Chapter 11

Actors, roles and responsibilities in the pre-trial detention decision-making process

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Introduction

This chapter will examine the key players in pre-trial detention proceedings: the prosecution; the defence; the judiciary; and the probation service, where this body is involved. It is based on the country chapters in this volume and findings from the DETOUR study (see Chapter 1). While many differences exist in practice across jurisdictions, and even within jurisdictions, it is notable that, across all countries included in this research, the position of the prosecution can be pivotal in terms of the practices implemented regarding pre-trial detention decision-making, as well as the culture which surrounds it. The relationship between judges and prosecutors is also a key influence in how pre-trial detention is used, where this relationship is close, there seems to be a higher use of pre-trial detention. As for defence lawyers, their role and influence can vary widely across countries, but where they are active and well resourced, they can contribute to an increased application of alternatives. The involvement of the probation service is also not consistent across countries.

The chapter will first outline the roles of the various players in the pre-trial detention decision-making process. It will then focus on the particular role of the prosecution. We will then explore the position of defence lawyers, and the common challenges they face across jurisdictions. We then assess the relative positions and influences of these actors and the dynamic between them, before examining the legal and social cultures which influence these relationships. Finally, we examine the position of the probation service, before concluding with some reflections on the lessons learned from our cross-jurisdictional assessment, and policy recommendations.

The key players

Across all countries included in this collection, it was clear that the dynamic between, and relative influence of, the prosecution, defence lawyers and the

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judiciary were critical influences on pre-trial decision-making processes and outcomes. The role of the probation service is variable, and some actors in some countries question whether the probation service should be involved in PTD proceedings.

The prosecution

Across the countries explored in this collection, the initiative for pre-trial proceedings, or at least the initiative to seek pre-trial detention, lies with the prosecution. The prosecution often also leads the police investigation, and, in these cases, is the party with the most relevant information and evidence on the questions before the court. While the prosecution has a major influence across all countries in this collection, there are big differences across jurisdictions when it comes to the position of the prosecutor in the legal system, with some prosecutors having more autonomy than others, and some having a closer relationship with political actors than others. For example, in Germany, the head of the public prosecution authority in each Federal State (*Bundesland*) has a post that may be politically influenced since the respective Minister of Justice can issue orders to him or her and usually also influences the decision on who is appointed (Morgenstern, 2017).

Prosecutors play an important "filtering" role. Their decisions as to when and whether to instigate applications for pre-trial detention are of central importance to the process. In Germany, for example, falling numbers in PTD have been attributed at least in part to a more cautious practice by public prosecutors when requesting PTD, while in Ireland, as will be described further later, a certain self-restraint amongst prosecutors is viewed as a reason behind lower rates of PTD there.

Across all countries examined in this volume, there was little evidence of the prosecution actively seeking alternatives to PTD. However, we see variation in the powers which prosecutors have themselves to apply less severe sanctions outside of the formal PTD legal frameworks. For example, in Lithuania and Austria, prosecutors can and should apply less intrusive provisional measures, whereas, at least in Austria, these options are almost never used. In Lithuania, by contrast, the prosecution is somewhat zealous in applying alternatives, which can have the result that defendant may be in the net of increased conditions, when they might otherwise simply be at liberty.

Prosecutors in the Netherlands have very limited legal options to seek alternatives straightaway: most conditions for release can only be set *after* a judicial order for PTD. This means the prosecutor should apply for PTD first, before an eventual suspension of PTD with conditions can be considered. While legislation permits the prosecution to order PTD and ask for conditional suspension in the same application, this is not common practice. Proposals for a new Dutch code of criminal procedure hold a legal obligation

for the judge to consider alternatives before ordering actual detention, but this provision is not yet in force. This situation already pertains in Germany. Notably, in Ireland as well as in England and Wales, the prosecution does not initiate an application for PTD, but rather resists or opposes an application for release, a difference which seems to play a large role in the development of a legal culture which looks at the application as one which starts with the position that there must be arguments for why the person should be detained, rather than arguments for why they should be released.

In countries where the prosecution can seek alternatives to PTD, in practice, these jurisdictions reported that such applications were constrained by the reality that finding suitable alternatives to PTD takes time and requires evidence and information which may not be readily available. As such, the administrative burden involved in seeking alternatives prevents prosecutors from doing so, with prosecutors in civil law jurisdictions described here reporting that a straightforward application for PTD is often the easiest option. This position is compounded by the fact that there is little societal encouragement for a broader use of alternatives – and sometimes even possible political encouragement *against* such use. As such, this approach seems unlikely to change in the current climate of criminal law enforcement.

A further feature of prosecution practice is also noteworthy. In the Netherlands, Germany and Belgium the prosecution is usually not present during the first judicial hearing concerning PTD, with prosecutors reporting that they do not have time to attend all these hearings. This also seems to set a lower threshold for the implementation of PTD, as prosecutors expressed a feeling that seeking PTD is a safer course of action, and that the case is in good hands with the judge, the defence lawyers and the suspect. In England and Wales, and indeed in Ireland, pre-trial detention hearings are adversarial. In England and Wales, for example, the prosecution is required to prove that the defendant poses a substantial bail risk and the right to unconditional bail should be rebutted (Chapter 4). Framing proceedings in this way seems to establish liberty as a starting point, placing a key obligation on the prosecution to place arguments before the court as to why a person must not be at liberty, rather than the defence having the burden of showing why the person should not be in detention, though the defence must provide arguments to support why bail should be granted. The difference in emphasis, perspective and perhaps role of the prosecution between England and Wales, and in Ireland, compared to continental European countries in this volume is also found in the practice of "consent to bail". As Hucklesby (Chapter 4) writes, the majority of bail hearings are not contested in England and Wales, even in cases where the prosecution had been requesting detention. While a consequence of this is that decisions must be taken on limited information in light of the early stage of the proceedings, it does have the effect of ensuring that the proceedings move, relatively, speedily.

The defence

The importance of the role of the defence lawyer in pre-trial proceedings can hardly be overrated. Their importance has been recognised in the creation of Council of Europe and European Union legal instruments on the tasks of defence lawyers in criminal proceedings (see also Chapter 14). The European Court of Human Rights (ECtHR) has emphasised that the defence plays a key role right from the moment a criminal charge exists (*Imbrioscia v. Switzerland*, 13972/88, 24 November 1993). In the past decade, since the Salduz judgment (*Salduz v. Turkey*, 36391/02, 27 November 2008), assistance from a lawyer in the earliest phase of the investigation has become be the norm, while in the Dayanan judgment (*Dayanan v. Turkey*, 7377/03, 13 October 2009), the court made clear that the term "assistance" refers to the whole range of services specifically associated with legal assistance which should be available to the suspect. Particularly focusing on PTD proceedings, the ECtHR held that in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, PTD proceedings must in principle also meet – to the largest extent possible under the circumstances of an ongoing investigation – the basic requirements of a fair trial as guaranteed by Article 6 of the convention. This requires the equality of arms, and more specifically the disclosure of relevant documents and files (ECtHR, *Schöps v. Germany*, 25116/94; *Lietzow v. Germany*, 24479/94; *Garcia Alva v. Germany*, 23541/94; all 13 February 2001). In the meantime, the European Union has issued several relevant instruments, such as directives as well as a green paper and an impact assessment (see Chapter 14). All this makes clear that legal aid to remand prisoners is one of the core defence rights.

Across all the jurisdictions examined in this volume, defence lawyers feel that they play an important role and contribute significantly to the fairness of proceedings, as well as limiting the use of PTD. In Belgium, the Netherlands and Germany, defence lawyers emphasise that, if it wasn't for their input, alternatives to PTD would hardly be considered at all. In all countries, defence lawyers are found to be the parties pushing for alternatives to PTD.

Access to defence lawyers may be limited, however, by practical and cultural barriers, explored in more detail later. While funded legal aid is available for defence layers' participation in many countries, defence lawyers in Romania and Lithuania consider that state paid defence lawyers are not able to provide an adequate standard of representation, while in Austria, the manner in which the legal aid scheme is organised means that inexperienced lawyers are required to represent suspects. Inadequate funding has also been the subject of complaint in the Netherlands.

The desire for release, which defence lawyers may understandably possess, may give rise to potential net-widening concerns. Prosecutors may press for an alternative to PTD, or for the application of conditions on release, even in cases where PTD might be rejected by the judge outright. Defence lawyers

may not always contest conditions, feeling that this might jeopardise the ultimate prize: release. Indeed, in Belgium and Germany, defence lawyers report concerns that lawyers may feel pressure to steer the proceedings towards the application of an alternative measure rather than risk the request for unconditional release being denied. In Ireland, too, defence lawyers reporting needing to be vigilant, as their clients may agree to any condition if it means avoiding PTD.

Judges

In accordance with Article 5 ECHR, in all countries represented in this volume, the judge is the final decision-maker concerning the use of PTD and therefore plays a decisive role. However, it is also clear that the dynamics between the different players can act to ensure that the judge does not take the decision in a vacuum. The decision is influenced by not only the facts of the case and the arguments presented, but also by the legal culture and relative positions of the prosecution and defence. As described further in the following, a particularly important relationship is the one between prosecution and judge, with civil law countries represented in this volume reporting that judges and prosecutors have shared views and understandings of the legal culture surrounding PTD. Informal communications between judges and prosecutors are also a feature of some countries, though not in Lithuania or Ireland, where such discussions would be considered irregular.

There was no strong sense in any of the countries represented here that the discretion afforded to judges was problematic. However, the level of proactivity of the judge regarding the pursuit of alternatives has been described as highly variable. In the Netherlands, for example, we see the attitude of the judge described as "passive" in this respect (Boone et al., 2017: 50). However, in Austria, judges do play a stronger role than prosecutors in putting forth the possibility of the use of an alternative. For Ireland, it was felt that judges were, on the whole, unlikely to rule that bail should not be granted when the prosecution was consenting to it, but that there may be situations where judges would question such an agreement.

Across many countries, we see concerns about a lack of time given to judges to prepare to hear applications for PTD. This can be a serious problem, which participants reported as leading to more use of PTD simply because of a lack of time to hear a matter fully. For example in Germany, we find that the decision had to be made within a relatively short period of time and on quite limited information, and in Austria, a heavy workload for judges has been described as being a possible restraint on the use of alternatives to detention, as it could be viewed as more efficient for the investigation to have the person in PTD (Hammerschick and Reidinger, 2017).

The particular role of the prosecution

As highlighted earlier, research from several countries indicates the central role which the prosecution plays in PTD decision-making and outcomes. In addition to the decisive influence prosecutors can have themselves, the relationship between judges and prosecutors is also a highly consequential factor which shapes the use of PTD. As such, it is worth dwelling on this position in a little more detail.

One of the most important ways in which prosecutors influence PTD practice is in the "filtering" role they play. The initiative for pre-trial proceedings or at least seeking PTD lies with the prosecution and as the prosecution often is also leading the police-investigation – and therefore is the party with the most relevant information on the suspect – their influence can hardly be exaggerated. In many of the countries explored here, the prosecution view was seen as being highly influential in the ultimate decision as to whether PTD will be ordered by a judge. In Germany, it was clear that the judicial decision to order PTD was based to a considerable degree on the submissions of the public prosecutor. Strikingly, some prosecutors in Germany therefore felt that they were the dominant players in the process, with the judge felt to be relying primarily on what they presented, and a few judges agreed on that. Other judges, however, insisted they were dominating the decision-making process or at least at having the last and decisive word (Morgenstern, 2017). Similar views were expressed in Lithuania, where it was found that a judge was very likely to approve a prosecutor's request for PTD. The prosecutor was also seen as highly influential in the proceedings, as the actor which ultimately decides whether a case for PTD should be put forward or not (Bikelis and Pajaujis, 2017). In the Netherlands, too, the power of the prosecutor was significant, with refusals of requests for PTD by the prosecutor being rare (Boone et al., 2017). In Austria, this filtering role was explicitly recognised by prosecutors, with one describing their role as being the second "filter", with the first being the police (Hammerschick and Reidinger, 2017: 57). There, the focus of the prosecution can be seen as being on the imposition or extension of PTD rather than the pursuit of alternatives, a view expressed also by judges. As a judge explained:

> If there are any requests (by the prosecution), then they usually request the imposition of PTD.
>
> (Hammerschick and Reidinger, 2017: 61)

Part of the reasons provided for this was prosecutorial risk-avoidance. On the other hand, in Ireland, the prosecution exhibited a degree of self-restraint, which resulted in PTD being requested less frequently than might otherwise be the case. The prosecutorial "self-restraint" noted there may be an important factor influencing the comparatively lower rates of PTD.

In some countries, prosecutors indicate that they anticipate the assessment of the case by the judiciary: established practice towards certain types of suspects or certain types of crimes would be taken into consideration regarding the decision to apply for PTD or not (Hammerschick and Reidinger, 2017). While this is in itself may not really be that surprising – it is common sense and professional to abide to established practice – it may become problematic when the person of the judge dealing with the application is a determinative factor in the decision-making process. This may be the case in the French-speaking part of Belgium, where prosecutors may choose to not refer the case to the investigation judge because they know that the judge in question will likely not provide an outcome they favour.

Challenges faced by defence lawyers

Defence lawyers play a critical role in the fairness of all criminal proceedings. Across many countries, defence lawyers report being underfunded, overstretched and at a disadvantage to the prosecution in terms of resources, but, in some cases, because of a shared culture and understanding between the prosecution and judiciary (Fair Trials International, 2017; De Suremain et al., 2019). While that is so, defence lawyers in most countries explored in this collection, consider themselves to play an important role, contributing to fair proceedings and in limiting the use of PTD. In some countries, particularly Belgium, the Netherlands and Germany, defence lawyers emphasise that, without their input, alternatives to PTD would hardly be considered at all as options. At the same time, almost all lawyers stress the limitations they encounter, especially at the very beginning of PTD: the very short time-span between the moment of their involvement and the first hearing simply doesn't allow for much thorough research or scrutiny. It seems that in some of the countries lawyers simply take this for granted, whereas in other countries, lawyers can be quite frustrated. Romanian lawyers, for example, seem to have the impression that they do not have an equal position compared to the prosecutors, as one lawyer stated:

> I have not seen yet in Bucharest a courthouse where the prosecutor stands face to face with the lawyer.
>
> (Lawyer 3, Oancea and Durnescu, 2017: 24)

Time, therefore, or the lack thereof, is a clear theme for the vast majority of defence layers. Limited access to lawyers is simply caused in many situations by organisational problems: sometimes there are too many suspects in the same case and not enough different lawyers (Maes et al., 2017, for the French speaking part of Belgium). The lack of time can also result simply from the pressures of workload and the immediacy of the short time allocated before the defence lawyer must become involved, but, in some cases, we see a view

amongst defence lawyers that there are reservations from prosecutors and judges regarding early representation from the defence: they feel that lawyers could hamper the investigation by urging their clients to remain silent (Hammerschick and Reidinger, 2017). Similarly, access to case files and evidence is of the utmost importance in PTD cases. Yet access is cited in some countries, notably the Netherlands, as a barrier for defence lawyers on a regular basis. This may often be due to logistical issues and deliberate non-disclosure of parts of the case file doesn't seem to occur very regularly. Still the prosecution can "play for time" quite a bit without having to admit that they rather not share certain information yet. Access was not reported as being an issue elsewhere, however, such as in Germany (Chapter 5), with a relative happiness with the implementation of the principle of equality of arms also expressed in Ireland (Chapter 6).

A critical concern across many countries is that of the availability of legal aid and its sufficiency. In some countries state paid lawyers do not seem to provide legal aid that meets the standard (Lithuania, Romania). In other countries, no measurable differences between legal aid scheme lawyers and private lawyers were reported, notably in Ireland and Germany. Austria can also be regarded as one of those countries, although at the same time Austria seems to have problems with the fact that their legal aid scheme is organised in such a way that inexperienced lawyers are obliged to represent suspects (Hammerschick and Reidinger, 2017). Lawyers in the Netherlands have been fiercely campaigning in recent years for a considerable extension of the budget available for legal aid schemes, with some success in 2021. Comparative research (funded by the European Commission) on legal aid to remand prisoners, conducted shortly after the DETOUR project, showed findings similar to ours and made clear that pre-trial detention can effectively complicate legal aid, for example due to limitations regarding visits to clients in detention facilities (De Suremain et al., 2019).

Defence lawyers evidently play a crucial role in advocating for alternatives to PTD. In some countries, practitioners feel that defence lawyers could be more proactive in their efforts to support the application of alternatives. In Austria for instance lawyers are the ones most often initiating and promoting the use of alternatives. Still some Austrian practitioners see room for more creativity. In Ireland, where defence lawyers are particularly active, some judges still find that lawyers should be more specific and do more than suggest "some kind of bail". Yet this is easier said than done, as finding the right information within a short amount of time is hard, especially when the information needs to be obtained through semi-official channels which means that the defence lawyer is dependent on those channels. For example, in the Netherlands, lawyers can not directly ask the probation service for information: this will have to go through the public prosecutor. And then of course in some countries there is no involvement of the probation service at all.

Defence lawyers also bear a burden in the form of being in the very difficult position of resisting net-widening. Prosecutors and judges may press for an alternative and seek some restriction on liberty, even in cases where PTD might be rejected altogether. Defence lawyers report that they may not always contest these unnecessary conditions, for them, it may not matter how they get their client out of prison, and, indeed, this is the highest priority for most defendants. Defence lawyers may be instructed by their clients not to contest conditions or try to steer the proceedings towards the application of an alternative rather than risk the request for unconditional release to be denied outright (Morgenstern, 2017, for Germany and Maes et al., 2017, for Belgium).

The relative positions and influences of these actors

In addition to the individual challenges posed for the work of each of the legal actors in PTD decision-making, a critical influence on the proceedings is the dynamic between them. Where there is a reported feeling of equality between prosecution and defence, and a neutral judge deciding, participants in the process tend to report greater feelings of fairness about the proceedings, and a less automatic application of PTD. Where participants identified a shared culture or sense of closeness between prosecutors and judges, PTD seems to be more likely to be imposed, in the view of the actors. In general, a common theme to emerge across the countries considered in this volume was that prosecutors were generally viewed by judges as responsible and careful, and this could mean that judges were inclined to follow their view (for example, in Germany, Morgenstern, 2017: 67, and chapter 5). In Lithuania, too, participants felt that the requests made by prosecutors were of high quality and this was the reason why they were so likely to be accepted. In Romania, prosecutors felt that judges tended to follow their applications because they applied only when the likelihood of success was high (Oancea and Durnescu, 2017: 25, and chapter 9).

Informal communications between judges and prosecutors on the case were reported in most countries with the exception of Ireland and Lithuania, where such discussions would be considered irregular. In some of the countries (Romania, Belgium, Austria) the relation between the prosecutors and the judges were mentioned as potentially prejudicial of the outcome of the case. The fact that these actors work in the same building, use the same canteen and enter the court room through the same door is, in the perception of lawyers, an indication that there are possibilities for the prosecution to influence the decision-making by the judge. Defence lawyers expressed concern about this closeness and felt that it could weaken the procedural safeguards in place to protect the accused person and the administration of justice. By contrast, Belgian judges reported that they were not constrained by the decisions or views of the public prosecutor, and some even reported frustration

with public prosecutors seeking detention too frequently (for both the Dutch speaking and the French speaking part of Belgium, Maes et al., 2017). Informal connections and discussions between prosecutors and judges were also, however, reported here.

In Ireland, most participants felt that there was generally "equality of arms" between prosecutors and defence lawyers, with prosecutors having some more access to resources. It was not felt by participants that there was a particular closeness between judges and prosecutors, nor that prosecutors' arguments were afforded a special status. At the barrister level, it is quite common for practitioners to appear regularly both for the prosecution and the defence, swopping roles regularly over the course of a single day. However, the opinion of the prosecutor could be determinative in situations where the prosecution was not seeking PTD.

At the same time, however, in the Netherlands, the prosecution is not always present at the initial hearing before the first order of PTD is made. Even when not present, however, the approach and values of the prosecution may permeate the proceedings. Until the last decade or so, prosecutors and judges had the same training programme; the shared legal culture between them seems to influence how the proceedings are run, in this case, with a more prosecution-focused mind-set. As written about elsewhere (Rogan, 2022), a shared legal culture between all players: prosecution, defence and judges (shaped by both constitutional doctrine and a common experience of legal practice) which tends to favour liberty may partly explain the lower rates of PTD there (see also Chapter 4 for England and Wales).

The role of the probation service

There is considerable variation across Europe regarding the involvement of the probation service in PTD proceedings. Some countries have quite extensive and intensive involvement by probation staff in the decision-making process, where in others they are not formally involved at all.

Probation officers do not play a role in pre-trial decision-making in Germany, nor do any other criminal justice social work institutions deal with adults during this phase. There is no role for probation staff or social services in Lithuania either. Romania, similarly, has no role for probation staff in the decision-making process. In Ireland, there is no formal role for probation staff, who begin their work after the sentencing process has concluded. However, probation staff could be involved on an informal basis, for example where a person was under the supervision of the probation service for a different matter.

By contrast, in Belgium, probation officers may be involved in the process, but, in practice, they are rarely asked to produce social inquiry reports by an investigating judge (Maes et al., 2017). In the French-speaking part of Belgium, the investigating judge tends to attribute a role to the probation staff

only after a decision to release under conditions has been made, with probation staff working mainly on the monitoring and enforcement of conditions (ibid.). The Netherlands has an active role for the probation service, which can be involved at the early stages. Probation staff are also involved in Austria, where, similar to the Netherlands, preliminary probation can be ordered as an alternative to PTD. In Austria, however, the probation service is not engaged in social inquiries and in the decision-making process. The potential advantages and disadvantages of the involvement of probation services are explored further in the following.

Whether probation staff were involved or not at the pre-trial stage, similar themes emerged concerning their work. A recurring concern was that of time pressure on probation staff and high workloads.

In Germany, there were mixed views about a greater role for probation staff. Defence lawyers generally felt that their support and involvement for the accused person was sufficient. Several interview partners indicated that it would be unwise to involve the probation staff as they are already very overburdened (Morgenstern, 2017: 61). The time pressure involved in decision-making was also a factor behind the limited involvement of probation staff in the Dutch-speaking part of Belgium, with a heavy workload also cited in the French-speaking part (Maes et al., 2017: Part II: 27 and 38). In the latter case, the investigating judge tends to attribute a role to the probation staff only after a decision to release under conditions has been made, with probation staff working mainly on the monitoring and enforcement of conditions, though this work was generally favourably viewed. For the Netherlands, the pressure of time in the proceedings was also cited as a factor which can lead to reports which are of insufficient quality (Boone et al., 2017: 50). The problem of workload amongst probation staff was also cited as a reason against the introduction of more probation involvement in Romania (Oancea and Durnescu, 2017: 49). Austrian respondents considered judges were reluctant to use preliminary probation with adults, especially at the early stages, because of the time it takes for probation staff to be appointed (Hammerschick and Reidinger, 2017: 44). Irish participants also felt that it would be unfeasible for the probation service to be involved as they did not have the resources to be involved at present (Perry and Rogan, 2017: 73).

A further recurring issue was the possible effect of probation involvement on the presumption of innocence. In the Netherlands, which has a lot of experience of probation involvement at the pre-trial stage, some participants noted that they cannot do meaningful work with a person who refuses to give any insight into the circumstances surrounding the alleged crime (a reasonable position should the person be contending they are innocent). There was also concern amongst defence lawyers about infringing the presumption of innocence through such engagement, and it was reported that some suspects were wary of speaking to probation staff as they are seen as part

of the "system" (Boone et al., 2017: 50). Defence lawyers in Germany also reported concerns that the probation staff does not act under confidentiality and that probation staff also have to provide all information they get from the suspect to the courts (Morgenstern, 2017: 61). Similarly, a possible effect on the presumption of innocence was cited in Ireland, where it was also felt that adding in probation involvement could lead to net-widening (Perry and Rogan, 2017: 73).

Another problem reported concerning probation involvement came from the Netherlands, where the prosecutor must agree to a probation report being ordered before it can be made. Agreement was usually forthcoming, but not always, as the prosecutor may believe it unlikely a person who has, for example, remained silent in the proceedings, will talk to a member of the probation staff. In the Netherlands, however, it was felt strongly that the probation service plays an important role in advocating for alternatives to PTD, with almost all successful requests for suspension of PTD following a positive report by the probation service. However, the Dutch DETOUR report also mentions that the availability of such a report can depend on very arbitrary grounds (Boone et al., 2017: 13).

While there was no clear consensus about the benefits of involving probation staff formally amongst the countries and within the countries, participants generally agreed that there was a need for more social work strategies and support for at least some groups facing PTD. The use of bail support and information schemes deserve special mention in this respect. As Hucklesby (Chapter 4) writes, though sadly in very serious decline, bail information schemes which are operated by probation or prison staff or NGOs provide collated and relevant information for the courts which may support a decision to release. Such information could include details of the person's address and employment status. These schemes also offer support in accessing accommodation and other important services. They provide a structured and effective way to provide reassurance to the court about the veracity of information which can support the decision to release. This type of intervention does not impinge on the presumption of innocence, but provides information which is often difficult to obtain in a timely way, but which can provide great assistance to a court. Practitioners have argued for the need for such information, regardless of its source. For example, defence lawyers in Romania considered, that an evaluation by probation staff would be helpful to provide reliable information about the social background of the accused person and support better decision-making, though prosecutors and judges did not feel this would be helpful (Oancea and Durnescu, 2017: 9 and 16). A recurring concern was the prevalence of drug use and housing problems amongst suspects, and it was clear participants felt that some support mechanisms were needed to address these issues.

Conclusion

The individual actions of each of the actors in the PTD decision-making process are clearly influential on how PTD is used. Prosecutors have a central role in making an application for PTD. Their views are taken seriously by judges, and decisions prosecutors make, about whether to apply for PTD, or to agree to an alternative have a key influence. Defence lawyers are essential for the application of the rule of law, the fairness of the proceedings, and the likelihood of the implementation of alternatives. Where defence lawyers have equal status in proceedings, and adequate resources and legal aid funding, they can be essential components in regimes where PTD is less frequently applied. Judges, of course, are determinative, and pressures on them in terms of time and ability to prepare are frequently a problem. The dynamics between these three sets of actors are profoundly important to PTD rates in countries. Further analysis of how these complex relationships play out can tell us much about how to reform PTD decision-making process and, ultimately, to reduce the use of PTD.

References

Bikelis, S. and Pajaujis, V. (2017) *Second Lithuanian National Report on Expert Interviews*, DETOUR at www.uibk.ac.at/irks/publikationen/detour-publikationen/2nd-lithuanian-report_interviews.pdf [accessed 6 February 2023].

Boone, M., Jacobs, P. and Lindeman, J. (2017) *Second Dutch National Report on Expert Interviews*, DETOUR at www.uibk.ac.at/irks/publikationen/detour-publikationen/2nd-dutch-report_interview.pdf [accessed 3 January 2023].

De Suremain, H., Fischer, N. and Boe, C. (2019) *Bringing Justice into Prison: For a Common European Approach. White Paper on Access to Justice for Pre-trial Detainees. A Report Based on Comparative Analysis and Empirical Studies in Nine EU Countries by the Research Project EUPRETRIALRIGHTS*, Paris: European Prison Litigation Network at www.prisonlitigation.org/wp-content/uploads/2021/04/WHITE-PAPER-final-ENG.pdf [accessed 10 January 2023].

Fair Trials International (2017) *A Measure of Last Resort? The Practice of Pre-trial Detention Decision Making in the EU* at www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf [accessed 24 May 2023].

Hammerschick, W. and Reidinger, V. (2017) *Second Austrian National Report on Expert Interviews*, DETOUR at www.uibk.ac.at/irks/publikationen/detour-publikationen/2nd-austrian-repor_interviews.pdf [accessed 6 February 2023].

Maes, E., Jockheere, A. and Deblock, M. (2017) *Second Belgian National Report on Expert Interviews (Part I: Report on Dutch-speaking Expert Interviews [Flanders]; Part II: Report on French-speaking Expert Interviews; Part III: Integrated Conclusions and Recommendations)*, DETOUR at www.uibk.ac.at/irks/publikationen/detour-publikationen/2nd-belgian-report_interviews.pdf [accessed 6 February 2023].

Morgenstern, C. (2017) *Second German National Report on Expert Interviews*, DETOUR (assisted by Eva Tanz) at www.uibk.ac.at/irks/publikationen/detour-publikationen/2nd-german-report_interview.pdf [accessed 6 February 2023].

Oancea, G. and Durnescu, I. (2017) *Second Romanian National Report on Expert Interviews*, DETOUR at www.uibk.ac.at/irks/publikationen/detour-publikationen/2nd-romanian-report_interview.pdf [accessed 6 February 2023].

Perry, D. and Rogan, M. (2017) *Second National Report on Expert Interviews for Ireland*, DETOUR at www.uibk.ac.at/irks/publikationen/detour-publikationen/2nscud-irish-report_interviews.pdf [accessed 6 February 2023].

Rogan, M. (2022) 'Examining the role of legal culture as a protective factor against high rates of pre-trial detention: The case of Ireland', *European Journal on Criminal Policy and Research*, 28: 425–433.