" the suspect (11, PP, 68).

But even if some kind of permanent address can be provided it obviously does not help for all groups; this was mainly claimed by defence lawyers, but some remarks by other actors showed that to a certain degree this is plausible. In particular **after several incidents involving sexualised violence** ("*Antanzen*", describing unwanted physical contact on the dancefloor), combined with pickpocketing or drug delinquency, were attributed to **young men coming from Northern Africa and/or Arab countries** ("Cologne incidents", see also section 3.3 and 3.4 of this report), this kind of behaviour for the group seems to have increased the risk of being detained (5, lawyer, 93; 26, lawyer, 133). The answers of two judges confirm this stance, both stressed the fact that with regard to smaller crimes, they would get a **speedy procedure**:

> *"For foreigners it is like that: If we have serious offences, they go in detention anyway. And what we practice often with foreigners, if you have for example a Polish citizen, he goes to M-shop and snitches razor blades for 200 Euros, he then goes in short term detention. This is often practiced here. And then in the speedy procedure, for example he appears before the judge [after arrest] on a Monday and has his trial on the Friday and after the trial he will – in case he has no prior record – released. He then usually gets a fine, often also a suspended sentence, so you can tell him, when you enter the country again and steal something again, then you will serve you sentence. And these cases all become effective."* (29, judge, 191; similar 17, judge, 78: "What we do with foreigner is: a short trial, detention then lasts two weeks.")

In particular in Berlin lawyers also claimed that **certain ethnic groups**, sometimes even a certain name that seems to be used as label for a certain type of criminal activity

attributed to Arab family clans, *per se* have a higher risk of being detained.[67] The same seems to be true for minor drug crimes and African suspects in certain notorious areas in Berlin (5, lawyer, 36; 20, lawyer, 153 and 225). Two other interview partners used the names of these criminal hot spots to illustrate typical detention cases against foreigners coming mainly from sub-Saharan Africa (7, judge, 46; 8, PP, 42), again making an increased sensibility and inclination to detain at least plausible.

When illustrating cases in which foreigners without a fixed residence status were detained, two more factors were mentioned occasionally: the fact that they were **illegal** in the first place increased the risk of absconding or hiding because this was in itself an offence (for example 1, lawyer, 114; 15, judge, 62) and the fact that they "often" **use false personal data** or use false papers was mentioned (15, judge, 62; confirming for some cases 4, judge, 72).

It should be mentioned for the sake of completeness that also five interview partners mentioned that (more or less) strong **contacts to other countries** would seriously increase the risk for **German** suspects to be detained; they all mentioned **significant economic crimes** (1, lawyer, 119; 7, judge, 57; 29, judge, 69; 30, lawyer, 47; 32, lawyer, 61); two of them, however, not spontaneously, but only when explicitly asked.

4.2.7. In particular: Drug addicts and persons with mental health problems

Suspects with drug addictions or suspected of drug crimes seem to play an **important role in the daily practice of many** of the interview partners – sometimes because the work the public prosecution agency is organised according to offence types, sometimes because a defence lawyer has particular contact to that type of offender, sometimes because regional crime hot spots are a cause of concern (see above sec. 3.2 and 4.2.6 of this report). Others state that they have no or no current experience with that kind of clientele (1, lawyer, 226; 32, lawyer, 55). For all judges interviewed, who work constantly or partly as detention judges, this seems to be a frequent or even an everyday feature of their work related to pre-trial detention (for example 33, judge, who several times illustrated his work with the example of a suspect with an addiction).

While I had expected that the fact that someone has an addiction problem would trigger answers with regard to alternatives to detention (allowing for a suspension of the arrest warrant under the condition to undergo therapy), rather the opposite was the case. It

[67] Even an wikipedia-entry exists for the name „Abou-Chaker-Clan" – this name, according to the entry, for the law enforcement agencies, serves as a label for a group of persone related to arganised crimes. Not suprisingly, the entry is marked as being of "contested neutrality" (https://de.wikipedia.org/wiki/Abou-Chaker-Clan; accessed 10 October 2017). One of the lawyers interviewed (20, lawyer, 225) confirmed this labelling.

was emphasised that an addiction would lead to the assumption that someone **is not reliable and therefore would increase the risk of being detained** (4, judge, 70; 6, PP, 68; 10, judge, 40; 13, judge, 60; 15, judge, 62; 33 judge, 95). While "a lack of reliability" is legally not acknowledged as a ground for detention, the respondents did consider this under the heading of the **risk of absconding**, often connecting it to problematic living conditions. Detention in these cases, must, however, rather be seen as detention motivated by the extra-legal ground "easier availability", see above 4.1.6) since drug addicts most probably do not have the energy to actually leave the country nor to go into hiding in an organised manner.

Other interview partners argued that in cases of delinquency related to financing the addiction increases the risk of repetition (8, PP, 88; 9, lawyer, 57; 22, judge, 56; 23, PP, 58; 29, judge, 63). This seems to be more plausible.

Only in a **few cases** the interview partners said that an addiction was "**ambivalent**" as it could be used to argue for detention but also could be used when arguing for the suspension of the arrest warrant to **undergo treatment** (26, lawyer, 54; 31, judge, 70) or they concentrated on the latter (detention-avoiding) aspect (9, lawyer, 59; 32, lawyer, 55). Two public prosecutors mentioned that the possibility of a **limited criminal responsibility** for drug addicts could decrease the length of the expected sentence and therefore rebut the risk of absconding (8, PP, 88; 11 PP, 293).

In our interviews **suspects with mental health problems** were mentioned only a few times although they are, according to studies, overrepresented in prisons (compared to the overall population).[68] This was confirmed by the interview partners in the prison visited (27 and 28, prison director and prison governor, 43-44). When explicitly asked one lawyer talked about **"a problem exploding"** (26, lawyer, 206). During my observations in Berlin at least 3 of the 22 suspects observed had either an addiction problem or severe multiple psychiatric diagnoses. Only in the latter case this was reflected in the decision-making.

When asking about this group, a few interview partners conceded problems, but did not seem to accept this as an issue for them, saying that "without having more information, if s/he is really mentally ill, it's hard to argue" (21, PP, 230); and "not every mental illness is relevant for criminal responsibility" (4, judge, 206).

[68] For more details Morgenstern (2017, in press).

Contrary to this notable lack of awareness, one public prosecutor raised the issue herself[69] and described as a particularly pressing problem, when I asked about persons under court-ordered guardianship because of mental health deficiencies:

> *"Because these are mentally ill, neglected people, alcoholics, other addicts, people with dementia… I believe it was 4 years ago when the local court XY, the director, has written an article about not having enough guardians for these people, they did not know how to deal with them. Then we found out that 5 % of all people in the district XY were under guardianship. This guardianship often is not in the files, and those under guardianship are often not capable of articulating this, they don't think of it, they are totally in a stress situation or are somehow blocked in their heads, because of their addiction or because of what they have consumed. I don't mean to be nasty, that's just how it is in reality and nobody thinks of it. Often the guardians are not so well-prepared that they would show up and explain 'he has this and this and that'. But this could be decisive and we should know about it beforehand, that there is an issue, because then we are not in 112 any longer, but in 126a*[70] *… Then the whole thing gets another direction and we would do no good to him with the application for detention."*[71] (19, PP, 176)

In general, however, almost none of the actors seemed to be willing to ask deeper questions about this problem, perhaps to **avoid taking responsibility** for this difficult group of persons. This is not only deeply unfair for mentally ill suspects, it may sometimes pose additional risks for suspects, prison staff and other prisoners. It shows that information that should be available to the authorities (as the local courts are the ones responsible to order this kind of guardianship) is not used in an adequate manner.

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[69] The answers in this interview generally are concise and often quite short. The answer to my question about people who are under "Betreuung" (custodianship ordered by a court) triggered a very long and elaborate, almost passionate answer.

[70] § 112 refers to the normal arrest warrant, § 126a to the preliminary order for mentally ill suspects to be placed in a psychiatric hospital.

[71] *„Weil es psychisch kranke, verwahrloste, alkoholkranke, andere suchtkranke Personen gibt,, Demenzkranke… Vor, ich glaube das ist vier Jahre her, da […] hat das Amtsgericht XY, die damalige Direktorin hatte einen Artikel verfasst, die haben keine Betreuer mehr, sie wissen nicht wohin mit den Leuten. Dann haben wir […] festgestellt, dass fünf Prozent des Kreises XY damals unter Betreuung standen. Die Betreuung ist oft nicht aktenkundig, die Beschuldigten sind nicht in der Lage sich zu artikulieren, denken da oft auch gar nicht dran, sind ja auch in einer totalen Streßsituation oder sind irgendwie zu im Kopf, durch ihre Erkrankung oder ihre Sucht, oder genossene Suchtmittel. Das meine ich jetzt nicht böse. Das ist einfach objektiv so und kein Mensch denkt daran. […] Oft sind die Betreuer aber nicht so geeicht, dass sie dann auch erscheinen und sagen "Hier, aus dem Grund ist der betreut, der hat das und das und jenes…". Das kann ja auch ganz ausschlaggebend sein und wir sind dann nicht mehr in 112 sondern in 126a. Das hätte man ja dann gerne schon vorher gewusst, wenn es da irgendeine Störung in irgendeiner Form gibt. …. Dann bekommt das Ganze eine andere Richtung und da würden wir jemanden mit einem Haftantrag nicht gut tun.“*

Central outcomes 4

- Risk of absconding is the dominating ground for detention in practice; the legal construction makes the ground the easiest to operate; behind this traditional dominance also stands the overriding aim of securing that the trial actually can take place.
- Lawyers pointed out that the risk of flight is grossly overstated and based on a prognosis not substantiated by facts but general assumptions.
- Sometimes and dependent on the region and the share of foreigners among suspects, the risk of repetition also plays a role.
- While the expected sentence may not be the sole argument to base a decision on, it nonetheless plays a central role when the risk of flight is considered – once a "perceptible" sentence is expected, the assumption is that the suspect would try to avoid it.
- When asked for thresholds, very diverse answers were given ranging from 6 months ("you can try it") to 5 years ("almost impossible to avoid PTD"). Such a huge range of different assessments of a sentence severe enough to stimulate flight is an indicator for an incoherent and somewhat irrational judicial practice.
- The expected sentence also was considered with regard to proportionality – this, however, often does not play a role, even for minor offences, for socially marginalised suspects that are repeat offenders.
- Previous convictions play a role in so far as they may increase the expected sentence.
- With regard to the personal circumstances that may trigger or hinder PTD, housing – a permanent address – was the main factor considered. Stable family bonds and employment or education were additionally mentioned as stabilising factors (and if missing, as indicators for the risk of absconding).

- Foreign nationals do not per se run a greater risk of being detained, but the risk of absconding is always linked to a stable living conditions in Germany. Certain subgroups often cannot avoid detention: so-called travelling offenders, those with insecure residence status or that are already illegally, and, due to recent events and political/media pressure, certain groups of young men coming from Northern Africa and/or Arab countries (also depending on regional particularities such as problematic hot spots for example for drug crimes).
- German nationals with contacts abroad (bank accounts or second homes) would be detained because the risk of flight as well, usually in more serious cases of economic crimes.
- Drug addiction is featured often mentioned, while the problem of a rising number of mentally ill suspects that is discussed in the literature, was only recog-

nised by some interview partners (then, however, as an "exploding problem") and very difficult to handle for an unaware and understaffed judicial system.

5. Avoiding detention – alternative measures to secure the trial

5.1. Introduction: Suspension of the arrest warrant under conditions as the German model

Alternatives to pre-trial detention **play a comparably small role** in Germany. This partly is due to the systematic concept of supervision in the community: The judge always has to comply with the requirements for pre-trail detention and issue an arrest warrant. Only if these prerequisites are met, s/he can – and because of the **principle of proportionality** in principle must - chose less restrictive means to secure the proceedings; that is, **release the suspect or accused under certain conditions** (suspend the arrest warrant, *Außervollzugssetzung*, sec. 116 CCP). In practice this concept is also called "to spare the suspect from detention" (*Haftverschonung*). Our assumption from this theoretical starting point and older research (see 1st National Report on Germany) was, that as a result, this mechanism **rather effects a reduction of the time in detention than it avoids custody from the start**. This research estimated that at most 10% of all arrest warrants were suspended immediately (in the first hearing, that means on the day after arrest), probably even less in adult cases. The suspension rate rose to 20 to 30% in later hearings that took place after two or three months.[72]

5.2. The practice

This overall assumption was generally confirmed by the justice professionals we interviewed. Usually they did not want to estimate how many of the arrest warrants the experience are suspended, but some at least were able to give rough assessments: They agreed that this rarely happens in the first hearing after the initial arrest, which means that the **review hearings are crucial**: One judge said that later arrest warrants then would be suspended **"often"** ("häufig", 29, judge, 80 – later he gave a quote of 25 to 30% [29, judge, 157]). A colleague gave, very tentatively, also a **quote of 25%** (31, judge, 123); a lawyer, referring to "smaller things" ("kleinere Sachen") such as theft or fraud estimated a suspension quote of **20%** as regards his own experience (18, lawyer, 217); another, depending on the nature of the case estimated "on a gut level" ("aus dem Bauch heraus") **up to 40%** (26, lawyer, 164).

[72] See 1st National report, p. 34.

Additionally some of our respondents mentioned a tendency to suspend arrest warrants "perhaps more often" (32, lawyer, 172) over time and that there is a **chance for defence lawyers to successfully argue for such a suspension earlier than some years ago**, namely in the first detention review that takes place usually after two to three weeks (26, lawyer, 164; 29, judge, 29, 79 and 156; 32, lawyer, 170-173).

Within the group of interviewed **defence lawyers** we found the prevailing notion that **alternatives to PTD are not used enough** (e.g. 1, lawyer, 216 - 217; 12, lawyer, 155 - 156), the expression of **"missing courage"** can be found in several interviews (20, lawyer, 159-161; 24, lawyer, 73). Equally, a prison social worker expresses this overall perception:

> *"The judges would have to show more courage and also more imagination, regarding less severe measures [....]."*[73] (25, prison social worker, 47)

A more guarded view was taken by one lawyer who - with regard to more 'creative' alternative solutions - remarked that

> *„[...] if there was be an abundance of imagination this perhaps would be not necessarily in the interest of the defendants."*[74] (32, lawyer, 78; with a similar tendency 24, lawyer, 104)

Most defence counsels argued that taking the risk of suspension is justified, as clients could see it as a chance, for example in this interview:

> *"I think we could risk it with a lot of more people to release them. This could be something where you could say 'now you have a second chance, now you can show that you are serious, that you do not want to do this and that anymore.' They can show a law abiding behaviour."*[75] (12, lawyer, 156)

When asked for the **reasons** for reluctance to suspend, one counsel stated the belief that judges do not use alternative methods often enough, because it is **more comfortable for them to know the suspects to be in PTD** (for example 1, lawyer, 217, 221). Another one has the feeling that judges and police are sometimes scared to make headlines in the tabloid media in case they would release someone and he or she would commit another crime (18, lawyer, 207; similar 12, lawyer, 132; 32, lawyer, 77). Another

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[73] *„Die Richter müssten mehr Mut beweisen und auch mehr Fantasie, was Auflagen angeht."*

[74] „[...], wenn da ein allzu großer Phantasiereichtum ausbrechen würde, wäre das vielleicht auch nicht unbedingt im Sinne der Beschuldigten."

[75] *"Ich glaube das man bei einer ganzen Menge mehr Leute das riskieren könnte, die rauszulassen. Das wäre ja auch etwas wo man möglicherweise auch den Leuten sagen könnte "Jetzt habt ihr eine Chance, jetzt könnt ihr mal zeigen, wenn es euch ernst ist, dass ihr dieses und jenes nicht mehr machen wollt". Man kann ja ein legales Verhalten an den Tag legen."*

conceded that **supervising the obligations** (at least those that are not the order to report to the police, mainly in juvenile justice cases) **means a lot of work for the judges** (9, lawyer, 181).

It was expected that **judges** differ in their view from that of the lawyer as regards to the general use of alternative methods. Usually they **seem to be satisfied** with their own practice and the practice of others (for example:

> *"I think the possibilities we have are used to their full extent and this is enough."*[76] [29, judge, 202])

although some shortcomings, mainly with regard to the accessibility of sufficient information about the suspect in practice are acknowledged (10, judge, 196; 15, judge, 189).[77]

Public prosecutors also differ in their views, as one said the use of alternative methods is "expandable" (6, PP, 187). More typical is the view that it is **used adequately**, as one public prosecutor put it:

> *"I have to say our judges act conscientiously and very much in accordance with the rule of law. As soon as a possibility is visible to suspend the warrant, it is done."*[78] (8, PP, 201; very similar 19, PP, 180)

Often, however, the use of alternative methods is viewed as **a compromise**, and not only by the defence counsels. This may even hint at an illegal practice, namely to suspend the arrest warrant in cases where it could legally be challenged because either the suspicion is not strong enough or the facts do not properly justify a ground for detention. **Concern** is expressed by interview partners from different professions (15, judge, 189; 16, judge, 110; particular critical 13 and 14, judges, 248; 20, lawyer, 186; 32, lawyer, 169-173) and

> *"I sometimes have the feeling that a sentence is only suspended* ***when the arrest warrant actually should be dismissed.*** *In this respect, I am then rather a friend to refuse an arrest warrant, instead of quickly impose one and then to suspend it later.*[79] (4, judge, 222)

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[76] *„Ich denke die Möglichkeiten, die wir haben werden ausgenutzt und das reicht auch aus."*

[77] *"Die gesetzlichen Möglichkeiten sind ja vorhanden. Das Problem ist die praktische Umsetzung."*

[78] *„Ich muss sagen, dass unsere Haftrichter sehr gewissenhaft und sehr rechtsstaatlich agieren. Sobald man die Lücke sieht, dass man den haftverschonen könnte, dann wird das auch gemacht. Es ist nicht, dass man von vornherein sagt ‚Ne, hier kommt keine Haftverschonung'. Also, wenn es die Möglichkeit gibt, wird es auch gemacht."*

[79] *„Ich habe manchmal das Gefühl, es wird nur eine Ausservollzugsetzung gemacht, wenn eigentlich der Haftbefehl abgelehnt werden müsste. Insofern bin ich dann eher ein Freund, einen Haftbefehlsantrag auch abzulehnen, als schnell einen zu erlassen und den dann Ausservollzug zu setzen."; „Ansonsten könnte man sage, wenn ich Fälle habe, wo ich die Leute Haftverschonen kann, kann ich auch schon fast überlegen, ob ich überhaupt einen Haftbefehl erlassen muss."*

> *"For the most part, [the defence counsel] bring this into play. Sometimes from my side, but more on demand by the lawyers, it's that I might make a corresponding request or because of the evidence, which is often* ***used as a crutch,*** *that the judge has any doubts about the urgent offense. Legally, this again is not really consequent, […]."*[80] (23, PP 201)

One the other hand, **pragmatism reigns**:

> *"The silver bullet is just to issue an arrest warrant and then to suspend with suitable conditions, then both sides are usually happy."*[81] (17, judge, 109; with a similar tendency 33, judge, 71)

Also one of the interviewed defence lawyers argued that **neither for her nor for the client it makes a big difference between the rejection of an arrest warrant or the suspension**, as long as detention is avoided; at least not when only the usual obligation to report to the police is the condition attached. She would then also accept this as a **fairly lenient restriction of the suspect's liberty**, even if it is a compromise; they simply taking the "path of least resistance" (24, lawyer, 97-98; comparably 26, lawyer, 83 – 85 and 164; 32, lawyer, 169).

There was great consensus among all interview partners that the **defence lawyers in most cases are the ones who start** the discussion about suspending the sentence and possible conditions (for example 7, judge, 195-196 who estimates that 90% of all initiatives are those of defence lawyers); often because they see a real chance, but sometimes only because the client advises them to do so (5, lawyer, 24; 24, lawyer, 79; also judge 10, who had some understanding for this tactics: "they need to offer them something" 10, judge, 220).

Most **judges** themselves were of the same opinion, and described their **own initiative as the exception** (7, judge, 196; 15, judge, 39). Interestingly one of the lawyers also suggested that a "rational judge" in cases of suspects that do not have a defence counsel for the relevant first hearing would "himself get the idea" to suspend the arrest warrant, namely when somebody mentions a family to sustain (9, lawyer, 191).

In some cases it was noted that **sometimes public prosecutors would in advance indicate to agree** (or rather: not to appeal such a decision later) to a possible suspension (7, Ri, 196; 11, PP, 213). This was mentioned either because s/he had been advised

[80] *„Manchmal, von meiner Seite, eher auf Nachfrage von Seiten der Anwälte, dass ich vielleicht einen entsprechenden Antrag stelle oder das aufgrund der Beweislage, das wird ja auch oft als Krückstock benutzt, dass der Richter irgendwelche Zweifel hat am dringenden Tatverdacht. Ist zwar rechtlich jetzt nicht wieder ganz konsequent, […]."*

[81] *„Der Königsweg ist ja der, den Haftbefehl zu erlassen und gegen geeignete Auflagen aus dem Vollzug zu setzen, da sind ja beide Seiten meistens glücklich."*

before that possibly the social circumstances were stable and by the time of the hearing this could be proven (8, PP 50; 11, PP, 99) or when the evidence showed weaknesses either with regard to the suspension or the grounds of detention. This was then, as mentioned above, a last resort to ensure the further development of the case and the arrest warrant (23, PP, 201). This plays into the assumption of some interviewees that alternatives are used by judges or especially the public prosecutor if they fear that the arrest warrant would otherwise not remain in force when appealed against.

5.3. Which alternatives are used?

5.3.1. The order to report

By far the most frequent form of condition to a suspended the arrest warrant that was mentioned is the **order to report to the police**. This was always the first alternative method that was named by the interviewees, and in some cases the only one. One defence counsel did not hold much appreciation for the order to report, stating that:

> *"In my opinion of course one should suspend warrants more often. But honestly, in the light of this, these orders to report are bullshit. If someone wants to go underground, then he will go underground. With or without an order to report."*[82] (5, lawyer, 185).

This is a sentiment shared by others, stating that they do not use the order to report often, as they believe the people would show up anyway and an additional obligation could even amount to an "harassment" ("*Schikane*": 4, judge, 233; 16, judge, 286). One public prosecutor said that he had the impression the police stations were not great fans of having the people coming to report to them (6, PP 186). This means that practitioners who despite this stance use or apply this option may view it either as **symbolic measure or as a means to bargain**, "*to give the judge something*" (9, lawyer, 144).

The opposite position takes a public prosecutor, who thinks that the order to report **puts a certain kind of pressure to attend the hearing onto the suspect**, one that would not be there if there would not be any requirement, as

> *"[i]t makes it certainly more difficult and one has the pressure that at the moment, where the order to report is not fulfilled, then the arrest warrant is again put into execution, which is surely a different pressure com-*

[82] *„Ich denke natürlich, dass man viel öfter haftverschonen sollte. Aber ehrlich, wenn man es recht betrachtet, sind diese Meldeauflagen doch ein Scheiß. Wenn jemand untertauchen will, dann taucht er unter. Mit oder ohne Meldeauflage."*

pared to a situation where no arrest warrant is in the world." (21, PP, 171).[83]

5.3.2. Other conditions related to accessibility of the suspect

In the hearings we had experienced sometimes that defence counsels had offered a "delivery authorisation form" (*Zustellungsvollmacht*) as an alternative to PTD. This means that **all judicial communications such as summons can be delivered to the defence lawyer with binding legal effec**t; it is the lawyer who then has to take care of actually sending it to the client. Our interview partners seemed to make use of this instrument only **rarely**, some of them never. Trust towards the suspect seems to be of importance (18, lawyer, 198 - 199) and it is used only in minor offences (13/14, judges, 231).

Another requirement that is discussed by the interviewees, especially the judges, is to **keep a suspects passport** (*Passeinzug*) in order for the suspect to not leave Germany (4, judge, 226; 10, judge, 182; 15, judge, 191). This seems to be a **more theoretical** idea of an alternative method because it is deemed too easy to get a fake passport or to even travel without the need of a passport within the borders of the European Union (4, judge, 233; 5, lawyer, 34; 15, judge, 191).

5.2.3. Financial bail

Money bail is used rarely in the practice of our interview partners, sometimes in economic offences / white-collar-crimes. In some courthouses it is also not used because there simply is no facility to pay the money (2, PP, 242; 4, judge, 222 (referring to the same courthouse). In some cases it is used in combination with an order to report to the police (for example 30, lawyer, 240-244; 7, judge, 111; 11, PP, 213). The reasons for this reluctant practice mirror the **classic criticism**: One public prosecutor for example feels that using a financial surety as an alternative is not just and he does not use it frequently, stating that

" ... I personally do not think that you should buy yourself free with money. In particular, this has a bland flavor when it comes to drug dealers,

[83] *„Es macht es sicherlich schwieriger und man hat das Druckmittel, dass in dem Moment, wo eben die Meldeauflage nicht erfüllt wird, dass dann der Haftbefehl wieder in Vollzug gesetzt wird, das ist sicherlich eine andere Drucksituation, als wenn gar kein Haftbefehl in der Welt ist."*

that you can free yourself with drug money. This is gladly offered, but I do not like to take it." (8, PP, 185).[84]

Others simply state that (many of) **their clients have no money anyway** (1, lawyer, 62; 12, lawyer, 134; 18, lawyer, 27; 24, lawyer, 101; 30, lawyer, 240).

Other opinions, however, could be found as well: Many interview partners did have experiences with financial bail, and thought it was **good for certain groups** (for example foreign offenders, 11, PP, 213) or occasions, but depended on the willingness and general stance of the judge involved (for example 12, lawyer, 160). This interview partner as well as one of the judges mentioned a controversy whether "own money" or that of third persons would diminish the risk of flight more efficiently. As regards the first option, one judge said:

> *"Suspensions with financial bail we did have. I can remember one case concretely, we were pretty much pummelled for that, but also this suspension worked out, he did not go into hiding. That was a relatively criminal person with not a beautiful career and he had offered quite a high sum, indeed by his sister in law. And this not really well-off woman gave, I think, 15,000 Euros to make a release possible for this rotten apple in the family. And he said, on records,* ***'never in my life has somebody done something like that for me. I'd rather lose my head than run away'.*** *This, for example, is such a weighty argument, where I say, if someone brings that and is authentic, I as a judge can say, I rely on that."*[85] (13, judge, 120).

A comparable story of a group of people that together managed to pay collectively a relatively high sum, was told by a judge who said that she was convinced by the fact that so many people obviously trusted the suspect – even if the individual sums partly were quite low (14, judge, 121). This indicates financial **sureties paid by others** may rather be seen as **symbol of functioning social relations** and also **revive the old idea of bondsmen**.

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[84] *"Kaution eher selten, weil ich persönlich finde nicht, dass man sich mit viel Geld freikaufen sollte. Insbesondere hat das einen faden Beigeschmack, wenn es um Drogendealer geht, dass man sich mit Drogengeld freikaufen kann. Das wird gerne angeboten, aber ich nehme das ungern an."*

[85] *„Kautions-Haftverschonungen haben wir durchaus gehabt. Und zwar, ich kann mich konkret an einen Fall erinnern, dafür sind wir auch ordentlich geprügelt worden, aber auch diese Haftverschonung hat gehalten, auch der ist nicht weggelaufen. Der hatte wirklich auch ein relativ krimineller Mensch mit keiner schönen Karriere, der hatte eine relativ hohe Kaution angeboten und zwar von seiner Schwägerin. Eine nicht besonders betuchte Frau, die ihre gesamten Ersparnisse, das waren glaube ich 15.000 Euro oder so was, hergegeben hatte um diesen schwarzen Schaf der Familie eine Kaution zu ermöglichen. Er hat dann aktenkundig gesagt "Noch nie in meinem Leben hat ein Mensch so etwas für mich getan. Ich würde mir lieber eher den Kopf abreissen, als wegzulaufen". Das ist zum Beispiel so ein Königsargument, wo ich sage, wenn jemand so etwas bringt und das authentisch ist, dann kann ich auch als Richter sagen, ich verlasse mich darauf."*

5.3.4. Therapeutic measures/obligations for drug addicts

Therapy requirements (*Therapieauflagen*) especially for suspects who have a **drug addiction** seem to be **welcomed in theory but in practice are not used very often.** The basic precondition is that there are places in suitable institutions available (which was denied for Berlin but the situation seemed better in the region of North Rhine-Westphalia, where we conducted a few interviews) and that it is clear who pays for the therapy. It was also mentioned that at least for the first hearing it is hardly possible that a suspect can prove s/he is already registered with an institution (18, lawyer, 199; 26, lawyer, 166; 30, lawyer, 240-244; 7, judge, 188; 6, PP, 195; 8, PP, 189). Nevertheless in one of the files studied this condition was available after a few days, once the suspect was able to show a contract with a forensic hospital.

As it becomes clear from the interviews, it would be the suspect (via his/her defence lawyer) who has to propose such an option. Therefore nobody mentioned the problem of consent and free will with regard to such a therapy under the threat of otherwise getting into detention (one judge, however, conceded that addicts are in a "plight" ("Zwangslage", 15, judge, 56).

A specific problem affecting suspects with **few financial means is drug testing** as a condition for the suspension of the arrest warrant, because they are expensive and have to be paid by them, sometimes for a long period (26, lawyer, 170). This shows that **even relatively mild measures can but a heavy burden on vulnerable suspects in particular**.

5.3.4. Electronic monitoring (EM)

The use or possible use of EM (in German usually dubbed "*elektronische Fußfessel*", "electronic shackle") was of great interest for the study. As explained in the 1st National Report, this measure as a condition for a suspended arrest warrant is only used in one of the German *Länder*, in *Hessen*. The **opinions about EM were mixed** between the judiciary, public prosecutors and **defence counsels; only in the latter group some advocates could be found**. one defence counsel was even quite enthusiastic:

> *"It would be a great thing…. You could eliminate most of the cases for risk of flight … "*[86] (30, lawyer, 248);

others had some sympathy for the idea, too (1, lawyer, 76; 32, lawyer, 177); one said that he had very much been in favour earlier but now feared that this could lead to stricter conditions for his clients than necessary (12, lawyer, 168).

[86] *„Wäre doch eine tolle Sache. …. die meisten Fälle der Fluchtgefahr könntest du damit ja ausschalten."*

In all three groups there were quite some interviewees **who until then did not think about EM as a possible alternative at all** or did not consider it as missing, a typical statement is

> ***"I did not miss it so far.*** *Honestly, I did not think about whether it would be a good option or not."*[87] (21, PP, 179).

Scepticism was based for example on the results of the pilot project, it was stated that people who took part did not have any benefits for their possible later sentence, which made the project a lot less successful than it could have been (6, PP, 201). Others did not believe that implementing ankle monitoring would bring any benefits for the procedure, stating:

> *"I think the [EM]* ***is unsuitable for the suspension of execution of the warrant,*** *because if I trust someone so little that I have to control him with an ankle bracelet then I have to think about whether I want to release that person in the first place or not. And if he has it, then that's just like with the video surveillance in the criminal justice area, so I can perhaps solve a criminal offense in retrospect, but I can under no circumstances prevent something. That is why I find this also from a practical point of view a wrong idea and under legal aspects I have not thought further about it."*[88] (26, lawyer, 172).

This view was supported by a public prosecutor, as in his view

> *"EM would not stop a serious criminal to commit further offences. Apart from that - we already had other people try to cut off the ankle monitor [….]."*[89] (23, PP, 19)

Overall, there was **no evident support for the implementation of EM** as a condition to a suspended arrest warrant, rather the opposite.

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[87] *„Ich habe es bisher noch nicht vermisst. Ich habe mir da ehrlich gesagt noch keine Gedanken drüber gemacht, ob das eine sinnvolle Möglichkeit wäre."*

[88] *„Ich finde sie eigentlich auch als eine Maßnahme für eine Außervollzugsetzung völlig ungeeignet, denn wenn ich jemandem so wenig vertraue, dass ich ihn mit der Fußfessel kontrollieren muss, dann muss ich mir überlegen, ob ich ihn rauslasse oder nicht. Und wenn er die Fußfessel hat, dann ist das genau wie mit der Videoüberwachung im Strafraum, damit kann ich vielleicht im Nachhinein eine begangene Straftat aufklären, aber ich kann auf keinen Fall irgendwas verhindern. Deswegen finde ich das auch unter praktischen Gesichtspunkten einen falschen Gedanken und unter rechtlichen habe ich mir da noch nicht weiter was überlegt."*

[89] *„Weil eine Fußfessel bei einem hochkriminellen Täter überhaupt keine Sicherheit bietet. Zum Beispiel von weiteren Taten abzuhalten. Unabhängig davon, dass wir auch schon bei anderen Leuten hier diese Erfahrung gemacht haben, das den sofort abgeschnitten hat… "* [The interview partner was referring to dangerous prisoners who get the obligation to war an electronic bracelet when they are released from prison.]

5.4. Experiences and the problem of breach

One of the **very clear results** in our expert interviews was that **most respondents assess that alternatives generally worked** according to their professional experience. We simply asked (meaning the suspension under certain conditions) "*Does it work*?" and by far the most said something like "*Yes, it does*". That the lawyers may be very positive about this possibility was perhaps less a surprise (for example 1, lawyer, 245; 5, lawyer, 218; 12, lawyer, 136; 20, lawyer, 190; 24, lawyer, 119; 26; lawyer, 174). But also judges and public prosecutor said that the suspects **generally fulfilled their obligations and also stood trial** (8, PP, 191; 15, judge, 207; 21, PP, 187; 19, PP, 205; 23, PP, 119; 31, judge, 271).

In some interviews the respondents remembered single cases of people actually absconding and depicted them as exceptional (5, lawyer, 219; 15; 207; 12, lawyer, 130; 20, lawyer, 192; 26, lawyer, 174), but in their view that was not relevant compared to the number of people who complied.

Two lawyers, however, in so far expressed **reservations** as they gave a comparably positive assessment only for those "*who do not have a substance problem*" (18, lawyer, 209) and one who had indicated that his clients very rarely would abscond depicted **standing trial as rational choice**– implying that those who do not act rationally perhaps sometimes do abscond:

> *„Apart from that, if at all, it is a panic reaction. But all people who think a little do not bunk off. It's nonsense anyway."*[90] (20, lawyer, 192)

Similarly, one public prosecutor (2, PP, 266: new offences while under suspension are *"more frequent than you would think"*) and one judge stated that non-compliance can be found more frequently. The latter estimated that in 10-15% of all cases orders to report or other obligations were violated and suspension had to be revoked (29, judge, 207) – but even here the failure rate could be assessed as low and perhaps indicates that this judge is prepared to accept a somewhat higher risk. Another judge made a **reservation for two groups, namely drug addicts and a certain group of "travelling offenders"**, but said that with Germans, in particular when they do not have a criminal record, her experiences were good (4, judge, 113).

Overall, this indicates that even in the eyes of those professionals who are sceptical with regard to expanding the use of alternatives this scepticism cannot be based on disappointing results - there is no evidence or experience that it does not work, rather the opposite. A problem that became evident again in this context, however, was missing

[90] *„Ansonsten sind das, wenn dann mal, eine Kurzschluss-Reaktion. Aber alle Leute, die ein bisschen nachdenken hauen nicht ab. Ist ja auch Blödsinn."*

feedback and the detachment of the ongoing process for many public prosecutors and also those judges only involved in the pre-trial phase (see above 3.4.). Similarly all three prison staff interviewed (25, prison social worker, 47; 27, prison director, 89; 28, prison governor, 90) **requested more communication** among the different professional groups.

5.5. Institutional support

As mentioned in our 1st National Report (p. 36 pp.), in Germany **probation or other services are not involved in pre-trial decision-making** with the exception of the juvenile justice court aid (*Jugendgerichtshilfe*) although the existing court aid for adults in principle could be asked to gather information about the suspect. Apart from this support for the decision-makers, one strategy to reduce pre-trial detention could be the involvement of practical social work to aid the defendants to rebut legal grounds for pre-trial detention (most notably, supporting the accused to find housing and therefore an address to reduce the fear of absconding). Both, but in particular the latter was **discussed in the 1970s and 1980s** with several projects working in that field but more or less **disappeared from the current discussion and reform agenda**.

This was reflected in the answers of our interview partners. When we asked whether there should be more "institutional support", leaving open at first how this support could work, in most cases the answer was negative. It was interesting, how the question was interpreted: Many just thought about an **additional source of information**, often with regard to former misbehaviour of suspects such as earlier crimes or breaches of obligations in other criminal proceedings (10, judge, 155; 16, judge, 113; 23, PP, 167). A judge, on the contrary, was explicitly hoping for such a mechanism to be put in place someday, in particular **to add to the sometimes biased way of searching for information by the police** (see below 6.5):

> *"If you ask me whether I would want this, that we have a court aid that investigates carefully in the social environment in detention matters, than I would want it. But I also know that I am a dreamer in that regard. This is simply a question of funding…"* [91] (13, judge, 217).

Others rather thought of **housing projects or social support mechanism** (5, lawyer, 170: "*everything that helps*"; 21, PP, 199: "*for people in desolate conditions*"; 26, lawyer, 154; sometimes restricted to juveniles, 2, PP, 220 and 326).

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[91] *„Wenn sie mich fragen, ob ich mir das wünschen würde, dass es eine Gerichtshilfe gäbe, die in Haftsachen umfassend zum Umfeld ermittelt, dann würde ich mir das erwünschen. Aber ich weiss auch, dass ich damit ein Träumer bin. Denn das ist einfach eine Frage der Finanzierung…"*

All in all, the **involvement of other institutions did not find much support**. One public prosecutor stated that there already are enough institutions involved to provide an adequate result (19, PP, 174, see also below 6.1). On the other hand, the same public prosecutor criticised that quite often suspects with mental health problems were not identified properly, although some of them are under a certain form of custodianship ("*Betreuung*") of which the authorities know – but communication lacks (19, PP, 178; see also above 4.2.7). An interviewed judge came to the same conclusion but not because she believed that there were already enough filters in place but because of a lack of trust in an additional institution (comparable in interview 2, PP, 218 and 15, judge, 181), as

> *"We see at the moment how bad the input of the juvenile legal aid is, I cannot imagine much at the moment. Obviously* ***money is missing*** *for it and willingness to invest into it."*[92] *(4, judge, 220).*

When compared to institutional support that was already in place, such as court aid for juveniles, **defence counsels stated that they were actually advising their clients against talking to them**, as the court aid must provide the information to the courts and do not act under confidentiality one going as far as saying that he "prohibit[s] [clients] to talk with them" (12, lawyer, 146; comparably 18, lawyer, 177). It was additionally argued that the personal information that is given to the court assistance could easily be provided by the defence counsel and they would be able to control the information themselves (Interview 12, lawyer, 147; 32, lawyer, 139).

We got the impression that **defence counsels mostly thought that support from their side is enough for the client.** Nevertheless there were some interview partners that thought that social work strategies at least for some groups would be helpful, namely for those in need of housing to provide a proper address or for those who are drug or alcohol abusers. Here, at least in some German regions some institutional support seems to exist (5; lawyer, 135; 21, PP, 191– both referring only to juveniles;[93] 25, prison social worker, 60-63; 26, lawyer, 154).

Equally, probation officers (in cases of suspects that are already convicted and are under supervision by the probation system when allegedly reoffending) were potentially seen as helpful by some interview partners (11, PP, 249; 16, judge, 113; 18, lawyer, 185; 26, lawyer, 160), but useless in the eyes of others, because they were hard to be contacted and always suffering from a case overload (15, judge, 185; 22, judge, 199). One judge was

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[92] *„Also wenn wir im Moment sehen, wie schlecht die Zuarbeit von der Jugendgerichtshilfe ist, kann ich mir da im Moment nicht viel vorstellen. Dafür fehlt offensichtlich das Geld und man ist nicht bereit, da zu investieren."*

[93] The respondents from Berlin referred to closed institutions for vulnerable (and sometimes dangerous) juveniles; they regarded them as beneficial. Currently, only one of the institutions still operates and these places do not suffice (2, PP, 324 and 21, PP, 193).

of the opinion that everything that could be said about personal circumstances "*the suspect himself can tell me*" (15, judge, 181).

Central outcomes 5

- The German way of providing for "alternatives" to pre-trial detention is to suspend an arrest warrant under conditions.
- This happens rarely in the first hearing after the initial arrest, but in the review hearing, meaning that it usually shortens PTD rather than substituting it completely.
- Suspensions in later review hearings happen in 20% - 40% of all cases according to personal impressions and assessments by our respondents.
- Some reported a tendency that these suspension happen *more often* than some years ago and that there is a chance for defence lawyers to successfully argue for such a suspension *earlier*, namely in the first detention review that takes place usually after two to three weeks.
- Defence lawyers are usually the ones who start the discussion about suspending the sentence and possible conditions.
- In most of the cases, the condition is the obligation to report to the police, usually weekly.
- Money bail is hardly used by our interview partners.
- Electronic monitoring is not used in Germany as a condition to a suspended arrest warrant except in one Federal State (Hessen) that was not in our sample. Most interview partners said that they do not miss that possibility except for a few of the lawyers that would welcome it.
- One of the very clear results in our expert interviews was that most respondents assess that alternatives generally worked in their professional experience. Not only lawyers, but also judges and public prosecutor said that suspects generally fulfilled their obligations and stood trial.

6. Role of the players, media and politics in the decision-making process

6.1 Decision-making: shared responsibilities?

6.1.1. Who acts?

In our 1st National Report on the German situation (p. 14) we have described that **constitutional and criminal procedural law attributes the responsibility for the**

detention decision to the detention judge (Haftrichter). We have, however, also indicated that this judicial decision to imprison according to older studies **depends largely on the submissions of the public prosecution.** This situation, in our view required particular research attention.

There is a strict time limit on the first decision of a judge on a detention case: "Without delay", but not later than at the end of the day after the arrest, the suspect must be brought before the judge. The judge then has to decide upon detention in **two scenarios** possible:

- In the first, a **judicial arrest warrant already exists**, often based on longer investigations, which means that a more or less substantial and voluminous case file is brought before the judge with the suspect. In this scenario a first judicial decision towards detention has been made, the decision in the hearing therefore is less an open issue. Usually it is a **question of confirming the initial written decision**. This already becomes clear when looking at the court language use: Despite the technical term of "*Vorführtermin*" (literally: "presentation" hearing), both in formal court decisions and during our observations and in the interviews it was called "*Verkündungstermin*" ("delivering" or "rendition" hearing).
- The second scenario represents the situation that the **suspect was preliminarily arrested** by the police more or less directly after an alleged offence (sec. 128 CCP), according to empirical studies, this is the more frequent scenario. It also played in our interviews a greater role – either because the judges interviewed were particularly working as stand-by judges for these cases or the defence lawyers interviewed dealt with that kind of "ad-hoc clients" (for example 9, lawyer, 31; 24, lawyer, 16). The public prosecutors and some of the defence lawyers had both types (for example 32, lawyer, 25).

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

In both types of hearings in principle only three persons **have to be present: the suspect, the judge and a court clerk to take the protocol.** As we have explained in our 1st report on Germany (p. 14), the **defence may be** present in the hearing and the suspect has a right to request a lawyer's presence. It is, however, **not obligatory**, and according what we have observed in the explorative stage of the study **it is often not the case in smaller everyday cases**. When we asked the judges whether the

presence of a defence lawyer was frequent, no clear pattern became visible. Equally, the **public prosecution may take part** in the hearing and **often does not**. Here, a tendency towards the absence emerged from the answers of our interview partners (see below 6.4. for more details).

Quite often - in particular in Berlin where it was the case in nearly all hearings observed – an **interpreter** is present in the hearing and in fact has an important and time-consuming role, in particular since a reform 2010 that strengthened the information and translation rights since now s/he has to translate all important documents to the suspect in the hearing. A few remarks were made on how difficult it was in single cases to find suitable interpreters (for example 19, PP, 30), that waiting for them can be time-consuming (4, judge, 39; 22, judge, 30; 33, judge, 31) and that these services are quite costly (for example 18, lawyer, 145). All in all, however, the interview partners seemed to be satisfied with the services provided and no major problems were reported in this regard.

Witnesses are **hardly ever** present in hearings, although defence lawyers said that they would, if possible, sometimes bring parents or relatives with them to a hearing in order to convince the judge of stable social circumstances (for example, 9, lawyer, 79; 24, lawyer, 20). That this – sometimes – is helpful and this kind of evidence was accepted in the so-called "*Freibeweisverfahren*" (informal intake of evidence) was confirmed from the judicial side (7, judge, 116; 15, judges, 169; 19, PP, 172).

In the review hearing (more on which in sec. 8) the presence and **roles of actors may be shifting somewhat**: Such a hearing (*Haftprüfung*) can be requested by the suspect and on his/her behalf by the defence. As explained in the 1st National Report (p. 14), a lawyer is assigned to the suspect in the moment his or her detention is enforced. In particular when the defence lawyer is of the opinion that s/he will be able to present facts that could exonerate the suspect with regard to the alleged offence or rebut the reasons for detention, s/he will quickly request such a review and will then usually take a much more active part in the hearing.

6.1.2 Who dominates?

One particular interest of our research was to see **how the different actors assessed their own role, influence and responsibility** in decision-making. This was often discussed with regard to the question of discretion (see below). Interestingly, in several interviews the respondents used the image of a **system with several filters**:

> *"The first preliminary test run already with the police, which looks at what is going on, which direction it might take, under which offence does*

it fall, is here a prison sentence in question or not. Then here with us at the prosecutor's office, where really the course is almost set. And once again more careful, with more peace and quiet and with better information, which are prepared on the table, the judge. These are different filters, I always imagine that for me."[94] (19, PP, 174; similar remarks were made by 8, PP, 167; 9, lawyer, 35; 26, lawyer, 127; 31, judge, 125)

Towards the end of the interview we asked quite boldly **who actually dominates the decision-making process in detention matters the early stage of the process**, the interview partners had to decide for one actor. Some tried to get around the question, but most of them gave an assessment. They **varied** to an astonishing degree:

Most of the **defence lawyers argued that it was the public prosecutor and the police** who actually steer the cause. While this certainly reflects the legal construction to a certain degree as illustrated in the filter model– no case gets before the judge when the public prosecutor does not request it - it sometimes was expressed as **strong criticism against the judges**:

"They do what the public prosecution wants."[95] (1, lawyer, 174; in similar words 24, lawyer, 85; for cases of larger economic or business crime 26, lawyer, 142)

"He could act differently. He could. But they are not willing to do it."[96] (30, lawyer, 190; in very similar words 20, lawyer, 159)

"What I would require from the detention judges it that they make their own decisions more frequently, independently from the public prosecution. That it is not always done in that way [the PP wants it]."[97] (5, lawyer, 118)

"I guess this is not true for all, but there are or at least were detention judges in XY where you had the feeling that they just don't want to decide against the public prosecution. I remember a concrete case where I had

[94] *„Aber wir haben ja nun erstmal, wenn wir den Antrag stellen, wir haben ja verschiedene Prüfungen, muss man ja sagen. Die erste vorab Prüfung läuft ja schon bei der Polizei, die sieht was los ist, wohin tendiert das ganze, unter welchem Tatbestand fällt das, kommt hier eine Haft in Frage oder nicht. Dann hier bei uns bei der Staatsanwaltschaft, wo ja wirklich die Weichen fast gestellt werden. Als nochmal sorgfältigeres, weil auch mehr mit Ruhe und mit besseren Informationen, die ja vorbereitet auf dem Tisch liegen, der Haftrichter. Es sind ja so verschiedene Filter, so stelle ich mir das immer für mich vor."*

[95] *„Die machen, was die Staatsanwaltschaft will."*

[96] *„Er könnte das anders machen. Er könnte. Aber die Bereitschaft ist gering."*

[97] *„Was ich mir mitunter wünschen würde von den Haftrichtern, ist das sie mehr eigene Entscheidungen treffen unabhängig von der Staatsanwaltschaft. Das nicht immer nur das gemacht wird [was die Staatsanwaltschaft, will]."*

presented a lot that he would not abscond. And then I had the feeling he considered this, said to the public prosecutor 'What do you think?' and he said 'I am against it' and then he said to my client, 'Yes, it just does not work out.'[98] (12, lawyer, 130)

Others were less critical but their answers showed that they see the **judge at best as a corrective figure**, who only deals with the case very shortly and is limited in his role except for the actual hearing. The mentioned exceptional cases were the judge was not content with the speed or the accuracy of the proceedings and therefore decided against the request of the public prosecution, obviously sometimes also for disciplinary reasons (for example 5, lawyer, 157; 9, lawyer, 147; 20, lawyer, 180). They therefore see the **public prosecution as their actual counterpart** (9, lawyer, 154; 26, lawyer, 146; 24, lawyer, 73).

Table 2: Dominating the decision-making process

Answers by →	*defence lawyers*	*judges*	*PP*
Who dominates?↓			
Judge	1	**5**	3
Public prosecutor	4	1	3
Defence	-	-	-
Police	1	-	-
Police, PP and judge	1	-	1
Police, public prosecutor	2	-	1
Defence counsel, PP	-	1	-
Public prosecutor and judge	-	2	-
Suspect	-	1	-

Among the **public prosecutors** (only) three very clearly attributed the responsibility for the detention decision to the judge and thought of him or her as dominating and

[98] *„Ich glaube auch, das gilt nicht für alle, aber es gibt oder gab jedenfalls noch Haftrichter in XY, da hatte man das Gefühl, dass die nicht gegen die Staatsanwalt entscheiden wollen. Ich kann mich an einen konkreten Fall erinnern, wo ich dann sehr viel vorgetragen habe dafür, dass er nicht abhauen würde. Und dann hatte ich das Gefühl er erwog das, sagte ‚Was sagen Sie denn, Herr Staatsanwalt?' und der sagte ‚Ich bin dagegen' und dann sagte er zu meinem Mandanten ‚Ja, es geht ja auch einfach nicht'."*

responsible figure (2, PP, 79 and 182; 3, PP, 165; 19, PP, 160). The others assessed **their own role as dominating**, mainly because they were the ones familiar with the investigation and the case material as this statement illustrates:

> *"I think the judge relies primarily on what is presented, of course he has his own authority to examine… But it rarely happens, when here we assess that it is going to be detention that he differs from that and refuses. And also the defence lawyers know to whom they have to talk, when they want to achieve something, so at that point of time they come to the public prosecution to find out where are chances, what do I have to do to get my client out."*[99] (23, PP, 163; with a similar tendency 6, PP, 142; 8, PP, 165; 11, PP, 97; 21, PP, 152)

Even **some of the judges** conceded that they were dependent on the work of the public prosecution, implying that they saw them as dominating in the decision-making. They stressed the fact that **all the information was delivered and handled by others** (10, judge, 160, including the defence lawyers as they also have more information about the client), that they have to work with the wording and the reasoning of the request for the arrest warrant prepared by the public prosecutor (7, judge, 105; 15, judge, 154; 29, judge, 145) and that the public prosecution is a reasonable actor ("They are also not too generous with their requests, they think about it carefully…", 7, judge, 208; similar 15, judge, 39). **Others (the majority)**, however, were more self-confident and explicitly talked about **taking responsibility** and also about **status:**

> ***"I decide upon something that is an ultima ratio, a deprivation of liberty, and I have the responsibility for this decision in the end."***[100] (22, judge, 23)

> *"There I do make the claim that it is me who dominates. […] in this case I come to a decision that is my very own and it is important for me to document this [explaining why he holds all hearings in the court building and not in the prison at it is sometimes done in his region]."*[101] (33, judge, 150; with a similar tendency: 4, judge, 133; 14, judge, 211; 31, judge, 223)

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[99] *„Ich denke der Richter verlässt sich ja im Regelfall erstmal auf das, was vorgetragen wird, natürlich hat der seine eigenen Prüfungskompetenzen…. Aber es kommt doch eher selten vor, wenn hier die Einschätzung auf Haft geht, dass der Richter abweicht und es ablehnt. Und auch ansonsten Anwälte quasi wissen an wen sie sich wenden, wenn sie was erreichen wollen, also die kommen ja dann zu diesem Zeitpunkt auch auf die Staatsanwaltschaft in aller Regel zu, um zu eruieren, wo sehe ich möglicherweise Chance, was muss ich machen, damit ich meinen Mandanten da raus kriege."*

[100] *„[…] ich entscheide etwas über was eine ultima ratio ist, nämlich eine Freiheitsentziehung, und ich habe dafür am Ende die Verantwortung."*

[101] *„Da nehme ich für mich schon den Anspruch, dass ich den Hut aufhabe. […] in diesem Fall treffe ich ja eine ureigenste Entscheidung und das ist mir auch wichtig zu dokumentieren. "*

Two judges from higher courts mentioned the pressure that is exerted on judges by the other parties – in particular that „every inquiry directed to the PP is deemed a personal injury" (14, judge, 199, in German even talking of a "*Majestätsbeleidigung*" which literally is "injury to the Majesty"). As will be discussed in more detail in section 7 of this report the different approaches may be explained by the degree to which the actors are willing to take on responsibility for the case and the decision, and this partly is influenced by the fact whether the actors feel that they act informed and can - and want to - influence the amount of information they have.

6.2. The role of the judges

As we have seen, the role of the judges in the detention decision is **not assessed in a uniform way, neither by the other actors, nor in the professional group itself.** They do not - or not often - seem to live up to the important task that has been attributed to them by the constitution and the code of criminal procedure.

Nevertheless it became clear that **their role may be underrated by some**. This particularly is true for the defence lawyers that do only see those cases in which an arrest warrant actually has been formally requested by the public prosecutor. Indeed in this stage, by far the most respondents from all groups said that it is a rare incident that this request is rejected (for example 7, judge, 208 and 15, judge, 136: "very rarely"; 4, judge, 275: 1 out of 15). Nevertheless some respondents reported that in **informal talks**, initiated by either side, cases are discussed between public prosecution and judge and the latter may indicate that s/he would **not accept the request**. Typical in this regard was the statement (when asked how often an application was rejected):

> *"I rarely reject by formal decision. Because I communicate a lot and I usually would send back the file with the request to investigate further or to put a certain aspect more clearly."*[102] (10, judge, 210; with a similar remark 29, judge, 221)

Reasons given referred to **badly prepared cases** or to **weak evidence** with regard to the suspicion, less to the reasons given for the assumed risk of flight or repetition (with similar remarks as above 4, judge, 133; 13, judge, 211; 15, judge, 136; 17, judge, 277; 21, PP, 152; 23, PP, 157; 29, judge, 165; 33, judge, 61). While the respondents usually did not want to say how often this happens or said that a rejection on the phone was rare (31, judge, 18) two judges estimated that altogether they would reject every fourth request (16 and 17, 275-277). In any case this informal communication in which things are prob-

[102] *„Ablehnen selten, also durch einen förmlichen Beschluss. Weil ich viel kommuniziere und in der Regel schicke ich die Akte zurück mit der Bitte nochmal etwas zu ermitteln oder den Aspekt doch nochmal klarer zu fassen."*

ably said more directly as in a protocol **may lead to some sort of self-restraint by the public prosecutors** and therefore confirms the decisive status of the judge in the decision-making at least to a certain degree.

The judges themselves did also insist that they had enough discretion and did usually not feel too much under pressure, neither from higher courts, nor from time pressure or scarce resources (except for rare occasion like football championships, riot-like situations you would sometimes find in Berlin on the 1st of May, or when a bigger group of suspects is arrested at the same time), and usually not from the other actors. In some cases, political, public and media pressure was mentioned (see in more detail below 6.6).

> *"I would say that I am content with the freedom I have. In the end it is me who decides and whatever it is, it will be enforced. Of course I reflect: how would the Court of Appeal decide? Of course it does not make sense when I release the murderer and tomorrow the Court of Appeal says we will catch him again. But if this were my conviction, I would release him."*[103] (10, judge, 151; very similar 15, judge, 148; other statements included the expression: "I am my own master" 29, judge, 145, or "I am completely free", 15, judge, 147)

That they in principle have **enough discretion** was also **stated by many of the other actors**, but it was criticised, as mentioned above, that many judges did not use it to a sufficient degree (9, lawyer, 144; 20, lawyer, 159; 26, lawyer, 165).

Several times we found the somewhat more reserved assessment that there were very many "clear" cases, as indicated in this statement:

> *"Surely there are clear-cut cases. I would say an estimated 80% are, spontaneously, clear cases, and for the rest you have leeway. I think that all know that. But then it is also important that you are aware of it, that you could decide this or that and that both could be motivated."*[104] (4, judge, 157; similar, but with reference to High Court jurisprudence you have to observe 22, judge, 166)

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[103] *„Ich würde schon sagen, dass ich zufrieden bin, mit der Freiheit die ich habe. Letztendlich, ich treffe eine Entscheidung und egal wie die ist, die wird erstmal umgesetzt. Insofern bin ich frei. Ich habe natürlich die Überlegung auch, wie würde das Landgericht entscheiden? Es macht natürlich keinen Sinn, wenn ich den Mörder aus der Haft entlasse und weiss, morgen sagt das Landgericht, den fangen wir wieder ein. Aber wenn das meine Überzeugung wäre, würde ich ihn rauslassen."*

[104] *„Ne, klar gibt es eindeutige Fälle. Ich würde sagen so geschätzt 80% würde ich als eindeutig jetzt spontan einstufen und bei den verbleibenden hat man einen Spielraum. Ich glaube das wissen aber auch Alle. Aber dann finde ich es auch wichtig, dass man sich dem bewusst ist, dass man sich jetzt so oder so entscheiden kann und beides gut begründen könnte."*

It became clear, however, that the **willingness to use that leeway increases with the duration of the procedure** and that it is used more often in the **review hearing** (see below 8); and often not a clear-cut decision, but a **compromise** is sought, as the relatively high percentage of suspended arrest warrants show (as explained already above, 5.1). **Both indicators show that indeed the discretion that the law gives the judges is not used well enough in the first hearing.**

6.3. The role of the suspect/defendant

Surprisingly **little was said about the suspect as a person**, perhaps we did not ask well enough for his or her role – in any case this role was not picked out as a central theme by our interview partners spontaneously. This is highly problematic with regard to **procedural justice issues and personal autonomy** of the persons concerned as described in section 2.1 of this report – it should be noted, however, that **most respondents did not see a problem in this minor role of the suspects**.

One judge, however, spontaneously mentioned at the end of the interview that he does not like it when suspects are brought to the hearing **handcuffed** or otherwise restricted in their mobility and would usually immediately order that these means of coercion are removed (17, judge, 315, agreeing 16, judge, 317). He linked this practice to the bad situation in the court's windowless room for this kind of hearings and said these circumstances were "**unworthy**", both for the suspect and the judge ("How do we actually work… and where?", 17, judge, 315). During **our observations** we were always already in the room when the suspects where brought in. In all cases **they came in without handcuffs or other restraints,** but it is possible that they were brought there handcuffed. The judge mentioned explained that problems always never arise and he then would still have one or two police officers in the room (16, judge, 322; 17, judge, 322; similar 4, 185). He linked the practice of regular handcuffing during the transports to the courts to a lack of staff to supervise them and therefore choose cheap solutions (16, judge, 322).

The **passive role** became tangible when I asked whether and under which circumstances the lawyer would let the **suspect present facts or him-/herself**:[105]

> *"**You rather avoid it**. To the facts certainly not, because you cannot handle it and it is an early stage of the investigations and you can ruin the case. What I do like, is to let them talk about their personal circumstances when I have the feeling that he cuts a good figure and he has*

[105] Which, admittedly, was not a good, open question, but rather suggestive.

> *something to tell. But there are candidates where I avoid this at all costs."*[106] (9, lawyer, 160)

This impression was confirmed by **judges** who said that they did have **"scarce exchange" with suspects** when defence lawyers were present (7, judge, 134) or that they cannot properly decide upon personal circumstances and reasons to detain "*if he does not tell me anything*" (10, judge, 162).[107] While the judges and PP conceded that they understand the tactics behind these instructions to stay silent, they seemed to imply that with regard to the detention question it was not helpful – for the defence lawyers this is a dilemma and will be discussed further below 6.5. In any case it raises concerns with regard to **respect for the autonomy of suspects**, that are underlined by expressions like "*letting them (not) talk*" as in the quote above or "*when defence lawyers have their clients under control*" (for example 2, PP, 117).

Between judges the readiness to try to communicate with suspects differed: One judge stated that in some cases suspects would end up telling things that are of no interest to the hearing and in other cases had been rude and out of line (4, judge, 179 - 181). Another one said that that the suspect is "of central interest" – meaning, however, less the suspect's possibility to act and speak but referred to him more as the object of the investigations, conceding, however, that for the sake of the suspect the procedure needs to be speedy (29, judge, 164). This **judge**, like some others, also said he **needed the "personal impression"** to properly assess the case and come to a decision (29, judge, 163; 31, judge, 120; 15, judge, 180). This type of decision-maker also tended to see the suspect as an important (if not decisive) **source of information** at least about his or her personal circumstances; interestingly also some PP mentioned this "information plus" judges have with regard to the decision:

> *"They themselves give thought to it by means of the file and the personality of the suspects they have in front of them."*[108] (19, PP, 160; similar 2, PP, 117; both PP that were of the opinion that it is only the judge who holds responsible to the detention, see above)

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[106] *„Man versucht es eigentlich zu vermeiden. Zur Sache eh nicht, weil das relativ unbeherrschbar ist und es ein frühes Ermittlungsstadium ist und man sich dadurch den Fall kaputt machen kann. Was ich gerne mache, ist die zu persönlichen Verhältnissen reden lassen, wenn ich das Gefühl habe, der kommt gut rüber und der hat was zu erzählen. Gibt es aber auch Kandidaten, wo ich auch das tunlichst vermeide."*

[107] In one of the hearings I could observe, a defence lawyer was present and the judge later pondered, whether it would have been important and her task to ask the (female) suspect who would take care of her children, but - she then shrugged - there was a lawyer who certainly would deal with that problem.

[108] *„Sie machen sich ja selber Gedanken anhand Akte und Aussage und Persönlichkeit der Beschuldigten, die sie ja vor sich haben."*

Others seemed to rely almost entirely on the files (see for more details below 7.2). The latter scenario is the more plausible one given the fact already mentioned: Once a formal request for an arrest warrant is in the world, the judge usually follows this request - the personal impression obviously cannot change much.

Some respondents, however, made the impression that they **were genuinely interested in the human beings they had to deal with** (and even saw this is one of the **interesting features of their profession**). One public prosecutor said that he wished to be able to follow more hearings, and recalled one case:

> *"There the person concerned actually did try to speak on his own behalf and again said that he would stand trial. I think this nearly changed the judge's mind. And of course it is the suspect's appearance that is important. If you only know somebody from the files, and then you have him in front of you and he does not look at all like the junkie that was presented in the files, then it makes a big difference."*[109] (6, PP, 148)

A judge, reflecting the meaning of the hearing for the decision:

> ***"Yes, I have the file. But for me personally it [the hearing] is always very important – and therefore we have it – and I really like to do it and I do take the time."***[110] (33, judge, 55)

6.4. The role of the public prosecution

German Public Prosecution Agencies are **organised hierarchically**, different from judges, public prosecutors have superiors and are, in principle, subject to directives. Additionally, the head of the public prosecution authority in each Federal State (*Bundesland*) has a post that **may be politically influenced** since the respective Minister of Justice can issue orders to him or her and usually also influences the decision on who is appointed. Therefore, **certain regional cultures**, stemming either from the Ministry of Justice of a *Bundesland* or from the head of the respective Public Prosecution Agency may shape also the pre-trial detention practice. Indeed, we found some evidence for the existence of such practices – not directives in the formal sense but certain **"house practices"**. We have already mentioned in the section on decisive factors that

[109] *„Da hat der Betroffene durchaus zu seinen Gunsten versucht zu sprechen und hat noch mal bekräftigt, dass er sich dem Verfahren stellen wird. Das glaube ich, dass hat schon Eindruck gemacht und hätte die Richterin fast umgestimmt. Da […] ist auch das äußere Erscheinungsbild des Angeklagten wichtig. Wenn jemand nur nach Aktenlage kennst und den dann vor dir hast und der kommt gar nicht so vor wie der Junkie, der im Akteninhalt präsentiert wird, macht das einen großen Unterschied."*

[110] *„…, ich habe ja eine Akte. Aber für mich persönlich auch immer ganz wichtig, dafür ist ja die Anhörung auch da und das mache ich eigentlich auch wirklich gerne, sind die Anhörungen, und da nehme ich mir auch Zeit für."*

respondents hinted at informal guidelines as to when an arrest warrant should be requested in some public prosecution districts (see above 4.2.1 and table 1). Equally, some offences or hotspots obviously trigger requests to varying degrees according to that kind of informal guidelines – the examples of burglary into a dwelling and a temporary "no tolerance"-policy with regard to street drug dealing were given (3, PP, 48; 6, PP, 25; 8, PP 18 and 160).

Nevertheless, the same PP said that they were **free in their decision** to actually follow these informal guidelines and partly refrained from doing so– as later was confirmed seen when they reacted to the vignette (2, PP, 152; 3, PP, 70 and 182; 11, PP, 31). One explained this with resource problems:

> *"I think you actually have a relatively high amount of discretion, in particular when you are done with countersigning* [a practice in the first one or two years, sometimes de facto shorter, when beginners must double-check their decision with their direct supervisor]. *Because of the abundance of work people are not interested in the work of others; they have plenty to do themselves."*[111] (6, PP, 126)

Two others were somewhat more reserved in their assessment when they said that they **"feel *rather* free"** [my emphasis] in their decision-making (8, PP, 167) or that the interviewed person was more easily to impress by superiors or the police **when she was younger** (23, PP, 133) (but not anymore).

As mentioned above, there was consensus among all interview partners that the public prosecutors were **the decisive filter within the decision-making chain** – also the lawyers agreed on this (for example 5, lawyer, 26:; 9, lawyer, 35; 26, lawyer, 137, the latter nevertheless thinks that police exercises quite some influence and sometimes pressure). They have to reject motions from the police when they differ in their assessment with regard to the evidence for an urgent suspicion and/or the reasons to detain. Several mentioned this task as a typical practice (for example 2, PP, 25), and one PP even assessed how often he contradicts the ideas of the police – in 30-40% of all cases (8, PP, 165).

Both the **collaboration between police and public prosecution** and the **need for correction – if necessary – by judges** can be seen from these two remarks, the first stemming from a PP:

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[111] *„Ich glaube du hast schon relativ weiten Ermessensspielraum, insbesondere wenn man aus der Gegenzeichnung raus ist, ist der unglaublich groß. Aufgrund der Fülle interessieren die Leute sich nicht für anderer Leute Arbeit, die sind selbst genug beschäftigt."*

> *"I think that the PP has great influence. Also because of the proximity to the police. When a commissioner calls and says 'we are tracking him for two weeks', there is a **certain fraternity**, both are law enforcement agencies, and you know your commissioners. Somehow I believe that when the PP and the police somebody really want to have detained, then they take pains with the request or really push that claim, the reasons for detention, and then this makes an impression. Of course, the judge still is a corrective, but I think the judge notices it, when it is of great importance to the PP and if they have researched a lot and have had a look at all criminal entries and have asked for old files from other proceedings to be able to really have a proper foundation for the arrest warrant. Or if it is just a makeshift request. I really think the biggest influence is with the PP."*[112] (6, PP, 145)

The **need for correction** is felt also by judges when reflecting on the selection and assessment of information by the PP:

> *"This is a fundamental problem. There is something written in a file and then the court has to be sceptical. You always have to keep in mind the intention of the police authorities – that I actually can understand – and this is rather rarely done by the PP, that sometimes positive effects [of certain information] are just neglected."*[113] (13, judge, 58; similar 14, judge, 57)

While obviously the **PP dominates the preparation of the arrest warrant**, the interest or possibility to follow up the case is less pronounced: Regarding the **presence of the PP in detention hearings** the answers differed, and there seem to be regional differences, but **more often than not** the PP does not take part in it (7, judge, 200; 19, PP, 166: "we completely let go of"; 23, PP, 149; 29, judge, 177). Some interview partners would try to be present and tell the detention judge to notify them, by phone, if neces-

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[112] *„Ich glaube schon, dass die Staatsanwaltschaft einen großen Einfluss hat. Auch aufgrund der Nähe zur Polizei. Wenn ein Kommissar anruft und sagt, an dem sitzen wir schon seit Wochen dran, da herrscht eine gewisse Verbrüderung, beide sind Ermittlungsbehörden, man kennt seine Kommissare. Irgendwie glaube ich schon, dass wenn die Staatsanwaltschaft und die Polizei jemand wirklich in Haft bringen will, dann geben sie sich bisschen mehr Mühe oder stellen das besonders nachdrücklich dar, die Haftgründe, sodass das dann schon einen großen Eindruck macht. Klar, der Richter ist immer noch ein Korrektiv, aber ich glaube der Richter merkt, ob es der Staatsanwaltschaft sehr wichtig ist, und ob sie besonders viel recherchiert hat und doch noch mal alle Vorstrafen angeschaut hat und alte Akten anderer Verfahren angefordert hat schnell, um den Haftbefehl auf anständige Füße zu stellen. Oder ob es ein Verlegenheitsantrag ist. Ich glaube den größten Einfluss hat tatsächlich die Staatsanwaltschaft."*

[113] *„Das ist ja ein grundsätzliches Problem. Man schreibt da etwas in die Akte und man muss da eben auch als Gericht skeptisch sein. Man muss diese Intention der Polizeibehörden, die ich durchaus nachvollziehen kann, immer so ein bisschen im Hintergrund behalten, das wird von Staatsanwaltschaften eher selten getan, das man diese auch denkbare positive Wirkung gerne unter den Tisch fallen lässt."*

sary. This was said at least when they were particularly interested or want to actually take part in the decision-making, for example signal the judge whether they would accept a rejection or suspension of the arrest warrant or whether they would appeal against it (for example 6, PP, 147; 11, PP, 9-97). This was echoed by lawyers - PP would be there "only, when something is at stake" (5, lawyer, 161).

6.5. The role of the police

The role of the police for decision-making in pre-detention matters is, as already indicated, of great importance as they start the investigation and dominate it to a great degree. Since **we did not interview police officers**, we only have some – scattered reflections by the other actors. police is certainly seen as playing in the same field as the PP (see above 6.4., "fraternisation"), sometimes even as the more influential players: According to two lawyers the respective report ("Vorführbericht") by the police "is just handed over" to the PP and there is "taken word-for-word" to file the request for the arrest warrant (1, lawyer, 192; in similar words for cases of everyday street crime 26, lawyer, 142).

Police is seen both by lawyers and sometimes by judges and PP as the authority that **too often presses for arrest warrants** *("they are happy about every arrest warrant they can get hold of"*, 31, judge, 192, *"they sometimes they think they decide"*, 5, layer, 214)) and we have some hints that they implicitly put PP and sometimes also judges under pressure to get them (for example 17, judge, 142; 23, PP, 133). In two cases **explicit pressure** via the media (20, lawyer, 159) and/or professional associations was mentioned:

> *"With the Police Associations it would already be important that they would not always say [publicly] 'we catch them and the stupid judges let them go'."*[114] (33, judge, 57, referring to police pressure via the Ministry; with a similar remark 7, judge, 251-253)

It became clear that **police investigations are the most important source with regard to information about the living circumstances** and having a permanent address (for example 11, PP, 25; 13, judge, 58; 14, judge, 54; 29, judge, 232, 31, judge, 38) – for many arrest warrants police therefore indeed is the decisive actor. **Criticism we heard in several interviews as to the thoroughness and neutrality of these investigations is important and a cause of concern** – suspects may go into prison just because the police did not properly investigate (with several examples judge 13, 56 and judge, 14, 57, see also quote above 6.4) or even "forgot" to mention certain

[114] *„Bei den Polizeiverbänden wäre ja schon mal wichtig, wenn die nicht immer sagen würden ‚wir fangen sie und die dummen Richter haben sie wieder laufen gelassen.'"*

facts that may be helpful to avoid pre-trial detention, such as a permanent residence at the home of girlfriend or family (13, judge, 48; 26, lawyer, 52).

6.5. The role of the defence

The role of the defence in pre-trial detention matters was **strengthened with the reform 2010**: Only since then a **defence lawyer is obligatory** (and needs to be paid by the state, if necessary) in all cases where remand **detention is actually *enforced*** (see also 1st National Report, p. 15). Further demands that there should be a mandatory defence counsel appointed already when an arrest warrant is *requested* by the public prosecution were discussed in a more recent reform project, but were rejected. According to German law, however, suspects are entitled to seek advice and support by a defence counsel in any stage of the proceedings, so **in many cases the suspect already has a lawyer quickly after the arrest regardless of a state appointment**. This discussion was interesting for us and we asked for the interview partners' opinions in that regard.

Defence lawyers, as we have depicted in section 6.1., usually do not have many possibilities to act in the first hearing, because they are the last actor involved and often have even fewer information than judges and PP and not much time to read the existing file to prepare. Often it was mentioned that they would take some time to understand what was happening in the case by calling the police, the PP or sometimes the judge and visiting the client (sometimes talking to the family), but that generally at most a few hours could be spend on getting to know the case, often a lot less. This means that **their possibilities to influence the decision in that early stage are very limited,** as both lawyers

> *"we have little possibilities to define [the situation], we rather have possibilities to intervene"*[115] (20, lawyer, 165; similar 9, lawyer, 144)

and the other actors (for example 10, judge, 226; 15, judge, 226; 16, judge, 228) confirmed.

All respondents agreed that there were **no differences** in the quality of work between **lawyers paid by the state and those paid privately** in pre-trial matters - simply that differences exist between well-prepared, engaged defence lawyers and others and that they do not have to do with the question of remuneration. In particular judges - who see many different lawyers acting – talked about **some badly prepared and undedicated lawyers** (for example 4, judge, 127; 7, judge, 103; 13, judge, 211; 21, PP, 154) but

[115] „Wir haben da wenig Möglichkeiten, zu definieren, wie können eher intervenieren."

in general did not criticise the lawyerly ethos and practice with regard to pre-trial detention.

When asked for their **assessment of the 2010 reform** mentioned above some practicioners said that it was quite an achievement or at least a step in the rights direction (9, lawyer, 89; 10, judge, 168; 12, lawyer, 73; 20, lawyer, 78; 25, prison social worker, 57; 32, lawyer, 90). Others thought that it was "disappointing" (13, judge, 226) because it did not help avoiding pre-trial detention, or said that it did not make much difference (7, judge, 128; 15, judge, 176-179; 16, judge, 228).

The **opinions were divided** in how far it was possible to **quickly organise a lawyer**, if needed via a so-called "*Anwaltsnotdienst*" (emergency legal aid): Some said that it was easily possible and worked fairly well (4, judge, 43-45; 12, lawyer, 80; 17, judge, 226; 31, judge, 193). Others said that it did not, that they in the course of the proceedings experienced fights between the "emergency" lawyer and a chosen lawyer that was called in later or that the emergency lawyers often did not know what they were doing (7, judge, 139; 10, judge, 169; 15, judge, 178). Some lawyer, in contrast, deplored an **intransparent practice of who was appointed** as legal aid lawyer by the courts (for example 18, lawyer, 75; 24, lawyer, 123; 26, lawyer, 25).

No clear picture emerged as to **when the appointment** actually takes place – the law foresees immediate action. While in Berlin the practitioners seemed to think that it was done very quickly, we heard different things from other regions (of up to two weeks before actually a lawyer can speak to the client in prison). In one of the files we inspected it became clear that the judge completely forgot to appoint a lawyer and only the police, when visiting to prisoner four weeks after his arrest to question him, discovered that he had no lawyer. While we cannot say if this is an isolated case the current system at least makes such a persistent mistake possible, and obviously the prison staff had not noticed the problem.

Not surprisingly, also with regard to the ongoing reform agenda of an **earlier mandatory appointment** of a defence counsel, the respondents differed in their view: Some did not think the involvement of a lawyer would change the course of proceedings, partly because **they themselves would treat the suspect fairly enough** by giving all the information and giving him or her the chance to explain the social circumstances, according to them such a **reform is not necessary** (4, judge, 189-191; 22, judge, 188; 21, PP, 169). Others said that it would be **difficult to organise** in an even shorter period of time. A third type of opponents said that it would be a **risk for the whole procedure** because lawyers then would, when in doubt, tell their clients to **stay silent** which would make investigations more difficult and probably also longer (4, judge, 190; 13, judge,

222; attributing this view to the law enforcement agencies and the judiciary also 23, lawyer, 96).

Most **lawyers** were clearly in favour for such an option, usually emphasising that the **2010 reform only had been stopped half way through** and that the appointment after the detention decision has been made, was **too late** (for example 12, lawyer, 74: "absurd point of time"; 30, lawyer, 128; 32, lawyer, 90 and 133). Most also thought that it would also be easy or at least possible to properly organise it and also ensure the quality of appointed lawyers (with the exception of lawyer, 24, lawyer, 74). Some, however, were more sceptical, in particular with regard to **overhasty appointments** that did not leave the suspect enough time to **carefully choose his or her lawyer** and requested a form of **preliminary appointment** for the first phase of the proceedings that could be changed more easily than it is the case now (for example 20, lawyer, 77-78; 26, lawyer, 25, 32).

Also some **judges** were **clearly in favour for an earlier appointment**, mainly arguing that this would professionalise the proceedings, perhaps speed them up and that it would be good (fair) for the suspects (10, judge, 168; similar 31, judge, 101; 33, judge, 100). One judge explained that it would "make my life easier" (10, judge, 168) - this is interesting in so far as it highlights **what is expected from the lawyers**: They must provide the **necessary information in particular about the social circumstances** of the suspect. Despite the responsibility of the judges to either investigate themselves when they have the feeling that important information necessary to decide upon pre-trial detention is missing, or to request more investigations by the police or the PP, some seem to think that it is the lawyer's duty. Indeed it is often only additional information lawyers bring in that help to suspend the arrest warrant at a later stage of the proceedings - in some cases this suspension or a rejection of the arrest warrant probably would have been possible in the first hearing if social circumstances, for example the credibility of statements with regard to address or job, had been investigated properly (more on this below in section 7.2). But several answers reveal that this seen as the lawyer's job (9, lawyer, 79; 10, lawyer, 168; 25, prison social worker, 153; 29, judge, 83). Interesting is a remark that perfectly illustrates both the flaws of these investigations and the burden that is put on the lawyers:

> *[...] those lawyers that are involved in an early stage in the end only present their own divergent interpretation of the same facts and nothing new - **admittedly it is not really their task**, but it would be a possi-*

bility that they would do it. For example positive developments, living situation, job perspectives […] [116] (13, lawyer, 211)

Some respondents were also critical with regard to useless requests for detention review hearings and thought that some lawyers do it only to be able to get the fees (for example 13, judge, 211; more on reviews in section 8).

While criticism to a rather passive role of (some) defence lawyers may be justified, the final remarks of this section are devoted to the **dilemmas defence lawyers face** in their work: In some cases a straightforward defence against pre-trial detention may put the **case tactics for later stages of the proceedings at risk**. And the current situation of the appointment of a state paid lawyer puts them in an impossible situation: When they **successfully argue against detention, they may go unpaid**. Obviously this leads to cases where the defence lawyer accepted pre-trial detention despite good chances to avoid it, although they seem to be rare (9, lawyer, 89; 10, judge, 170; 30, lawyer, 130).

6.6. Influence of media, public pressure and politics

When discussing „apocryphal" grounds for detentions or extra-legal motives, we have mentioned **media influence** and the fear of **being harassed by media or politicians** (see above 4.1.6.). Various kinds of these pressures were mentioned by our interview partners and this kind of pressure **played a greater role in the interviews than we had expected.**

Many generally referred to changing times and **more** public and/or media **pressure** to stricter law enforcement that also hit the judiciary (2, PP, 160; 7, judge, 251-253; 9, lawyer, 142; 10, judge, 142; 13, judge, 102; 20, lawyer, 159; 21, PP, 130-132; 22, judge, 159; 23, PP, 137; 25, prison social worker, 34; 27, prison director, 33; 31, judge, 183; 33, judge, 250). On the other hand, some (but not all!) interview partners working in the northeast of Mecklenburg-Western Pomerania said that in that remote region the press did not take notice of this kind of questions (17, judge, 181; far less than in bigger cities: 18, lawyer, 151) – this probably is more a question of personal experiences, since other respondents from that region explicitly reported attacks at least by social media.

Their assessment, however, **on how far this actually negatively influences the development of the pre-trial detention practice, varied considerably**. Most of

[116] *„[…] dass die frühzeitig tätig werdenden Verteidiger letztlich nur ihre abweichende Bewertung des selben Sachverhalts darbringen und nicht[s Neues] - ist auch nicht wirklich ihre Aufgabe muss man sagen, aber es wäre ne Möglichkeit, dass sie es täten. Zum Beispiel positive Entwicklungen, Wohnsituation, Berufsperspektiven […]"*

them said that even if **they can feel the pressure, they themselves could resist**. Sometimes they even tried to downplay personal experiences, for example:

> *"It [public and political pressure] has become stronger. I don't know with which trends this has to do, but the media coverage has increased the pressure, partly within the agency, partly from superior authorities, and then detention is sought after more frequently. Even if you express doubts […] that has become more common. I don't know where it comes from, but I think that after all these years I can push through my 'No'."*[117] (23, PP, 137)

A similar remark was made by a judge:

> *"The judge is always in the focus, in the media. I know it, I have rejected […] a request for an arrest warrant and this has led to a so-called shit-storm in the media, but this honestly does not bother me a lot. You have to live with that. Honestly, I do stand above it. […] Honestly, on the contrary, the relation between the judiciary and the public anyway has been quite disrupted, there will not change much in the future. The judges always have said 'we do it, how we think it is right, because you don't know the circumstances of the case'."*[118] (31, judge, 182-188; with other references to personal experience and the claim not to be bothered really 7, judge, 251-253 and 33, judge, 250)

In the conversations we had with the interview partners it was **assumed**, in particular by lawyers, **that the decision-making indeed was influenced by that pressure - always referring to other actors or colleagues**. **Very few took** into account that perhaps ***their own decisions*** actually could be influenced (2, PP, 151; 22, PP, 151). It must be noted, however, that **most interview partners really engaged in that part of the interview** and usually referred to certain examples where colleagues had suffered from media attacks (in particular the "case study" presented in section 3 of this report) which in our view indicates that it **touched a sensitive issue**. Several interview partners talked about their own experiences and from some remarks we can deduct

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[117] *„Es ist stärker geworden. Ich weiß nicht mit welchen Strömungen das zutun hat, aber das mit Presseberichterstattung quasi hier, sei es dann schon von oberen Behörden, sei es allein schon innerhalb der Behörde an sich […] der Druck erhöht ist und auch gerne mal eher die Haftentscheidung gesucht wird. Selbst wenn man Zweifel bekundet… das ist mehr geworden. Woran es liegt, weiß ich nicht, aber auch da bilde ich mir ein, dass nach all den Jahren ich mein Nein da auch durchsetzen kann."*

[118] *„Der Richter steht immer im Fokus, medial. Ich weiss es, ich habe jetzt einen Haftantrag […] abgelehnt, dass hat zu einem sogenannten shitstorm geführt in den Medien, das belastet mich ehrlich gesagt aber auch nicht weiter. Damit muss man leben können. Ehrlich gesagt stehe ich da so drüber. […] Ehrlich gesagt, trotzdem, da ohnehin das Verhältnis der Justiz zu der Öffentlichkeit sehr gespalten ist, war, wird sich da auch nicht viel ändern in Zukunft. Die Richter haben auch in der Vergangenheit immer schon gesagt ‚Wir machen das so, wie wir das für richtig halten, weil ihr die Hintergründe des Falls nicht kennt'."*

that decisions may actually be influenced in certain situations, perhaps without them being aware of it. One PP talked about a documentary he had watched on TV, about a certain drug hotspot in his city, and said:

> *"[…] it was about drug crime in XY, what happens in X-Park, what happens in Y. I was angry about that, honestly, that you are openly addressed, that you convey to the public that you would be nearly in a legal vacuum. Citizens were interviewed that I can understand very well when they say 'Why is nothing done there?' Something is done, but there are just too many. […] This is not acceptable from my point of view, there I am very much pro law enforcement…* [119] (8, PP, 161)

A judge stated that that without issuing an arrest warrant in severe cases there would a "legitimate public outcry" (31, judge, 114); and another concluded her thoughts referring to a case that had significant media coverage:

> *"I don't feel media pressure in a sense that I say I am not free in my decision, I would not say that. But I think that here we needed a decision that transports to the electorate outside* [jokingly]*, you cannot behave in that way in Germany."*[120] (10, judge, 142)

Central outcomes 6

- When asked who actually dominates the decision-making process in (the initial phase of) detention matters, the answers of our interview partners varied to an astonishing degree. Most lawyers attributed the most influential and in that sense dominating role to the public prosecution. Several public prosecutors and even some judges agreed – the majority of judges, however, said that it was them who actually have and take the responsibility for the decision and therefore saw themselves as the dominating actors.
- The suspect usually does not play an active role in the proceedings and hardly articulates him- or herself in the detention hearings.
- Public prosecution, according to the German CCP, is the "master of the investigation". As regards the detention decision, the judges are dependent on the PP's

[119] *„[…] da ging es unter anderem um die Drogenkriminalität in XY, was da am X-Park los ist, was da in Y los ist. Mich hat das geärgert, ganz ehrlich, dass man da so offen angesprochen wird, dass man so nach außen vermittelt, dass man sich quasi in einem rechtsfreien Raum befinden würde. Da wurden auch Bürger interviewt, die ich sehr gut verstehen konnte, wenn die sagen ‚Warum wird hier nichts gemacht?'. Es wird ja etwas gemacht, aber es sind einfach zu viele. […] Das ist nicht hinnehmbar aus meiner Sicht. Deswegen bin ich da schon sehr pro Strafverfolgung, […]."*

[120] *„Ich spüre keinen medialen Druck, dass ich sage, ich bin nicht frei in meiner Entscheidung, das würde ich nicht sagen. Aber ich finde hier musste eine Entscheidung her, die an die Wähler draußen [lacht] transportiert, so kann man sich in Deutschland nicht verhalten."*

preparatory work and gathering of information, which in practice leads to a dependence on investigative work actually done by the police.

- The role of the defence in pre-trial detention matters was strengthened with the reform 2010: Only since then a defence lawyer is obligatory (and needs to be paid by the state, if necessary) in all cases where PTD is actually *enforced*. Further demands that there should be a mandatory defence counsel appointed already when an arrest warrant is *requested* by the public prosecution or even earlier, when a suspect is interrogated by the police, were rejected. According to German law, however, suspects are entitled to seek advice and support by a defence counsel in any stage of the proceedings, so in some - but often not everyday street crime - cases the suspect already has a lawyer quickly after the arrest regardless of a state appointment.
- Since a defence counsel often comes in only very shortly before the first detention hearing (if at all), the possibilities to influence this are very limited. They become more important during the detention phase, in particular with regard to review hearings.
- All interview partners agreed that there are no quality differences between state-paid and privately paid lawyers in detention matters; criticism rather targeted some unengaged and uninspired lawyers mainly interested in getting fees for sometimes useless review requests.
- Our respondents feel increasing media, public and political pressure, assessments on whether this actually influences their everyday practice were not uniform.

7. Procedural aspects - practical problems

7.1. Introductory remarks

As mentioned in our 1st National Report (p. 45), the two occasions Germany was convicted by the **European Court of Human Rights** (in several cases respectively) for breaches of the convention related to the length of pre-trial detention and to the right to inspect files - thus to **fairness issues** the pre-trial detention procedure. The existing research often describes the procedure leading to (and prolonging) pre-trial detention as a procedure dominated by considering files. This was at least partly confirmed during our observations in court, where quite some discussions between the professional actors dealt with **files - that have to be send, waited for, or read.** During the interviews files where mentioned quite often which makes them a central procedural aspects.

On the other hand **communication** was interesting for us in several regards: First of all, the **hearing** of a suspect that may lead to his/her loss of freedom is of central importance. Here we had mixed experiences during our observations, as in principle most **suspects got the chance of contributing** to the hearing, but **mostly did not** contribute themselves – sometimes because it was their lawyer who spoke, in two other cases because they were mentally (long alcohol abuse, multiple mental disorders) not capable of articulating themselves well. In many cases communication was difficult because it had to be mediated by an interpreter. **Communicating reasons** for detention is a special aspect that had been criticised in studies and jurisprudence. Often the **(written) motivation** of a detention decision **leaves at lot to be desired.**

Another particular concern is the length of pre-trial detention, as the above mentioned jurisprudence by the ECtHR, abundant high court jurisprudence and research shows. Some of our respondents mentioned this problem of the overall length, more obvious for our research interested in the decision-making, however, were concerns about **delays** – and sometimes the opposite, the **"need for speed" – in the early stage of the proceedings.** Time therefore played a considerable role both in older material and our study, as did other **resource problems** that frustrated our interview partners.

7.2. Files

7.2.1. Access to files for lawyers

As mentioned above and in our 1st report, the right to inspect files in the past often was restricted due to investigation requirements by the PP, which had been criticised heavily by defence lawyers and later by courts. While the new provision from 2010 that strengthens this right still is criticised by some as not going far enough (because the PP in principle still can object to a file inspection in certain cases), we hardly heard complaints in that regard – most lawyers said that **they usually get the files without problem**s (for example 12, lawyer, 134-136; with some reservation with regard to more complex economic crime 18, lawyer, 262, who also said "you always have to chase them"; 20, lawyer, 147: "in 80-90% I have no problems whatsoever"; 30, lawyer, 209; 32, lawyer, 33). It is important to know, however, that always a **formal request** of getting access to the files is necessary.

Routinely **lawyers do not become active before they have inspected the files** – as soon as they are involved they usually would advise the client to stay silent until they have received the files and studied them. Very often they would then start to collect more information in cases they see a chance to argue against pre-trial detention and either immediately or a few days or week later request a review hearing (more in section

8). This course of events is typical which means that **the point of time the lawyers get access to the files is decisive.** Because there is **no automatism** of sending the file to the defence, nothing happens unless the lawyer has requested the file and again nothing happens until he or she actually received the file and had the time to work with it. Some lawyers described this as a **"problem of timing and organisation"** (24, lawyer, 80; 30, lawyer, 207-209). Because the files play such an important role, organisational problems of requesting, sending and receiving the files delays in that procedure may well contribute to unnecessary periods of detention when s/he is released in the first review hearing. While, as mentioned above, the lawyer generally do not complain about having access to the files, at least in one region it was reported that organisational problems do exist and have become more serious (25, prison social worker, 48: it used to be 2 weeks before files were sent, now 4 to 6 weeks).

To us, therefore, the **suggestion** of one of the lawyers (30, lawyer, 209) makes sense: The defence lawyer, once s/he is appointed, **should get a copy of the file automatically and immediately** (and perhaps for a restricted period). This certainly would help to spare at least some days of unneccesary detention in certain cases.

4.2.2. Working with files

When discussing the importance of the hearing with regard to the position of the suspect it already became clear that for some, if not most, actors, the files are more important for the actual decision-making than the hearing. The usual way for judges seems to take a **preliminary decision on the basis of the files** before s/he sees the suspect and then – as the case may develop – amend it or change it. The most important parts of this file with regard to the detention decision are the criminal record, as mentioned above, and the results of the questioning of the suspect by the police (for example 4, judge, 32; 19, PP, 160; 29, judge, 31 with the important note that what was said by witnesses would only be in the files; 31, judge, 41-42).

Since either the request for the arrest warrant already exists (and therefore would have to be significantly changed, which means more work) or a preliminary version has to be formulated by the judges themselves (as this was the case in some of the observed court hearings) an **inclination rather to confirm this preliminary decision** than to formulate a new one is natural. This means that **files indeed have an overriding significance and the whole procedure is dominated by file work** in most cases.

7.3. Communication

From what has been said above with regard to the different roles it may have become clear that also the **interaction and communication between the actors** is important. Nearly all respondents **confirmed that informal communication** by telephone calls or short conversations before the hearing or, more rarely, in the office of judge or PP do take place frequently.

In the discussions **between PP and judges**, often the chances of "getting an arrest warrant" are discussed or the judges point out to the PP that in their view important information is missing in the request for an arrest warrant and they would not accept it in that form. This **closeness** between judges and PP (some emphasised how "trusting" the working relationship is, for example 23, PP, 37; 29, judge, 221) often is criticised. This criticism partly is justified as this "closing of ranks" makes it harder for the third actor involved, the defence lawyer (let alone the suspect) to successfully intervene. On the other hand it is in these communications the **judge already may stop further steps towards detention**.

Indeed also **lawyers** are **part of the informal communication**. While this was usually referred to **almost as a matter of course**, two of our interview partners were more sceptical; one lawyer always tries to send formal written notes to be able to document the course of events (24, lawyer, 88); one PP said he rather directed lawyers to the judge during the investigation (3, PP, 174). When lawyers are involved, these conversations often deal with **practical questions** of getting information from the police (usually depicted as unproblematic, 1, lawyer, 18; 21, lawyer, 25; 26, lawyer, 137), fixing dates or sending files. Sometimes also the reasons to detain are discussed, often when lawyers are **informing PP (less often judges) about personal circumstances** of the suspect.

Several lawyers also explained that apart from presenting a lot of personal details to convince either PP or the judge to at least suspend the arrest warrant, sometimes would also "offer" a confession (see also above 4.2.4.), **trying to "negotiate" or "reach a compromise"** (for example 20, lawyer, 167; 21, lawyer, 175; 26, lawyer, 83-85), and described it as successful defence strategy for some cases (**"consensual defending"**, 9, lawyer, 154; in principle agreeing 7, judge, 196; describing that kind of conversation before the formal hearing also 15, judge, 177).

In some cases the informal communication between defence lawyer and detention judge dealt with the lawyer not being able to attend the hearing. He would then – as two judges described it – ask the judge to tell the client to remain silent, which would be accepted by the judge:

> *"Or the lawyers ask me to tell the defendant, before he does not know the file and talked to him. This will all be in the protocol, so that the defendant does not talk nonsense* [later]. *Then I just tell the defendant, you will now go in detention for a start and your lawyer will visit you there and then he requests a review hearing and then we'll see. This is how I do it."*[121] (29, judge, 169; very similar 17, judge, 232)

It is the question whether this **collaboration always is in the interest of the defendant or rather serves the necessities of the professional actors.** These findings remind us of the research on the **"court room work group"** (see above section 2) – this research, however, had also suggested that thriving collaboration in the long run could also be beneficial for the clients.

Further indications for this notion of the court room work group is the **mutual understanding for each other's professional roles.** A typical remark showed understanding for lawyerly advice to remain silent *("[…] then of course every right-minded lawyer says: 'We don't talk.' "*, 15, judge, 177). On the other hand defence lawyers showed understanding for the pressure on judges or PP by media and politics (see above 6.6., for example 32, lawyer, 77) or limited time and resources (9, lawyer, 79; 20, lawyer, 159).

7.4. Gathering information

When discussing the different roles of the actors it already became clear that the **inclination to look for as much information as needed** to properly prepare the decision (as for the PP) or to actually take it (as for judges) **exists to varying degrees**. According to our impression, **many actors are not willing to investigate themselves** and make do with what they find in the files or get to know in the hearing. In particular **personal circumstances** that are important to avoid detention have to be presented by lawyers. This means that they **often only are available for the second, the review hearing**, although they may have existed - and could have been known - already when detention was ordered.

Some judges clearly were of the opinion that it was not their task or that at least it was not a feasible task to investigate themselves in detention matters:

[121] *„Oder aber die Anwälte bitten mich dem Beschuldigten zu sagen, bevor er nicht die Akte kennt und mit ihm geredet hat, die Aussage zu verweigern. Das wird dann alles protokoliert, damit also hier der Beschuldigte keinen Unsinn erzählt. Dann sage ich halt dem Beschuldigten, sie gehen jetzt erstmal in Haft. Und der Verteidiger wird sie demnächst da aufsuchen und der stellt dann einen Haftprüfungantrag und dann gucken wir mal. So handhabe ich das."*

> *"It's only in the review that I have an own right to investigate, not before. There is high court jurisprudence that the investigation concerning the social circumstances do not only have to be done by request of the lawyers, but ex officio. This means that I would have to send the public prosecution, that the police fully investigates the circumstances."* [122] (7, judge, 219)

Judges from a higher court that have to deal with contested cases accordingly see **many flaws in this regard**, they come back to this point over and again in the interview (see also above section 6.5):

> *"Of course the quality of the investigation result depends on what has been found out by the PP and the courts. One of the things that really make me unhappy personally is that in detention matters it is often operated with insufficient knowledge. Then positive circumstances are not considered because they have not been ascertained."*[123] (13, judge, 26)

> *"That's how it is, also in the course of events it is not investigated any more. It is investigated with regard to the urgent suspicion, but concerning the personal circumstances nobody bothers to ask the family or the employer or the hostel."*[124] (14, judge, 67)

> *"[…] because this is the task for the court and the PP, to determine the facts. They have this duty ex officio to investigate positive aspects. Perhaps I have pummelled the defence lawyers too heavily [referring to an earlier remark], because I want to emphasise that it is not their job, but in the forensic reality it is the standard that if something is presented concerning the personal circumstances, it comes from the defence."*[125] (13, judge, 214)

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[122] *„In der Haftprüfung habe ich dann eigenes Ermittlungsrecht, davor nicht. Es gibt auch eine […] Rechtsprechung, dass die Ermittlung des sozialen Umfelds nichts auf Vortrag des Verteidigers erfolgen muss, sondern von Amtswegen. Im Grunde müsste ich danach die Staatsanwälte losschicken und besorg mir mal die polizeiliche Ausermittlung des Umfelds. Das ist schon so, dass das von den Verteidigern or angetragen wird."*

[123] *„Die Qualität der Ermittlungsergebnisses hängt natürlich davon ab, was die Staatsanwaltschaft und die Gerichte ermittelt haben. Einer der Umstände, die uns, mich persönlich, unglücklich macht ist, dass in Haftsachen oftmals mit einem unzureichenden Sachverhalt operiert wird. Dann sozusagen denkbare positive Punkte nicht berücksichtigt werden, weil sie nicht festgestellt sind."*

[124] *„Das ist einfach so, dass auch in der Folge nicht weiter ermittelt wird. Es wird zum dringenden Tatverdacht ermittelt aber zu den persönlichen Verhältnissen da fragt keiner mal die Familie oder den Arbeitgeber oder das Heim."*

[125] *„[…] weil das Aufgabe des Gerichts und der Staatsanwalt ist, den Sachverhalt zu ermitteln. Die haben von Amts wegen die Pflicht auch positive Gesichtspunkte zu ermitteln. […] wahrscheinlich [habe ich] gerade ein bisschen zu doll auf den Verteidigern rumgeprügelt, denn ich will das hervorheben, das ist nicht ihre Aufgabe, es ist im forensischen Alltag allerdings der Standard, dass wenn etwas zum persönlichen Umfeld vorgetragen wird, das kommt dann von der Verteidigung."*

It should be mentioned, however, that we do find (rare) indications that indeed some PP and judges request more information (in that sense investigate themselves, for example call the employer named) when they have doubts (for example 11, PP, 25; 15, judge, 178; 33, judge, 51). Sometimes we also find indications that they follow almost an "*in dubio pro reo*"-approach"[126] that is not foreseen in the law for this kind of evidence; they do it as a matter of fairness (for example 4, judge, 64; 23, PP, 27; 31, judge, 86), but perhaps also because it spares them work.

7.5. Reasoning

Both research relying on file analysis and high court jurisprudence often criticise the fact that the written reasons given for pre-trial detention in the decision (the arrest warrant) are sometimes not much more than a simple repetition of the wording of the CCP or shows otherwise insufficient reasoning (see 1st National report, p. 10-12). Additionally, the judge – despite his constitutional role as **"*author*"** (in the sense of creator) in the true sense of the word – usually just takes the document prepared by the PP and makes it the basis for his own version, amending or changing it to a larger or lesser degree. In the (few) files we studied, this findings were fully confirmed.

Indeed, as several of our respondents acknowledged, **the reasons given in written, are very short and usually stem from the PP,** a typical statement was:

> *"A huge part of the arrest warrants [the requests] you can just adopt. Then you add three, four sentences, and then it's good."*[127] (29, judge, 149; with several similar statements from other judges and PP, for example, 19, PP, 158)

This was taken by most interview partners quite matter-of-factly and also lawyers did usually not complain about it – they did not expect more.

The stinted written motivation however does not mean that the decision-makers (both the PP when writing the request for an arrest warrant and the judge when actually issuing it) do not motivate their decisions for themselves in a more complex way, as has been described by some of our respondents (see above 4.2.1.1.) or as it was put by a high court judge, describing time pressure for detention judges:

> *"And then you produce an arrest warrant they would probably be ashamed of when they had the time. But you cannot let people go. […]*

[126] In that case taking favorable information for granted, see also above 4.2.5.

[127] *„Ein Großteil der Haftbefehle, die kann man halt übernehmen. Da schreibt man noch drei, vier Sätze rein und dann ist gut."*

you examine the basic facts, you realise that the preconditions are met and then you sometimes just write down a sweeping sentence. […] But you order pre-trial detention nevertheless in all certainty that the pre-conditions are met."[128] (13, judge, 298 who in the other hand also was very critical with the quality of the written reasons, 13, judge, 193; 14, judge, 197)

Nevertheless the meagre reasons given in written are **unsuitable to build a proper basis of control by higher courts or counterstatements by lawyers.**

With regard to the **prognosis** that decision-makers have to make – usually pondering about the expected sentence as stimulus to abscond, see above 4.2.1. – several interview partners see a **problem in the missing feedback:**

"In particular as you get not much feedback. We only see the cases once. And when you yourself do not get active and ask what has happened to the cases, you don't get that feedback. And then you cannot really assess, for example, when you suspended an arrest warrant but you did not have a 100% good feeling, but you wanted to give him a chance, and then you don't know, did it work or not. And then I formed the habit of asking the lawyers 'did it work' or asked colleagues from the regional court how did the proceedings end. And then you learn."[129] (4, judge, 113)

„I mean, it is an old request to statistically collect data exactly which grounds for detention where used when and that also the feedback to the detention judges is there, what has happened to him. That they will get data, this and that case has been sentenced to this and that and your prognosis that he gets five years was completely wrong. Or with a suspension – yes, he showed up, he only got 3,5 [years] *and actually showed up to serve the sentence. That would be, I think, useful."*[130] (20, lawyer,

[128] *„[…] dann machen sie da Haftbefehle, für die sie sich wahrscheinlich schämen würden, wenn sie Zeit gehabt hätten. Aber man kann die Leute auch nicht laufen lassen. […] man prüft als Richter die Grundlage, man stellt fest, die Voraussetzungen sind da und dann schreibt man eben auch mal so einen pauschalen Satz auf. […] Aber man ordnet die Untersuchungshaft gleichwohl in der Gewissheit an, dass die Voraussetzungen da sind."*

[129] *„Noch dazu, wenn man wenig Rückmeldung bekommt. Wir sehen die Fälle nur ein Mal. Und wenn man selbst nicht aktiv wird und nachfragt, was ist aus den Fällen geworden, bekommt man keine Rückmeldung. Sodass man auch schlecht beurteilen kann, zum Beispiel, wenn man eine Haftverschonung gemacht hätte, bei der man selber kein 100% gutes Gefühl hatte, aber demjenigen eine Chance geben wollte, dann weiss man nicht, ja ist die aufgegangen oder nicht. Und dann habe ich mir irgendwann mal angewöhnt, dann die Anwälte auch anzusprechen, ist das gelungen, oder Kollege am Landgericht gefragt, wie ist der Prozess ausgegangen. Und dann lernt man ja dazu."*

[130] *„Ich meine, es ist ja eine alte Forderung auch, dass statistisch mal erhoben wird genau welche Haftgründe wann [gebraucht wurden] und dass auch der Rücklauf an die Haftrichter mal erfolgt, was ist denn mit dem passiert. Dass da da mal eine Statistik kriegen, der und der Fall is zu dem und dem verurteilt worden und deine Prognose, der kriegt fünf Jahre ist völlig falsch gewesen. Oder mit*

198; similar remarks by 13, judge, 190; 24, lawyer, 74; 25, prison social worker, 48; 27, prison director, 89; 32, lawyer, 125)

Some judges however thought that their prognoses were not bad and also claimed that they **actually do try to follow up cases** - at least those they found interesting (for example, referring to growing experience and the above mentioned efforts to get feedback 4, judge, 117; rather self-confident also 10, judge, 146; 15, judge, 209).

7.6. Time

7.6.1 Deciding under time pressure?

Having described the sometimes flawed decisions due to lacking information and poor motivation, it seems likely to explain this with a **lack of time and resources in that situation**. Indeed this sometimes is conceded to detention judges by others (13, judge, 197; 14, judge, 64; 20, lawyer, 159).

In contrast, the question **'Do you feel under time pressure before deciding'** did **not lead to many complaints in that regard by those affected**. By far the most PP said they take their time and that this is sufficient (for example 11, PP, 31; a little less positive 3, PP, 162, who said that time restrictions make you *"act instinctively"* and that it was not possible to *"waste much time"* with requests for arrest warrants). Among **judges the respondents equally found that they have "all the time I need"** (10, judge, 55) unless very special situations arise (similar 15, judge, 35; 16, judge, 27; 17, judge, 27; 33, judge, 135; somewhat less confident 7, judge, 200 and 22, judge, 30, referring to the problem of organising translations). This **cognitive dissonance** could perhaps be explained with **habituation and adaptation to the situation.** Perhaps at least in the cases where judges do not feel responsible for more investigations this is subconsciously justified by the feeling that they would not have the time anyway – which means that they may not want to have more time because then they would have to become more active.

7.6.2 Duration of detention and the proceedings

Despite the allegation that pre-trial detention in Germany often lasts too long (see 1st National report, p. 23), the **length of detention** in our interviews **was not a major**

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der Haftverschonung, ja, der ist erschienen, hat da nur 3,5 gekriegt, hat auch noch die Haft angetreten. Wäre auch glaube ich ganz sinnvoll."

point of discussion or concern. It is plausible that the length of detention in complex cases of economic crimes is more of a problem and according to one respondent the regional courts that are competent for these cases act much too slow (1, lawyer, 249; with regard to some other cases in the competence of the regional courts also 9, lawyer 148). Since these are not typical cases for many of our respondents or they are active only in the early stages (as most of the detention judges) we perhaps **did not cover this problem fully with our sample.**

In any case most of our interview partners said that length of detention – usually referring to the length of the proceedings – in the jurisdiction of the district courts (*Amtsgerichte*) is not a particular problem and that the six-month-period is usually not exhausted (longer detention requires an extension by the regional court based on special reasons, see 1st National report, p. 14). The prison director interviewed, however, estimated that **pre-trial detention in his prison usually lasts at least six months** ("rarely shorter", 26, prison director, 55; 27, prison governor, 58), so the **speediness of procedures may vary between different regions**.

Several respondents reported cases where a **delay was deemed unacceptable with regard to the detention situation** and that was a **reason to suspend the arrest warrant** (or *"even to repeal it"*: 29, judge, 163; experiences like that were reported by 3, PP, 130, who got a request denied therefore; requesting more of this disciplinary efforts 12, lawyer, 177).

7.6.3. The new speediness

In several interviews **new tendencies to use speedy procedures** or at least a particularly speedy approach in the normal procedure were mentioned. Sometimes this was supported in particular for cases where pre-trial detention seems to be unavoidable even in smaller cases, often for socially marginalised and/or foreign suspects: Referring to a repeat shoplifter from another country we heard the remark

> *"...she has that last conviction, four months suspended and two weeks later it went on. Now she is in detention. Even if they don't go into the speedy procedure, they have their verdict after six weeks. That is all okay."*[131] (13, judge, 275; similar 16, judge, 78; 17, judge, 80, both referring to periods of pre-trial detention of two weeks; referring to an increased use of speedy procedures 19, PP, 220; 29, judge, 129 and 193; 33, judge, 85 and 125).

[131] *„[...] die hat das letzte Urteil, das ist nicht so lang her, da steht vier Monate mit Bewährung und zwei Wochen später geht es weiter. Jetzt sitzt sie halt in Untersuchungshaft. [...]selbst wenn sie nicht ins beschleunigte gehen, haben sie nach sechs Wochen ihr Urteil. Das ist alles in Ordnung."*

Also in the **prison** it was felt that speedy procedures have become **more popular**, with the result that very short terms of detention (§ 127b CCP allows for one week of detention, so-called "*Hauptverhandlungshaft*", in cases of the speedy procedures according to § 417 CCP) are enforced more frequently (25, prison social worker, 191).

Hearings in speedy procedures were observed by us in Berlin where they could be called **"super-speedy":** The suspects in simple cases, usually under the precondition that they have confessed, stay at most overnight in prison and get their hearing, trial and sentence at the same time the next day – which in some cases may spare them PTD. If in the hearing the case proves to be more complex it is transferred into a normal procedure – either with the result that the suspect actually goes into pre-trial detention or, as to my impression more often, that s/he is released and later summoned to the normal kind of trial.

7.7. Other resources

Several interview partners referred to the **overburdened and understaffed judicial authorities**, in some cases even those who thought that in principle enough time was available for detention decisions. Apart from the fact that it was said that there is a severe risk that the work done is of bad quality (for example 3, PP, 313; 6, PP, 215; 14, judge, 327), it transpired that the fact that so **few resources are allocated in the judicial system** (including prisons and court aid for juveniles) was also felt as **missing appreciation for the work done** by our respondents (13, judge, 328; 14, judge, 329; 15, judge, 238).

Central outcomes 7

- There is a strict time limit on the first decision of a judge in a detention case: "Without delay", but not later than at the end of the day after the arrest, the suspect must be brought before the judge. Two scenarios possible: In the first, a judicial arrest warrant already existed, so usually the hearing is just confirming this decision. The second scenario represents the situation that the suspect was preliminarily arrested by the police more or less directly after an alleged offence. This, in our interviews, was more frequently the case.
- Therefore our interview partners usually have to deal with situations in which a decision has to be made within a relatively short period of time and with usually only a thin file containing not much information.
- The right to inspect files was strengthened with new provisions in the CCP in 2010. Most lawyers interviewed usually get the files without problems.

- However, a formal request of getting access to the files is still necessary – this causes delays and is not a sensible requirement since all lawyers need the files for their work anyway.
- Files and paper work play the central role in the process and the decision-making on PTD.
- Nevertheless all interview partners said that there is a lot of informal communication – possibly with the result that requests for arrest warrants are declined because they are not substantiated in the eyes of the next decision-maker in the "decision-chain" or because alternative solutions are prepared ("negotiated") informally.
- A lot of deficits, however, exist with regard to the gathering of information that could help to avoid PTD (mainly on personal circumstances) partly because responsibilities are unclear or shifted from one actor to the other.
- The duration of PTD played not a major role in our interviews, perhaps because in our sample many respondents deal with street crime cases in the competence of the district court that are usually proceeded quite speedily. This may be different in the ambit of regional courts where more complex cases are tried, in particular with regard to serious economic crimes. The prison director we interviews said that in his prison PTD lasts "rarely below 6 months".
- We observed, on the contrary, a new enthusiasm for speedy procedures, in particular for foreign suspects.

8. Detention control (Procedural safeguards, review and appeal)

8.1. Procedural safeguards, notably instructions and information

Not much was said about particular procedural safeguards. In 2010 some provisions on the obligation to inform the arrested person about his or her rights were reformed (sec. 114a-114c CCP, see 1st National report p. 46). In our observations we could see that **judges tend to use a simplified version of what according to the letter of the law would be required** in that regard, with the explanation that

> *"[…] it became more difficult for the defendant to differentiate what is important for me and what is not. **They are flooded with instructions.**"*[132] (4, judge, 123; similar 7, judge, 103; 13, judge, 324; 14, judge, 325)

[132] *„ […] ich glaube auch für den Beschuldigten ist es schwieriger geworden zu differenzieren, was ist jetzt wirklich wichtig für mich und was ist unwichtig. Sie werden überflutet mit Belehrungen."*

Apart from this finding procedural rights mostly were discussed with respect to the question of informing the suspect of right to appoint a lawyer or to get one appointed; these aspects have been discussed above in section 6.5.).

8.2. Reviews (Haftprüfungen) and appeal

8.2.1. General remarks

As explained in our 1st National Report (p. 5 an 23, several forms of judicial control exist. The **most frequently used is the review** ("*Haftprüfung*") that in principle can be lodged at any time by the defendant (some time restrictions apply when repeated). They are decided upon by the detention judge. Secondly, the so-called detention **appeal** "*Haftbeschwerde*" exists that is decided upon by the regional court. Additionally, an *ex officio* judicial review of the imposition and prolongation of remand detention exists after six months, these high court decisions in the long run may have contributed to changed detention cultures and to speed up the process.

In our interviews, **almost exclusively the review was discussed.** The overall impression is that it **plays a significant role in the everyday practice of pre-trial detention**, since, as mentioned above, according to the estimates of our interview partners **between 25 and 30-40% of reviews are successful** and effectuate the suspension of the arrest warrant and thus the defendant's **release**. It was not always clear how many reviews were necessary to be successful. One PP said that he usually expects one to two review hearings in every detention case (8, PP, 43) in his area of work (everyday drug cases), a lawyer that deals with more complex cases said that sometimes only after many efforts finally one review is successful and would not know "why now" (32, lawyer, 220). This indicates that the progress of the proceedings and the lapse of time play a role in the review decision-making.

8.2.2. The important role of reviews for shortening detention

Since the reform of 2010 the pre-trial detention review practice has changed in so far as the defence lawyer that is appointed immediately (see above 6.5.) **in most cases very quickly requests a review hearing.** This was confirmed by our respondents. It seems that since the reform sometimes the review is anticipated and may even serve as a justification of a preliminary detention decision. In that way **the "real" and thorough examination of the case is postponed** as this answer indicates:

> *"In some cases you really give people the advice with the instructions* [in the detention hearing] *immediately and for the protocol to request a review, with the indication that in 14 days somebody, who has more time -*

that you don't say but that's how it is, - deals with the case."[133] (13, judge, 298; with a similar tendency 17, judge, 232; 29, judge, 172)

When we asked whether the **review hearing really makes a difference** (compared to the first hearing), **answers were mixed**: Some interview partners, in particular judges, said that it often was a **dull repetition of the first hearing** (15, judge, 162; 16, judge, 217; 29, judge, 151 referring to quasi-automatic and underprepared review requests; sceptical also 13, judge, 211 reflecting the protocols of these hearings). But the majority thought it did **make a difference**, in particular with reference to new information on social circumstances – at least when reviews were sufficiently prepared by the lawyers:

"You actually update it then. You certainly cannot say it is just a rehash. If there is a lawyer in now, he often brings new aspects. And also the investigations made progress. So that you say it's just rehashing, nothing new has happened, that is rare."[134] (33, judge, 148; similar 10, judge, 218).

Lawyers agreed:

"This is the part of the show were you have a chance." (30, lawyer, 199; 32, lawyer, 131; in principle, depending on preparation, 24, lawyer, 82; 26, lawyer, 148)

8.2.3. Timing and the role of the lawyers in the review procedure

From this point of time therefore the defence lawyer becomes a **significantly more important player** and can greatly influence **the pace of the proceedings.** In particular in the cases described above, when obviously the real decision-making is postponed for a review hearing, it is of great importance that they are **aware of this responsibility** and act accordingly.

The **typical course of events** is described as follows:

"With the rendition of the arrest warrant defence lawyers immediately request three things: Access to the files, appointment as assigned counsel and review. That means that usually review is requested, than you have two weeks to fix a date. I then copy the complete file and get the original file down to the detention judge… You can anticipate one or two reviews,

[133] *„In manchen Fällen gibt man den Leuten sogar noch bei der Belehrung so richtig den Rat, möglichst gleich zu Protokoll einen Haftprüfungsantrag zu stellen, mit dem Hinweis, dann in spätestens 14 Tagen wird sich einer, der mehr Zeit hat, das sagt man so nicht, aber so ist es, dann mit der Sache beschäftigen. Aber man ordnet die Untersuchungshaft gleichwohl in der Gewissheit an, dass die Voraussetzungen da sind."*

[134] *„Also zweiter Aufguss kann man sicherlich nicht sagen, sondern in der Zeit sind die Dinge voran gegangen, aber auch von beiden Seiten. Wenn da ein Verteidiger drin ist, der bringt dann eben auch oft nochmal neue Gesichtspunkte. Aber auch die Ermittlungen sind ja voran gegangen, […]. Und zweiter Aufguss, dass man jetzt sagt, jetzt ist nichts Neues gekommen, das ist ja nur sehr selten."*

this of course also has to do with economic considerations of the defence lawyers.[135] (8, PP, 169; 7, judge, 118: three weeks until the review hearing; 16, judge, 208 describes a similar sequence of events; confirming also 1, lawyer, 134)

How quickly the events unfold thus depends on the defence lawyers, on their **capacity and their engagement** (for example 24, lawyer, 80: it can be three weeks, but it also can be six weeks, depending on agenda). While, as mentioned already, the quasi-automatic or at least **very frequent review requests are** sometimes criticised by judges, some lawyers explained that they often use that tool regardless of the concrete chances **to get quicker and easier access to the files, and to speed up the process** (1, lawyer, 134; 26, lawyer, 148). Some lawyers, on the other hand, explained that they would not, not even for the sake of file inspection, request a detention review when there is no chance of success (5, lawyer, 137; 20, lawyer, 84; 24, lawyer, 54) – it transpired that for them it is also a **question of credibility not to request when it is hopeless** and will be useless efforts for everybody.

It was already emphasised above (7.4. and 6.5.) that it is the task of the lawyers to **collect now as much information as possible to rebut the grounds of detention,** in particular on social circumstances such as employment and address – regardless of the fact that this also would have been the duty of the other actors before.

Central outcomes 8

- Reviews play a significant role in the everyday practice of pre-trial detention: According to the estimates of our interview partner between 20 and 40% of all reviews requests are successful and effectuate the suspension of the arrest warrant and thus the defendant's release.
- In most cases lawyers very quickly request a review hearing. This may lead to the unwanted consequence that they in some cases even serve as a justification of a preliminary detention decision. In that way the "real" and thorough examination of the case is postponed.
- In the review procedure the defence lawyer becomes a significantly more important player: They influence the pace of proceedings and it is their task to collect now as much information as possible to rebut the grounds of detention, in

[135] *„Die Verteidiger beantragen sofort bei der Haftbefehlsverkündung drei Sachen: Akteneinsicht, Beiordnung und Haftprüfung. In der Regel ist die Haftprüfung also schon beantragt, dann hat man noch zwei Wochen Zeit da einen Termin anzuberaumen. […] Ich lege dann Doppelakten an, d.h. komplette Ablichtung der Akte, bringe die Originalakte runter zum Haftrichter… Man muss ungefähr mit ein oder zwei Haftprüfungsterminen rechnen, das sind natürlich auch wirtschaftliche Erwägungen für die Verteidiger."*

particular on social circumstances (regardless of the fact that this also would have been the duty of the other actors before). It is of great importance that they are aware of this responsibility and act accordingly.

9. European Aspects

9.1. Detention decisions against EU citizens

In our 1st National Report we wrote that "slowly German courts also accept at least for EU-citizens that the fact that someone holds a foreign passport and lives abroad does not necessarily justify pre-trial detention" (p. 47) and based this assessment on studies and analysis of published jurisprudence (usually from higher courts). Indeed, we found indications in our interviews that German citizens and citizens from other EU countries were treated equally, but we also heard voices – mainly from lawyers – assessing that nothing really had changed.

Some explained the **new practice with better possibilities of cooperation within the EU,** in particular with regard to summoning and other formal communication. Perhaps it should be noted that the three quotes stem from relatively young (but not unexperienced) practitioners:

> *"[…], if you have Germans or EU nationals then it of course plays a role if they are registered here or in an EU country. If the suspect for example lives there and he has a fixed address, then you also have to consider if he is contactable for us there. Then certainly it plays a role for the detention decision of you can summon him there."*[136] (11, PP, 62)

> *„With EU citizens you completely have to leave aside that they are 'foreigners at all'. When I was on duty in X-court the last time, the judge completely left aside that they were form other EU countries, Romania and Lithuania on that day. [She said] you could summon the suspects in their home countries without problem. In both cases no arrest warrant was issued."*[137] (8, PP, 92; similar 4, judge, 76 for *„small and middle-ranged criminality"*, referring also to the possibility of formally submit-

[136] *„[…], wenn wir hier deutsche oder EU Ausländer haben, spielt natürlich eine Rolle, wenn die hier gemeldet sind oder im EU Ausland. Wenn da z.B. der Beschuldigte, als Beispiel, leben würde, dann müsste man auch überlegen, wenn er da eine feste Meldeanschrift hat, dann ist er für uns auch erreichbar. Dann spielt das für die Haftentscheidung sicherlich eine Rolle, dass man den zum Beispiel da laden kann."*

[137] *„Bei EU-Bürgern muss man es völlig ausser Acht lassen, dass das überhaupt "Ausländer" sind. Bei meinem letzten Dienst […] hat die Richterin völlig außer Acht gelassen, dass das Ausländer sind, Rumänen und Litauer waren das an dem Tag. Man könne ja die Beschuldigten problemlos in deren Heimatländern laden. In den beiden Fällen wurde Haftbefehl nicht erlassen."*

ting so-called penalty orders ("*Strafbefehle*") that represent convictions in a written procedure within the EU).

Two other judges acknowledged somewhat reluctantly that there have been changes in that regard:

> *"* [laughing] *...in the past you could lock up everybody coming from a foreign country, you always had a risk of flight. But meanwhile you say, also in the European ambit you find people relatively quickly and extradite them. That of course you have to consider."*[138] (29, judge, 69; similar 15, judge, 62).

Both, however, immediately made reservations and explained in which cases it does not work, referring to economic crimes, giving the example of somebody having "several millions in Switzerland" (29, judge, 69) or to the "travelling offenders" mentioned above (15, judge, 64). Another judge acknowledged the need for equal treatment of EU foreigners **"in theory"** but said that **in practice it is irrelevant to him** and gave the example of suspects with alleged thefts for gain ("*gewerbsmäßig*"), who would *"straightaway disappear to Eastern Europe"* if released (16, judge, 57).

From this last and other reactions by our interview partners we can assume that **in many cases and perhaps in some regions the willingness to take into account the possibilities in the EU is not or hardly present.** Some lawyers spoke of a quasi- automatism of detaining all foreigners without permanent residence in Germany and explicitly reproached the judiciary for their lack of engagement to use new cooperation tools:

> *"[...] that on every occasion you talk about unified Europe, but when you look at detention judges' decisions, you would find often enough arrest warrants saying 'He does not have a fixed abode in the Federal Republic of Germany' and then it is not fussed about this person having in the neighbouring country Poland the same address for 20 years, because they are too lazy and too comfortable or too delicate to respect this and to get that information."*[139] (26, lawyer, 62; similar statements from 1, lawyer, 58; 18, lawyer, 45; 30, lawyer, 47)

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[138] *„...[lachend] früher konnte man noch jeden einsperren, der aus dem Ausland kam, man hatte immer Fluchtgefahr. Aber mittlerweile sagt man, auch im Europäischen Raum kann man die Leute relativ schnell ausfindig machen und auch ausliefern. Das muss man natürlich berücksichtigen."*

[139] *„[...], dass bei jeder Gelegenheit vom geeinten Europa geredet wird, wenn es aber um Haftrichterentscheidungen geht, dann finden sie oft genug Haftbefehle in XY in denen steht, "Er hat in der Bundesrepublik keinen festen Wohnsitz", dann ist es piepsegal, ob der Mensch im Nachbarland Polen seit 20 Jahren unter der gleichen Anschrift gemeldet ist, weil sie zu faul und zu bequem oder zu fein sind, das zu respektieren oder da Auskünfte einzuholen."*

9.2. Information exchange

We then asked about how well the cooperation within the EU works. Usually the answers referred to getting information about criminal records, to information about residence in the respective countries, possibilities to summon or to use mechanisms like the European Arrest warrant. The answers were mixed, also within the same region or even the same institution – this shows that the readiness to try to use these tools and/or the experiences in concrete cases vary individually and a lot of room for improvement exists. It is interesting to note that the lawyer who complained about the lack of engagement to use the EU mechanisms to avoid pre-trial detention said that all instruments of cooperation that are directed towards investigation prosecution work quite well (26, lawyer, 183, giving the example of parallel house searches in three countries).

9.3. The European Supervision Order

Most of our interview partners **did not know the European Supervision Order** as a means to avoid pre-trial detention for residents of other EU states by supervising them in their own country, even if the Framework Decision was transposed into German law in 2015 (§§ 90 o-90 y IRG, the Legal Cooperation Act). Some said that they knew that this provision existed but had now personal experience with it.

Two interview partners had used it (3, judge, 253; 7, judge, 222). The PP was responsible for international legal cooperation and assistance and had received a supervision request from Austria. He said that it was somewhat difficult to organise it but that with exchanging a lot of emails it worked out. The supervision included the condition of reporting to the court (although in Germany it would usually be the police). The other case was a request sent to Spain, again involving reporting to the police there. The judge interviewed said that he found it extremely **complicated and time-consuming** and also that the lawyer he had collaborated with in that case "begged him not to repeat this exercise".

Some of the interview partners that did not know the European Supervision Order **asked for explanations** – my impression was that some did it rather out of **politeness** and not because they were genuinely interested. Two lawyers interviewed thought it could be a useful tool and actually tried to apply it during the project period (as we learned during one of our workshops), but did not succeed with the judges. The judges were sceptical: one said that he was **"deterred by all the bureaucracy"** and would rather opt for a financial surety (10, judge, 233), another said that he would not use it because he was just "happy that I have the person here on-site" (16, judge, 299). A lawyer spontaneously said that probably a **detention judge would "declare him com-**

pletely off his mind" when he would request such as thing, "even it was in the domestic law like all the other provision on pre-trial detention" (26, lawyer, 189).

In short: Interview partners **were not too enthusiastic** about this new tool.

Central Outcomes 9

- As regards detention decisions against EU-citizens we found several indications in our interviews that German citizens and citizens from other EU countries were treated equally; usually with the explanation that now better possibilities of cooperation within the EU exist.
- We nevertheless heard voices – mainly from lawyers – assessing that nothing really had changed; the judiciary was blamed for their lack of engagement to use new cooperation tools.
- This was echoed by answers that acknowledged the need for equal treatment of EU foreigners **"in theory", but rejected it for many practical cases** as diverse as serious economic crimes and crimes committed by "travelling offenders."
- The quality of information exchange and cooperation within the EU was assessed very differently by our interview partners; indicating also varying degrees of willingness to try to use these tools. References were made to getting information about criminal records and residence, possibilities to summon or to use mechanisms like the European Arrest warrant.
- The European Supervision Order as a means to avoid pre-trial detention for residents of other EU states was unknown to the majority of our interview partners. Only two had personal experience (thinking it was complicated and time-consuming), two more showed interest or tried to use it within the project period. Others feared the bureaucratic effort it would take to use it.

10. Responses to the Vignette

10.1. The use of the vignette

This section focuses on the outcome of the first part of the interviews that **introduced a case vignette to the interview partners** and served to validate the other statements in the interview (see above 2.2. for methodological issues). In this vignette,

> *[a] 23 year old male is suspected of burglary in a house at 3 o'clock at night, while the house-owners and their 4 years old daughter were sleeping upstairs. He went into the house by cutting the glass of the entrance*

door and opened the door. Next morning the owners discovered that precious jewellery, a laptop and money all together worth 3000 euro was stolen. The police identified the suspect from CCTV recordings. The suspect is currently unemployed and was sentenced before to a community service order/conditional sentence (depending on the national situations) two years ago. Apparently he is living with his parents.

The very **first task** for the interview partners (defence counsels, judges and public prosecutors) **was to consider the information they were given** in regard to their potential decisions (whether to apply for an arrest warrant or not for the public prosecutor; whether to order PTD for a judge or not). Defence lawyers were asked what decision they would expect. The vignette was not presented to the interview partners in prison.

We expected that most interview partners would not be willing to give an answer just with the information we included in the vignette and **would ask for more information**. This was, however, **not always the case**; possibly because many of those interviewed are used to base decision on very little information. Interestingly, **some took the information we gave for granted** (and argued that in those cases where they do not have more information they just have to believe the suspect with regard to his permanent residence, for example 2, PP, 25, see also above 4.2.5); others **tended to take the arguments as defensive lies or expected information about the living situation from the police** – if there were none, they tended to assess the living situation as "non-permanent" or "loose"(see above 4.2.5 and below).

10.2. To detain or not to detain? General findings

Table 3: Tendencies to detain in the burglary case

Vignette	Defence Lawyers	Judges	Public Prosecutors
Yes PTD	6	-	3
No PTD	-	-	2
Undecided	4	11	3
Of those: Tendency towards PTD, if previous conviction was of a simi-	*2*	*8*	*3*

lar nature			
No clear tendency	*1*	*3*	-

Although the interviews are in no way representative on a quantitative scale, an interesting pattern was visible between the different groups of interviewees regarding their answers towards the possibility of PTD for the suspect in the vignette.

Most of the **judges** gave no clear answer whether as to they would decide on PTD in such a case or not, as **more information was needed to make a decision**. A clear tendency in this group was visible towards PTD if the previous conviction was of a similar nature ("*einschlägig*"). Both the interviewed defence lawyers as well as the public prosecutors were more decisive in their answers, with six interviewed lawyers stating that they think the suspect would definitely go into PTD.

As a slight surprise came the responses of the public prosecutors, usually deemed the hardliners of the system, because two interpreted the case in a way that they would not apply for detention and three others only would do so only when the conviction mentioned is relevant and relatively recent (19, PP, 43 – no application when conviction 3-4 years ago and suspect had reached the final phase of probation period). In the context of the interviews we could find that **proportionality arguments played a role but also resource-related thoughts** (two interview partners said, using the same words: "detention means work"[140] [7, judge, 241; 3, PP, after the interview and 3, PP, 313: "you have to consider that more resources for the PP may mean more coercive measures").

10.3. Handling the case

Information about the case is mainly expected from the police (see more on investigative duties above 7.2) that provides it to the public prosecutor and later to the judges. Other sources of information are *"…. the internal database of the investigating authority"* (6, PP, 21) and in particular the criminal record registry ("*Bundeszentralregister*", 2, PP, 32-33; 3, PP, 262; 19, PP, 23). Some public prosecutors said that they would also gather information themselves when it is missing, in this case check (or ask the police to check) whether the suspect really lives with his parents (3, PP, 52, see also this report's section on information above).

This means that the defence counsel is usually provided with the information shortly before the first hearing where s/he in most cases can quickly read or at least have a look

[140] *„Man muss klar sagen: Haft macht Arbeit."*

at the file(s); which according to a defence lawyer "*they have to give to me....*" (9, lawyer, 20 – 25; more on files above 7.1). Also sometimes defence counsels are able to meet the client shortly before the first hearing in police detention, police officers according to one interviewee are *"usually very cooperative and let you get through easily [....]"* (1, lawyer, 21). He or she may also have information from the suspect him/herself or relatives or friends in cases where s/he has been hired before the hearing (9, lawyer, 18 - 25; 18, lawyer, 18 - 19; 30, lawyer, 23). Usually, the respondents among the defence lawyers said, that they would try to collect information themselves also by calling the police or the public prosecution service in those cases (for example 26, lawyer, 23).

The judge's views were quite heterogeneous as regards their possibility and responsibility to access the relevant information, this controversy is discussed above 7.2.

10.4. Decisive factors

The **key factors** regarding the use of PTD were the previous conviction of the suspect, his living conditions, mainly regarding the question of a permanent address, and the crime as such. As said before, the previous conviction seemed to be the most important factor for decision-making, as it could be used to argue for the risk of absconding – mediated by the length of the expected sentence (see above 4.2.1) - or the risk of re-offending. The **risk of absconding was crucial** for most of the interview partners, the **risk of re-offending was discussed in some interviews** (1, lawyer, 48; 10, judge, 35; 17, judge, 17; 19, PP, 21; 24, lawyer, 17).

The majority of the interviewees asked whether the **previous criminal offence** was also a burglary (*einschlägige Vorstrafe*, see also above 4.2.1). In this case, it was assumed, the suspension of the suspect's prison sentence most likely would be revoked and he would be recalled to prison. For the current case a longer prison sentence and hence a greater risk of flight was therefore probable; although several respondents thought it was possible that there is still a chance for another suspension in his case that would make the risk of absconding hard to justify (5, lawyer, 36; 29, judge, 49). Sometimes it was even assumed that the public prosecutors would take the risk of repetition into account (for example 5, lawyer, 26; this could also be seen in the reflections of 19, PP, 17 and 26, who said that she would think of a risk of repetition, obviously because this in cases of burglary often can be found; however, that there must be repeat or continued" offences). But even if the previous conviction was not for the same crime ("*einschlägig*")

> *"[it] is crucial that this is a guy where one thinks, he does not care about the law...."*[141] (Interview 24, lawyer, 38)

Another important factor for the decision making is the **social situation of the suspect** (see also above 4.2.5), mainly related to having a **permanent address** or not, but also with regard to **having a job**. One defence lawyer stated very clearly: *"Unemployed? He will go in 100%."* (1, lawyer, 52).[142] Asked for an explanation of this clear stance, the interviewed person said that the judges reasoning is likely to be

> *"Unemployed, this is a waster - that is the impulse, that one has....Sorry, I am a bit negative at the moment, but: that's detention judge, they think like that." (1 RA, 124).*[143]

The reasoning the judges themselves presented was not so much the fact that the suspect does not work, but the **social ties** that come with it. A job as well as strong family ties are viewed as strong indicators against the risk of flight, as one judge put it:

> *"I always say risk of flight is eliminated by an environment that makes it hard for me to leave. That is the decisive thing for me."*[144] (10, judge, 42).

Therefore, stronger family ties and a stable social environment would be viewed as favourable for the suspect by some and defence counsels would always argue in that way to avoid PTD (20, lawyer, 43; 24, lawyer, 25).

These arguments, however, **would not count automatically:**

> *"An essential argument, which is always made, is that he does not commit crimes because he has firm social ties. He is married, he has children. My counter-argument is always, these social ties have not prevented him from entering into this house."*[145] (29, judge, 83)

But **in the presented case** the suspect is not only unemployed, he **lives with his parents.** For a 23-year old man this was expected to be considered as **"loose living conditions" by some** (1, lawyer, 48; 5, lawyer, 26; 8, PP, 22; 12, lawyer, 41; 22, judge, 26; 20, lawyer, 33). These "loose living conditions" ("*leicht lösliche Wohnverhältnisse*", see above 4.2.5) can be viewed as an shibboleth for unfavourable social circumstances

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[141] *„....Entscheidend ist die Bewährung, das ist dann ein Typ von dem man denkt, dem ist die Rechtsordnung egal."*

[142] *„Arbeitslos? Hundertprozent fährt der ein."*

[143] *„Arbeitslos, das ist einfach ein Nichtsnutz, das ist der Impuls, den man da hat.... Entschuldigung, ich bin im Moment so ein bisschen negativ aber, das ist Haftrichter, die Denken so."*

[144] *„Ich sage immer Fluchtgefahr beseitigt eine Umgebung, die es mir schwer fällt, zu verlassen. Das ist das Entscheidende für mich."*

[145] *„Ein wesentliches Argument, was immer gebracht wird, ist der begeht keine Straftaten, weil er feste soziale Bindungen hat. Er ist verheiratet, er hat Kinder. Da ist mein Gegenargument immer, diese sozialen Bindungen haben ihn ja auch nicht davon abgehalten in dieses Haus einzusteigen."*

and seems to serve as **self-evident factor for the risk of flight**; we also found it in some of the files inspected. Interestingly and contrary to the assessment of the defence lawyers, the living situation with the parents was viewed as normal or good by others (2 PP, 25; 11 PP, 23; 14, judge, 73; 15 PP, 21).

The emotional and psychological influence of the decision making must be taken into account, as the vignette showed that although presented with the same case, the decisions or considerations regarding a decision for or against PTD varied among the different groups of interviewees. One important factor in favour for PTD clearly was such a **psychological one, namely the effect the burglary potentially has on the family that was at home while it happened.** There was a difference in taking into account the seriousness of the crime, as some interviewees took those psychological effects it might have on the victims into account, several others did not mention it at all. One public prosecutor argued to justify her assumption that an aggravated sentence can be expected:

> *"This is a traumatising experience, so I do not see any reason to stick with the minimum punishment…."*[146] (8, PP, 18)

> *„Here in the case of burglary into a dwelling, that I personally take as a very serious offence, in particular because it, as experience tells, is a traumatising the victims life long, would here apply for an arrest warrant even if the previous conviction was for something else."*[147] (21, PP, 49)

That the reasoning is not always just bound to legal arguments, but also on an emotional or psychological level, was indicated by some of our respondents (9, lawyer, 75; 26, lawyer, 31; 5, RA, 28) and is backed by the two voices cited above. One defence lawyer stated:

> *"Also there, psychology… in the initial case, the mother with the sleeping child on the upper floor is psychologically bad. This makes a difference, the judge is a human being. He will be much more likely to go in than someone who broke into lawyer's office XY, although it is the same offense." (9, lawyer, 75).*[148]

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[146] *"Das ist ein traumatisierendes Erlebnis, sodass ich hier keinen Grund sehen würde, an der Mindeststrafe festzuhalten."*

[147] *„Hier im Fall von Wohnungseinbruch, den ich persönlich für ein sehr gravierendes Delikt halte, insbesondere, weil er Erfahrungsgemäß die Geschädigten fast lebenslang traumatisiert, würde ich das auch beantragen ohne eine einschlägige Vorstrafe."*

[148] *"Auch da wieder Psychologie, im Ausgangsfall, die Mutter mit dem schlafenden Kind im Obergeschoss ist psychologisch doof. Das macht einen Unterschied, der Richter ist ein Mensch. Der*

Legally, this statement is not true, as burglary into a dwelling carries a sentence of six months to 10 years imprisonment (since 22 July 2017: one year minimum, § 244 StGB), while a burglary into an office carries a sentence of three months to 10 years (§ 243 StGB). This lawyer nevertheless points to the problem that **aggravating circumstances** are used as additional argument although they should not influence the risk of absconding (other than a higher sentence expected) – an indicator for extra-legal reasoning.

The interviewed **defence counsels** seemed to have a more **pessimistic** view towards the chances of the suspect to be released, some would nevertheless try to discuss **alternatives** (*Haftverschonungsauflagen,* more on which above 5. 1 and 5.2) during the hearing. Reporting obligations (*Meldeauflage*) were most commonly suggested by the defence counsels (1 lawyer, 19; 5, lawyer, 30; 12, lawyer, 41; 24, lawyer, 49; 30, lawyer, 239-244). Another option was trying to convince the judge by providing proof of a new job (for example 1, lawyer, 21; 5, lawyer, 100; 9, lawyer, 139; 26, lawyer, 29), although here it was stated that it would take some time to get the relevant information.

11. Concluding remarks and recommendations

Our interviews leave the overall impression that the practice of pre-trial detention in Germany is currently not seen as the most pressing problem of the criminal justice system. Nevertheless in all professional groups certain issues were pointed to as problematic, sometimes as highly problematic. As mentioned above, in our sample high profile crimes and complex cases were not discussed very often, so for example the speediness of procedures was assessed to be satisfactory (this probably is different for *Landgericht* matters). Several interview partners that have great and long experience in detention matters thought the situation has been a lot worse one or two decades earlier and gradually became "better" (in a sense of more liberal); most of them were aware that the numbers of pre-trial detainees had gone down for a long while.

With regard to the most recent developments, some respondents, mostly defense lawyers, showed concern with regard to increasing pressure for PTD for certain groups of suspects and increased public pressure to order PTD. Other, however, were insensitive to these developments and seemed not to be affected or did not want to be bothered.

Despite German legal professionals having a certain cultural inclination to refer to principles, the basic or principal dilemmas of pre-trial detention were hardly discussed: Almost nobody referred to the presumption of innocence as leading principle for his or her

geht mit einer deutlich größeren Wahrscheinlichkeit ein, als jemand, der in der Kanzlei XY eingebrochen ist, obwohl es dasselbe Delikt ist."

practice (in contrast for example to the colleagues in Ireland) and also the principle of proportionality that is prominent in German legal doctrine, was not mentioned often.

Other more practical dilemmas, however, were addressed; namely how to make an adequate prognosis to assess the risks that the suspect impeded the proper conduct of the proceedings. Usually this risk is the risk of absconding that in the eyes of the defense lawyers interviewed was grossly overstated. Also among judges the decision-making in this regard came under scrutiny and shortcomings were mentioned.

One problem clearly observed is the overreliance on the argument of the severity of the sentence to be expected inducing the wish to abscond or go into hiding. The thresholds given here vary to a great degree, with some practitioners arguing that every prison sentence that actually will be enforced would be such a "flight stimulus". This variation, the fact that it is unknown what sentence the suspect actually expects (and only this could stimulate his or her actions) and also the ignorance to other factors are a matter of concern.

While in principle it was acknowledged by all decision-makers that PTD never may be disproportionate to the offence actually persecuted, practitioners seem not to adhere to it when it comes to minor offences such as (repeat) shoplifting of little value by socially marginalised, neglected suspects that are homeless or by travelling foreigners that are feared to disappear for good if not detained. When asked about this dilemma the response often was that these proceedings were conducted very speedily so that pre-trial detention at least does not take very long. This, however, is not a satisfactory solution and does not adhere to the law – it can be assumed, on the contrary, that these individuals get pre-trial detention rather as an immediate punishment to avoid not so much their absconding but the fact that a suitable non-custodial punishment for them is hard to find: they perhaps would not pay the fine adequate for their offence and would perhaps not refrain from committing new (small) offences when under probation (in case of a suspended prison sentence).

Another dilemma confronted by some of our interview partners was the role of the judge as the ultimate decision-maker being dependent on (often scarce) information supplied by others. It became very clear that while some judges are willing to take their responsibility seriously and to broaden that basis of information if necessary, others remain rather willingly in their passive role, expect all information to be delivered by others and accept what they get. In smaller cases often the only information available is the criminal record and some police information on the whereabouts of the suspect.

In this context we also saw that the defense lawyers are very important not least as providers of information (in particular on the social and living circumstances of the suspects) and in particular when a detention decision is reviewed their role is vital.

Practical problems we have observed often have to do with these questions of information-gathering and the role of the lawyers. While in principle the public prosecutor as well as the judge are responsible for getting enough information to fully assess the situation of the suspect the shortcomings mentioned make the involvement of a lawyer necessary from early on. In many smaller cases, however, the suspect appears in front of the judge without defense lawyer because mandatory defense only starts when PTD actually is ordered and enforced. A problem in these cases is that a state-paid lawyer will not be assigned when an arrest warrant is suspended. This leads to the curious (and intolerable) situation that in a case a lawyer is present, defends an indigent client successfully and manages to reach a decision that suspends the arrest warrant he will neither be paid by the state nor by the client.

Other practical problems relate to the problem of accessing the files. While nobody in our interviews thought that files are systematically and wilfully withheld (as this often was the case in the past) by the PP, the organisation of requesting and sending files was sometimes difficult and time-consuming – time that suspects spend in PTD.

We found some important issues neglected by most of our respondents but highlighted by some: One if them are prison issues. While we had not explicitly asked for them, we expected that the prison would play a role when reflecting the overall situation of and the communication with the suspect. Two decision-makers indeed mentioned that the vulnerability of certain suspects make them think twice whether they shut be put into prison. Again a minority of defense lawyers said that prison issues for pre-trial detainees are a neglected area for the defense and that more should be done on the concrete situation (that more often than not is deplorable because of the overall detention conditions in PTD). It also seems that lawyers often do not visit their clients in prison after the first decisions are made.

The situation of mentally-ill suspects was described as a pressing problem by a few of our interview partners but was neglected by most others, although statistics show an enormous increase of persons later detained as mentally ill offenders in special forensic institutions – some of them probably have spent time in PTD unsuitable for them.

Alternatives to PTD in the form of suspending the arrest warrant under conditions was not one of the things our interview partners pondered on a lot. Only when we specifically asked for these options some thought that they have become more frequently, some thought that the possibilities are not used enough and some thought of this option as a

possibility for a compromise to reach with the other professionals involved. Only a minority asked for more fundamental changes (very few for the broader introduction of electronic monitoring, others for a more frequent use of money bail).

Defense lawyers, however, thought that judges could show more courage – if they were not able to dismiss the request for an arrest warrant they should at least suspend it. That form of compromise actually is not how the German system is constructed but seemed to be acceptable because the usual obligation to report to the police was not deemed a severe infringement of the liberties of the suspect.

Most respondents did not have the wish for fundamental reforms of the law regarding PTD but rather had ideas of how to chance problematic points in practice or minor points in legislation. Several mentioned the under-resourcing of the judicial system as a problem that urgently needs to be solved. Others suggested collecting data on cases with PTD systematically to enable feedback to the first decision-makers on how the case progressed. Very few mentioned that PTD in their training as legal professionals did not play a role and that they learnt most practices "by doing" and not systematically.

On the basis of these interviews and the desk-top research conducted[149] some recommendations can be made:

- Better **data must be collected** to understand the development of cases, this data must be analysed and made accessible for practitioners. **Training and seminars** are needed to enable young practitioners with the necessary skills to deal with PTD matters and problems in reality (and go beyond what they have learnt in university where PTD does not play an important role either) and to update more experienced practitioners, among others on European developments. Training events are important for interdisciplinary exchange and enable feedback on and reflection of own practice. While it is true that the workload of practitioners is large and they need to be updated on many different other things, PTD as fundamental interference with personal liberty merits a deeper understanding and more training.

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

[149] 1st National Report, www.irks.at/detour and Morgenstern, Die Untersuchungshaft, Nomos Verlag 2017 (in print).

be appointed in all cases an arrest warrant is requested by the public prosecution.

- The role of the defense lawyers is of particular importance with regard to the detention review because once they are appointed some judges seem to expect all further motions to avoid PTD from the side of the defense. It is therefore also important that **a review, this time with more complete information, takes place early.** This means first, that **files must be sent out immediately and automatically** and not upon request, since they are indispensable for the defense in any case. It means second, that the review should be scheduled ***ex officio* after 10 to 14 days** – this should be sufficient time for the defense to prepare but still is a time span to endure for a suspect under stress and that does, in case the warrant is lifted or suspended, enable him or her to get back to his normal life without necessarily loosing his job or housing. It seems, however, that also defense lawyers are sometimes responsible for delaying the review for organisational reasons, so the scheduling should not entirely rest in their hands.

- To further avoid PTD without loosing sight of the needs of the criminal procedure **the way of decision-making should be changed**: With the same prerequisites (grounds and thresholds as well as the proportionality requirement) as now for actually ordering an arrest warrant judges must examine which non-custodial measures (conditions for suspensions) exist and how they would fit for the individual case. **Only when they can explain that none of these measures will prevent the individual suspect from absconding, hiding, obstructing evidence etc. an arrest warrant may be ordered.** While there is the same risk as before that the reasoning would be superficial, and in principle also now the judge always has to check whether milder measures are available, at least then an explicit reference must be made to the other options and **explicit reasons given why they do not suffice**.[150]

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

[150] This suggestion has been made before by the Association of Defense Counsels, see http://www.strafverteidigervereinigungen.de/Strafverteidigertage/strafverteidigertag2015.html.