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Session I: Pre-trial phase: Reducing the influx – shared responsibility

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A. Introduction

German public prosecutors and German investigating judges are in principle bound by the principle of legality which means they are bound by the provisions of the law. It is not a discretionary decision whether an accused person is taken into pre-trial detention or not. Nevertheless, German law offers considerable scope of action, which I will show you later.

B. Conditions for pre-trial detention

Section 112 paragraph 1 of the German Code of Criminal Procedure (StPO) stipulates that a suspect may be remanded in custody if he is urgently suspected of the offence and there is a reason for detention. However, pre-trial detention may not be ordered if it is disproportionate to the importance of the matter and the punishment to be expected.

I. Grounds for arrest

According to German law, three cumulative conditions must be met in order to be able to detain a person on remand at all: an urgent suspicion of an offence and a reason for detention. At the same time, the detention must be proportionate. If these three conditions are met, an accused person must be taken into custody and the public prosecutor has to submit an appropriate request to the investigating judge. But as we will see in the course of the lecture, the principle of proportionality in particular offers considerable discretion. And even in cases where pre-trial detention would be proportionate, German law provides solutions to otherwise avoid pre-trial detention.

German law knows four grounds for remand detention, which must be based on facts: (1) flight, (2) the risk of flight, (3) the risk of tampering with evidence and (4) in certain cases, in particular in sexual and violent crimes, the risk of re-offending.

1. Flight and risk of flight

The ground of arrest “flight” is established if the accused has fled or is hiding.

There is a risk of flight if the suspect is more likely to evade criminal proceedings than to than that he would hold himself at its disposal.

The assessment of the risk of flight requires the prosecutor and the investigating judge to take into account all the circumstances of the case, in particular the nature of the allegedly committed offence by the accused, the personality of the accused, his circumstances, past life and conduct before and after the offence. The Public Prosecutor and the investigating judge shall carefully and thoroughly weigh up all these circumstances in favour of and against a flight.

The risk of flight can be constituted by a conspicuous change of residence or job, as well as the use of false names or papers or flight in an earlier proceeding. The risk of flight is also indicated by instability of character, such as drug abuse, the absence of firm family or professional ties, easily detachable housing conditions or the absence of a fixed home or residence. Close relations with foreign countries (not with EU-member states though), in particular assets located there, can also constitute a risk of flight.

Strong family or professional ties and the fact that the defendant has faced the proceedings over a longer period of time, his old age or a poor state of health, which therefore prevents him from fleeing, usually speak against the danger of flight.

2. The risk of tampering with evidence

The ground of arrest “risk of tampering with evidence” applies if the accused's conduct gives reason to an urgent suspicion that certain acts have an effect on factual and personal evidence and thus make it more difficult to investigate the truth. There must be a strong probability of unfair and procedural tampering measures in the case that the accused is not taken into custody. This suspicion must be based on facts, namely those arising from the behaviour, relationships and circumstances of the accused. At this point, too, the public prosecutor and the investigating judge must carefully weigh the pros and cons of pre-trial detention against each other. Here they have considerable discretion as well, especially from the point of view of proportionality, which needs to be explained in more detail later on.

3. The risk of re-offending

The ground of detention for the risk of re-offending is a preventive measure of preventive detention to protect the general public against further serious offences, especially sexual and violent crimes, committed by particularly dangerous offenders. The maximum duration of preventive detention is one year. The ground of arrest for the risk of re-offending only intervenes if the legal system is seriously impaired. The nature and extent of the injury must be considerable for each individual act, the wrongdoing must be above average and the act must be capable of impairing a feeling of security in society as a whole. Thus, the public prosecutor must also carefully consider at this point whether he would like to take an accused person into custody.

II. Principle of proportionality

Any pre-trial detention must respect the principle of proportionality. Both the public prosecutor and the investigating judge have to examine this principle very thoroughly and carefully. Detention on remand is only permissible if and insofar as the complete investigation of the offence cannot otherwise be ensured. Therefore, pre-trial detention may not be ordered if the accused subjects himself to voluntary restrictions, e.g. delivery of identity papers or voluntary treatment in an institution. For the determination of proportionality, the seriousness of the interference with the life sphere of the accused must be balanced against the significance of the offence and the anticipated legal consequences. Of particular importance for the significance of the matter are the abstract threat of legal consequences, the nature of the infringed legal interest, the concrete course of events and the intensity of the criminal behaviour of the accused. The state of health of the accused must also be taken into account. But to make this clear, there is no disproportionality from the point of view that only a short prison sentence or a fine can be expected. In this case, a comprehensive consideration of the case by the public prosecutor is also necessary.

C. Suspension of execution of a warrant of arrest

Furthermore, section 116 StPO provides that the pre-trial arrest warrant will be suspended if the aim of the pre-trial detention can be achieved by an alternative, less intrusive measure. With regard to the conditions for an alternative measure to a pre-trial detention, section 116 distinguishes between the different aims of a pre-trial arrest warrant, which are to ban.

I. Conditions for a suspension of execution of a warrant of arrest

1. Pre-trial detention in case of flight risk

Section 116 paragraph 1 StPO provides that if the pre-trial detention has been ordered for the risk of flight, the judge shall suspend the arrest warrant if it can be expected that the aim of the pre-trial detention may be achieved by alternative measures. The public prosecutor

may request so. The provision then lists possible examples for alternatives to a pre-trial detention for a risk of flight:

- order to report in regular intervals to the judge, the prosecutor or to a specified police station
- order not to leave the place of residence or a certain area without permission of a judge or the prosecution authority
- order to leave home only under surveillance of a specific person
- deposit of a (financial) security by the accused or another person

However, these orders are only listed by way of example and the judge may also order different measures such as:

- order to render the driving license to the prosecution authority
- order to render the passport to the prosecution authority
- order to freeze the bank account
- order to start drug rehabilitation or
- also possible, but not yet used a lot, would be an order to wear an electronic hand- or footcuff (or as it is called “electronic residence monitoring”)

It is important to note that the suspension of the arrest warrant is obligatory if it is reasonable to expect that the aim of the pre-trial detention can be achieved by using alternative, less intrusive measures (principle of proportionality).

2. Pre-trial detention in case of risk of tampering with evidence

According to section 116 paragraph 2 StPO, an arrest warrant for the risk of tampering with evidence may be suspended if such risk can be mitigated considerably by alternative, less intrusive measures. The provision lists as possible measures a restraining order prohibiting contact to other suspects, witnesses and experts.

Even if the wording in the provision states that the arrest warrant may be suspended the judge has no discretion. The reason is again that the principle of proportionality commands that the arrest warrant has to be suspended if its aim may be achieved by less severe measures.

3. Pre-trial detention in case of risk of re-offending

According to section 116 paragraph 3 StPO the arrest warrant for risk of re-offending may be suspended if it is reasonable to expect that the suspect will comply with certain orders and that hereby the aim of the pre-trial detention will be achieved.

Section 116 paragraph 3 StPO does not list any examples, but similar orders as listed in paragraph 1 and 2 may also be used to mitigate the risk of re-offending. In particular, the judge may consider orders of surveillance, restraining orders and orders to start a therapy or a similar program. However, as a general rule, a risk of re-offending will be more difficult to mitigate by alternative measures. Therefore, a suspension of the arrest warrant will only be ordered in exceptional cases.

4. Non-compliance with suspension order

Section 116 paragraph 4 StPO provides for the conditions that justify a withdrawal of the suspension order. According to this provision, the judge shall order the re-execution of a warrant of arrest if

- the suspect violates grossly the duties and restrictions imposed upon him,
- the suspects takes steps to prepare its flight, does not appear upon being properly summoned or shows in a different way that the trust placed in him is not justified, or
- new circumstances require the detention

It is important to note that not any non-compliance justifies the withdrawal of the suspension order. A simple negligence is not sufficient to order the re-execution of the arrest warrant.

5. Stimulation of alternatives to pre-trial detention

As already said, according to German law, the suspension of the arrest warrant is always mandatory if the aim of the detention (mitigate risk of flight risk, tampering with evidence or re-offending) can be achieved in an alternative, less severe way.

D. Review of pre-trial detention and complaint against pre-trial detention

Even if pre-trial detention is already executed section 117 paragraph 1 StPO provides that the accused may at any time apply for a court hearing as to whether the warrant of arrest is to be revoked or its execution is suspended in accordance with the already described section 116 StPO. The accused also has the possibility to complain against the judge´s decision, according to section 304 StPO. The arrest warrant will then be reviewed by the district court. So also the accused can take action against an arrest warrant.

E. Special Review of pre-trial detention exceeding 6 months

If the execution of pre-trial detention exceeds a period of six months, it has to be reviewed by the higher Regional Court, sections 121 and 122 StPO. These sections are particular expressions of the principle of acceleration. Section 121 paragraph 1 StPO states that as long as a judgment has not been given imposing imprisonment pre-trial detention for one and

the same offense exceeding a period of six months may only be executed if the particular difficulty or the unusual extent of the investigation or some other important reason do not yet admit pronouncement of judgement and justify the continuation of the pre-trial detention. Otherwise, the detainee has to be released. Neither the ECHR nor the German Code of Criminal Procedure knows an absolute maximum limit for pre-trial detention, but requires very compelling reasons and special care in the conduct of the proceedings by both the public prosecutor and the investigating judge for pre-trial detention exceeding the 6-month period. According to section 122 paragraphs 1 and 2 StPO the Higher Regional Court decides on the continuation of pre-trial detention and not the otherwise competent investigating judge. The public prosecutor must therefore submit the files to the Higher Regional Court, which may provide further protection for the prisoner on remand. And indeed, suspects increasingly have to be released from pre-trial detention for excessively long criminal proceedings. Last year, the Higher Regional Courts revoked arrest warrants for at least 65 suspects nationwide. In 2017 there were 51 cases, compared to 41 in 2016.

F. Revocation of the warrant of arrest

Furthermore the warrant of arrest has to be revoked as soon as the conditions for pre-trial detention no longer exist or if the continued pre-trial detention is disproportionate to the importance of the case or to the anticipated penalty. Section 120 paragraph 1 StPO lists particular examples:

- the accused is acquitted,
- the opening of the main proceedings is refused or
- the proceedings are terminated other than provisionally.

However, other grounds may also be taken into account, such as the requirement that a warrant of arrest has to be proportionate or that the principle of acceleration is violated. The pre-trial detention is disproportionate if its further execution would be beyond proportion to the significance of the matter and the legal consequences to be expected. The requirement to accelerate proceedings is primarily in the interest of the accused person, in particular the accused person in custody, and arises directly from Article 5 paragraph 3 and Article 6 ECHR. It obliges the German government to organise its jurisdiction and its public prosecutor's offices in such a way that the accused shall be entitled to trial within a reasonable time. Otherwise the accused has to be released pending trial.

According to section 120 paragraph 3 StPO the warrant of arrest has to be revoked by the judge if the public prosecution office makes the relevant application before public charges have been preferred. The judge will be bound by that request.

G. Dispense with prosecution

As in Germany the principle of legality applies, it entitles and obliges the prosecutors to intervene, against every suspect and for every offence as well as, if there are sufficient grounds for suspicion, to prefer public charges. Although this principle applies, there are possibilities to dispense with prosecution, which may also be a less intrusive alternative to pre-trial detention, particularly in the area of light and medium criminal offences. I will give you some, not conclusive examples:

I. Non-Prosecution of Petty Offences

According to Section 153 paragraph 1 StPO the public prosecution office may dispense with prosecution with the approval of the court competent to open the main proceedings if a misdemeanor is the subject of the proceedings and if the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution.

II. Provisional Dispensing with Court Action

In a case involving a misdemeanor, the public prosecution office may according to section 153a paragraph 1 StPO, with the consent of the accused and of the court competent to order the opening of the main proceedings, dispense with preferment of public charges and concurrently impose conditions and instructions upon the accused if these are of such a nature as to eliminate the public interest in criminal prosecution and if the degree of guilt does not present an obstacle. The provision then lists examples for conditions and instructions:

1. to perform a specified service in order to make reparations for damage caused by the offence;
2. to pay a sum of money to a non-profit-making institution or to the Treasury;
3. to perform some other service of a non-profit-making nature;
4. to comply with duties to pay a specified amount in maintenance;
5. to make a serious attempt to reach a mediated agreement with the aggrieved person (in the StPO it is called "perpetrator-victim mediation") thereby trying to make reparation for his offence, in full or to a predominant extent, or to strive therefor;
6. to participate in a social skills training course; or
7. to participate in a driver's competence course.

H. Conclusion

As you can see, there are many ways to avoid pre-trial detention. Especially the principle of proportionality is very important. Thank you for your attention.