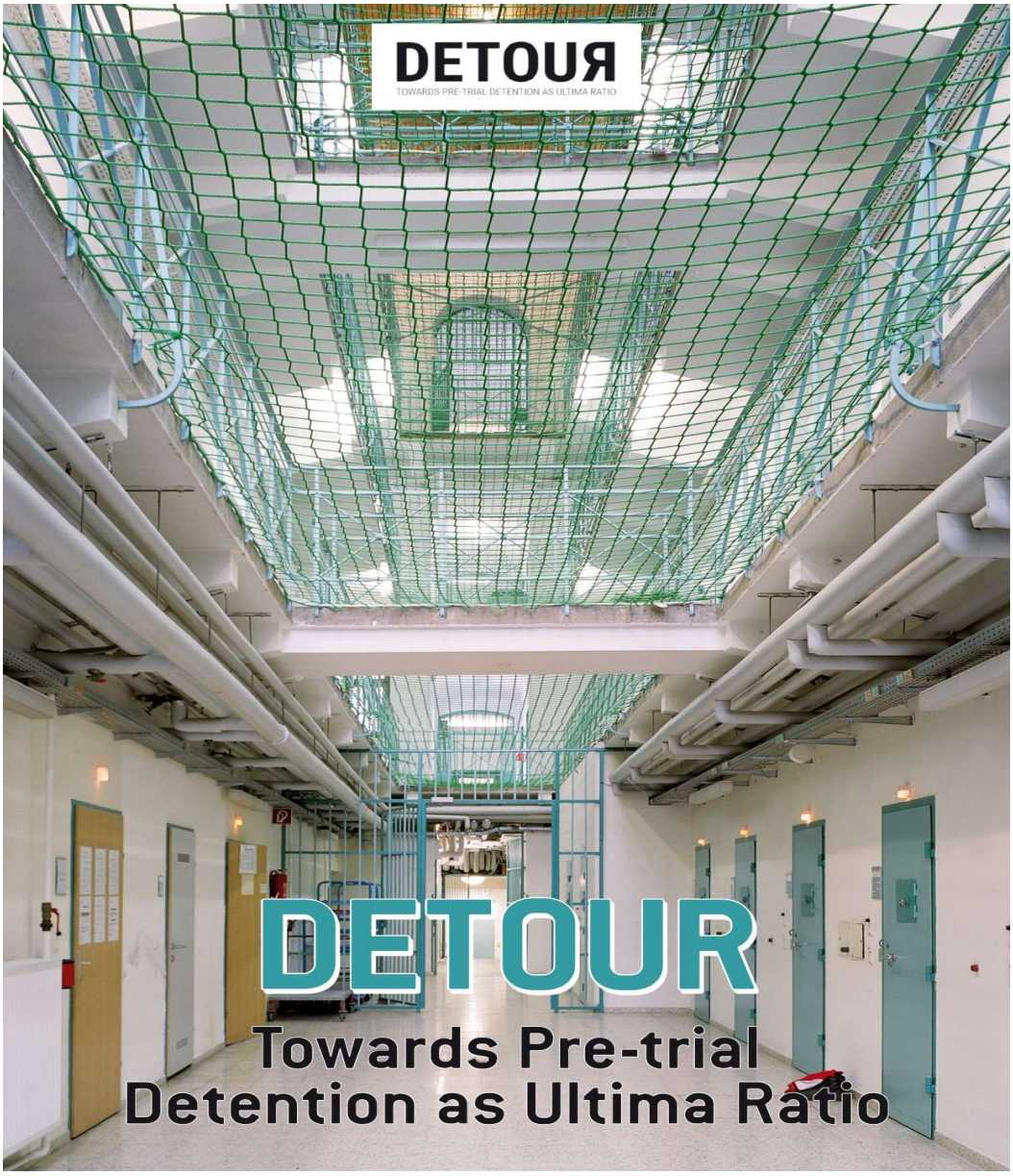
DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO



RECOMANDĂRI

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1. Recomandari generale

- Arestul preventiv este definit ca o exceptie si o masura de ultima instanta . Strategiile care fac apel la **AP ca un instrument de preventie sunt, prin urmare , problematice**. Masurile preventive ameninta prezumtia de nevinovatie deoarece considera suspiciunea ca un fapt. Va rugam sa aveti in vedere ca interpretarile si aplicarile extinse ale motivelor preventiei, pun in pericol principiul masurii de ultima instanta si pot duce la cresterea numarului celor retinuti;

- Am constatat un anumit grad de **substituire a motivelor de retinere** si a justificarilor acestora. In plus , deciziile pot fi influentate de **motive ascunse sau care depasesc cadrul legal** , cum ar fi motivele preliminarii. In acest mod principiul masurii de ultima instanta poate fi pus serios in pericol. Cunoscand persistenta acestei practici nu consideram ca situatia poate fi imbunatatita suficient prin directive sau modificari legislative. Este nevoie de un **efort continuu de constientizare si perfectionare profesionala a procurorilor si judecatorilor**. O atentie deosebita trebuie acordata pregatirii profesionale a tinerilor praticieni in spiritual articolelor 5 si 6 ale CEDO. Avand in vedere practica actuala, pregatirea profesionala trebuie sa abordeze motivatiile ascunse operationalizarea adecvata a principiului proportionalitatii si acordarea unei atentii sporite evaluarii riscurilor de fapt;

- Exista anumite grupuri de persoane cu un risc mai mare de a fi retinute nu doar din cauza "conditiilor sociale precare" in care traiesc. **Legea penala nu poate rezolva inechitatile sociale. Totusi , aplicarea ei trebuie sa evite agravarea acestora;**

- Trebuie stimulata **reflectarea in profunzime asupra interdependentelor dintre politicile sociale , politicilor fata de migranti si politicile penale**;

- **Procurorii** au o importanta capitala. Ei prefer deseori sa adopte calea sigura si sa aplice AP. Prin urmare orice dorinta de a **reduce aplicarea AP** are asigurat succesul daca procurorul **da dovada de stapanire de sine** in aceasta privinta . Se recomanda studierea comparativa a rolului acuzarii;

- In tarile unde cultura legala implica o anume **"apropiere" intre judecator si procuror** AP este foarte probabil a se aplica daca procurorul o cere. Recomandam efectuarea cu regularitate a unor **introspectii in randul practicienilor** asupra **rolului** si **relatiilor** lor;

- **Volumul si calitatea informatiilor** disponibile in special referitoare la persoana suspecta si a conditilor in care traieste , determina calitatea deciziilor si a varietatilor de optiuni. **Sprijinul din partea agentiilor de munca sociala externe** (cum ar fi serviciile de probatiune , ajutorul judiciar) **incluzand de asemenea informatiile despre masurile disponibile si potrivite sa sustina eliberarea (conditionata)** pot aduce imbunatatiri in acest sens. Chiar daca astfel de rapoarte nu sunt completate pentru prima decizie aceste informatii pot fi valoroase pentru audieriile urmatoare. Ar merita sa fie facuta o **evaluare** pe plan national care sa evidentieze daca un asfel de sprijin poate duce **la evitarea intr-un numar mai mare de cazuri a AP**. Desi costurile implicate in acest sprijin nu pot fi ignorate , nu acest aspect trebuie sa aiba relevanta dominanta;

- De o importanta majora este **reprezentarea activa si timpurie din partea avocatilor apararii**. Ei poarta o larga raspundere in evolutia cazului mai ales cu privire **la informatiile despre suspect** si la **non-custodial alternatives**.. Pentru a se asigura o reprezentare eficienta in apararea clientului, avocatii trebuie sa fie bine pregatiti si activi. In sprijinul acestor cerinte trebuie sa se asigure un **acces facil la dosare** . Si nu in ultimul rand **problemele practice** referitoare la acestea trebuie rezolvate;

- In tarile reprezentate in acest studiu am observant diverse obiceiuri in utilizarea alternativelor la AP. Deseori **alternativele la AP se aplica cu prea multe ezitari** AP fiind decis in cazuri ce s-ar califica pentru o masura alternativa. Pe de alta parte exista si **riscuri in aplicarea unor masuri mai blande decat AP in cazuri unde se justifica o libertate fara restrictii.** Mai sunt lucruri de facut in acest domeniu. In acest scop este necesar acest **studiu si elaborarea de date statistice potrivite** pentru informarea practicantilor de azi , pentru evidentierea nevoilor de dezvoltare , de **sprijinire a acestei dezvoltari** si de crestere a increderii practicienilor in masuri mai putin severe;

- Exista **grupuri de suspecti** pentru care este **dificil de identificat optiuni de evitare a AP**. Acestia sunt in cele mai multe cazuri , cetateni straini fara legaturi sociale atat in tara de procedura cat si in tara lor de origine . Este **necesar sa dezvoltam optiuni de evitare a AP cat mai des pentru aceste grupuri**. De ex. s-ar putea initia proiecte de munca sociala pentru a putea identifica care optiune este mai potrivita;

- Potrivit multor respondenti **parerea lor despre AP lasa mult de dorit**. Cu toate acestea ei reprezinta sustinatori activi ai scurtarii perioadei de AP , de celeritate in

desfasurarea procesului si a permite tuturor partilor implicate sa discute - poate chiar sa negocieze – optiuni alternative. **Recomandam prin urmare , o reevaluarea rapida si o incurajare a tuturor partilor implicate de a folosi concluziile stabilite;**

- **Avocatii apararii** din multe tari sunt deseori **reticenti sa atace in apel** masura AP din motive tactice si de timp. Acest lucru pune in pericol insasi **valoarea cailor de atac**. Luand in considerare diferitele sisteme de drept , nu putem identifica o solutie generala la aceasta problema . Prin urmare se **recomanda evaluari la nivel national destinate analizei cailor de atac si a unor posibile adaptari ale legii;**

- Exista inca judecatori si procurori care **sunt reticenti in a elibera suspecti cetateni straini** – chiar cetateni al statelor member UE – din cauza **lipsei de incredere** in cooperare sau in alte sisteme judiciare. In mod evident se mentine **necesitatea urgenta ca practicantii sa se intalneasca cu colegi din alte tari , pentru schimb de experienta , sa invete impreuna si nu in cele din urma sa faca eforturi impreuna pentru realizarea de standarde comune**. Cunoscand cat de greu este sa convingi praticantii sa participle la astfel de evenimente , este necesar sa se investeasca in strategii in acest domeniu si sa se asigure **sprijinirea practicantilor** de catre superiorii lor si de catre departamentele de resurse umane (de ex: oferirea de traduceri pentru depasirea barierelor in acest sens, identificarea de solutii administrative de reducere a volumului de munca pe persoana si a presiuni timpului, etc.);

- Multi practicanti din dreptul penal inca nu au aflat de **Ordinul European de Supraveghere Judiciara** (OESJ**) Training-uri si seminare** organizate la nivel national si European ar trebui sa schimbe aceasta stare de lucruri. Pana acum putine informatii erau disponibile referitoare la cele cateva OESJ raportate de statele membre. Speram ca in viitor sa creasca volumul informatiilor despre astfel de cazuri care sa fie baze de studii practice si care sa fie incluse in programele de pregatire profesionale;

- In luarea **deciziilor este obligatorie o examinare a masurilor neprivative de libertate** (conditii de suspendare) care exista si cum se potrivesc acestea cu cazurile individuale. Un ordin de AP si deci **respingerea masurilor alternative** va fi dat doar in cazurile in care exista **motive si explicatii clare** referitoare la renuntarea la masuri alternative ce ar exclude detentia;

- Judecatorii si procurorii percep deseori **presiunea publica si a mass-mediei** referitoare la AP. Intrucat acest lucru este greu de evitat, publicul si mass-media trebuie **informate cu regularitate asupra principiilor statului de drept si a principiilor legale** referitoare la AP si cautiune. **Politicienii** ar trebui sa isi asume **neabatut respectarea** acestor principii si sa se abtina de a le pune la indoiala , intarind astfel pozitia judecatorilor si a procurorilor;

- **Informatii complete si cat mai corecte trebuie colectate si analizate** cu privire la practia AP, a utilizarii masurilor alternative si nu in ultimul rand al efectelor utilizarii masurilor alternative . In primul rand informatiile trebuie **puse la dispozitia judecatorilor pentru aprofundarea** cazurilor individuale (de ex. suspectul eliberat s-a prezentat la proces?) In al doilea rand informatiile trebuie prezentate la un nivel agregat in scopuri de evaluare si pentru a oferi **suport pentru politici bazate pe dovezi si pentru dezvoltari ulterioare.**

2. Recomandari pentru Romania

- Ar trebui realizata o infrastructura pentru monitorizarea electronica;
- Ar trebuie clarificate reglementarile referitoare la si in legatura cu controlul judiciar pe cautiune ;
- Ar trebui reglementat precis si clar cand se aplica arestul la domiciliu si controlul judiciar pt a se evita efectul de extindere ;
- Ar trebui organizate mai multe cursuri de pregatire profesionala pt corpul judiciar si pt avocati despre deciziile cadru europene , in special al Deciziei Cadru a Consiliului 2009/829/JHA din 23 octombrie 2009 referitoare la la aplicarea , de catre Statele Membre ale Uniunii Europene a principiului recunoasterii reciproce a deciziilor referitoare la masurile de supraveghere ca o masura alternativa la retinerea preventiva;
- Se recomanda in pregatirea profesionala a judecatorilor constientizarea importantei factorilor personali in cazurile de recidiva;
- Pregatirile profesionale despre Decizia Cadru a Consiliului asupra importantei factorilor personali in cazurile de recidiva ar trebui sa faca parte din curricula Institutului National al Magistraturii;
- Pentru ca judecatorii sa aiba acces la informatii complete despre acuzat, avocatii sugereaza ca serviciul de probatiune sa intocmeasca un raport de risc. In prezent Directia Nationala de Probatiune considera aceasta sarcina ca fiind in afara obiectului sau de activitate si , in plus , se confrunta cu o lipsa de resurse.

3. Recommendations for Austria

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

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

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

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

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

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

- The detention hearings, which are run, conducted and scheduled by independent judges, are generally considered important procedural events. Nevertheless, and again, without challenging the principle of judicial independence, often critique has been expressed pointing at a restriction of many hearings to formal qualities. The time pressure for the first decisions on detention often only allows for little information with respect to the assessment of possible alternative measures. At least at the detention hearings[1] substantial information in this respect should be available, particularly if some assistance is employed. This would upgrade the detention hearings and strengthen the ultima ratio principle particularly if the hearings would focus stronger on a possible release with decisions denying release being obliged to substantiate why alternative measures are not applied.

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

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

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

4. Recommendations for Belgium

- Improve access to case files, especially in early stages of the proceedings and by making use of modern technologies (digitalisation of files).
- Develop uniform instructions/regulations and practices with respect to the accessibility of case files and possibilities of consultation of suspects by defense lawyers.
- Improve communication between actors involved in the process of supervision of alternative measures (investigating judges, probation services, public prosecutors), e.g. via performant digital platforms.
- In case legislative reforms are considered as an option to reduce the use of custodial measures, prefer 'radical' options and/or conduct ex ante and post factum evaluation;
- Consider (legal) reforms to stimulate (more) use of alternative options such as financial bail and electronic monitoring.
- Be aware of potential unintended effects of (legal) reforms and policies (e.g. impact of sentence implementation policies on pre-trial decisions).
- Consider practical reforms in order to better inform decision-makers on possible alternative options in concrete individual cases, e.g. permanent presence of probation officers at the court house and/or review hearings.
- Identify 'good practices' and share experiences beyond the borders of local judicial districts.
- Strengthen social policies and promote them as valuable crime prevention strategies, and reinforce co-operation between welfare, health care and justice departments (e.g. quota for ambulant or residential care facilities outside prison infrastructure?).
- Stimulate communication and co-operation between judicial actors and the immigration office, and promote international judicial co-operation.
- Organise interdisciplinary meetings with active involvement of key players.
- Include participation of key players in the preparation and follow-up of research projects.

- Include presentations on results of scientific research projects in training programs of judicial actors.
- Enhance (active) participation of judicial actors and practitioners in relevant conferences and expert seminars.

5. Recommendations for Germany

- Better data must be collected, analyzed and made accessible to understand the development of cases. Training and seminars are needed to enable young practitioners to deal adequately with PTD matters and to update more experienced practitioners on current developments. European developments are an important feature. Training events are important for exchange and enable feedback on and reflection of own practice. While it is true that the workload of practitioners is large and they need to be updated on many different other things, PTD as fundamental interference with personal liberty merits a deeper understanding and more training.

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

- It is important that a review, with more complete information in particular on the social circumstances of the suspect, takes place early. This means that files must be sent out immediately and automatically, since they are indispensable for the defense in any case. It also means that the review should be scheduled *ex officio* after 10 to 14 days – this should be sufficient time for the defense to prepare but still is a time span to endure for a suspect under stress and that does, in case the warrant is lifted or suspended, enable him or her to get back to his normal life without loosing job or housing.

- To further avoid PTD without losing sight of the needs of the criminal procedure the way of decision-making should be changed: With the same prerequisites (grounds and thresholds as well as the proportionality requirement) as now for actually ordering an arrest warrant judges must examine which non-custodial measures (conditions for suspensions) exist and how they would fit for the individual case. Only when they can explain that none of these measures will prevent the individual suspect from absconding, hiding, obstructing evidence etc. an arrest warrant may be ordered. While in principle also now the judge always has to check whether milder measures

are available, at least then an explicit reference must be made to the other options and explicit reasons given why they do not suffice.[2]

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

[2] This suggestion has been made before by the Association of Defense Counsels in 2015.

6. Recommendations for Ireland

- Recent political and media discussion concerning the use of PTD (PTD) in Ireland seems to suggest that there may be an increased use of PTD in the future. Irish policymakers should recall that there is a movement within other European countries and at European Union level to reduce levels of PTD. Careful consideration must be given to the possible effects of changes in policy and practice on the rates of PTD in Ireland.

- The extensive use of conditions, some of which are quite onerous and restrictive of liberty cannot be overlooked in an assessment of the comparatively low rates of PTD in Ireland. This system of graduated deprivations of liberty is a clear feature of the Irish system, and it is recommended that it not be taken for granted. There is a need to resist a narrative which views the decision on PTD in Ireland as one between liberty and detention simpliciter.

- There is a need for an ongoing review of PTD rates and outcomes of bail applications to monitor trends, particularly as there may be increased PTD rates in Ireland in the coming years.

- There is a need for wide-reaching review and improvements in the collection and publication of data on the outcome of bail applications and PTD rates.

- Participants in the Irish criminal justice system should take care to view conditions imposed on a person granted bail as restrictions on liberty, and ensure they are imposed in a proportionate manner.

- The emphasis on the constitutional protections of the presumption of innocence and liberty should be maintained in Irish practice.

- There should be resistance amongst prosecutors to the possible effects of media outcries concerning the use of PTD.

- A lack of housing needs to be addressed to ensure that people are not placed in PTD because of a lack of an address.

- There is a general need to address addiction problems and mental health issues amongst defendants at the pre-trial stage.

- Care must be taken, in particular for non-EU nationals, that PTD is not imposed in a discriminatory way.
- The constitutional requirement that any financial bail is set in proportion to the means of the accused person should be carefully applied in practice.
- Prosecution self-restraint on the issue of PTD in Ireland is valuable and should be maintained.
- Careful consideration and assessment of the effects of any introduction of electronic monitoring at the pre-trial stage is necessary to ensure:
    - There is a need for electronic monitoring in the Irish situation;
    - The purpose of electronic monitoring in the Irish situation;
    - The implications in terms of cost and the effect of breaches.
- In particular, concerning electronic monitoring, it is recommended that Irish policy-makers recall that electronic monitoring has been introduced in other European countries with the purpose of reducing levels of PTD.
- It is further recommended that Irish policymakers pay close attention to the experiences of other countries concerning electronic monitoring.
- Defense practitioners, in particular, would benefit from more time to prepare for bail applications.
- Judges are under a great deal of time and caseload pressure and would benefit from additional background information and time to make their decisions.
- There is a risk that spending too many consecutive days hearing PTD cases can lead to frustration and fatigue, and rotation of judges on such lists is recommended.
- It is recommended that judges be supported to engage in educational and networking opportunities within Ireland and, especially, within Europe, to share practices and perspectives on their work. It is challenging for judges to be able to find the time for this activity in light of their caseloads.
- Funded and high quality legal assistance for defendants is a necessary protection for the rule of law and constitutional rights and should be maintained.

- There is a clear need for more training and information on the European Supervision Order in Ireland.

- The European Supervision Order may be particularly useful for Northern Ireland-Ireland cases and training and support for practitioners and judges on its use is necessary.

7. Recommendations for Lithuania

- Further institutional and academic promotion of PTD as ultima ratio, combined with the promotion of effective international cooperation, might further limit the imposition of PTD.

- We recommend to follow reasonably high standards of proof of the risk of absconding bearing in mind difficulties and high costs of successful hiding from justice in the area of the EU.

- We recommend to follow reasonably high standards of proof of the risk of re-offending with particular focus to the nature of previously recorded offences and also the time lapse between the previous and new offence.

- We recommend restricting the authority to impose the least severe measures (LSM - except seizure of documents) to only prosecutors and the courts and promoting the importance of diligence in reviewing the necessity of the LSM.

- It is recommended to reconsider the practices to force the provider of the bail to sign up an agreement to give up the bail money for the recovery of a fine in the light of the principle of fair proceedings.

- It is recommended that the law be amended to allow conditional PTD, i.e. a rule which would allow the automatic release of the suspect from detention as soon as the ordered sum of financial bail was paid.

- It is recommended that the prosecution and judiciary critically reconsider the reasonability of use of house arrest.

- Judicial review of detention (repeated appeal) should be available within a shorter period than three months, if the new facts are present in the case.

8. Recommendations for the Netherlands

- The Prosecution Service and the judge should have the legal responsibility to investigate the possibility of a suspension with or without conditions in every case. Whether a suspension is realised or not should not depend on the arbitrary activity of the defense lawyer but should be systematically investigated in every case.

- The current review of PTD by the court in chambers does not always offer an effective remedy. We favour a practice in which additional reporting by the Probation Service – aimed at exploring the possibilities of conditional suspension by the court in chambers – is the rule rather than the exception.

- Prosecutors and judges should constantly be (made) aware of all the practical aspects regarding conditions/alternatives. Limited practical knowledge on (or experience with) the possibilities of (e.g.) financial bail, electronic monitoring or the European Supervision Order (ESO) should not be to the detriment of suspects in PTD.

- We agree with the basic ideas that lead to the proposal to abolish the suspension under conditions and the introduction of the provisional restriction of liberty. However, it is not necessary to wait for a change in legislation. To reduce the use of remand detention, the question that should be considered in the pre-trial stage is not if detention should be applied or not, but what restrictions of liberty are necessary to fulfil the aims that are at stake in this stage of the criminal justice process.

9. Partners of DETOUR

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