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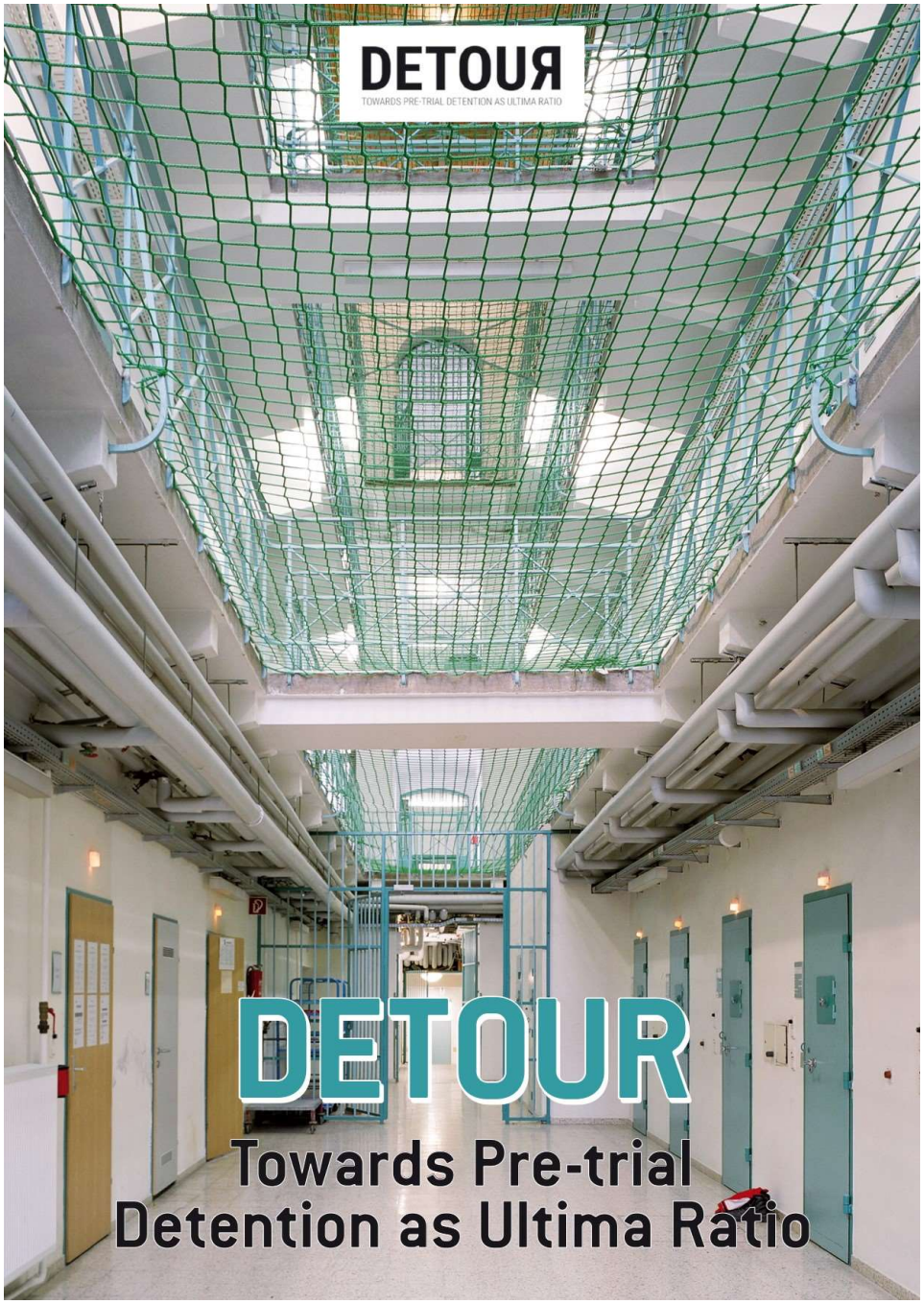

2nd *Romanian* National Report on Expert Interviews

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Bucharest, November 2017

Funded by the Justice Programme of the European Union

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List of abreviations

CPC – Criminal Procedure Code
FD – Framework decisions
HA – House arrest
JC – Judicial control
JCB – Judicial control on bail
NDP – National Department of Probation
PTD – Pre-trial detention

1. Introduction

This report presents a comprehensive picture of pre-trial detention (PTD) and its alternatives in Romania from different angles. If the first country report described the legal framework for PTD and its alternatives together with some statistics, this report is focused on how PTD and alternatives particularly the practice are perceived by the main actors involved: judges, prosecutors and defence lawyers. As probation counsellors are not involved in the preventive measures decision–making, their perceptions were not considered critical. However, a representative of the National Department of Probation was interviewed and her opinions were included in this report.

The central question of this study is 'Is the pre-trial detention used as ultimo ration in Romania?' Subsequently, there are other questions that are relevant to this study:

- what are the factors influencing the decision-making?
- what is the process of decision-making?
- how decision-making is understood by each actor?
- how are the PTD alternatives perceived?
- what are the main obstacles in their use?
- are there indications of net widening in relation to alternatives? etc.

Due to the decreased number of PTD imposed in Romania in the last two-three years (from 2802 in 2013 to 2173 in 2015), another question was considered relevant for the Romanian report: why has the number of PTD decreased in Romania? What seem to be the factors associated to this trend?

The report is organized following the structure decided with the project partners: introduction, methodology, reflections on the PTD, basis for the decision-making, alternatives to PTD, role of the players in the decision-making process, procedural aspects, procedural safeguards and control, European aspects and Vignette. The last section summarises all the main pints and conclusions of the report.

2. Methodology and realization of the research

As mentioned above, this report is based on a series of interviews with practitioners in the field of criminal law (judge, prosecutors and defence lawyers). A number of nine interviews with judges (two from the district court, four from the Bucharest Court of Appeal and three judges from the High Court of Cassation and Justice- HCCJ), six interviews with prosecutors (2 prosecutors from the prosecutor's office attached to the district court, 1 prosecutor from the prosecutor's office attached to the tribunal and 2 prosecutors from the National Anticorruption Directorate) and four interviews with defence lawyers. In order to test some recommendations, we have also interviewed one representative of the National Department of Probation. Although we have aimed for more interviews with judiciary, that was not possible due to the access issues. In spite of the fact that the subject is considered important in Romania, due to the judiciary independence it was not considered feasible for the National Institute of Magistracy or the Superior Council of Magistracy to facilitate access to judges or prosecutors. Therefore, access to this group of professionals was negotiated on a one by one basis. Unfortunately, this recruitment strategy reduced the number of judges and prosecutors we had access to for the purpose of this study. Access to defence lawyers was addressed through the Bucharest Bar Association, which facilitated access to four lawyers interested in taking part in the study.

Interviews were conducted based on the interview guides elaborated in the DE-TOUR project for each category of practitioners. Although there were some slight differences between those three types of interview guidelines, the main structure of the guidelines remained the same and was focused on:

- the general perception on the PTD,
- the factors considered important in the decision making
- the main grounds for PTD
- the role played by each actor involved in the decision-making
- the procedures involved,
- the PTD alternatives
- the legal safeguards, review and legal remedies,
- the European aspects of ESO and alternatives
- a Vignette – a case presented and discussed with the participants,
- recommendations with respect to PTD and its alternatives.

All interviews followed this structure. However, when necessary more questions were added in order to further clarify and explore different answers. Therefore, the interviews were semi-structured and took 60 minutes on an average.

The interviews were conducted by the two members of the research team usually in the environment of the participants (e.g. their office). However, five interviews took place in the University of Bucharest premises and also in public places. All interviews were transcribed verbatim and analysed using thematic analysis with Atlas.ti.

Due to the specialization of the courts, it was important for the study to include judges from different levels of competence. For instance, judges at the High Court of Cassation and Justice deal with high corruption and very serious crimes. This specialization may reflect in a certain way on the decision-making process related to PTD and its alternatives.

3. Reflections on the national system and on the practice of PTD

3.1. The view of judges and public prosecutors

The legal bases regarding the conditions under which PTD can be imposed is art. 223 of the Code of Criminal Procedure, which provides that preventive arrest can only be taken during investigation and trial phases if evidence shows that there is a reasonable suspicion that the defendant has committed an offense and that one of the following situations exists:
a) the defendant fled or was hiding in order to escape criminal prosecution or trial, or made any preparations for such acts;
b) the defendant attempts to influence another participant in committing the offense, a witness, an expert, or to destroy, alter, hide or evade material evidence or instigate someone else to such a behaviour.
c) the defendant puts pressure on the injured person or tries to make a fraudulent deal with him;
d) there is reasonable suspicion that, after the criminal action has been initiated against him, the defendant intentionally committed a new offense or is preparing a new offense.

Also in par. 2 a series of additional criteria are to be taken into consideration when deciding on PTD: there is a reasonable suspicion that the person has committed a violent crime, or a crime against national security, a crime related to drug trafficking or human trafficking, terrorism, money laundering, forgery, blackmail, rape, kidnapping, bankruptcy, corruption, phissing or any other crime punishable with more than five years of imprisonment. The same paragraph goes on and stipulates that the seriousness of the crime, the circumstances and the way it was committed, the peers, the social environment of the defendant, the criminal history and other personal factors should be taken into account when deciding the pre-trial detention.
All the criteria formulated in the paragraphs 2 of the art. 223 CPC define to a certain extent the seriousness of the crime.

As it can be noted, apart from most of the property crimes and a few other petty crimes, all serious crimes can be the grounds for imposing pre-trial detention. However, if the crime committed maybe sanctioned with more than five years of imprisonment, PTD maybe applied even for property or petty crimes.

When these conditions are met, the prosecutor may file an application for PTD and submit it to a special judge called the judge for rights and liberties.

As a general perception, judges and prosecutors consider pre-trial detention (PTD) practice to be balanced nowadays. This implies somehow that the PTD practice was not so balanced in the past and the practice around PTD is dynamic and improves every year:

> '*The practice has evolved recently. First, the PTD was imposed by the prosecutors, now we have the judges applying it. Later the ECHR jurisprudence became more important. Of course, the first steps were a little unsecure but now I think it is balanced'*. (Judge 3)

or

> '*I think nowadays the PTD is an exceptional measure. Every measure is analysed and alternatives are taken into account'* (Judge 2)

Some judges seem to be aware that sometimes the public or the other professionals (e.g. defence lawyers) consider the PTD practice as exaggerated

but they argue that this perception is explained mainly by the confirmation rate – number of prosecution requests that are confirmed by the court. However, they argue that most of the proposals are well justified, based on the facts and the law:
'*It is true that most of them (requests) are confirmed but this is because there are reasonable suspicions and all the other criteria are met'* (Judge 1)

Furthermore, they consider that there are several levels of decision: the police, the prosecution, the judge and the appeal judge. Thus filters are in place to avoid abuse or unfair treatment:

> '*Statistically, 80-85% of the proposals are confirmed by the court but this is mainly due to the filters applied first by the prosecutor… as a difference compared to previous years, the prosecution selects the eligible cases more effectively. They come to us only with cases that are eligible for this measure.*' (Judge 4)

Indeed, from the interviews with judges and prosecutors, we can infer that there is a **feedback loop** that regulates the practice around PTD. The communication seems to start with the prosecutors observing and analysing the court decisions and adapt accordingly. Some prosecutors mentioned in the interviews that there are weekly meetings among the prosecutors of one office where the court decisions are analysed. An important topic of these meetings seems to be the court decisions regarding PTD. Once a certain pattern is identified, the prosecution is maximizing the effectiveness of its applications and apply for PTD only when the probability of obtaining it is quite high. Obviously, there may be some limit testing but they come as exceptions. During the interviews and the informal talks, we have heard several times expressions such as 'depending on how the court is formatted'. This illustrates once again that the courts may regulate when the prosecutor may apply for the PTD and vice versa: the prosecution may push and test the limits to shape the patterns of PTD practice by appealing the first court decision to a higher court.

3.2 The view of the defence lawyers

Lawyers consider the PTD practice also to be balanced and to be used mainly for violent crimes and high corruption cases. However, lawyers seem to be quite critical as judges downplay factors as:

> '*… when the offence was committed, previous history, specialization etc. The courts do not pay enough importance to these issues …*' (Lawyer 1)

In general, defence lawyers seem to think that in some cases these personal factors could be interpreted in favour for the defendant. The fact that they are not taken very serious in the decision-making process may be to the disadvantage of the defendants.

As we have noted in the previous section, criminal history, the circumstances of committing the crime and so on are all stipulated in the Criminal Procedure Code as factors that can ‚speak' about the seriousness of the crime or the degree of public danger that a defendant poses to society. Although they play some role in the ‚chain of decisions', these factors do not seem crucial when deciding on the PTD. This observation will be consolidated in the next sections.

Lawyers seem to favour more than the others **one more evaluation** made by a probation service that would provide more personal information about the defendant. They appear to think that an independent party – such as probation service – could provide reliable information about the defendant in terms of: family, education, job history etc. In some cases, this information could help the judge have a full portrait of the defendant and make a better informed decision on the PTD.

3.3 Changes in the past years

Most judges see the PTD practice as an evolution product: **first change took place when the measure was introduced to be decided by the judge (in 2003); the second change took place with the ECHR jurisprudence** and so on.

In 2014 a new Criminal Procedure Code came into power and **introduced a new alternative to PTD** – house arrest. It seems that this new alternative encouraged some judges to use it as alternative to PTD:

> '*Now the new legislation includes a new measure – house arrest. There are judges that use it. There are judges who do not. And there are judges that are using it only in exceptional cases'* (Judge 1).

Other judges argue that the changes in the PTD practice are due to some **changes in the mentality** of the decision makers – judges and prosecutors – and the development of the alternatives:

> '*I think the vision regarding the alternatives has changed as well. It is a matter of mentality that not all the offenders should go to pre-trial detention. There are other measures that the prosecutor could impose. They have noted that these alternatives work and maybe they do not ask for PTD if not necessary*.' (Judge 4)

The **new generations** of prosecutors and judges are perceived as being more prone to use alternatives:

> '*There are new generations now. There are prosecutors that entered the system in the last 3-4 years and they come with a different vision. I have seen this also among the new judges. The new ones seem to be more open to use alternative measures … they seem to start the analysis from the alternatives and not from the PTD'* (Judge 1)

Judges of all levels mentioned in different ways this change in mentality. Some use the pyramid metaphor where the peak is the PTD and the alternatives are the base. The principles of 'PTD as last resort' or 'only for exceptional cases' are

mentioned by almost all judges. Therefore, as far as the judges and prosecutors are concerned, PTD is a last resort.

But the change in mentality is not working only in the direction of favouring the alternatives. Judges of the High Court of Justice and Cassation (HCJC) mentioned also that prosecutors become braver and apply for PTD more often than before against politicians and public leaders, when deemed necessary:

> '*… in the context of fighting corruption, the institution (the Prosecution Office) started to work more independent and therefore prosecutors started to apply for PTD also for politicians or magistrates …*' (Judge 5)

This change in mentality seems to be influenced by factors such as: **ECHR jurisprudence, changes in the National Institute of Magistracy curricula (more focused on ECHR), a long process of adjusting between prosecution and the courts, the new generation of magistrates that entered the system in the recent years**[1]. Mass media seems to play a role also in the evolution of the PTD practice but the direction of this influence is not yet clear. Especially the judges at the High Court of Justice and Cassation also mentioned expectations of the society. Due to their specialization, they tend to observe the society's expectations regarding the corrupted politicians or high corruption. Although they were not in the position to state how this expectation is constructed, they mentioned it as a 'responsibility towards a non-presence' in Apel's terms (1999). Although the public is not present in the room, it can put some invisible pressure on the decision-makers:

> '*I have never felt any pressure but I always knew there is an expectation'* (Judge 2)

In the same time, the public expectations are influenced by the judicial practice:

[1] Some of the new judges are even called by their colleagues 'cedoisti' (from the ECHR name) because they use extensively the ECHR jurisprudence.

'*... the public opinion was also educated by the judicial practice. The public opinion understood that PTD should not be a rule but an exception*' (Judge 2).

3.4 Central outcomes and conclusions

To conclude this section, it can be inferred that changes in the PTD practice could be explained by a continuous dialog between different factors such as:

- Changes in the decision-making process. Once the decision on the PTD has passed from the prosecutors to the judges, the practice of PTD became more balanced and used as ‚last resort'.
- ECHR jurisprudence on PTD had a great impact on the PTD practice in Romania. This influence seems to be exerted directly: it is often when one can see ECHR jurisprudence mentioned in the courts decisions on PTD (especially Creanga vs Romania, Cuteanu v Romania etc.). Based on the interview with the judges, ECHR seems to influence the practice around PTD in an indirect way: through the training at the National Institute of Magistracy and also through changes in the mentality of the judiciary.
- A new influx of judges and prosecutors that were trained at the National Institute of Magistracy appear also to support the progress in PTD practice. They were trained in the ECHR and human rights framework and that seems to favour a more balanced PTD practice.
- Structural changes seem to play also an important role. Once the spectrum of alternatives was enlarged with home detention, the practice of PTD seemed to decrease. Although we have no statistical data to substantiate this conclusion, some judges stated that more credible alternatives were able to decrease the use of PTD.
- Although the public is not present in the courtroom, it seems that it plays an important role in the general use of PTD. As mentioned by some judges, public sets some expectations on how the court should react in some cases. It is not yet clear what is the mechanism behind this public pressure but this factor may be taken into account in correlation to other social forces that shape the penal policies (e.g. punitivity etc.).
- important to mention is that the PTD practice seems to be shaped through the feedback loop created by judges and prosecutors. By feedback loop we mean the dialog that follows a process such as: the prosecutor applies for PTD and observes/reflects upon the judge decision. After testing the

decision with the higher courts, they begin to understand and incorporate in their practice the new court pattern in imposing the PTD. In the next stage they will apply for PTD mainly when they know they have good chances for success. As we shall see later, in certain cases the role of the defence lawyer is quite small in influencing the decision.

- Usually, the lawyers draw up their understanding of the PTD practice based on an individual perception of the practice. Prosecutors draw up their understanding of the PTD based on a group perception (via the weekly meetings).
- One more report that would provide more reliable personal and social information about the defendant would be very welcome, especially from the lawyer's point of view.

4. The basis for decision-making

4.1 The process from the judges and prosecutors perspective

As mentioned at the beginning of the previous section, the Criminal Procedure Code stipulates at art. 223 what are the factors that should be taken into account when deciding on the PTD. However, neither the Criminal Procedure Code nor the ECHR jurisprudence are giving guidelines with respect to factors which should be treated as more important than others and in what order. Therefore, it is for the judges and prosecutors to determine what factors should be taken into account and in what order for each particular case.

However, based on our interviews with the decision makers, judges seem to follow **a two steps process** in the decision-making process.
In the first step, the judges seem to look at the **offence and the person**: the seriousness of the offence, the manner of committing the crime, the offence circumstances, the personal circumstances, and the stage of the trial.
Evidence that the accused is the one who committed the crime is also critical. Judges who do not have a reasonable suspicion that the defendant did not commit the crime are reluctant to impose any preventive measure.
When looking at the crime, most judges and prosecutors we have interviewed seem to evaluate first the **seriousness of the offence**:

*'If I refer only to my own activity, because I work with cases of violence, homicide and attempted murder, I can almost say that preventive arrest is a rule. But this is the nature of the offenses I work with; they are violent crimes, most of them against life. The automatic rule in the nature of these crimes is to impose the PTD. As a general rule, if we look to all the prosecution practice, the PTD is an exception.' (*Prosecutor 1*)*

or

'For violent offenses, such as crimes against life, PTD is applied for almost all cases. The same goes, for example, in case of murder or attempted murder, battery resulting in death, rape and so on. Regarding the robbery offenses, which also involve an element of violence, the practice is much more diverse as we have different forms of robbery: robbery under threat, robbery with guns, robbery by snatch or robbery through simple violence. ' (Judge 8) .

If seriousness of the offence is evaluated by the lower courts depending on how much violence the crime involved, the judges at High Court of Justice and Cassation, due to their case-law, emphasise two other important elements in defining the seriousness of the crime: **the amount of money** involved in the corruption cases and the **professional role** of the defendant (e.g. member of the Government, member of the Parliament, magistrate etc.):

'... is it very common to impose PTD in corruption cases. Especially for senior civil servants, magistrates, police officers, i.e. persons who are using public power and commit corruption acts, they are usually arrested. They are not held in custody during the whole trial, unlike murder and battery resulting in death (...) but the idea is that for corruption offenses or large-scale corruption, such measures are applied at least for a while ... (Judge 9)

The lawyers we interviewed were very critical of this practice:

'I work especially in cases of corruption and fraud, the so-called "white collars crime" without an extensive experience in violent crimes. I can understand violent crimes to be considered dangerous for the public order, but it is hard for me to understand why someone

*committing the crime in 2007, 2008 or 2009 is arrested in 2016. Why do you need PTD in these cases? '(*Lawyer 2)

Although the seriousness of the offence was mentioned many times as very significant in the decision-making, the other factors play a role as well:

'I have said that seriousness of the crime is important but it is not the queen of the factors. It is the starting point but I do not stop there in my evaluation' (Judge2).

Another factor that is taken into account in the first step is the **risk of committing further offences (risk of reoffending)**. As mentioned by several judges, the risk of committing further crimes plays an important role. The way this risk is evaluated is not very clear. Some judges are looking at the criminal history. Some others are looking at the motivations behind the crime:

'We look at the past behavior, if he/she is recidivist. We look at the social environment, peers and the seriousness of the offence.' (Prosecutor 4)

However, there seems to be a consensus among judges that recidivists, violent offenders and sometimes drug addicts (especially those on hard drugs) are considered as high risk of committing further crimes and therefore are good candidates for PTD.

In some cases, judges stated that the **attitude of offender** during the hearing is very important. If they seem co-operative and seem to regret the crime, they are less likely to be placed under PTD. A sort of **risk report** submitted by the probation service could help with more personal information about the defendant. As mentioned in the previous section, lawyers in particular seem to suggest that such a report could provide more reliable personal information about the defendant. In some cases, this information could promote the alternatives to PTD. However, when we interviewed the jurist representing of the National Department for Probation (NDP) we learnt that the Probation Service is not ready to draft this report as this service is already overcrowded and it is not required by the law. The focus or probation, as mentioned by the NDP

representative, should be on the offenders under community sanctions and measures. Furthermore, judges and prosecutors do not seem to be very much interested in this information. The only personal information that seems to be useful at this stage is the attitude of the defendant.

In the second step of the process, judges seem to evaluate the **risk of absconding, influencing the witnesses or tampering with evidence.**

Most judges stressed that they take the PTD measure in order to ensure a good progress of the trial. This means to ensure that the defendant will not contact the victim, will not run away or influence the witnesses. However, as in the case of evaluating the risk of committing new crimes, these risks are not defined very clearly in the judges or prosecutors interviews. In most cases, they seem to evaluate these risks based on the previous attempts in absconding, influencing the witnesses or tampering with evidence.
A separate discussion was made regarding the corruption cases involving high-ranking officials. In case they are still in power and could influence the witnesses (usually their subordinates), then the likelihood of PTD is high. By doing so, the judge can make sure the witnesses feel no intimidation when giving their statements.

Most judges emphasised the complexity of the decision-making process on PTD. None of the judges mentioned one single criteria for imposing PTD. In most cases they state that the decision is based on a 'whole picture' or a multi-factorial analysis where many factors play a role:

> *' Even in sexual offences where the probability of pre-trial detention is high or when dealing with homeless people, the decision is corroborated with many other factors. Are they employed, is there a fixed address, what is the criminal history of the person, what about the substance abuse etc.? I would not be able to say: only one factor – lets say the lack of a fixed address – could lead automatically to the PTD decision. It is rather a corroborated decision where the whole ensemble is taken into account'* (Judge 1)

All judges and prosecutors evaluated that they have enough resources to make the decision on the preventive measures. They think they have enough time and enough information.

Sometimes they would like to know more about the personal circumstances of the defendant but, as this information is not essential in the decision-making process they can be satisfied with their own impressions (see the discussion about the attitude). In case the judges cannot make the decision within the prescribed time, they can release the defendant and impose the measure later when they are satisfied with the information they have. Prosecutors would also like more information but due to the time pressure they do not see how they can get this information. Moreover, as this personal information is not crucial for the decision-making, they could be satisfied with the data they can access in the existing databases.

As a recommendation at this point, it may be useful to further train the judges and prosecutors in the dynamic factors involved in reoffending. By doing so, they could grasp a better understanding of the importance of social bonds in the economy of recidivism.

4.2 The foreign offenders

In the case of foreigners, the mere fact of being a citizen of another country is not a reason justifying preventive arrest, on the assumption that this person has a high risk of evading criminal prosecution. When applying for PTD, prosecutors have to prove that there is a risk that the foreign citizen wants to leave the Romanian territory. In turn, the judges in the decision-making process regarding foreign citizens, analyse a number of issues such as the **legality of stay** in Romania and the **existence of subsistence means** (e.g. a job):

> *'I have seen many situations when these people, if they proved they had a residence or a place to stay in Romania, the PTD was replaced with house arrest or judicial control. There are many foreign citizens, investigated, judged in Romania for whom PTD has not been applied or this measure has been replaced with some other measure. It also depends very much on the type of offense.'* (Judge 9)

or

> *'A preventive measure does not punish. It is meant to discipline the criminal trial and ensures the presence of the party in the trial. By doing so you want to secure the presence of the party on one hand (...) or, if I realize that I cannot ensure your presence, as you have entered the country illegally or maybe legally anyway, but your goal is to leave for the West or for another country, then I will seriously think about taking a preventive measure to ensure presence here. Of course, if all other conditions are met. '(*Judge 10).

Some judges have made a series of distinctions regarding the citizenship of a foreign person against whom a preventive measure is being discussed, in the sense that they pay more attention to cases involving foreigners who are not citizens of the European Union. If the defendant is a **third country citizen** from a country with whom Romania has no bilateral agreement of extradition, the likelihood of PTD is quite high. Obviously, the other factors (e.g. the seriousness of the crime, the legal status in Romania etc.) are still important. Most judges estimated that the number of foreign citizens for whom PTD was discussed was very low and especially for less serious crimes, such as small economic crimes, driving offences etc.

Interviews with lawyers and prosecutors seem to confirm these observations. None of the participants argued that being a foreign offender could lead automatically to PTD. As they mentioned, foreign offenders do not seem to be treated differently apart from what the criminal procedure is requiring for this group – the existence of the official interpreter.

4.3 The process from the defence lawyer perspective

The lawyers we have interviewed seem to be aware of the fact that the seriousness of the crime is one of the most important factors when deciding on PTD. They also share the opinion that the PTD is complex decision where more than one factor is involved. However, they criticise the decision-making process

from two perspectives: **the nature of the factors** taken into consideration and **the procedure**.
Regarding the factors taken into account, the lawyers complain that personal circumstances, such as employment, family status etc., are not sufficiently taken into account when deciding on the PTD. Indeed, these factors are mentioned in the CPC in relation to PTD but judges in their motivations do not often mention them for PTD. If static factors like the seriousness of the crime or the previous convictions (as indicators of the risk of reoffending) are those important in imposing or not PTD, then there is little room for the lawyer to influence the final decision on the preventive measure.
Furthermore, they argue that sometimes PTD is taken to 'help the prosecutor' in his/her investigation. By placing a defendant under PTD, the judge put a lot of pressure on him/her to confess or cooperate with the investigation.

From the procedural point of view, the lawyers complain of an unequal position of the lawyer compared with the prosecutor in front of the judge. This point will be further developed in the Procedural aspects section.

However, all lawyers we have interviewed agreed that there is a tremendous progress in the PTD practice. They explained these transformations mainly due to the ECHR's jurisprudence.

4.4 Prolongation and the contestation of PTD

When it comes to the prolongation of the PTD the process and the relevant factors seem to change. In this respect it seems that judges operate under the assumption that the risk of reoffending decreases over time.
Therefore, the decision to prolong PTD or not depends on:

- how much time passed since the first application of the PTD,
- how many times the measure was prolonged already,
- what arguments are there for the prolongation,
- what the prosecutor did in that specific case from the last application of prolongation. If the prosecution is perceived as having a passive attitude, most judges tend to deny the PTD prolongation.

The process starts with a review of the reasons PTD was imposed for last time. Then, the judge checks on whether the reasons are still relevant and how the prosecutor investigation progresses. If the reasons are still active, the

investigation makes progress, and the measure was not already prolonged for two-three times, quite likely the judge would prolong the measure. If any of these factors is missing, than it is quite likely that the judge would replace the measure with house arrest or judicial control.

The prosecutors seem also aware of the fact that the PTD should be as short as possible. As they estimated it is quite hard to justify PTD for more than two-three months.
Based on some judge's statements, it seems that there is a pattern whereby PTD is replaced after 2-3 months with house arrest which is latter replaced with judicial control. This process should be further scrutinised as it can generate a **net widening effect.** It may be that alternatives are sometimes imposed as an automatism rather than in a justified manner.

In case the PTD is contested at a higher court, it seems that the decision-making process starts with an evaluation of the **decision made by the lower court**. Once that is clear for the judge, the process continues with an evaluation of the seriousness of the crime and all the other evaluations as if the PTD decision would be imposed for the first time. However, this process is rather associated with the working style of the magistrates.

4.5 Meta-factors in the PTD decision: setting up examples and public expectations

As already anticipated in the first section of this report, many judges mentioned apart from the factors stipulated in the CPC, the public or the public expectations.
'*Oprobiul public*' or the **public expectation** was mentioned by several judges as if the preventive measures are the **first real reaction of the criminal justice** against the crime.

> *'At the end of the day, judges are part of the society and I would be very intrigued to see that somebody who killed somebody or committed high corruption would walk free on the streets. ' (Judge 1)*

or

'If we take public opinion, the PTD is the measure that satisfies the public the fastest. The public does not want a long trial but an immediate remedy …' (Judge 2)

In some cases, the prosecutors use the public expectations to convince the judge to impose PTD in serious cases. This happens especially if the case has already received mass media attention.

Related to the public expectation, judges at the High Court of Justice and Cassation mentioned also **setting up an example** as another subsequent reason for imposing PTD, especially in the corruption cases:

'PTD is to prevent but also to give a clear example. You are not above the law and you will be an example for the others who may be tempted to do what you did. The message is clear: this is what happens to them if they follow your example.' (Judge 9)

This is what some lawyers criticized heavily in their accounts:

'Some abuses have been committed in the past. Judges wanted to set some examples. I don't think this is a kind of example we want to give to society. A mature society should follow rules and not other pressures.' (Lawyer 1)

They gave some examples of crimes committed many years ago and the accused did not have the capacity to commit such crimes anymore and still the courts applied PTD. The only explanation the lawyers could give was the existence of extra-judicial pressures on the Anticorruption Prosecution Office and the courts to look aggressive in fighting corruption.

4.6 Central outcomes and conclusions

- The decision making process around PTD is very complex and involves a multi-factorial analysis
- One of the most important factors in making the decision for PTD is the seriousness of the crime

- In cases of corruption or other 'white colour' crimes, the amount of money involved and the professional position of the defendant seem to be critical
- The decision making process appear to have two main parts: one when the judge is evaluating the crime and the person and one where the judge is assessing for the risks of flight, absconding, influencing the witnesses or tampering with the evidence.
- When evaluating the person, judges and prosecutors seem to take into account the attitude of the defendant and not factors such as: employment, family, housing and so on.
- The risk of committing new crimes and the other types of risks are evaluated mainly based on the previous behaviours or previous attempts.
- Lawyers tent to acknowledge the progress of the last few years. However, they still criticise the process for not taking into account personal information about the defendant (e.g. employment, family status etc.) and also for the unequal position compared with the prosecutor.
- As a recommendation, it may be useful to consider further training for judges and prosecutors on the dynamic factors associated to reoffending. In this context, they might develop a better understanding of the social bonds and other personal factors.
- Being a foreigner may increase the likelihood for PTD but only in connection with other factors and in some circumstances. Coming from a third country and not having resources may increase the chances for PTD.
- Apart from the criteria mentioned in the CPC other meta-factors such as public expectations and the need for examples should be taken into account for a more comprehensive understanding of PTD as a socially and culturally situated phenomenon.
- PTD and sometimes the alternatives seem to be used in Romania for prevention reasons but also as a 'fast reaction' of the criminal justice system in front of a crime. In this respect, they tend to be used in a punitive manner.

5. Role of the players in the decision making process

The players involved in the decision-making process regarding the preventive measures are the defendant, the prosecutor, the judge and the defence lawyers.

5.1 The defendant

Although the defendant should play one of the main roles in the criminal procedure, the process is organized in such a way that the defendant has the opportunity to address the court at the end of the hearing. First, is the prosecutor, second is the defence lawyers and then it is the defendant. Some lawyers considered this order as not being in the defendant favour.

5.2 Lawyers and prosecutors

When it comes to the position of lawyers and prosecutors, most judges were aware of the lawyers' suspicion that prosecutors are closer to the judges than the lawyers. However, most judges argued that based on what they do in court they try to give them equal weight: they have access to the same information, they can speak in front of the court, they can ask for more witnesses etc. As stated by one judge, the positioning of the two main protagonists depends to a large extent on the judge's working style in court.

Some judges made a small distinction between ex officio lawyers and chosen ones:

> *'... Those ex officio are not working always very hard ...' (Judge 1)*

It seems that those selected by the defendants themselves are more interested in defending them than the ex officio ones. A small number of judges argued that there is no difference in terms of the quality of defence between those two categories of lawyers. One judge noted some improvements in the performance of the ex officio lawyers.

Prosecutors participating in the study evaluate their position as being equal to the position of the defence lawyers:

> *,The position is pretty equal. The role of each of us is clearly defined by the law. I never had any issues with the defence lawyer. We have a relatively good cooperation.' (Prosecutor 3)*

They assume that lawyers have the impression that they have more power in influencing the judge's decisions on PTD because:

> *,We tend to apply for PTD when we know this is the case, when we know that the court practice is as such. Where we have doubts we do not apply for PTD.' (Prosecutor 4)*

The lawyers perceive that all the symbolic actions (such as using the same door to enter the courtroom, the possibility of the court to have direct communication with the prosecution etc.) seem to suggest that the prosecutor has more power than the defence lawyers.

As mentioned already in the previous section, lawyers have repeatedly referred to the fact that even at the architectural level they have no equal position with prosecutors. The latter, as a rule, sits on a podium in the courtroom, at the judge's right.

> *,Equality does not exist from the architectural perspective either. Although there was an intention to create this equality at a certain moment, this has never happened in practice. I have not seen yet in Bucharest a courthouse where the prosecutor stands face to face with the lawyer. '* (Lawyer 3)

These issues, rather of a symbolic nature, tend to be minimized by judges or prosecutors, but for lawyers they are apparently of particular importance.

As is in the symbolic interactionism theories, there are not objective actions but different interpretation of the same actions by different actors. Apart from these discrete behaviours that make the lawyers perceive as if they are not as important as the prosecutors in the courtroom, some lawyers gave also examples when the lawyers did not have access to all the evidence available in one case. This was the case when intelligence reports were submitted in particular cases and the lawyer did not have access to it. However, as they stated, this has happened several times in the past and it is not an issue anymore.

It may be useful for the future to change the setting of the courtroom in a way to reflect better the equality between the lawyer and the prosecutor in the criminal procedure.

5.3 Central points and conclusions

- It seems that the decision-making process on the PTD and its alternatives is dominated by the judge.
- According to the defence lawyers, the prosecutor has a privileged position before the judge. The main reason they have this perception is the court setting that places the prosecutor close to the judge and almost at the same level.
- Prosecutors and judges seem to be aware of this perception among lawyers but reject it. They argue that both parties – prosecutor and lawyer – have access to the same information and could address the court the same way.
- Moreover, prosecutors explain this perception as based on the observation that many prosecutor's applications are approved by the court. However, they argue that this is because they apply for PTD when they know that chances to be approved are high.
- Some judges argue that ex oficio lawyers are not always motivated to defend their clients properly.
- Some lawyers noted that the position of the defendant in the procedure is quite limited. Usually, he/she has the chance to address the court the last.

6. The alternatives to the PTD

6.1 General introduction

According to the art. 202 para. 4) of CPC the alternatives to PTD are**: judicial control, judicial control on bail and home arrest.**

As in case of the PTD, these measures may be applied if there is evidence or strong indications that can lead to a reasonable suspicion that the defendant has committed a crime and if preventive measures are necessary in order to:

- ensure a good progress of the trial,
- prevent the defendant' absconding or

- prevent a new crime.

The CPC also provides that any preventive measure should be proportionate to the seriousness of the crime and is necessary for one or more of the above mentioned aims.

All the preventive measures apart from the PTD and house arrest (HA) may be ordered by the prosecutor and the judge. They all can be appealed against to the court (with respect to decisions of the prosecutor) or to a higher court (with respect to decisions of the judge).

6.2 Judicial control

The judicial control (JC) may be imposed by the prosecutor, the judge in the preliminary stage or the court during the trial stage only after hearing the defendant and only in the presence of a lawyer. Based on our interviews, it seems that prosecutors are those who apply this measure most often.

During the judicial control, the defendant or the convicted person should comply with the following measures:

a) to appear before the criminal investigation body, the Preliminary Chamber Judge or the court at any time they are called;

b) to inform forthwith the judicial bodies having ordered the measure or in which their case is pending on any change of domicile;

c) to appear before the law enforcement body appointed to supervise them by the judicial bodies having ordered the measure, according to the supervision schedule prepared by the law enforcement body or whenever they are called.

In the same time, the judicial body may also impose one or more obligations such as:

a) not to exceed a specific territorial boundary, set by the judicial bodies, without their prior approval;

b) not to travel to places set specifically by the judicial bodies or to travel only to places set by these;

c) to permanently wear an electronic surveillance system;

d) not to return to their family's dwelling, not to get close to the victim or the members of their family, to other participants in the committed offense, witnesses or experts or to other persons specified by the judicial bodies and not to communicate with these in any way, be it directly or indirectly;

e) not to practice a profession, craft or activity associated to their prior offence;
f) to periodically provide information on their living means;
g) to subject themselves to medical examination, care or treatment, in particular for the purpose of detoxification;
h) not to take part in sports or cultural events or to other public gatherings;
i) not to drive specific vehicles established by the judicial bodies;
j) not to hold, use or carry weapons;
k) not to issue cheques.

Most respondents were **in favour** of this preventive measure. In practice, in most cases, JC requires that the defendant present himself at the police station according to a pre-determined schedule, and also to attend to the judicial bodies whenever he/she is called and inform about any change of dwelling. As mentioned above, other obligations may be imposed on the defendant/convicted person, depending on the case. They are also supervised by the police.

Most judges were in favour of this preventive measure because it ensures the good progress of the trial while **allowing the defendant person to continue his/her social and personal life**:

> *'Judicial control allows the person's mobility ... It allows the supervision of not leaving the country or a locality. Yet, he may go to work, school, etc. He is permitted also to appear before the court or criminal prosecution body when asked to do so.'*(Judge 5)

On the other hand, some participants, lawyers in particular, criticised this measure on the ground that **it is imposed far too easy**. As they stated, judges do not appear to be aware of the severe impact this measure has on people's life and hence they tend to use it in excess.

> *'When this measure was taken, almost 90% did not get away from it until the end of the trial. Even if it is reviewed every 60 days. It is always in discussion, but in most cases only formal. I had a case in which the JC measure was taken at the beginning of the trial and lasted until the end although we argued every time that the convicted person complied with all the measures and obligations.'*(Lawyer 3).

Unfortunately, Romania **does not record the number** of judicial control imposed during one year. Most probably, such a statistic could illuminate this net widening effect in a more convincing way.

Another lighter criticism of the JC was raised by some judges. In short, they expressed some concern regarding the **police capacity** to follow up all the cases placed under JC. This concern was raised in particular in relation to some obligations that could not be monitored easily without an electronic device (e.g. not to leave specific boundaries). In this respect, most judges urged the Romanian authorities to develop the **electronic monitoring** infrastructure so that a real time surveillance is possible. Although this possibility exists in the Romanian legislation, the infrastructure needed for electronic monitoring is yet missing.

6.3 Judicial control on bail

Under the judicial control on bail (JCB) the defendant/convicted person has to make available to the judicial body a certain amount of money or a material guarantee of a certain value. The Code of Criminal Procedure stipulates only the minimum amount of the bail, namely 1000 lei (about 200 Euro), but makes no reference to a maximum amount. The amount has to be proportionate to the seriousness of the crime and also to the level of income of the person.

Based on the participant's opinions, JCB is used quite sparsely in practice due to several reasons. One reason mentioned by many participants was the **lack of clarity in regulating** this measure:

> *'It is a rather ineffective measure because the steps that need to be taken are not clearly regulated. Some (judges n.red.) say there are two steps. As a first step, you notify him of his duty to plan to pay a bail, and after he pays, you install the measure of control. Here, the regulation in the Criminal Procedure Code is to be improved.'* (Judge 5).

Another reason judges are quite reluctant to use this preventive measure is the **lack of financial capacity to pay** of many Romanians:

'And we still have to consider the reduced financial possibilities and a certain kind of mentality that some prefer to stay behind bars rather than pay.' (Judge 5)

The fact that this preventive measure **is regulated more or less like the judicial control** – except the amount of money – many judges find it more feasible to use this measure rather than the JCB. Moreover, if the defendant has no money or simply does not show his willingness to pay bail, judges have to apply the next measure, which is the judicial control, since the other preventive measures (PTD and home arrest) are considered far too severe in relation to the seriousness of the crime or the risks involved:

'There is still a problem with the JC, which renders it less applicable in the judicial practice. Why do I tell you this? Because it has as a condition of admissibility the payment of a bail. If the defendant has no money or does not want to deposit this bail, this measure cannot be taken. In fact, neither this preventive measure nor the old regulation are applied quite rarely, because concrete conditions were not specified. The way of regulation is similar between simple JC and bailout JC. The only difference is that this bail is being paid. Why should the defendant want to pay that bail, when the same conditions must also be met for the simple JC measure?' (Prosecutor 4).

Another concern of the judges was **how to settle the amount of bail in a real case**. Given that the law does not provide for a maximum limit of bail, the magistrates' concern was how to determine an amount that is likely to serve the purpose of bail, namely to guarantee the person's participation in the criminal proceedings. The Criminal Procedure Code does not provide a series of benchmarks to assist magistrates in individualizing the amount of bail, so they need to take a number of additional steps to accurately determine the defendant's income / property.

'The law does not provide for precise criteria how to establish this bail. It leaves the judiciary body to estimate the amount of this bail. There are no mathematical criteria for us to calculate values of the

limits of bail, for example, in case of taken bribe. It is a purely subjective appreciation of the prosecutor in relation to the evidence in the case file and the defendant. But how can we establish the income? Perhaps we could do this only by checking the wealth declaration but there is no time to do a financial analysis of the income to estimate the bail value. Neither does the law require such criteria to be considered.' (Prosecutor 4).

Linked to these concerns, Romania had a **high profile politician** who was required to pay 13 million Euro (and paid) and subsequently skipped bail leaving the territory of Romania. This event seemed to strengthen the magistrates' mistrust on the viability of the bailout institution. As this measure is likely to involve large amounts of money, it can be argued that JCB is a measure more available to rich defendants rather than the poor ones.

6.4 House arrest

House arrest (HA) is the second most severe preventive measure just after PTD. HA can be imposed only by a judge when all the other preventive measures are not sufficient but the seriousness of the crime or the personal circumstances of the defendant do not justify PTD.
During HA, the person has the obligation not to leave the house without prior approval of the court, to come before the prosecutor, the judge or the court anytime he/she is required and not to communicate with the victim or any other person. During the HA, the judge or the court could ask the defendant to wear an electronic device (which does not exist yet).

According to the judges we interviewed, HA is imposed most often after PTD as a transition towards judicial control.
One of the most important criticism mentioned by our participants was that according to art. 399 CPC the **period of arrest at home is deducted from the prison** sentence by the equivalence of one day of HA with one day of imprisonment. Although they all agree that HA means deprivation of liberty, magistrates consider that this legal provision is likely to create a situation of discrimination between HA subjects and defendants who have executed their pre-trial detention in the police or prisons' detention facilities. In practice there

are many **paradoxical situations** where the defendants placed in HA do not contest the measure applied because they would like to stay under HA as long as possible because they will be later in the position to deduct those days from the prison sentence. Moreover, they even resort to a series of practices aimed at extending the criminal trial and, implicitly, extending the period of HA so that the period subsequently deducted from the prison sentence is as large as possible:

> *'When they are released from PTD with a milder preventive measure, the defendants tend to delay the criminal trial, especially in the case of house arrest. This happens especially when they know they will receive a prison sentence. In paedophilia cases, for example, they always demanded HA, but they were trying their best to prolong the trial, maintaining house arrest, and then deducting it. He basically ends up doing the fraction of his time in penitentiary … Many defendants with house arrests do not challenge it. Half of those who are under this measure no longer appeal against it.'* (Judge 5)
>
> or
>
> *'We have had some objection in taking the HA measure because there is a rule that the time on HA is deduced from the length of the punishment applied at the end of the trial. This aspect did not seem quite fair or equitable at least to the person in PT. Many defendants are on HA, sometimes for a long period of time, and they deduct the same days, as the defendants who were on PTD. From this point of view, we have had some reservations. We even faced situations where the defendants themselves requested to extend the period of HA knowing that they would receive a custodial sentence at the end and that they will be able to deduct the period of time spent on HA from the prison sentence.'* (Prosecutor 4)

Without being explicitly mentioned, these statements also highlight the fact that, apart from the issue of deduction of days in arrest, magistrates consider that this measure is **devoid of the afflictive character that the PTD** or imprisonment has.

According to art. 221 CPC, when imposing HA the judge could also allow the defendant to leave the house during certain hours in order to **continue the professional or educational programs.** This possibility was severely criticised by the judges we have interviewed. Most of them stated that HA is deprivation of freedom and therefore it should be as close as possible to the PTD:

> *‚If we look more at the house arrest measure as regulated in our code, we will notice that it is clearly ineffective, as long as you replace the preventive arrest measure with home arrest, next he will come with a request and say that sir, I have nothing to eat, I have nothing to drink, so you have to let me provide for the basic needs, but keep my house arrest. So there is only one way to get earn a decent living, and that is going to work. Going to work for 8 hours. The time spent to go to work one hour, and back one more hour, so we have 10 hours to go out. After that, the person will say yes, but I still need the hospital, I also need to buy food, not just go to work, so that we reach a solution devoid of contents (...)'* (Judge 4)

As far as lawyers are concerned, they state that such a thinking among magistrates **overlooks the real aim** of the preventive measures – to ensure the person's participation in trial.

> *'The discussion has the roots in our mentality ... We are more focused on imposing measures to make the perpetrator suffer. What is not understood is that this man is still deprived of freedom. He cannot go, for example, to meet his friends. He cannot go somewhere; he cannot get out of the house ... which is a restriction of freedom. We talk about human freedom. He misses some chances, he has certain problems that he cannot solve from home. '* (Lawyer 3)

Another aspect that was criticised by the judges and prosecutors was related to the practical means to **ensure the defendant's compliance** with the obligations. The compliance is monitored by the police staff who can make unannounced visits to the defendant's house to check on his presence. The

magistrates we have interviewed expressed serious doubts that the police have the capacity to do that and therefore the defendant has many opportunities to breach his/her obligations without being caught:

> *'We understand that the police are making phone calls at defendant's home at different hours, but we also need to think about whether the police have the capacity to provide an effective check, and how can a policeman check if the defendant goes out of his/her house in the neighbourhood, around the house or at the restaurants that are around the house (...)* '(Judge 2*).*

or

> *'There are very few police officers who are very busy already with too many defendants on HA'* (Judge 5)

Under these circumstances, magistrates consider that the development of the **electronic monitoring** system would be likely to contribute to providing certainty about the defendant's compliance with the alternative preventive measures.

Regarding the electronic monitoring system, it should be mentioned that the current regulatory framework, i.e. the Criminal Procedure Code, stipulates that defendants on JC and JCB could be obliged to wear an electronic device that would facilitate their monitoring (art. 215, paragraph 2, letter c). However, as mentioned above, there is currently **no infrastructure** in Romania for the implementation of these legal provisions.

> *'So my personal point of view is to introduce an automatic system, such as the monitoring bracelets, in order to render these measures efficient. Of course it is not infallible, but it is much better than what we have at the moment, that is to have the policeman call him up from time to time or to call on his home and to make a visit when he is around.'* (Judge 6)

Interesting enough, **lawyers seem to share this view**. They tend to view EM as a positive development that would increase the judge's confidence in this preventive measure:

'Electronic monitoring would be useful for judges who wonder: how should I know he is not out of his house while being under HA? In practice, it's harder ... It's all about money, human resources. I do not see this possible. But it would be very good. '(Lawyer 1)

or

'This is what judges complain about. Given that HA was recently introduced into the law, everything should be changed at the police level ... An electronic system would be welcome ... '(Lawyer 3).

Regarding the HA, some lawyers criticised the measure for not being available for all citizens. As they argue, the measure seems to be mainly available for defendants with a certain social status that allows them to survive without having to work all days. Furthermore, defendants with no stable domicile, homeless people etc. cannot benefit from this measure, which creates some ethical issues:

'There are many who cannot prove they have a stable domicile. Then PTD appears as the only solution. '(Lawyer 2)

To conclude this section, it seems that the alternatives are used when the seriousness of the offence or the circumstances of committing the crime do not justify the pre trial detention but the judge or the prosecutor have some concerns either for the public reaction, for the risk of committing further crimes, for influencing the witnesses or the risk of fleet.
Important to note here is that judicial control and house arrest are very often used after PTD as a way to let the defendant free in a progressive manner. In this case, HA and JC are not alternatives to PTD but ways to prolong the state's control over the defendants or ways to decrease the time spent by the defendants under PTD.

However, concrete steps should be done in order to control better the alternatives in a way that they are alternatives to PTD and not alternatives to freedom.

6.5 Central outcomes and conclusions

- The alternatives to PTD are: judicial control, judicial control on bail and house arrest. They are all regulated in the Criminal Procedure Code.
- Most of the participants evaluated them as very useful and contributing to the good progress of the trial. Judicial control is by far the most popular preventive measure. The main arguments in favour of this measure were:
  - It contains many measures and obligations that can be used by the magistrates to ensure the defendant's presence in trial and avoid the risks of absconding or tampering with evidence,
  - It allows defendants to continue the professional and social life,
  - It really protects the principle of innocence until proved guilty etc.
  - However, as mentioned by some lawyers, there is a significant risk for this measure to be used too widely and create the so-called net-widening,
- The judicial control on bail was criticized by many participants for not being well regulated: it is too close to the judicial control, it is difficult to establish the bail amount and it is quite difficult for some people to pay the bail. As it is now regulated, it seems available mainly for rich people.
- House arrest is perceived by many judges as a strong alternative to PTD as it ensures the deprivation of liberty.
- However, HA was severely criticized by participants for the fact the HA days are deducted from the final prison sentence. This is perceived as highly discriminatory compared to those defendants on PTD. However, the interviews with judges revealed that some of them expect the preventive measures – in particular PTD and HA – to have a punitive weight. Based on their accounts, it seems that HA is not punitive enough to justify its deduction from the prison sentence.
- This deduction possibility creates some perverse effects where defendants themselves are applying for HA in order to make sure that the final prison sentence will be shorter.
- Many of these alternatives were criticized also for the lack of an effective tool for monitoring compliance. Electronic monitoring was mentioned in this context like a silver bullet.

- EM is regulated in the Criminal Procedure Code of Romania but the infrastructure lacks completely.

7. Procedural aspects – practical problems

7.1 Practical problems

During interviews, the participants raised two main procedural problems: one related to the **unequal position of the defence lawyer** in relation to the prosecutor and one related to the **lack of time in different stages** of the procedure.

As anticipated, some lawyers argued that their position and influence in the courtroom are not equal with the prosecutors. They tend to give many examples but the most cited one is the setting of the court: prosecutors are usually closer to the judge and on a higher position than the lawyers.
However, most judges argued that the setting of the court is not important for the court dynamic or the decision on the preventive measures. Moreover, the judges pointed out that the interaction with the representatives of the prosecutor's office takes place only in the meeting room. They have denied any professional interaction with lawyers or prosecutors, formal or informal, outside the courtroom.

Regarding the second issue, the CPC provides that the prosecutor may detain the person for 24 hours. During this time, the prosecutor has to decide on whether to apply for PTD or not. In the same time, the prosecutor has to deal with other procedural processes such as appointment of an ex officio lawyer if necessary, the settlement of a possible complaint by the suspect or defendant on the detention order, the notification of a member of the family or another person designated by the suspect or defendant with regard to the detention measure, etc.

Under these circumstances, both lawyers and magistrates consider that these provisions are not as such as to provide an optimal framework for conducting the procedural activities, especially in complex cases involving organized crime networks, crimes with significant damage, etc.

'There are sometimes dozens of people who come with bags of papers that you have to examine to make an effective hearing. Otherwise you do not know what to ask. As long as you do not know all his activity you can not be convincing ... Many times there are criminal acts that have been committed for very long periods of time ... for many years even, and it is very difficult to analyse in a very short term all these activities to make a file and request PTD.' (Prosecutor 3)

In turn, defence lawyers argue that this short period of time makes it impossible to prepare a good defence.

'For example, there are the big cases when we have basically organized groups of offenders. Let's say the prosecution brings 50 suspects. When they bring them it is clear they do not have the necessary staff for hearing them and there are suspects who are heard after 13-14-15-20 hours. Throughout this period, they are guarded, staying on the hallways. If they need it, they are taken to the toilet and brought back under guard. From my point of view, it's an arrest. They are not allowed to smoke. Neither they are allowed to go out for a smoke ...' (Lawyer2)

or

'(...) *in certain situations, the lawyer and the defendant may be disadvantaged by not knowing all the evidence, for example, we take him today, we hear him, we take the measure of restraint, and we make the preventive arrest application. While the lawyer does not have the physical time to prepare for defence.* '(Prosecutor 2).

Just to guarantee the defendant's right of defence, in the sense of giving the lawyer the time to prepare the defence, the Code of Criminal Procedure provides at Art. 235 par. 1 that the application to extend the preventive arrest together with the case file is submitted to the judge of rights and liberties at least 5 days before the expiry of the preventive arrest. Initially, when the CPC came into force the prosecutors interpreted this procedural term as a recommendation, so that in many situations, due to the high volume of activities to be undertaken, this

was not respected. There were many cases when the application for prolongation would only arrive one day before the PTD term expired.

The Constitutional Court was addressed and ruled that this term is imperative and, if not observed, is considered as a violation of the human rights. This ruling was especially appreciated by lawyers, who concluded that, at least when discussing the prolongation of PTD, lawyers have the time to prepare an adequate defence.
Apart from this criticism, all parties involved in the application of the preventive measures argued that the procedure is clear and well applied in practice. Some doubts were raised by the lawyers regarding the excessive use of the alternatives post PTD. For some of them, judicial control after PTD or HA seems to be applied even when not necessary and it is not always well justified in the decision. They explain this practice as being a consequence of the judges not being fully aware of what it means for the defendants to be under JC.

7.2 Central points and conclusions

- The main procedural problems mentioned by the participants were the unequal positions between the defence lawyers and the prosecutors and the lack of time in different stages of the procedure.
- Unequal position and influence was the criticism raised by the defence lawyers who argued that even the courtroom setting seems to suggest a difference between the prosecutors and themselves.
- The lack of time was mainly mentioned by the prosecutors and the lawyers, but for different reasons.
- The prosecutors argued that it is quite difficult for them to follow all the procedures and comply with the 24 hours time limit to apply for the PTD. Furthermore, they find it quite difficult to apply for the prolongation of PTD five days prior to expiring the PTD imposed.
- The lawyers complained that if the time framework is not complied, they would not have enough time to study the files and prepare the defence.
- The Constitutional Court ruled that the five days rule is an imperative one and therefore lawyers could have the time needed to prepare the defence.

8. Procedural safeguards and control

8.1 Safeguards

Most of the participants in this study stated that from the normative point of view Romania provides for an appropriate legal framework that is fully compliant with the international standards on PTD and its alternatives.

One strong evidence in this respect is the Constitutional provision that stipulates at art. 23 par. 4 that the PTD shall be ordered only by the judge and only during the criminal trial. Furthermore, in para. 7 Constitution stipulates that the court rulings on the PTD are subject to appeal laid down by law.

In turn, the Code of Criminal Procedure contains, in the case of each preventive measure, provisions concerning the guarantee of the right to defence, which require the suspect / defendant to be presented before the judge hearing his case, the possibility of appealing against the solution at first instance, the possibility to be informed of the contents of the criminal file in a language he understands, the obligation of the judge to motivate the decision imposing a preventive measure, etc.

The interviews particularly highlighted the problems related to the interpretation and application of the existing normative framework, whether the participants were lawyers or magistrates

> *'The general framework is sufficient (...) we have four measures that are sufficient. Correlative duties are adaptable (...) we have a number of problems with their application. They are sometimes poorly implemented in practice and judges do not understand their purpose. The problem with us, many times, is that the defendant is too little involved in procedures. The prosecutor talks about you, the lawyer also speaks about you, and the defendant sometimes has the last word. You have to say something there .... That's the problem (...) so we have a legal framework, it helps us. It is would be good to be applied accordingly.'* (Lawyer 2)

During the interviews, the participants mentioned the important role played by the Constitutional Court, which was called upon to clarify some legal provisions applicable in the field of preventive measures. Two such situations were mentioned:

- when the Constitutional Court was called to rule over the obligation of the judiciary body to hear the defendant before deciding to prolong the judicial control
- when the Constitutional Court was called upon to rule over the unlimited period of time that judicial control and judicial control on bail can be ordered.

In both occasions the Court has ruled for strengthening the position of the defendant in the criminal procedure.

Some defence lawyers argued that, besides the interpretation issues, there are also difficulties related to providing the arguments for one decision or another:

> '*the majority of judges tend to fail in providing the arguments behind their decisions …'* (Lawyer 3)

According to the CPC, all decisions regarding the preventive measures should be well justified and concrete evidence and reasons should be provided for any decision. However, as stated by some lawyers, sometimes these reasons are not very clear and concrete and therefore it is difficult for them to argue against the decision (e.g. 'the defendant represents a risk for the society', 'the crime is very serious'). This seems to be the case in particular when prolongation decisions are under debate.

Another discussion was generated by the fact that, according to the CPC, the prosecutors is representing the interest of the State and should collect evidence for both: to accuse and to defend de defendant. However, as stated by the lawyers, the prosecutor seems to play almost exclusively the role of the accusation. In practice, in almost all cases, the prosecutor is collecting evidence to ensure the accusation of the defendant and not his/her defence.

One topic that was suggested by the lawyers regarding the procedure is the balance between the presumption of innocence and the right for privacy, on

one hand, and the PTD, on the other hand. In many corruption cases, the defendants were exposed to mass media hand-cuffed when being brought to the court. This practice of tele-justice was criticised severely by some lawyers:

> '*You have to protect the presumption of innocence and the right for a good public image. We should stop showing these cases on TV. Maybe, if we stop making a show out of PTD, we will not be tempted to use it so much…* ' (Lawyer 2)

As it can be noted, most of the participants evaluated the legislation and the practice around preventive measures as being in line with the European standards. However, lawyers in particular put forward some criticism in relation to practice.

8.1 Central points and conclusions

- Most participants stated that from the normative perspective, Romania complies with the European standards.
- However, some participants raised some issues related to the way the norms are implemented in practice.
- One issue mentioned by some lawyers was the relative marginal position of the defendant in the criminal procedure. Usually, the defendant gets to speak the last and has little chances to influence the final decision on the preventive measure. However, from the judge's point of view, defendant's attitude is important for the decision on PTD.
- Some lawyers also criticized that some judges fail to provide written justifications for their decision. In this case, it is quite difficult for the lawyers to prepare counter-narratives to something very general or vague.
- Another criticism put forward by some lawyers is the fact that prosecutors are more concerned with finding evidence to accuse the defendant and not to defend him.
- Also related to procedural rights, some lawyers complained that defendants sometimes are exposed to excessive media attention and therefore have their human rights violated.

9. European aspects

9.1 General perspectives

Most judges interacted with the European Arrest Warrant (EAW) and found it very useful and already settled within the mainstream practice. They cannot see the judicial practice at the European level without it. However, they stated that there are still difficulties in working with EAW especially with countries like Cyprus, Malta and UK.
It seems that Cyprus tend to cancel many EAW without solid reasons. UK seems to ask from the Romanian authorities many guarantees in relation to prison or detention conditions. UK competent authority seems to raise concerns related to the trial in absentia. It seems that many Romanian citizens complain to the British authorities that they were not summoned or not summoned in a correct way by the Romanian judiciaries and therefore they were not informed about the trial and could not defend properly. According to art. 5 of the FD 2002/584/JHA, in case of decision rendered in absentia, the executing state may ask some guarantees from the judicial authority in the issuing state that the person will be allowed to apply for retrial.

Malta responds very late to the requests or not at all. However, the judges mentioned the facilitating role of the Ministry of Justice as very important in promoting a good cooperation with other Member States. Some judges are of the opinion that mutual trust is not going both ways. The Romanian judiciary seems to trust the other European judiciary's decisions while the judiciary in other member states does not seem to share the same sentiment towards the Romanian authorities:

> *'We do have some European cooperation practice. We still have some problems with that. While we trust the courts of other Member States the other way around is not always the case.' (*Judge 4*)*

However, the study highlighted that the judges and lawyers interviewed ignored the European Supervision Order (ESO). Although Framework Decision 2009/829 / JHA was implemented within the Romanian legislation by amending Law no. 302/2004 on International Judicial Cooperation in Criminal

Matters we did not identify, during the interviews, the existence of a judicial practice in this matter. When the participants were given more details on the specifics of this European instrument, they appreciated its potential usefulness.

The prosecutors we interviewed were not informed in details about these procedures, as they were not involved directly in this kind of cases. The same applies also for the lawyers. They seemed vaguely informed about the possibility of transferring pre-trial preventive measures among EU Member States but they were not informed about the details.
All participants suggested more training for understanding how these tools work in practice.

9.2 Central points and conclusions

- Most participants seem familiar with EAW. However, only a few judges had some concrete experience with this tool. They all found it very useful and easy to use.
- Nether the less, some judges argued that there are still issues in implementing EAW especially in relation to some jurisdictions: UK, Cyprus and Malta.
- The main difficulties with EAW were: the requirement for guarantees to comply with human rights, the judgments rendered in absentia, delays and cancelling the EAW with no proper justification.
- Judges reckoned the positive role played by the Ministry of Justice in coordinating the procedures.
- Only some judges were aware of the FD 2009/829. There was no training provided for this FD and there is no practice.
- Judges stated that FD 2009/829 could be useful but could not give examples where this FD could be implemented in practice.
- Prosecutors and lawyers were not aware of the FD 2009/829 but were not sure when it can be implemented.
- Training for all parties were suggested by the participants on FD issues.
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10. The Vignette

Almost all participants were invited to solve a concrete case. After reading the vignette out loud, the interviewer asked all the questions included in the guidelines in turns.

Most of the judges estimated that **they would apply PTD** in this case. The main reasons would be the **seriousness of the crime** (burglary with people present in the house) and the **concrete circumstances of the crime** (during the night, by breaking entry). In almost all cases, the judges decided for the PTD without asking for more information. The seriousness of the crime and the concrete circumstances made them believe that the crime is serious enough and justifies such a decision. Although it is a property crime, due to its seriousness, the likely sentence maybe be of five years or more and therefore PTD may be applied.
The fact that the person was previously convicted for a crime and did not take the lesson from the court's leniency was also mentioned as an aggravating factor. Only one judge from the Court of Appeal stated that she would impose judicial control in this case.

The prosecutors also inclined **to apply for PTD** in this case. The main reasons behind this decision are the **seriousness of the offence** and the **circumstances of the offence**. The risk of committing further offences seems also high in the prosecutor's view due to the past behavior and not having a job. More information would be not be needed for the PTD decision. More information will be needed for the sentencing but not for the preventive measures.

The **lawyers also stated that in this case PTD is to be expected**. The main reasons behind this evaluation are the previous history, the circumstances of committing the crime (with the owners in the house, during the night etc.) and the fact that the suspect has no job. All the other factors could matter but not to such an extent to change the decision on the PTD. In order to convince the judge that PTD is not necessary, they would insist on the social and personal factors (e.g. he lives with his parents).
It was interesting for us to notice the prosecutors and the judges analysed the case pretty much in the same manner. Both, the seriousness and the

circumstances of the crime, were considered critical for imposing/applying for PTD.

Issues like whether the defendant recognizes he is guilty are not important at this stage for none of the participants.
Other factors, such as the existence of the fixed address, the citizenship and whether he is a drug user and committed the same offence in the past **seem to increase** further the likelihood of taking the decision to PTD. Although the relationship with the family, work experience and so on could play a positive role, they would not be able to overturn the decision to impose the PTD. As mentioned by all judges, the **seriousness of the offence is so high** that nothing could change the decision to impose PTD. The other factors may play a role in sentencing but not in imposing a preventive measure.

The space for a lawyer in this case is quite limited as the **decision seem to be led by the seriousness of the crime**. However, as argued by some judges, a good lawyer could stress on the procedural aspects (e.g. demonstrating that the cameras were not able to record with the right accuracy, the defendant is not the author of the crime etc.) or on the personal circumstances (e.g. the time passed since the last conviction was long and meanwhile he had a job etc.). Even in these circumstances the chances for avoiding PTD are quite slim.

11. Conclusions

Going back to the initial question of whether PTD is used as ultimo ratio in Romania we could conclude that, based on the participants account, PTD is used in Romania when there are grounds for immediate detention.
The practice seems to be improved in the recent years under the influence of several factors such as: changes in the CPC, influence of the ECHR jurisprudence, changes in the training provided at the National Institute of Magistracy and recruiting new magistrates.
As it can be noted, improvements were achieved under the influence of several factors coming from different perspectives: changes in the law, ECHR jurisprudence, training of judiciary and new recruitment.

The main grounds for PTD seem to be related to the seriousness of the offence, circumstances of committing the crime and several risks like: risk of reoffending, risk of absconding, risk of influencing the witnesses and the risk of tampering with evidence. Although the decision to apply or not PTD is a complex one, involving many factors, the seriousness of the offence seems to be critical in the decision-making.

From the judge's perspective, the decision-making appears to follow a two steps process: in the first stage, the judges are evaluating the crime in terms of seriousness and risk for the public. In this stage they also assess the personal characteristics of the defendant. In this respect, the attitude of the defendant in court seems to be very important.
In the second stage, the judges are evaluating different forms of risks such as: risk of absconding, influencing the witnesses and tampering with evidence. These forms of risk are evaluated starting from the previous behavior or attempts.

When applying for PTD, prosecutors seem to take into account first the seriousness of the offence and second various other factors such as: the circumstances of committing the crime, risk of reoffending, risk of absconding and so on.

As it can be noted, personal factors, such as employment, family, school and so on are not taken into account when applying PTD. The only personal factor that seems to matter is the attitude of the defendant in court. Lawyers made this point many times during the interviews. They argue that all these factors should be taken into account when individualizing the preventing measures. They also complained about the unequal position of the lawyers and the prosecutors in front of the judge. They claim that a clear indication in this direction is also the court architecture, where the prosecutors is sited closer to the judge than the defence lawyer. Lawyers were also critical with the procedural position of the defendant and also regarding some interpretation of the CPC. The time limits provided in the CPC were also criticized by the lawyers and the prosecutors.

The alternatives to PTD are considered by the participants as well developed. The most popular one is the judicial control. It seems that this measure has the great advantage of ensuring a good performance of the trial while allowing the defendant to continue the personal and professional life. Judicial control on bail is not very used in practice due to its difficulties: it is not clear how the amount of bail can be established; the procedure is not very clear etc. The main criticism is related to the fact the JCB seems to be available mainly for rich people.
House arrest seems to be imposed when there are grounds for detention but the seriousness of the crime or the risks involved are not very high. The measure is criticized by the judges for the fact that the days under HA are deducted from the prison sentence. This possibility creates some perverse practices whereby defendants themselves apply for this preventive measure in order to reduce the later prison sentence. This criticism is widely shared among the judges and demonstrates that judges expect that these measures are not merely tools to protect fair trial but also penal devices aiming at inflicting a certain level of punishment. As mentioned by some judges, preventive measures are also perceived as fast reactions of the criminal justice in the face of crime. This assumption seems to be associated by some judges with certain expectations set by the public. As one of them stated 'we are all part of the society' and therefore some judges feel some abstract pressure from the public to impose or not preventive measures. Although the law allows for the judge to approve the defendant to continue school or work, this approval is very seldom granted by the judge. The main reason for that seems to be the fact that the measure involves deprivation of freedom and by allowing the defendant to continue work would take this feature away from the measure. This sort of perception consolidates the conclusion that judges attribute preventive measures a punitive character that is not explicitly mentioned in the law.

Unfortunately, there are no statistics available for the alternatives to PTD. However, as argued by some lawyers and judges, HA and judicial control seem to follow almost automatically after PTD. In case the PTD was imposed once or twice and there are no such strong reasons for prolongation, the judge is inclined to apply first HA and later JC. This practice is not always very well justified by the judges and therefore can be suspected of net widening.

The most often criticism of the alternatives was that the police – which is responsible for implementing these measures – has no capacity or tools that it needs to ensure a proper implementation of them. For instance, police cannot check at any time whether the person under HA is at home or not.

As far as the European dimension of the PTD and its alternatives is concerned, judges were very satisfied with the EAW. However, they also advanced some criticism regarding the human rights guarantees required by some states, the delays in others and so on. Although, they were aware of the existence of FD 2009/829 they were not in the position to provide details or examples of its application. The prosecutors and lawyers we have interviewed were not aware of the FDs but they welcome more information and training.

The vignette included in the study was another opportunity to test some of the interim conclusions. Most judges would apply PTD based on the seriousness of the offence and the circumstances of the crime. Although the vignette is about a property crime, due to the fact that the crime was committed with the owners in the house and during the night, made judges to evaluate the seriousness of the crime as very high. The vignette was yet a good opportunity to note the importance of the seriousness of the crime when applying PTD.

The recommendations made in this report aim at consolidating but also controlling the alternatives to PTD:

- to develop the infrastructure for the electronic monitoring,
- to clarify the regulations around judicial control on bail,
- to regulate in a clearer way when house arrest and judicial control should be applied in order to avoid the net widening effect,
- to provide more training for judiciary and lawyers on the framework decisions, especially on FD 2009/829.
- to provide more training to judges on the importance of personal factors in the process of reoffending.

- the training on FDs and the importance of the personal factors in reoffending should become a part of the National Institute of Magistracy curricula.
- in order for the judges to have access to more personal information about the defendant, the lawyers suggested a risk report that could be drafted by the probation service. However, the representative of the National Department of Probation rejected this idea as being outside the scope of probation and also due to the lack of resources.