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Assessing Flight Risk in pre-trial detention decision-making: a European comparative study

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Abbreviations and Terminology

EU	European Union
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
TFEU	Treaty on the Functioning of the European Union
RUC	Release under Conditions (Belgium)
PTDA	Pre-trial Detention Act (Belgium)
ESO	European Supervision Order - Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
Bail	In Belgium and Bulgaria the term 'bail' is specific to the requirement to lodge money as a condition of release pending trial, in Austria this is referred to as 'Kaution.' In Ireland the term 'bail' is broader and denotes the release from custody subject to conditions pending trial or the final determination of a case. The Belgian term for this is release under conditions (RUC), which in Austria it is known as "*Gelindere Mittel.*"
Pre-trial Detention	'pre-trial detention' should be understood as any period of detention of a suspect or accused person in criminal proceedings ordered by a judicial authority and prior to conviction.[1]
Alternative Measures	A non-custodial measure of restraint intended to ensure that the person accused of a crime appears before the investigative body or the court for further legal proceedings.[2]

1 See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023H0681.

2 Council of Europe Pre-trial Detention Assessment Tool available at https://rm.coe.int/pre-trial-detention-assessment-tool/168075ae06.

Executive summary

Flight Risk is a Fair Trials led project, funded by the European Commission, analysing how the risk of flight is assessed by decision-makers when deliberating on the use of pre-trial detention. The overall research considers the national experience of five European Union (EU), Member States (Austria, Belgium, Bulgaria, Ireland, and Poland) in the consideration of Flight Risk as a ground for Pre-trial detention. The study comprises of a comparative analysis of the national reports in the context of a review of both the European Court of Human Rights (ECtHR) case law, and the available data and scientific research regarding the risk of flight. Drawn from the conclusions of the research are recommendations directed at policy makers on both a regional and national level as well as key stakeholders.

Issues of pre-trial detention are of paramount importance in the context of the fundamental rights of EU citizens, and cross-border cooperation in criminal matters. Intertwined with any consideration of pre-trial detention are the core values of the EU, the right to liberty, the presumption of innocence, access to a lawyer, due process and detention as a measure of last resort. In addition to undermining these principles, the overreliance on pre-trial detention contributes to the EU-wide, and indeed global, problems of overcrowding in prisons which impact on prison conditions and the health and dignity of those within the prison walls.

On a regional level, there is an absence of legislation specifically addressing pre-trial detention and the question of Flight Risk. This lack of harmonisation of the rules surrounding pre-trial detention has resulted in significantly diverging approaches in the assessment of Flight Risk across the EU. Such varying approaches can frustrate the mutual trust between Member States which underpins cross-border criminal cooperation. However, notwithstanding the legislative gaps identified during this research, a series of cases from the ECtHR have emerged to develop standards and tools in line with Article 5 ECHR and the core connected principles. When placing pre-trial detention and alternatives to detention in the balance, the ECtHR has emphasised the importance of taking a holistic and evidenced-based approach. This requires looking beyond the offences alleged, to also consider the character and circumstances of the accused and the potential alternative measures that could address concerns of Flight Risk.

Through the lens of the national experiences a number of key issues came into focus. Firstly, there is a lack of national statistics available in relation to the application of Flight Risk. Flight Risk and the risk of reoffending are the most frequently relied upon grounds for ordering pre-trial detention. Examples emerged where the grounds of the risk of flight or the risk of reoffending were used interchangeably depending on which was easier to prove or more difficult to rebut.

In terms of assessing Flight Risk, although similar criteria were often adopted, there was considerable variation in the manner in which assessments were made, the transparency of the decision-making, and the different weight attached to the criteria applied.

There also appeared to be a **reluctance to apply alternative measures**, the inevitable result being an overreliance of pre-trial detention. It became apparent during the course of the research, that a number of the **national practices resort to a box ticking exercise applying formulaic justifications**. Often, the decisions were reliant on the prosecution submissions, demonstrating also a lack of confidence in the available alternative measures. There appears to be an overemphasis on community ties and nationality in the assessment of Flight Risk. This has led to a **discriminatory application of pre-trial detention**, and an overrepresentation of non-national detainees awaiting trial.

Having identified the patterns of practice that point towards the increased use of pre-trial detention, the study considers recommendations to address these findings. A clear need to **harmonise the assessment criteria** and **ensure procedural rights guarantees** in respect of Flight Risk and the application of pre-trial detention came to the fore of the research. The case law of the ECtHR, and the rights enshrined in the ECHR and the CFREU, coupled with European Commission Recommendations relating to pre-trial detention, and the panoply of Procedural Rights instruments drawn together could be adapted and applied to pre-trial detention and Flight Risk. This harmonisation could address *inter alia,* when pre-trial detention is applied, how it is assessed (both in substance and procedurally) the duration of the detention, the procedural rights applied relating to pre-trial detention, including access to a lawyer, the array of alternative measures available, and the relevant review procedures and remedies. Such measures would bring about uniform standards and create a consistent approach across the EU.

The **adoption, implementation and application by Member States of alternatives to detention** to address the overuse of pre-trial detention requires particular consideration. For example, the ESO which aims to secure the attendance of the accused at trial without pre-trial detention, is poorly implemented and underutilised. For judges to be able to give alternative measures practical effect, Member States need to adopt and apply the available tools. This could be achieved by encouraging coherent and practical implementation by governments, as well as conducting effective monitoring.

Equally important is the **awareness raising** among stakeholders of the procedural rights, the broad range of alternative measures available, and how to apply them in practice through handbooks and training seminars. These tools need to be more accessible to the practitioners and the authorities that would seek to rely upon them. Through consistent application best practices will emerge and be shared, and networks between authorities forged strengthening cross-border cooperation.

Introduction

There is no standard legal definition of 'Flight Risk' in the EU. In broad terms however, Flight Risk is the perceived danger that an individual suspected or accused of committing a crime will evade justice. The concept of Flight Risk ranges from an individual fleeing the jurisdiction, to hiding, or simply failing to attend court. A study in the United States noted that these two aspects of Flight Risk are used interchangeably or are used as 'different degrees of the same type of risk.' The study suggests that a more nuanced and precise definition would be required to fully address the situation.[1] The NICC report on the available statistical data and research on Flight Risk, references the German example of the nuanced definition in practice commenting that,

"In Germany, for example, the term Flucht (flight) covers two alternative actions, which can exist contemporaneously and which both lead to the imposition of pre-trial detention: The action of absconding itself (fliehen) and the action of going into hiding (sich verborgen halten). Both alternatives require the accused's will to evade ensuing criminal proceeding' (Jung et al., 2021: 307; see also Morgenstern, 2023)."[2]

A finding that an accused is deemed a Flight Risk, is one of four accepted grounds[3] for remanding an individual in custody pending trial. Pre-trial detention is a major contributor to the overcrowding of prisons in the EU which in turn contributes to inhuman and degrading detention conditions. Certain groups are also disproportionately affected by the overuse of pre-trial detention, for example, people of limited means and foreign nationals. Notwithstanding the principles of mutual trust and recognition which underpin cross-border cooperation in criminal matters across the EU, there are ongoing findings in the ECtHR of violations of Article 5 and Article 3 ECHR by EU Member States.[4] The nexus between overcrowding and fundamental rights violations, as well as the contribution to overcrowding by the overuse of pre-trial detention has been well documented.[5]

The necessary standards for the proper application of pre-trial detention are found in the ECHR and the jurisprudence of the ECtHR. However, these standards have not been sufficient to reduce overreliance on pre-trial detention in practice. This is in part because they are either not consistently applied in judicial decision-making at a national level or they are not sufficient to change prosecutorial and

1 Gouldin, Lauryn P. (2018) «Defining Flight Risk,» *University of Chicago Law Review*: Vol. 85: Iss. 3, Article 3 available at https://lawreview.uchicago.edu/print-archive/defining-flight-risk.

2 NICC, *Available statistical data and research on flight risk in pre-trial (detention)proceedings*, 2024, page 4.

3 This will be discussed in full within this report in Chapter 2.1, but by way of overview the four recognised grounds for pre-trial detention are (1) risk of absconding; (2) risk of re-offending, (3) risk of interfering with the course of justice or (4) risk of a threat to public order.

4 Fair Trials, *A Measure of Last Resort: The practice of pre-trial detention decision-making in the EU*, 2016, para 103, available at: https://www.fairtrials.org/publication/measure-last-resort.

5 Fair Trials, *A Measure of Last Resort: The practice of pre-trial detention decision-making in the EU*, 2016, para 2, available at: https://www.fairtrials.org/publication/measure-last-resort.

judicial culture of requesting and ordering pre-trial detention.

1.1.1. Objectives of the Research

This research intends to contribute to the broader goal of tackling the overuse of pre-trial detention by taking an in-depth look at the decision-making of one of the most commonly applied grounds of detention – Flight Risk. By considering judicial decision-making in the context of Flight Risk, the study will look at the prosecutorial and judicial practice of assessing Flight Risk to identify the most effective measures to reduce pre-trial detention based on this ground.

The research aims to contribute to raising awareness of the application of the standards of the ECHR and the decisions of the ECtHR in the day-to-day decision-making on Flight Risk as a ground for pre-trial detention, and identify and tackle obstacles such as the underutilisation of alternative measures, for preventing the overuse of pre-trial detention, which is driving prison overcrowding and undermines mutual trust between Member States. Tackling the overuse of pre-trial detention will require a number of measures: legislative, institutional restructuring, cultural shift, and reallocation of budgetary resources. The specific objectives of this research are as follows:

1. To promote a deeper understanding of the reality of judicial decision-making on pre-trial detention, including:
    a. How prosecutors present and judges assess Flight Risk and how clearly this decision-making is reflected in decisions on pre-trial detention;
    b. What evidence can therefore be presented by defence lawyers to oppose the assumption of Flight Risk; and
    c. Any differences in Flight Risk assessment based on status or residence, belonging to a minority group, specific socio-economic background and other similar criteria.
2. To identify the legislative, institutional and knowledge gaps that could provide basis for further in initiatives at EU or Member State level to effectively address the issues identified.

Through harmonising criminal justice procedures, and setting standards of practices firmly rooted in fundamental rights, real meaning would be given to mutual trust. The resultant coherent and consistent practices would in turn serve to improve judicial decision-making in the assessment of Flight Risk and Pre-trial detention and strengthen mutual recognition and cross-border cooperation in criminal procedures.

Methodology

The project which commenced in June 2022 involved five partners conducting research in five EU Members into the assessment of Flight Risk by decision-makers in the context of pre-trial detention applications. The research partners are the Ludwig Boltzmann Institute of Fundamental and Human Rights (Austria), Helsinki Foundation for Human Rights, (Poland), Bulgarian Helsinki Committee, (Bulgaria), National Institute of Criminalistics and Criminology- NICC (Belgium) and the Irish Council for Civil Liberties (Ireland).
Each partner undertook the following research elements:

- **a.** desk research, which consisted of an examination of the legal framework, case law and academic literature to review Flight Risk as a ground for detention;
- **c.** an analysis of approximately 50 judicial decisions, case files or pre-trial detention hearings;
- **d.** stakeholder consultations through focus groups and interviews to verify the key findings of the domestic research, discuss the practical challenges faced by each stakeholder group and benefit from stakeholder input on key recommendations.

The following is a breakdown of the case files considered in the implementation of the activities of the research. In Austria, of the 100 cases provided by the Ministry of Justice, 39 pertained to Flight Risk as a ground for pre-trial detention, comprising of 59 accused and 129 individual court orders. The Bulgarian researchers analysed 50 cases, while In Poland 56 cases were reviewed with reference to pre-trial detention in the context of Flight Risk. In Belgium 50 criminal dossiers were reviewed as well as pending cases at the clerks of the courts. In Ireland 50 cases were reviewed (6 Supreme Court, 7 Court of Appeal, and 37 High Court decisions). In addition, a group of qualified volunteers attended court in-person and reported on Flight Risk cases as they arose. Fair Trials then developed a national template research tool with input from the project partners. Each partner finally published a domestic report.[6]

Parallel to the national research conducted by the partners there was a detailed regional study undertaken. Fair Trials prepared an analysis on the European legal framework with particular emphasis on the case law of the ECtHR with a view to assessing the standards, tests and principles emanating from the Strasbourg court.[7] At the same time, NICC conducted an analysis of the statistical data and scientific research into the application of Flight Risk as a criterion within pre-trial detention procedures.[8] This was undertaken through a literature review comprising of relevant articles in five criminological journals, previous scientific work undertaken by the NICC team, and key word searches online. The second part of the research was a survey, which comprised of a questionnaire sent to relevant stakeholders from all EU member states. These two report components,

6 The domestic reports are available here: Belgium, Ireland, Austria, Poland, and Bulgaria.

7 The Fair Trial's ECtHR Review on Flight Risk is available on the Fair Trial's website.

8 The NICC's report 'Available statistical data and research on flight risk in pre-trial (detention) proceedings on available statistical data and research on flight risk' is available on NICC's website.

the ECtHR review and NICC report together with the national research set out the regional state of play.

The different legal systems impacted on the methodology adopted by national partners and also on the comparative findings. For example, Ireland has a common law system, which is different from the other four partners where the justice system follows the civil law format. Irish law places a particular emphasis therefore on case law and the establishments of legal precedents. This resulted in the availability of more detailed written decisions, in contrast with the judgments emanating from Austria, for example, where they are significantly briefer with very little recorded beyond a one-page decision. This difference is reflected in the methodology whereby the Irish study plays greater emphasis on the High Court bail list judgments, and in contrast, the Austrian research placed more focus on the interviews with lawyers and judges to better understand the decision-making process. In Belgium, owing to the emphasis of the presumption of innocence, pre-trial proceedings are held in camera, therefore largely inaccessible for the researchers. The researchers overcame this by accessing the case files. Conversely in Ireland, accessing case files would not be possible. However, bail applications are usually in open court, which gives more opportunity to hear viva voce the decision-making process as well as the defence and prosecution submissions. These procedural differences are reflected in the study through the different focus on the research methods relied upon during the course of the research.

1. Regional context: European legal framework & state of play

1.1. European context: statistical data on the use of Flight Risk

One of the key empirical findings of the statistical research undertaken was the lack of statistical data sourced from official bodies on the application of Flight Risk on a national level.[9] Germany and Spain were the only two countries surveyed that had national figures on the use of Flight Risk specifically in pre-trial detention decisions.[10] Notwithstanding the limited available body of research on the topic, the statistical study was able to uncover emerging themes and trends on Flight Risk.

1.1.1. Rate of application of Flight Risk

The records in Germany indicate that 93.2% of pre-trial detentions refer to the risk of flight.[11] This emphasis on the danger of absconding as the primary reason for pre-trial detention was also noted in Lithuania through a file analysis of court decisions, which showed that Flight Risk was employed in 89% of cases often also in conjunction with other grounds.[12] However, this does not appear to be the

9 NICC, *Available statistical data and research on flight risk in pre-trial (detention) proceedings,* 2024, page 4.

10 Ibidem page 5.

11 Ibidem page 6.

12 Ibidem page 8.

norm overall. In Belgium the risk of reoffending was more frequently relied upon to ground detention pre-trial at 91% in contrast with the risk of flight which was reported at 39%.[13] In Austria a recent study showed that the risk of reoffending is applied in about 90% of all pre-trial detention cases,[14] and that 'with an estimated rate of applications in about 60% of all PTD cases, the risk of absconding is also often applied.'[15]

The likelihood of offending while on bail was also the predominant ground in England (61%) and Wales (44%).[16] In Italy, reoffending was almost always relied upon to ground pre-trial detention whereas Flight Risk was often invoked in combination with another ground. In a study based in the Netherlands by the Netherlands Institute for Human Rights, Flight Risk was only mentioned in 13% of the cases where an individual was detained in custody.[17] In Finland, again there was no official data available but in response to the questionnaire carried out by the NICC, the risk of absconding was attributed to 20% of the cases where pre-trial detention was directed by the court.[18]

One of the findings of DETOUR, a previous comparative study in the area of pre-trial detention, was that the grounds of detention were seemingly interchangeable in practice, and that decision-makers selected the ground that was easiest to justify.[19]

"In Austria for instance, we heard about cases in which a central motivation for PTD was to avoid absconding, while a risk of reoffending was central to the formal motivation of detention. This was explained by the risk of reoffending being the ground which was easier to substantiate and because it would make it more certain that a suspect will remain in detention…This gives rise to the impression that the normative framework for the legal grounds may be of lesser importance once decision-makers are convinced that PTD is necessary and are able to interpret the grounds in a way that fit to the factual risks" [20]

1.1.2. Overview of the criteria considered in the decision-making of Flight Risk

As the review of the ECtHR found during this research, the court in Strasbourg favours a holistic assessment of Flight Risk to include the relevant aspects of the character and behaviour of the accused, as well as the nature of the offence and the likely sentence on conviction, and not solely on one of these considerations in isolation *(Infra 2.3).*

Both in Poland and Belgium, greater emphasis is placed on the seriousness of

13 Ibidem page 9.

14 Ibidem page 9.

15 Hammerschick and Reidinger, DETOUR-Towards Pre-trial Detention as *Ultima Ratio. 2nd Austrian National Report on Expert Interviews,* October 2017 page 14.

16 Ibidem page 8.

17 Ibidem page 8.

18 Ibidem page 9.

19 Ibidem page 20.

20 Ibidem.

the offence and the capacity of the accused to abscond.[21] Equally, as evidenced from a study in Austria, an offence which attracts a less severe sentence, alleged against an individual with strong community ties, may mean that the offender is perceived as being less likely to abscond in the absence of 'concrete preparations to flee.'[22]

The research showed that across the EU there are differences on the weight attached to the criteria when assessing Flight Risk. Diverging practices were also identified within the Member States on a regional basis. For example, eastern Austria places greater emphasis than western Austria on the lack of permanent residence coupled with the imposition of a potential serious sentence."[23]

1.1.3. Research on the particular situation of foreign nationals

A constant theme throughout the research was the disproportionate application of pre-trial detention on foreign nationals, particularly in the context of Flight Risk. The term 'foreign national' is applied here in relation to individuals "*who are not citizens of the country where they are accused of committing an offence*."[24]

In a previous study conducted by Fair Trials it was noted that 'while approximately 22% of detained persons in Europe are held pre-trial detention, almost 60% of foreign people detained in European prisons in 2019 were waiting for their trial of final sentence.'[25] The statistical research undertaken in this study found that foreign nationals were disproportionately overrepresented in pre-trial detention, and that it was 'systematically higher than the percentage of foreign nationals as convicted prisoners.'[26] Furthermore, foreign nationals were underrepresented when it came to the application of alternative measures owing to the perception that foreign nationals pose a greater risk of flight.[27] The statistical review concluded that the 'situation varies considerably from one country to another.'28

1.2. Legal overview: EU legislative framework and ECtHR review[29]

Having considered the general trends and experiences of the Member States across the EU, the report will look first to the legal framework and context of the

21 Ibidem page 10.

22 Hammerschick, *'Pre-trial detention in Austria: a preventive approach,'* in Christine Morgenstern, Walter Hammerschick, Mary Rogan (Eds.), *European Perspectives on Pre-trial Detention,* 2023.

23 Hammerschick et al, Comparative Report, Vienna 2017.

24 Ibidem page 12.

25 Fair Trials, Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution? 2021, available at https://www.fairtrials.org/app/uploads/2021/11/EAW-ALT_Report.pdf p. 28., Council of Europe – Université de Lausanne, Prisons and Prisoners in Europe 2019: Key Findings of the SPACE I report (2020), 24 February 2020.

26 NICC, Available statistical data and research on flight risk in pre-trial (detention)proceedings, 2024, page 12.

27 Ibidem.

28 NICC, Available statistical data and research on flight risk in pre-trial (detention)proceedings, 2024, page 13.

29 This chapter is based on research done by Fair Trials on the standards that the case-law of the European Court of Human Rights sets for the assessment of Flight Risk (ECtHR Review). The report detailing the results of this research is published on Fair Trials' website.

EU, before turning to the standards set by the ECtHR, and consider the extent to which standards have been applied in the five EU Member States linked to this study.

The EU has developed measures to promote judicial cooperation in criminal matters among Member States. Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) sets out the competence of the EU to legislate for criminal matters, and provides the legal basis for judicial cooperation in cross-border criminal matters. It notes that such cooperation is based on the principles of mutual trust and mutual recognition of judicial decisions and provides that directives may be adopted to achieve uniform standards. Directives are legally binding instruments that establish objectives for Member States to achieve. While the objective of the directives must be fulfilled, the way in which this is achieved rests with Member States. Article 82(2)[30] provides that:

"To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

- **a.** *mutual admissibility of evidence between Member States;*
- **b.** *the rights of individuals in criminal procedure;*
- **c.** *the rights of victims of crime;*
- **d.** *any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.*

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals."

Framework decisions (FD) and recommendations[31] also form part of the panoply of instruments applicable to cross-border criminal cooperation. Like directives, it is the objective of the framework decisions that must be implemented by Member States, and the means to achieve these aims are at the discretion of the Member State. The Treaty of Lisbon abolished framework decisions in favour of directives. However, several framework decisions continue to be in effect and are of relevance to this report.

Despite the competence bestowed upon by Article 82 TFEU, specific legislation addressing pre-trial detention has not been developed. However, legal standards have emerged through the case law of the ECtHR, in line with the European

30 Article 82(2) TFEU.

31 Recommendations are non-binding and serve to set standards across the EU and provide a 'line of action without imposing any legal obligation; See https://european-union.europa.eu/institutions-law- budget/law/types-legislation_en.

Convention on Human Rights (ECHR). A key provision referred to by the ECtHR in the context of pre-trial detention and Flight Risk is Article 5 ECHR, which enshrines the right to liberty. Article 5 ECHR, provides that:

> **"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."**[32]

It aims to ensure that no one should be arbitrarily deprived of liberty. The right to liberty is a fundamental right. It contains a positive obligation to actively protect against unlawful interference with the right to liberty. It is not an absolute right, and it may be curtailed, but only in accordance with the law. The Article elaborates on the permissible encroachments of the right to liberty. Article 5(1)(c) addresses the deprivation of liberty for the purposes of preventing an individual from absconding where they are suspected to have committed a criminal offence.

> **"The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."**[33]

The provision includes the test of a 'reasonable suspicion' that the detention is 'necessary' to prevent the individual from absconding. The 'reasonable suspicion' standard requires an "existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence."[34] Central to this provision is the fundamental principle of the presumption of innocence, enshrined in Article 48(1) of the Charter of Fundamental Rights and Freedoms, Article 6(2) ECHR and elaborated upon in Directive EU 2016/343 on the presumption of innocence in criminal proceedings.[35] Advocate General Wathelet, referencing the case law of the ECtHR, commented that "there is a direct link in the case-law of the ECtHR between the right to liberty and the presumption of innocence. They are inseparable."[36]

As noted at the outset, the right to liberty is not absolute and may be limited once the '*reasonable suspicion*' test is satisfied and if one of the four grounds of detention developed in the jurisprudence discussed below has been substantiated. A number of directives were introduced to strengthen individual rights during criminal proceedings while bolstering mutual trust and recognition. As the preambles of the procedural rights directives note:

32 Article 5 (1) ECHR.

33 Article 5 (1)(c) ECHR.

34 ECtHR, *Guide on Article 5 of the European Convention on Human Rights - Right to liberty and security* updated on 31 August 2022, available at https://www.echr.coe.int/documents/d/echr/guide_art_5_eng, para 90.

35 Directive EU 2016/343 on the presumption of innocence in criminal proceedings.

36 CJEU Case C-310/18 PPU *Milev*, Opinion of AG Wathelet, 7 August 2018 para 62. See also the European Commission, Green Paper, *on the presumption of innocence*, 2006, COM(2006) 174, Final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l16032.

> *"The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition."*[37]

While these directives do not specifically address Flight Risk, the rights they seek to protect equally apply at the pre-trial stage. Examples of these provisions include the right to information in criminal proceedings[38] which applies from the moment a person is suspected of committing a criminal offence. It requires that individuals have access and knowledge of the case that is against them, and details of their rights in a language of their understanding.[39] The directive providing right of access to a lawyer[40] protects against arbitrary detention from the moment of arrest and bolsters the rights enshrined in Article 5 ECHR and central to this report. The directive on the right to interpretation and translation[41] is also particularly valuable in this context as it ensures that anyone suspected of a crime is provided with free translation, an essential safeguard in the context of cross-border criminal proceedings.

Notwithstanding numerous directives addressing procedural rights and cross-border cooperation in criminal matters,[42] there is no harmonisation of EU rules surrounding pre-trial detention or Flight Risk. This means that although broadly speaking, Member States enjoy significant cross-border cooperation in criminal matters, underpinned by fundamental concepts of mutual trust and recognition, the practical implementation of key aspects of these measures are often so divergent so as to undermine mutual trust and recognition.

2. The ECtHR approach to Flight Risk

2.1. Grounds for pre-trial detention: A focus on Flight Risk

The limited permissible grounds for detaining an individual Pre-trial were set out by the ECtHR in *Piruzyan v. Armenia*. The Court found that:

37 Directive 2010/64/EU Of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, at Preamble 3 and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to Information In criminal proceedings, at Preamble 3.

38 Ibidem.

39 Ibidem Article 4.

40 Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings.

41 Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

42 For example, Directive 2016/343EU 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings, Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

> *"The risk that the accused would fail to appear for trial (see Stögmüller v. Austria, 10 November 1969, § 15, Series A no. 9); the risk that the accused, if released, would take action to prejudice the administration of justice (see Wemhoff v. Germany, 27 June 1968, § 14, Series A no. 7) or commit further offences (see Matznetter v. Austria, 10 November 1969, § 9, Series A no. 10) or cause public disorder (see Letellier, cited above, § 51)."* [43]

In light of the jurisprudence, and in a bid to consolidate the measures and standards for ordering pre-trial detention, the European Commission noted in a recommendation that Member States should only impose pre-trial detention in the following circumstances;

> *"on the basis of a reasonable suspicion established through a careful case-by-case assessment, that the suspect has committed the offence in question and should limit the legal grounds for pre-trail detention to (a) risk of absconding; (b) risk of re-offending, (c) risk of interfering with the course of justice or (d) risk of a threat to public order."*[44]

In addition to setting out the legal standard and the permissible grounds, the Recommendation also refers to how this assessment should be conducted. It provides that every decision by a judicial authority imposing or prolonging Pre-trial detention is duly reasoned and justified and that it references the specific circumstances of the accused and justifies the detention.[45] These principles were developed from the evolving case law of the ECtHR and serve to provide a template for judges from the national courts when deliberating on issues of pre-trial detention and alternative measures. Of the four grounds referred to above, the first one, namely 'the risk that the accused would fail to appear for trial' or Flight Risk, is relevant for this study.

2.2. Assessing Flight Risk

A variety of different reasons have been given by national courts when directing pre-trial detention due to a perceived risk of flight. These include for example, a given history of non-appearance at court by the accused,[46] the difficulty apprehending the individual at the outset of proceedings,[47] and the likelihood of a sentence on conviction which would give rise to a danger of absconding.[48] Often the concerns of Flight Risk are either combined with or justified by the nature and seriousness of the alleged offence by the national courts.[49] In its assessment of Flight Risk, the Court has rejected any attempt to invoke pre-trial

43 ECtHR [Third Section], *Piruzyan v. Armenia*, No. 33376/07, judgment of 26 June 2012, para 94.

44 European Commission Recommendations (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para. 19.

45 Ibidem para. 22.

46 ECtHR [GC], *Selahattin Demirtaş v. Turkey* (no.2) No 14305/17, judgment of 22 December 2020.

47 ECtHR [Second Section], *Gilanov v. The Republic of Moldova*, No 44719/10, judgment of 13 December 2022.

48 ECtHR [Court Chamber]. *Stögmüller v Austria* No. 1602/62, judgment of 10 November 1969.

49 ECtHR [GC], *Idalov v. Russia*, No. 5826/03, judgment of 22 May 2012.

detention simply due to the nature of the offence or the likely sentence imposed on conviction.

> *"The seriousness of the penalty and the strength of the evidence gathered may be relevant factors, but are not in themselves decisive in this respect, and the possibility of obtaining guarantees to ensure the appearance of the accused may be used to prevent this risk."* [50]

The Court has been unequivocal in any attempt to direct pre-trial detention where Flight Risk has been raised as an issue, entirely based on the seriousness of the alleged offences, and in the absence of other factors supporting Flight Risk. *"The risk of flight cannot be gauged solely on the basis of the severity of the possible sentence."*[51]

Equally, the ECtHR has been highly critical of cases where on account of the nature and seriousness of the offence, a State has specifically legislated for pre-trial detention only, with no possibility of applying alternative measures. In doing so, the State shifts the presumption in favour of pre-trial detention and frustrates the presumption of innocence by displacing detention as a last resort. The effect is to absolve the State of a requirement to give a reasoned consideration of alternative measures. Precluding alternative measures on this basis was found to be incompatible with Article 5 ECHR.

> *"The Court notes that in S.B.C. v. the United Kingdom (no. 39360/98, 19 June 2001) it found a violation of Article 5 § 3 because the English law did not allow the right of bail to a particular category of accused. The Court found in that case that the possibility of any consideration of pre-trial release on bail had been excluded in advance by the legislature."* [52]

In particular the Court has repeatedly found that Flight Risk alone cannot give rise to pre-trial detention, where sufficient guarantees can be given which could ensure court attendance. Guarantees for examples could include the lodgement of a sum of money, regular attendance at a police station, surrender of passports and an undertaking not to apply for other travel documentation. In *Letellier v. France,* the Court held as follows:

> *"When the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by lodging a security."*[53]

50 ECtHR [Fourth Section], *Maksim Savov v. Bulgaria*, No. 28143/10 judgment of 13 January 2021.

51 ECtHR [Second Section], *Radonjić and Romić v. Serbia*, No. 43674/16, judgment of 4 April 2023. See also ECtHR [Second Section], *Gilanov v. The Republic of Moldova*, No 44719/10, judgment of 13 December 2022, ECtHR [Court Chamber], *Neumeister v. Austria*, No. 1936/63, judgment of 27 June 1968.

52 ECtHR [Fourth Section], *Boicenco v. Moldova* No. 41088/05, judgment of 11 July 2006, para 134.

53 ECtHR [Court Chamber], *Letellier v. France*, No. 12369/86, judgment of 26 June 1991, para 46.

2.3. Criteria developed for assessing Flight Risk

As discussed, the Court will not entertain the serious nature of the allegations or the severity of the potential sentence on conviction as a singularly defining ground to direct Pre-trial detention in the context of Flight Risk. Instead, and through its jurisprudence, the Court has identified criteria for evaluating and determining if there is a Flight Risk and should be detained pending the outcome of the case. These criteria relate primarily to the character and personal circumstances of the accused.

The case of *Neumeister v. Austria* is one of the early considerations of the relevant criteria. The standards articulated in this case have since been consistently applied and adopted in subsequent cases. Here the Applicant had been on bail pending his trial. However, arising from a subsequent statement made by his co-accused, the allegations against Mr Neumeister became more serious, and as a result, the State applied to revoke bail and remand the Applicant in custody. The Court noted that this development which elevated the case against the Applicant was not a reason alone to determine Flight Risk, but instead listed other criteria that also must be taken into account.

> *"…other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial."* [54]

In the case of *Panchenko v. Russia*, the ECtHR commented on the failure of the domestic court to fully consider the individual's personal circumstances, particularly his permanent residence and family ties,

> *"…it was not until 29 February 2000 that the city court, when ordering the applicant's release from custody, took stock of the applicant's personal circumstances, such as his permanent residence and family ties, positive work references and the absence of a criminal record, which mitigated, if not removed, the risk of his absconding or interfering with the administration of justice"* [55]

In *Stögmüller v. Austria* the Court expanded on the elements deemed to be relevant for the purposes of evaluating Flight Risk:

> *"One must note, in this respect, that the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier … there must be a whole set of circumstances, particularly, the heavy sentence to be expected or the accused's particular distaste of detention, or the lack*

54 ECtHR [Court Chamber], *Neumeister v. Austria,* No. 1936/63, judgment of 27 June 1968, para.10.

55 ECtHR [First Section], *Panchenko v. Russia* No. 45100/98, judgment of 8 May 2005. See also ECtHR [GC], *Idalov v.Russia*, No. 5826/03, judgment of 22 May 2012.

of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem to him to be a lesser evil than continued imprisonment." [56]

The Court has consistently rejected the cherry-picking of criteria, and this comes to the fore when considering community ties and family links. Often by virtue of being a foreign national, community ties are more tenuous, family links more remote. The potential burden of extradition proceedings should the individual abscond weighs heavy in the minds of the authorities, alternatives to detention become less attractive, and often the result is that foreign nationals are disproportionately overrepresented when it comes to pre-trial detention.[57] To this end, the Council of Europe has formulated recommendations to Member States that a lack of ties to the community shall not be '*sufficient to conclude that there is a risk of flight*' and that alternatives to pre-trial detention shall always be considered by judicial decision-makers.[58]

The development of criteria from the case law of the ECtHR demonstrates that a case-by-case analysis is required. This analysis must refer to the relevant personal circumstances of the individual, coupled with the circumstances of the allegations. Namely, the nature of the alleged offence, the strength of the evidence, and the likely sentence to be imposed. While weight is attached to the character of the accused - with specific reference to the morals of the individual, previous convictions, and their personal circumstances including family and community ties, and employment - the Court has been consistent in the need for a holistic approach in any assessment of Flight Risk.

2.3.1. The link between Flight Risk and time spent in custody

The ECtHR has found that when an individual is detained pending trial, the risk of flight decreases as any sentence that might follow on conviction would be reduced to take into account the time already spent in pre-trial detention. This was suggested in *Neumeister v. Austria,* where it was noted that the danger of absconding should decrease as the time spent in detention passes. The rationale for this lies in the probability that the time spent in custody on remand would be deducted from the total period of imprisonment should the individual ultimately be convicted. Therefore, this too should form part of the balancing exercise when determining Flight Risk. This was followed in subsequent cases, including in *IA v France,* where the Court noted that the risk of flight, '*necessarily decreases as time passes*.'[59]

2.4. Requirement of evidence-based criteria in assessing Flight Risk

Further to developing the criteria to be considered in assessing Flight Risk, the

56 ECtHR [Court Chamber]. *Stögmüller v Austria* No. 1602/62, judgment of 10 November 1969, para. 15.

57 Fair Trials, *A Measure of Last Resort: The practice of pre-trial detention decision-making in the EU*, 2016, available at: https://www.fairtrials.org/publication/measure-last-resort, p.21.

58 Recommendations CM/Rec (2012)12 of the Committee of Ministers to Member States concerning foreign prisoners 10 October 2012.

59 ECtHR [Court Chamber], *IA v. France* No 28213/95, judgment of 23 September 1998, para 105.

ECtHR has also elaborated on how this assessment should be undertaken. The case law of the ECtHR, has been unequivocal in its requirement that the criteria be evidence based and firmly rooted in fact.[60]

In *Panchenko v. Russia,* the ECtHR considered whether the continued detention of the Applicant was justified on the grounds of a perceived risk of absconding. The Court held that there was a breach of Article 5(4) ECHR due to the lack of concrete facts considered in support of the perceived risk of flight, noting that the examples given were '*general and abstract*.'[61] Further, the Court commented that the national court failed to properly take into account the family ties, permanent address and the fact that the Applicant had no criminal record.

> *"The Court finally observes that the decisions extending the applicant's detention on remand were stereotypically worded and in summary form. They did not describe in detail the applicant's personal situation beyond a mere reference to his "personality" and were not accompanied with any explanation as to what his personality actually was and why it made his detention necessary."* [62]

The Court in *Grubnyk v. Ukraine*, held *"that the domestic courts gave 'relevant' reasons for his detention which were 'sufficient' under the circumstances to meet the minimum standard of Article 5(3) of the Convention,"* [63] and as a result found that there was no violation of Article 5 ECHR.

Any risks or concerns referred to and relied upon when ordering pre-trial detention must be duly substantiated, and the reasoning must not be abstract, general or stereotyped. The personal circumstance must be well considered and evidenced.64 More recently, in the case of *Kovrov & Others v. Russia,* the Court rejected the contention of risk of flight in circumstances where the finding was not supported by facts.

> *"In the present case the decisions of the domestic authorities gave no reasons why, notwithstanding the arguments put forward by the applicant, they considered the risk of his absconding to be decisive. They referred to the fact that the applicant did not have any place of residence, however, the mere absence of a fixed residence does not give rise to a danger of absconding (see Pshevecherskiy v. Russia, no. 28957/02, § 68, 24 May 2007). The Court*

60 ECtHR [First Section], Trzaska v. Poland, No. 25792/94, judgment of 11 July 2000, para 65. See also ECtHR [Second Section], *Radonjić and Romić v. Serbia*, No. 43674/16, judgment of 4 April 2023.

61 ECtHR [First Section], *Panchenko v. Russia* No. 45100/98, judgment of 8 May 2005. para 94.

62 Ibidem, para 107.

63 ECtHR [Fifth Section], *Grubnyk v. Ukraine*, No 58444/15, judgment of 17 December 2020, para 129.

64 ECtHR [GC], *Merabishvili v. Georgia*, No. 72508/13, judgment of 28 November 2017, ECtHR [Second Section], *Gilanov v. The Republic of Moldova,* No 44719/10, judgment of 13 December 2022, ECtHR [GC], *Selahattin Demirtaş v. Turkey* (no.2) (App. no 14305/17) 22 December 2020, ECtHR [Fourth Section], *Maksim Savov v.Bulgaria,* No. 28143/10, judgment of 13 October 2020, ECtHR [Third Section], *Hysa v. Albania* No. 52048/16,judgment of 21 February 2023, ECtHR [Second Section], *Bakirhan and others v. Turkey*, No. 40029/05, judgment of 7 December 2010.

finds that the existence of such a risk was not established in the case at hand."[65]

In *Makarov v. Russia,* the Court delved into the obligation on the domestic authorities to "*analyse the applicant's personal situation…and to give specific reasons, supported by evidentiary finding,"*[66] when detaining the Applicant pre-trial. In that case, the Court was highly critical of the failure to consider the Applicant's submissions rebutting Flight Risk and accepting the arguments of the Russian internal security services without conducting a sufficient analysis of its credibility:

"It is a matter of serious concern for the Court that the domestic authorities applied a selective and inconsistent approach to the assessment of the parties' arguments pertaining to the grounds for the applicant's detention. While deeming the applicant's arguments to be subjective and giving no heed to relevant facts which mitigated the risk of his absconding, the courts accepted the information from the FSB officials uncritically, without questioning its credibility."[67]

2.5. The duty to consider alternative measures

Alternative measures refer to the application of '*less restrictive measures*' as an alternative to detention.[68] Article 5(3) ECHR notes that pending trial,

"release may be conditioned by guarantees to appear for trial."

In the case of *Jabolonski v. Poland,* the Court examined the reasons grounding the Applicant's detention pending trial. It was considered in accordance with Article 5(4) and the right of the Applicant to review the lawfulness of his detention. The Court noted that the reasons given for detaining the Applicant were to ensure the proper conduct of the trial. Absent from the deliberation was any consideration of what actually gave rise to the risk of flight, or alternative measures that could guarantee attendance. As a result, the Court found a violation of Article 5(4) ECHR.[69] In doing so, the ECtHR held that the specific duty to consider alternative measures is reflected in the '*purpose*' of Article 5 ECHR, and as a result that the underlying principle of the presumption of innocence favours release:

"Under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of

65 ECtHR [Third Section], *Kovrov & Others v. Russia* Numbers. 42296/09, 71805/11, 75089/13, 1327/16, 14206/16, judgment of 16 November 2023.

66 ECtHR [First Section], *Alexsandr Makarov v. Russia* (No. 15217/07), judgment of 14 September 2009, para 127.

67 Ibidem.

68 European Commission Recommendations (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para. 5.

69 ECtHR [Fourth Section], *Jabolonski v. Poland*, No. 33492/96, judgment of 21 December 2000, para. 84.

> *ensuring his appearance at trial. Indeed, that Article lays down not only the right to "trial within a reasonable time or release pending trial" but also provides that "release may be conditioned by guarantees to appear for trial" … That provision does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release – even subject to guarantees. Until conviction he must be presumed innocent, and the purpose of Article 5 § 3 is essentially to require his provisional release once his continuing detention ceases to be reasonable (see the Neumeister judgment cited above, § 4)."*[70]

The Court ultimately found that in light of the years spent in pre-trial detention, there was inadequate consideration given to whether the same aim of bringing the Applicant to trial could be achieved with less restrictive means, such as admitting him to bail or under police supervision, as provided for by domestic law. Specifically, the Court found that the national courts had failed to properly reflect on what the specific factors were that gave rise to a finding of Flight Risk, and why alternative measures provided for in law were not deemed fit to ensure the attendance of the Applicant at trial.[71] The obligation to consider alternative measures was reiterated in the case of *Idalov v. Russia,* where the Court held that "*when deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial."*[72]

In the case of *Merabishvili v. Georgia*, the Court again referred explicitly to the duty to consider alternative measures in the context of Flight Risk. Referring to the meaning of Article 5(3) and the previous jurisprudence of the Court, it held that:

> *"when the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that will ensure that appearance."*[73]

This position has been supported by the Commission in its Green Paper on Detention which noted that *"a judicial authority must apply the most lenient coercive measure appropriate, i.e. choose an alternative measure to pre-trial detention, if this is sufficient to eliminate the risks of absconding or reoffending."*[74] Alternative measures referred to above have included bail conditions,[75] police supervision,[76] handing in passports to authorities.[77]

70 Ibidem para. 83.

71 Ibidem para. 84.

72 See ECtHR [GC], *Idalov v. Russia*, No. 5826/03, judgment of 22 May 2012, para 140. See also ECtHR [Fourth Section], *Sulaoja v. Estonia*, No. 55939/00 judgment of 15 February 2005.

73 ECtHR [GC], *Merabishvili v. Georgia*, No. 72508/13, judgment of 28 November 2017, para. 223.

74 European Commission, Green Paper, *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention,* 2011 (COM(2011) 327 final), available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011DC0327 p.9.

75 ECtHR [Fourth Section], *Jabolonski v. Polond*, No. 33492/96, judgment of 21 December 2000.

76 Ibidem.

77 ECtHR [Court Chamber], *Neumeister v. Austria,* No. 1936/63, judgment of 27 June 1968.

A number of framework decisions[78] were introduced as a means to improve cross-border judicial cooperation in criminal matters. The European Supervision Order (ESO) is particularly relevant in this context. It provides for cross-border supervision by authorities of individuals accused of committing a crime as an alternative to pre-trial detention. To this end. Article 2 of the ESO specifically sets out the objectives of the instrument:

> **"to ensure the due course of justice and, in particular, that the person concerned will be available to stand trial" and "to promote, where appropriate, the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place;"[79]**

The ESO particularly addresses the plight of foreign nationals accused of criminal conduct. Preamble 5 notes the particular challenges foreign nationals are confronted with when applying for alternatives to pre-trial detention. The ESO looks to address this inequality and promote the right to liberty and the presumption of innocence.

As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident.[80]

3. Comparative study: domestic research analysis

As outlined, this comparative report provides insight into the evaluation of the risk of flight when assessing whether an individual should be remanded in custody or released, pending the outcome of the case. Having considered the Regional context through the statistical data and legal framework, with emphasis on the ECtHR decisions, and the standards contained therein, the study turns to the

78 For example, Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

79 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, Art. 2.

80 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detentionPreamble 5.

national experiences.

The analysis of the assessment of Flight Risk draws on five national experiences, beginning with an overview of the national criminal justice systems and pre-trial detention procedures. It then considers the assessment of Flight Risk, comparing the core criteria relied upon in each Member State, and how the key actors approach the question of Flight Risk, before concluding with how the decision-makers ultimately assess, deliberates and determines the issue.

The experience of each partner is informed by its geographic location, for example, whether it is situated centrally or is an island at the edge of Europe, whether it is a member of the Schengen area or not, whether the neighbouring countries are in the EU or are third countries. Other relevant distinguishing features arise from the particularities of the legal system, whether common or civil law jurisdictions, the differing functions or roles played by the main actors. At the same time, and notwithstanding these different features, all five partners have similar experiences, trends, and challenges relating to the shared core values of the right to liberty, detention as a measure of last resort, and the presumption of innocence.

3.1. National legal framework and procedures

This section will analyse the judicial decision-making process in Austria, Belgium, Bulgaria, Ireland and Poland. First by giving a brief overview of the national legal context, before turning to the specific practices involved in the assessment of Flight Risk.

Austrian criminal law, rooted in the civil law tradition, is characterised by inquisitorial processes. At the core of the Austrian national legal framework is the Criminal Code ("*Strafgesetzbuch*"), which defines criminal offences, and the Code of Criminal Procedure (CCP) ("*Strafprozessordnung*"), which regulates the process of criminal prosecution by the police, the public prosecutor's office and the court.[81]

Pre-trial detention may only be requested by the public prosecutor (public prosecutor's office "*Staatsanwaltschaft*") and must be authorised by a competent judge, the detention and legal protection judge ("Haft-und Rechtsschutzrichter"). Representation by defence counsel is mandatory for the accused throughout the pre-trial proceedings.

The procedures following arrest are governed by Art 172 CCP. Upon arrest, the police must notify the prosecuting authority without delay. Within 48 hours of arrest, the accused must be placed in the detention facility of the competent court. If the police has arrested the accused without direct order from the public prosecutor's office, it must question the accused without delay on the suspicion of the crime and the grounds of the arrest. If it becomes evident during this investigation that no further ground exists which warrants holding the accused, they must be released immediately. The accused must also be released

81 FLIGHTRISK Austrian National Report, 2024, paragraph 2.2.1.

immediately if the prosecuting authority declares that it will not request pre-trial detention, but instead will apply milder measures.

Pursuant to Art 174 CCP, individuals who have been arrested by the police must, after admission to a detention facility, be questioned by a competent judge regarding the allegations and the grounds of detention. Defence counsel and the prosecution must be afforded an opportunity to participate in the questioning, but it is not mandatory. Prior to making a decision on whether to impose pre-trial detention, the court may conduct immediate investigations or instruct the police to do so, if this is deemed necessary in order to ascertain the grounds for pre-trial detention. 48 hours after admission to a detention facility, the court must decide whether the accused is to be released, using milder measures (Art 173 (5) CCP), or whether to impose pre-trial detention.

In **Belgium** the criminal justice system is a mixed inquisitorial/accusatory system. In principle, the pre-trial investigative phase is predominantly inquisitorial in nature, while the trial phase appears to follow the accusatory model. The process distinguishes between two different types of criminal investigations, namely the information investigation - led by the public prosecutor - and the judicial investigation - led by the investigating judge. The distinction between the two lies in the type of investigative powers available. The powers of the investigating judge can be described as more far-reaching. Thus, it is only the investigating judge who can order a house warrant, a wiretap or - relevant here - an arrest warrant.[82] Once an investigating judge is appointed, it is at this stage that the public prosecutor may also request that a suspect be placed in pre-trial detention.[83]

With regard to pre-trial detention, the most relevant sources of law are the Constitution, the Pre-trial Detention Act (PTDA) and the Code of Criminal Procedure (CCP). A suspect who has been detained must be brought before the investigating judge within 48 hours or released. At this point the suspect has the right to a lawyer if the investigating judge issues a warrant of arrest, this warrant is treated as a custody order for a period of 5 days, after which a decision must be made in relation to remanding the individual in custody pending trial. Thereafter the detention is automatically and periodically reviewed.

At the close of the judicial investigation, a special procedure takes place during which the judicial council will decide on whether there is sufficient evidence to send the suspect to the criminal court for trial. The appropriateness of the continued pre-trial detention is also assessed at this point. Once the investigation phase is completed and pre-trial detention has been extended, the detention runs until the conclusion of the case, and the pre-trial detention is longer periodically reviewed. However, the accused can still file a petition for release.

Like Austria, Belgium, and Poland, **Bulgaria** is a civil law state. The Criminal Procedure Code (CPC) provides the legal framework for criminal proceedings, and governs the application of pre-trial detention. Pre-trial detention in Bulgaria

82 The 'arrest warrant' in the Belgian context is the decision of the investigating judge to place a suspect in pre-trial detention.

83 FLIGHTRISK Belgian National Report, 2024, paragraph 2.2.

is divided into three types: police detention, detention by a prosecutor (for 72 hours), and remand in custody. In accordance with Article 57 of the Criminal Procedure Code, pre-trial detention is applied in order to prevent the accused from absconding, committing a crime or preventing the execution of an effective sentence.[84] According to Article 193 of the CPC, the authorities responsible for conducting the pre-trial proceedings are the prosecutor and the investigative authorities.

Article 63 CPC contains the key condition for pre-trial detention – a reasonable assumption that the accused has committed a crime, as well as two of the specific grounds for detention, namely the danger that the accused may abscond or commit a crime.[85] Pursuant to Articles 64(4) – (7) of the CPC, the court examines the case in an open session with the participation of the prosecutor, the accused and defence counsel.[86] Where the grounds under Article 63 are met, the court remands the accused in custody.

Police detention under Article 72(1)(1) of the Ministry of the Interior Act can only be imposed where '*there is information that the person has committed a crime.*' The statutory provision is general and does not appear to suggest that for such detention, it is necessary to have 'reasonable suspicion' within the meaning of the ECHR.[87] Detention for up to 72 hours ordered by a prosecutor under Article 64(2) CPC has an even more general purpose – '*to bring [the accused] to court.*' Similarly, the requirement of '*reasonable suspicion*' is not clearly stated, even though the detention, unlike police detention, is only permissible where the person has been charged with a crime.

In contrast to the other Member States reflected in this study, **Ireland** is an adversarial system rooted in the common law tradition. Both sides of each case are argued by the defence and prosecution before a presiding judge who considers the submissions, adjudicating on matters of law, before delivering a decision. Unlike the inquisitorial system of the partners to this research, the judges do not have an investigative function. Importantly this means in practice, that the judge can only decide on matters that have been submitted before the court by one side or another.

The law relating to pre-trial detention derives from the unenumerated rights reflected in the Irish Constitution, case law, in particular the seminal case of the *AG v O'Callaghan,*[88] and Statute, namely the Bail Act 1997. Prior to the Bail Act, bail could only be refused under the *O'Callaghan rules* where there was a likelihood that the accused would evade justice, by absconding to avoid trial or interfering with evidence or witnesses. However, on foot of a referendum, the Constitution was amended to provide that:

84 FLIGHTRISK Bulgarian National Report, 2024, paragraph 2.4.

85 Ibidem.

86 Ibidem.

87 Ibidem.

88 AG v. O'Callaghan [1966] IR 501.

> "Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person."

In terms of the process, following on from arrest, the accused is brought to a police station and detained for questioning. The accused is entitled to a lawyer from the moment of detention, and at all subsequent court appearances. In practice the defence lawyer engages with the police or prosecutor in advance of any bail hearing with a view to agreeing bail conditions, in which case bail is granted 'on consent' by the court. In circumstances where the police object to bail, the matter is brought before the court to determine whether the individual is to be remanded on bail or in custody. A refusal of bail can be appealed in the High Court. An order directing pre-trial detention is not automatically reviewed, but is only addressed on foot of an application for bail or to vary bail conditions brought on notice to the prosecution by the defence.

Although referenced at the outset in the definition section of this report, it is worth recalling the distinction in terminology when discussing '*bail.*' In Belgium and Bulgaria, the term '*bail*' is specific to the requirement to lodge money as a condition of release pending trial, which in Austria, is known as '*Kaution.*' In Ireland, the word bail denotes the release from custody of an accused on any given condition pending trial or the final determination of the case. It is not limited to the lodgement of a sum money, but rather it is the alternative measure and encompasses all other alternative measures or conditions that can be placed on an individual, including financial security. The Belgian equivalent is known as Release under Conditions (RUC), and in Austria such alternative measures, or the release subject to conditions are referred to as '*Milder Measures*.'

The **Polish** criminal proceedings is primarily governed by the Code of Criminal Procedure. Preventive measures, which include detention on remand, bail, and police supervision are applied in the course of the proceedings either by virtue of a decision of the public prosecutor (in the case of non-custodial preventive measures) or by the court at the request of the public prosecutor (in the case of pre-trial detention).

Article 249 of the Code of Criminal Procedure provides that '*preventive measures may be applied in order to secure the proper conduct of the proceedings, and exceptionally, to prevent a new serious offence from being committed by the accused. It may be applied only if the evidence collected indicates a high probability that he has committed an offence*.' In line with the above provision, a request for pre-trial detention must fulfil certain requirements. The prosecutor is required to show evidence demonstrating a high probability that the suspect has committed the offence. In addition, the request for pre-trial detention must state the circumstances that indicate a risk to the proper conduct of the proceedings or that the suspect could commit a further serious offence, as well as demonstrating the need for pre-trial detention.

At any stage of the proceedings, the suspect has the right to have a defence counsel present. In some circumstances, the participation of defence counsel

in proceedings is mandatory, for example, where the suspect is a minor or in cases where the mental state of the accused may impact on their ability defend themselves.[89] Despite its mandatory nature, there have been cases where this requirement has not been adhered to during the first interrogation.[90]

In Poland an individual who has been in pre-trial detention and subsequently acquitted is entitled to compensation. Data from the Ministry of Justice shows that in 2023, compensation for the use of manifestly unfair pre-trial detention was awarded to 116 individuals.[91] Over €1.17 million was paid out in reparations.[92] In Bulgaria where the pre-trial proceedings are subsequently terminated, or the defendant is acquitted, the individual may seek compensation for the time spent in detention.[93] In Austria the Federal Constitutional Law of 1988 on the Protection of Personal Freedom provides for compensation for cases involving unjust arrests or detentions.[94]

3.2. National assessment of Flight Risk

In this next segment the study will turn to **how Flight Risk is defined and applied in practice** as one of the grounds for pre-trial detention on a national level. It follows that in the absence of a harmonised approach to pre-trial detention, and specifically Flight Risk, there is no uniform agreed definition of Flight Risk. Instead, the term carries with it a range of different meanings and connotations of risk. The statistical research and literature review prepared by the NICC refers to the different terms that can be used to describe Flight Risk, namely "*the risk of absconding, the risk of fleeing, the risk of evading (not from a prison, but from a particular country), the risk of hiding*."[95]

In **Bulgaria** and **Austria**, the terminology adopted when referring to Flight Risk, is the '*risk of absconding*.' In **Belgium** the wording is '*evading the judicial procedure*" this gives a broad definition which encompasses evading justice without fleeing, as well as fleeing a jurisdiction.[96] **Ireland's** seminal bail case of *AG* v. *O'Callaghan* notes broadly that the purpose of refusing bail is to '*secure the attendance of the accused at trial*.'[97] This is similar to the reference to securing the proper conduct of the proceedings in the Code of Criminal Procedure (CCP) in **Poland**. In accordance with the CCP in Poland pre-trial detention may be employed if there is a well-founded fear that the accused will abscond or go into hiding, especially if the identity cannot be established, or if there is no

89 FLIGHTRISK Polish National Report, 2024, paragraph 3.1.

90 See, for example ECtHR judgment [First Section] *Lalik v. Poland* No. 47834/19, judgment of 11 May 2023.

91 MS Statistical Handbook, available at https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/download,2853,39.html.

92 Ibidem.

93 FLIGHTRISK Bulgarian National Report, 2024, paragraph 2.4.

94 FLIGHTRISK Austrian National Report, 2024, paragraph 2.2.1.

95 NICC, A*vailable statistical data and research on flight risk in pre-trial (detention)proceedings,* 2024, page 4.

96 FLIGHTRISK Belgian National Report, 2024, paragraph 2.2.

97 AG v. O'Callaghan [1966] IR 501.

permanent place of residence in the country.

Flight Risk and the risk of recidivism, or a combination of the two, are the most frequently applied grounds invoked to justify pre-trial detention. In most EU Member States with the exception of Germany, the risk of reoffending is usually the most readily applied ground.[98] This is for example the case in **Austria,** where Flight Risk is rarely applied as a stand-alone ground, but rather in conjunction with the risk of recidivism.[99] In the research conducted as part of this study, of the 59 pre-trial detention orders that were examined, over half of them (32) contained Flight Risk and the risk of re-offending as grounds for pre-trial detention, and about a third of the orders (22) contained all three possible grounds for pre-trial detention. Flight Risk was the sole ground in only two orders (in three orders, the grounds were not specified). In the two orders where Flight Risk was the sole ground, milder measures were applied.[100] The research in line with previous studies on the topic noted with concern that the risk of re-offending is considered to be easier to prove, and more difficult to disprove than Flight Risk, and is deployed accordingly. This is particularly problematic because it appears to set aside the careful consideration of the facts of the case, in favour of achieving pre-trial detention, and it risks operating as a preventive measure.[101]

In relation to its application in practice in **Belgium,** studies similarly found that recidivism is by far the most frequently applied ground. Flight Risk was often applied in a significant number of the cases (62%) - but it is the least often relied upon of the three grounds (recidivism 93% and collusion 73%). In most cases (44%) all 3 criteria were applied together. Flight Risk was retained as the sole ground for pre-trial detention in only two cases (2.4%), noting that both files concerned investigations into offences with potential sentences exceeding 15 years imprisonment (for which there is no legal requirement to mention any of the three criteria).[102] During the focus groups carried out as part of the national study, it was remarked upon that this preference for recidivism over Flight Risk could be explained by the relative vagueness of the criterion and the ease of justification. Conversely the focus group described Fight Risk as the most concrete criterion requiring some objectification[103].

In **Bulgaria**, the most significant grounds referred to in the Criminal Procedure Code are the danger of absconding or committing a crime.

> *"The measure of remand in custody shall be applied where a reasonable assumption can be made that the accused party has committed a criminal offence punishable by deprivation of liberty or another severe punishment, and*

98 NICC, *Available statistical data and research on flight risk in pre-trial (detention)proceedings,* 2024, page 8.

99 Hammerschick and Reidinger, *DETOUR-Towards Pre-trial Detention as Ultima Ratio. 2nd Austrian National Report on Expert Interviews*, October 2017.

100 FLIGHTRISK Austrian National Report, 2024, paragraph 3.

101 Hammerschick and Reidinger, *DETOUR-Towards Pre-trial Detention as Ultima Ratio. 2nd Austrian National Report on Expert Interviews*, October 2017.

102 FLIGHTRISK Belgian National Report, 2024, paragraph 3.

103 Ibidem.

evidence case materials indicate that h/she poses a real risk of absconding or committing another criminal offence."[104]

In all 50 of the cases considered during the research, the prosecutor relied on either the danger of absconding or the risk of reoffending in support of a request for pre-trial detention.[105]

3.3. Criteria adopted when assessing Flight Risk

Having looked at the term Flight Risk and its application, the research will consider the criteria adopted by decision-makers in their assessment of Flight Risk as a ground for pre-trial detention. Criteria are the elements, or the facts of the case considered, when pre-trial detention and alternative measures are placed in the scales. There are two broad categories of criteria, the first relates to the nature of the alleged offence, and the second relates to the character and previous convictions of the accused.

104 Bulgarian Criminal Procedure Code Article 63 available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2019)034-e.

105 FLIGHTRISK Bulgarian National Report, 2024, paragraph 2.4.1.

Criteria when assessing PTD in the context of Flight Risk	Austria	Belgium	Bulgaria	Ireland	Poland
Nature and seriousness of the offence	•	•	•	•	•
The strength of the evidence		•	•	•	
Previous offences committed while on bail		•	•	•	
Likely sentence to be imposed on conviction	•	•		•	•
Previous history of failing to attend Court while out on bail		•	•	•	•
Previous conduct in the course of the proceedings		•	•		•
Previous convictions	** •	•	•	•	
Character		•			
Nationality of accused	•	•			•
Travel History		•	•		
Financial resources		•	•	•	•
Fixed abode	•	•			
Family ties abroad	** •	•			
Lack of social integration Ties to the community	•	•	•	•	•
Other Flight Risk Indicators i.e. plane tickets purchased		•	•		
Psychological issues		•			
Suspect failed to appear in prison				•	•

*** denotes criteria that are rarely mentioned, or which interviewees have noted, but would not be listed as specific justifications in the decisions examined during this research.*

Table 1 above illustrates that the most commonly applied criteria in relation to all five Member States represented in the study, is the nature and seriousness of the offence alleged, and the lack of community ties. Thereafter it is the question of previous convictions and a history of failing to attend Court when required, coupled with the likely sentence that would be imposed on conviction, that broadly forms part of the assessment.

In **Austria,** the primary aim of imposing pre-trial detention is to ensure the proceedings.[106] To this end, the judge is required to make an assessment of the character of the accused and the severity of the likely sentence which would be imposed upon conviction.[107] The test (criteria relating to personal circumstances and residence) for assessing Flight Risk where the offence carries a sentence of less than five years imprisonment is set out in Art 173 (3) CCP, which states that:

> *"The risk of flight is not to be assumed if the accused is suspected of a crime that is not punishable by a sentence of more than five years' imprisonment, if they have orderly personal circumstances and a permanent residence in the country, unless they have already made preparations for flight."*

While not legally binding on the lower courts, the Supreme Court in its jurisprudence has concretised the requirements for the use of Flight Risk as a ground for pre-trial detention.[108] It has found that relying solely on a lack of community ties is insufficient to justify a finding of Flight Risk. Rather, a reasoned consideration of the particular circumstances of the case is required. This evaluation comprises of a cumulative assessment of the social, family, and economic circumstances both domestically and abroad.

In its assessment of the particular circumstances of the individual, the Austrian Supreme Court has stated that a lack of integration in Austria does not automatically mean that there is a Flight Risk where the accused is integrated in another EU Member State, and there are no other sufficient concrete indications to show that the individual will evade domestic criminal proceedings. Illustrative of this point is a decision of the Austrian Supreme Court where the court found that the petitioner's right to personal freedom was violated. In that case, the court held that the lack of social integration in Austria did not constitute as a valid ground for pre-trial detention, considering the claimant's social integration in Hungary, a Member State of the European Union.[109]

The desk research carried out in Austria confirms that there are no guidelines for judicial authorities on the assessment of Flight Risk. Instead, the decision-making by the prosecutor consists of an individual assessment by the officer weighing up the different factors and circumstances of the accused.[110]

106 FLIGHTRISK Austrian National Report, 2024, paragraph 2.4.4.

107 Ibidem.

108 FLIGHTRISK Austrian National Report, 2024, paragraph 3.1.

109 OGH 17.11.2009, 110s31/08f. – see also the National Report of Austria paragraph 3.1.

110 Ibidem.

> *"Of course, it is easiest if someone tries to flee as soon as they are stopped by the police. Then you basically look to see if he has a place of residence. Does he have any outstanding warrants? And what is the expected penalty? Does he have a job, of course, which also plays a role, i.e. is he socially integrated, does he have a family? But I don't think that's something where we have any specific requirements in terms of content, because that's the basics you learn in training anyway, and as I said, the law is relatively open and it's often a question where many things interact, firstly proportionality, grounds for detention, the suspicion."*
>
> - Interview with a prosecutor, 07.09.2023, Austria

The criteria adopted in **Belgium,** where the emphasis rests on there being '*serious reasons that the suspect would evade justice,*[111] depends on, for example, if the accused is fleeing to another jurisdiction or more generally not attending the proceedings in court *(supra, 3.2).* The criteria in respect of the former include;

- possible ties with foreign countries,
- having a foreign nationality,
- lack of ties in Belgium,
- family ties abroad,
- the available financial resources.

With regard to the more general risk of evading justice, the usual criteria considered include;

- any previous convictions in absentia,
- a perceived ability to comply with conditions, whether monitoring is a viable option,
- whether the paperwork and registration of the accused within the state is in order,
- if there is a history of a failure to comply with a previous RUC.[112]

This distinction carries through to the assessment of alternative measures where there must be a nexus between the conditions imposed and the risk of flight *(infra 3.6).* In **Belgium** the two core criteria central to the assessment of Flight Risk are whether the accused had a permanent residence, and, to a lesser extent the nationality of the accused. The research demonstrated that a finding of Flight Risk was often made when the suspects were of foreign nationality, usually outside of the EU, and if they were of no fixed abode.[113] Another important consideration was the role the accused is alleged to have played in the offence, whether they were believed to have been involved at a more serious level or played a more minor role.

There are no specific criteria for evaluating Flight Risk in the Criminal Procedure Code of **Bulgaria**, instead judges typically are required to consider various criteria in order to determine the likelihood that the accused will attempt to flee

111 FLIGHTRISK Belgian National Report, 2024, paragraph 3.1.

112 Ibidem.

113 FLIGHTRISK Belgian National Report, 2024, paragraph 3.4.

the jurisdiction before trial. Some of the common criteria which were observed during the course of the national research undertaken are set out below, these include the;

- nature and severity of the charges,
- ties to the community, including family, employment, property ownership, and social networks.
- past criminal history, including previous incidents of flight or failure to appear in court,
- available financial resources, including assets, income, and ability to pay the bail, can influence their inclination to abscond.
- travel history, including previous trips abroad and any ties to other countries,
- the character of the accused,
- other general Flight Risk indicators identified by the courts. These relate to the specific conduct or circumstances of the accused that suggest a heightened risk of flight, such as making plans to leave the jurisdiction evidenced by the purchase of airline tickets, reservations or visa application, the disposal of assets, or having ties to other countries without extradition treaties.[114]

The research found that of the criteria listed above, the previous criminal convictions or conduct of the accused was the most often cited reason for pre-trial detention based on Flight Risk.[115] Judges shared the following factors that they found to be the most influential when justifying detention. Namely, the person's social status, a lack of a permanent address, lack of employment, information that the person works abroad and often travels, and the risk of absconding. They noted that the absence of employment while not a factor that implies absconding, its presence tends to show that even if the person does not have a registered address, there is a residence, which the investigating authorities can establish if necessary.[116]

In **Ireland** the criteria relied upon by the courts when assessing Flight Risk are set out it the seminal case of *AG v O'Callaghan,*[117] where the court set out a list of factors to be considered when assessing whether an accused is likely to evade justice. In doing so the court noted as follows:

"Where this Court, or for that matter any other Court, has to consider the question of bail the fundamental matter to which regard must be had is the likelihood of the appearance of the prisoner, if admitted to bail, at the time and place specified by the District Justice in his order, or, putting this in another way, the likelihood of the prisoner attempting to evade justice. There are a number of matters which may be, and should be where appropriate, taken into account by the Court in considering whether or not it is likely that the prisoner may attempt to evade justice. These I enumerate as follows:

1. The nature of the accusation or in other words the seriousness of the

114 FLIGHTRISK Bulgarian National Report, 2024, paragraph 3.1.

115 FLIGHTRISK Bulgarian National Report, 2024, paragraph 3.4.

116 Ibidem.

117 *AG v. O'Callaghan* [1966] IR 501.

charge. It stands to reason that the more serious the charge the greater is the likelihood that the prisoner would not appear to answer it.

2. *The nature of the evidence in support of the charge*. The more cogent the evidence the greater the likelihood of conviction and consequently the greater the likelihood of the prisoner attempting to evade justice.
3. *The likely sentence to be imposed on conviction*. The greater the sentence is likely to be, the greater the likelihood of the prisoner trying to avoid it. The prisoner's previous record has a bearing on the probable sentence and consequently must be before this Court.
4. *The likelihood of the commission of further offences while on bail*. In this connection, a prisoner facing a heavy sentence has little to lose if he commits further offences. A prisoner may consider that he has to go to prison in any event and in an effort to get money to support his family may commit further offences.
5. *The possibility of the disposal of illegally acquired property*. Stolen property may be stored or cached away.
6. *The possibility of interference with prospective witnesses and jurors*.
7. *The prisoner's failure to answer to bail on a previous occasion*.
8. *The fact that the prisoner was caught red-handed*.
9. *The objection of the Attorney General or of the police authorities*.
10. *The substance and reliability of the bailsmen offered.*
11. *The possibility of a speedy trial*."[118]

In a more recent case involving a European Arrest Warrant, the court set out what it considered to be positive factors and negative factors in the assessment of whether subject of the EAW was a real and substantial Flight Risk.[119] The court found that the *'positive factors'* included the Applicant's family network in Ireland, the limited means, the lack of previous convictions, the availability of independent surety and the agreement of the applicant to attend a police station at regular intervals, and hand in a passport. The '*negative factors*' identified, and which weighed against the granting of bail included that the applicant was a convicted person, meaning that he had incentive to abscond, the applicant had already absconded from the requesting State, as a foreign national he is likely to have fewer ties to Ireland than an Irish national would have. It was also noted that the State was objecting to bail on Flight Risk grounds, and that the applicant had given a false name on another occasion when arrested in respect of a domestic matter. Taking both sets of factors into consideration the court found that there was a real and significant risk that the applicant would abscond.[120]

During the course of the national research, it was found that the severity of the charge formed a key consideration in the assessment of bail applications. Since a more serious charge would naturally lend itself to a more severe sentence,

118 *(AG) v. O'Callaghan* [1966] IR 1 page 504.

119 FLIGHTRISK Irish National Report, 2024, paragraph 3.4.

120 *Minister for Justice and Others v Zielinski* [2011] IEHC 45.

it is considered a motivating factor to abscond. Notwithstanding this finding, a charge of murder, carrying a mandatory sentence of life imprisonment does not automatically lead to the denial of bail. Illustrating this finding, the domestic report on Flight Risk highlighted a recent case which demonstrates the delicate balancing act undertaken by the court in each assessment of pre-trial detention in the context of Flight Risk.

> In 2022 a lawyer and academic was accused of murder. The prosecution raised objections to bail on the grounds that the accused was perceived to be both a Flight Risk and at risk of committing another serious offence. The Flight Risk objection was based on the proposition that the accused had links to 'the north of Ireland', mainland Europe, the United States, and has considerable means. The accused's initial application for High Court bail was refused with the judge finding him to be a serious Flight Risk. It was found on the first instance that he had a 'powerful incentive to evade justice' based on the seriousness of the charge, the strength of the evidence, the likely sentence in the event of a conviction and alleged ongoing threats to the accused."[121] The judge was also concerned that the full extent of his assets '*was not known and the court noted that three different addresses in south Dublin had been submitted by the accused.*'[122] On appeal, the Court of Appeal granted him bail stating that he *'enjoys a presumption of innocence and as part of that he enjoys a presumption in favour of bail…he has ties to the State as a member of the Bar of Ireland and as a person with significant assets in this jurisdiction."*[123]

While considerable weight remains attached to the seriousness of a charge, the example referred to above demonstrates that each case is decided on its own merits and the court will look not only at the seriousness of the offence but will consider all the relevant factors in its assessment of whether there is a risk of flight in light of the specific circumstances of the accused. Emphasis is also placed on the seriousness of the allegation and the strength of the evidence, a history of failing to attend previous court appearances and amassing what is known as '*bench warrants*.'

The research in Ireland found this assessment process to be a *'fundamental aspect of the system, which allows for the flexibility of judicial discretion, however this discretion is something which leaves scope for bias, prejudice and undue leniency or rigidity to occur, particularly given the decision on bail is largely based on a factual analysis."*[124]

In **Poland,** the procedure for applying pre-trial detention and other preventive measures is comprehensively regulated in the Code of Criminal Procedure. According to the provisions, preventive measures, including pre-trial detention,

121 Eoin Reynolds, 'Barrister on murder charge granted bail on strict conditions by Court of Appeal', *The Irish Times,* Dublin 8 April 2022. https://www.irishtimes.com/news/crime-and-law/courts/barrister-on-murder-charge-granted-bail-on-strict-conditions-by-court-of-appeal-1.4848322.

122 Ibidem.

123 Ibidem.

124 FLIGHTRISK Irish National Report, 2024, paragraph 2.4.3.

are primarily employed to ensure the proper conduct of proceedings. The use of alternative measures is mandated in circumstances where the likely outcome of the proceedings is conditional suspension, or a sentence lesser than the time spent in pre-trial detention. However, an exception to this rule is where the accused is in hiding, consistently fails to answer the summons, unlawfully obstructs the proceedings or where there is a difficulty in establishing the identity of the accused.[125]

According to the Code of Criminal Procedure preventive measures, including pre-trial detention, may be applied if there is a well-founded fear that the accused will abscond or go into hiding, especially where the identity of the accused cannot be established, or where there is no permanent place of residence in the country. From the cases of the courts reviewed in Poland during the research, a number of factors are to be taken into account when assessing the risk of flight. In this context, the courts rely on *inter alia* the following list of criteria;

- the stage of the proceedings,
- the character of the accused,
- the risk to influence or interfere with the course of the proceedings
- the public interest criteria which is assessed both from the perspective of the seriousness of the acts alleged and the potential consequences of interfering with the course of justice,[126]
- prior use of an EAW to locate the suspect,
- whether the accused has a fixed abode and/or stable employment, or evidence of family support[127]
- the circumstances of the commission of the offence, including its commission within an organised criminal structure and the size of the income earned in a criminal manner[128]
- Any previous attempt to evade justice[129] In one example the suspect's failure to answer summonses combined with his failure to establish any contact with the court conducting the case raised issues of Flight Risk.[130] In a separate case, the question of mobility, including the fact that the accused was living, working and running a business in another Member State of the European Union[131] also found contribute to the risk of hiding or fleeing.

It is worth considering also the factors which the courts have concluded do not justify pre-trial detention on the basis of Flight Risk. These include the fact that the suspect provided an incorrect address, especially where the accused has appeared for the various court dates,[132] a failure to reside at the nominated place

125 FLIGHTRISK Polish National Report, 2024, paragraph 3.7.

126 FN 23 Order of the SA in Krakow of 27.4.2018.

127 Order of the SA in Kraków of 13.02.2014, II AKz 42/14, KZS 2014, no. 2, item 44.

128 Order of the SA in Kraków of 30.10.2019, II AKz 607/19, KZS 2019, no. 12, item 39.

129 Order of the SA in Katowice of 2.12.1998, II AKz 338/98, Biul.SAKa 1999, no. 1, item 15.

130 Order of the SA in Katowice of 15.12.1999, II AKz 366/99, LEX no. 42103.

131 Order of the SA in Kraków of 13.02.2019, II AKz 69/19, KZS 2019, no. 2, item 51.

132 Order of the SA in Katowice of 8.06.2016, II AKz 288/16, LEX no. 2139309.

of residence,[133] that Poland is in the Schengen Area,[134] or that the co-accused fled abroad.[135]

3.4. Burden of proof & the prosecution's position

In **Austria**, although the prosecutor is responsible for carrying out the investigation, when it comes to the circumstances of the accused that could be favourable in their defence, in practice, the onus is on the defence to raise these issues. Prosecutors often seem inclined towards advocating for pre-trial detention, although, in principle, they are also obliged to pursue factors that could potentially exonerate the accused.[136] It falls to the defence counsel to deliver proof of employment, residence or social reintegration in Austria, which could determine whether Flight Risk is assumed in an individual case.

> *"The way it is interpreted in our country, I am, the onus is on me, so to speak, so I have to deliver, the court would not pursue it on its own. Actually, the police could and, in my opinion, should investigate the person and their personality, i.e. what is the background, is there a family network?*
>
> - Interview with a lawyer, 14.09.2023, Austria

Similarly, when it comes to raising viable options for the application of milder measures, the onus is on the defence to propose concrete conditions for release.[137] This is comparable to the other participating Member States. In **Belgium,** the burden of proof rests with the investigating judge. Thereafter, it is for the defence to demonstrate either that the criteria were wrongly applied, or no longer apply, or that the risks identified can be neutralised by alternative measures (RUC).[138]

In **Bulgaria** Article 63(1) of the Criminal Procedure Code[139] provides for pre-trial detention. It sets out the following:

"(1) The measure of remand in custody shall be applied where a reasonable assumption can be made that the accused party has committed a criminal offence punishable by deprivation of liberty or another, severer punishment, and evidence case materials indicate that he/she poses a real risk of absconding or committing another criminal offence.

The segment goes on to identify what constitutes a real risk within the meaning of the act. It is also clear that in order to "establish the contrary," evidence must be collected and presented to the court during the remand proceedings. This cannot be the prosecutor's office which, according to Article 64(1) of the Criminal

133 Order of the SA in Katowice of 11.10.2000, II AKz 384/00, OSA 2001, no. 9, item 57.

134 Order of the Supreme Court of 17.04.2008, WZ 27/08, OSNwSK 2008, no. 1, item 926.

135 Order of the SA in Katowice of 10.03.2010, II AKz 145/10, LEX no. 603304.

136 Hammerschick and Reidinger, *DETOUR-Towards Pre-trial Detention as Ultima Ratio. 2nd Austrian National Report on Expert Interviews*, October 2017.

137 FLIGHTRISK Austrian National Report, 2024, paragraph 3.6.1.

138 FLIGHTRISK Belgian National Report, 2024, paragraph 3.2.

139 Article 63(1) and (2) of the Bulgarian Criminal Procedure Code.

Procedure Code, is the authority that should request the detention. The court has no obligation to collect such evidence *ex officio*. Therefore, the burden of collecting evidence falls entirely on the defence.

> "*The very structure of the rule reverses the burden of proof, and the defence must present evidence of the negative fact that there is no danger of absconding, instead of the prosecution presenting evidence of the existence of such*."
>
> - Interview with defence lawyer, Bulgarian National Report

In this regard, a specific problem emerged in relation to Bulgarians who are abroad and accused *in absentia*. According to the interviews conducted during the course of the domestic research, the vague wording of Article 63 of the Criminal Procedure Code resulted in a situation where Flight Risk is found simply by virtue of being charged *in absentia*. One of the problems that the lawyers identified during the course of the focus groups was the challenge in gathering evidence in order to rebut the presumption of Flight Risk. In this scenario, there is a prosecutor, an accused charged in absentia who cannot present evidence, and a legal aid attorney – no evidence can be gathered to rebut the presumption that the accused absconded.[140]

In **Ireland,** the burden of proof in the context of bail applications rests with the prosecution, as noted in the Supreme Court judgment of the *People (AG) v Gilliland*.[141] Every bail application starts from the position that the applicant is entitled to bail. In cases where Flight Risk is at issue, the prosecution objecting to bail must prove that there is more than a possibility of a Flight Risk – there must be a probability that an applicant will abscond based on the evidence. In practice, the defence lawyers approach the prosecution to negotiate bail conditions that would assuage concerns of Flight Risk. If terms are agreed, bail can be directed by the Court 'on consent.' If conditions or terms are not agreed, there is a bail hearing before the Court, and although the burden rests with the prosecution, in practice it falls on the defence to present sufficient measures and conditions that would persuade the court to remand the accused on bail, notwithstanding the prosecution objections.

The case law in **Poland** indicates that it is the prosecutor who bears the burden to demonstrate the preventive measures sought. *"Therefore, in the motion for pre-trial detention, the prosecutor is obliged to provide evidence indicating a high probability that the suspect has committed the offence charged and circumstances supporting the existence of threats to the proper course of proceedings*."[142] This rule applies not only to the application of pre-trial detention, but also to any subsequent application for its extension. "[*T]he duty of the public prosecutor is to be vigilant as to whether the reasons for which the preventive measure has been applied continue to exist in the case, or whether reasons justifying its revocation or modification have occurred.*"[143]

140 FLIGHTRISK Bulgarian National Report, 2024, paragraph 3.3.

141 *People (AG) v Gilliland* [1985] I.R. 643.

142 Order of the SA in Wrocław of 16.05.2018, II AKz 307/18, OSAW 2018, no. 1, item 375.

143 Order of the SA in Wrocław of 16.05.2018, II AKz 307/18, OSAW 2018, no. 1, item 375.

3.5. Rebutting Flight Risk: The defence perspective

The previous section considered that while the burden of proof rests with the prosecution, it falls to the defence to address Flight Risk concerns, so as to avail of alternative measures in lieu of detention. This next section will look at how the defence rebuts Flight Risk, before turning to address the alternative measures.

In **Austria** the presence of defence counsel is only mandatory at the pre-trial detention hearings (where the judge decides whether to continue pre-trial detention) and not when the judge decides on imposing pre-trial detention within the second 48 hours. One lawyer interviewed for the report saw this as a missed opportunity to rebut grounds for pre-trial detention and highlighted the importance of access to effective defence counsel. Accordingly, the court when directing pre-trial detention does not reference whether a defence counsel was present, but the decisions reviewing and continuing pre-trial detention orders do mention the name of the defence counsel present at the detention hearing.

However, it is not possible to infer from the decisions whether this counsel was court-appointed. This information could only be gleaned in some instances where access to the entire case file was possible, and documentation of legal aid or appointment of a counsel was evident. Furthermore, the orders imposing pre-trial detention do not contain which – if any – arguments defence counsel adopted to rebut Flight Risk. It is also not evident if and how defence lawyers proposed 'milder measures' as an alternative to pre-trial detention. Arguments for rebutting Flight Risk as a ground for pre-trial detention requires a close examination of the accused's personal circumstances; i.e. whether they have a proof of address, ties to the country, a social network, proof of being in employment, vocational training or education, and so on. Similar considerations are also relevant for proposing certain 'milder measures' as an alternative to pre-trial detention. However, defence counsel, especially if they are court-appointed, may not always have the necessary resources. In addition, interview partners have expressed the view that such arguments rebutting Flight Risk is not so effective, on account of the strong presumption of pre-trial detention on the part of the judiciary.

> "So pre-trial detention, there are very, very few cases where I have the feeling that it was actually only decided at the detention hearing, or the judge wanted to decide differently beforehand, and it was then decided that way on the basis of the submissions [note: by the lawyer]. But otherwise it was always clear beforehand."
>
> - Interview with a lawyer, 14.09.2023, Austria

With regard to appeals to pre-trial detention decisions, previous research has also noted that challenges to court decisions prior to the trial are generally underutilised.[144] This is partly due to concern by defence counsel that decisions

144 Birklbauer et al. Die Rechtspraxis des Ermittlungsverfahrens nach der Strafprozessreform. Wien-Graz: Neuer Wissenschaftlicher Verlag, 2011, p. 121.

from the higher court may adversely impact upon the final verdict.[145] A prosecutor mentioned that even if those decisions are appealed, the likelihood that appellate courts will quash them is rather low.

> *"I don't know what percentage of the detention appeals I have seen have been successful, there have been very few in truth..."*
>
> – Interview with a prosecutor, 07.09.2023, Austria

The ECtHR case of *Salduz v. Turkey*[146] brought about significant improvements in terms of access to a lawyer in **Belgium**. Initially there was no role for lawyers at the start of pre-trial detention, but the decision in Strasbourg prompted legal reform, and access to legal advice is now proscribed by law[147] for from the initial questioning phase by police.[148] The national research noted that at this point the lawyer is given an opportunity to comment on the interrogation and on any potential arrest warrant, and the practice has been that the lawyers 'use this opportunity to suggest alternative measures.'[149]

Once Flight Risk is raised as an issue, it is for the defence to either refute or neutralise it depending on the reasons Flight Risk was invoked in the first place. Defence arguments may be made at any stage, after the suspect's hearing before the investigating judge, during the hearings of the investigating courts and at any time during the investigation by means of a request for release addressed to the investigating judge, who may make a decision regarding pre-trial detention at any stage of the proceedings.

The distinction between Flight Risk and the risk of absconding and of evading justice becomes relevant in the context of how the defence rebuts a perceived risk. When Flight Risk is justified in the sense that it is feared that the suspect would effectively leave for abroad, the defence may try to refute this by showing that there are sufficient links with the territory. For example, evidence can be brought to highlight social embedding including any employment in Belgium, the residence of family members, and so forth. Bail can obviously also be a useful tool in this case. During the course of the focus groups, it became clear that in practice the proposal of bail is specifically supposed to come from the defence. [150]

In circumstances where Flight Risk arises on account of a risk of absconding and where it is rooted in the socio-economic situation of the accused or the financial means of the suspect, lodging bail may not be an option. If there are questions over maintaining contact with the suspect, the defence may try to address this risk of absconding on the basis of documents including statements from family members or housemates.[151]

145 Hammerschick, W. (2019). ‚Empirische Forschung zur Praxis der Anordnung von Untersuchungshaft als reflexionsangebot', *Journal für Strafrecht,* 6(3), 221-227.

146 ECtHR [GC] *Salduz v. Turkey*, Number 36391/02 judgment of 27 November 2008.

147 Article 47bis,§2 CCP referenced in the Belgian National Report, 2024, paragraph 2.4.ii.

148 FLIGHTRISK Belgian National Report, 2024, paragraph 2.4.ii.

149 Ibidem.

150 FLIGHTRISK Belgian National Report, 2024, paragraph 3.3.

151 Ibidem.

Overall, the open category of conditions allows for the defence to creatively address and rebut the concerns raised in relation to pre-trial release. Article 94(1)(6) of the Criminal Procedure Code in **Bulgaria** mandates for the participation of a defence attorney when a remand in detention has been sought. To ensure the right of defence of the accused, the law provides for a mandatory participation of counsel, as set out in Article 94 of the Criminal Procedure Code. The detainee may authorise a lawyer or, if they are financial constraints, legal aid would be assigned to the accused. In practice, access to legal assistance, especially during pre-trial proceedings, is problematic within the Bulgarian criminal justice system. The CPT during a recent visit noted that;

"as regards the fundamental safeguards against ill-treatment advocated by the CPT – namely the right to notify one's detention to a third party, the right of access to a lawyer and to a doctor, and the right to be informed of the above-mentioned the Committee very much regrets the absence of any real progress in their application since the CPT's previous visits. In short, these safeguards were hardly ever applicable during the initial 24-hour police" [152]

The practice adopted when arguing for pre-trial detention, is that the prosecutor adduces evidence in support of the existence of at least one of the four presumptions of a real danger, introduced by Article 63(2) of the Criminal Procedure Code. It then falls to the defence to point to evidence rebutting the presumptions – for example, the presence of a permanent address, employment, the need for the accused to take care of a family member, the ill health of the accused, cooperation with the investigating authorities, or an admission of guilt.

In most cases, the research found, that the court in practice tends to repeat the arguments of the prosecution, finding that the defence failed to rebut the presumptions under Article 63(2) of the Criminal Procedure Code and remanding the accused in custody.[153]

The adversarial nature of the bail application process in **Ireland** is such that it is for the prosecution to present to the Court stateable objections to the granting of bail to the accused person. As outlined above, these objections may either fall under s. 2 of the Bail Act 1997 or under the *O'Callaghan* principles. For the defence lawyers representing the accused person, their role is to put forward submissions which address and alleviate the concerns raised by the prosecution. It has been noted that one of the markers of Irish pre-trial detention practice is the 'active role' of the defence.[154] This appears to contribute to the trend of favouring release over pre-trial detention. Similar to the Belgian situation described above, the open-ended nature of bail conditions allows for a creative and dynamic approach in the application of pre-trial release, and to this end, it falls to the defence to advocate accordingly.

152 Bulgaria: visit 2021 CPT/Inf (2022) 20 Sectoin:7/32 17/3/2022 available at https://hudoc.cpt.coe.int/eng?i=p-bgr-20211001-en-7.

153 FLIGHTRISK Bulgarian National Report, 2024, paragraph 2.4.3.

154 Rogan M. (2022), Examining the Role of Legal Culture as a Protective Factor Against High Rates of Pre-trial Detention: the Case of Ireland, available at https://link.springer.com/article/10.1007/s10610-022-09515-9#Sec8.

Since 2015, the Code of Criminal Procedure (CCP) in **Poland,** has required that court decisions on the application or extension of pre-trial detention be based on evidence that is open to the accused and his defence counsel. To this end, the CCP requires that the suspect and defence counsel have access to the case file where the evidence attached to the application for pre-trial detention is provided. The only exception to this is where there is a fear of danger to the life, health or freedom of the witness. Evidence of this kind is contained in a separate file and may form the basis for a decision on the application or extension of pre-trial detention. However, this evidence is not made available to the suspect or his defence counsel, which raises questions under EU law.[155] In Belgium, there is no such right to consult the file.[156]

3.6. Alternatives measures to pre-trial detention

The legal framework for alternatives to pre-trial detention in **Austria** are set out in Article 173(5) CCP. Judges have a discretion to impose any of the so called "*Gelindere Mittel*" or "milder measure" or any combination of them as they deem appropriate in the particular circumstances of the case. Typically, these measures include a requirement to reside in a particular place, an undertaking to refrain from obstructing or interfering in the proceedings, an agreement to regularly report to the police, and directions to stay away from certain areas (for example, in cases of domestic violence) or avoid contact with specific individuals.

In order to limit movement, authorities may seize passports or other travel documentation, and in cases where alcohol or substance use is identified as a factor connected to the offence, an order to undergo treatment. In Austria, the lodgement of a sum of money as bail bears minimal significance as an alternative to pre-trial detention, primarily because it may only be mandated when Flight Risk is the sole ground for pre-trial detention.[157]

When asked, which 'milder measures' are applied most frequently in practice, a lawyer interviewed during the course of the research noted the following:

> *"In any case, a job, therapy, depending on the offense in question. If it's a case of drug-related misconduct, drug-related crime, then of course a detoxification therapy, which could perhaps be interesting when it comes to the Flight Risk, if someone has no roof over their head, is not registered anywhere, has nowhere to live, has had to sleep under the bridge, to put it bluntly, but then perhaps finds a connection to their family again, or finds a place where they can stay, sustainably, then that would of course also be something that changes the situation somewhat. Because the accused simply becomes more reachable to the justice system. In my opinion, this accessibility also plays a part in the Flight Risk in practice, because it sometimes happens that*

155 The requirement to make available to the suspect and his or her defence counsel relevant documents relevant to the effectiveness of challenging a suspect's arrest is established by Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ EU. L. 2012 No. 142, p. 1).

156 FLIGHTRISK Belgian National Report, 2024, paragraph 2.4.ii.

157 Hammerschick and Reidinger, *DETOUR-Towards Pre-trial Detention as Ultima Ratio, 2nd Austrian National Report on Expert Interviews*, October 2017, page 45.

the accused can simply no longer be found."

- Interview with a lawyer, 14.12.2023, Austria

The requirement to surrender the accused's passport alongside an undertaking to report to a local police station regularly are amongst the most commonly utilised proposal by defence counsel. In the case files examined for the present research, only six instances of applications of milder measures were identified (in one additional case, bail was ordered but not paid by the accused and as a result was not released but instead remained in pre-trial detention).

In two out of the six instances where milder measures were applied, Flight Risk was the only ground for pre-trial detention. Mostly, a combination of pledges in addition to bail were ordered; bail was ordered in four instances and varied between €4.000 and €10.000. The court order contains the reasoning for the amount at which financial bail was set; taking into account the seriousness of the offence and the income and financial circumstances of the accused, whether they own any properties, have any outstanding loans to pay or dependants for whom they pay child support.

The pledge not to abscond, go into hiding, or leave one's place of residence without permission by the prosecuting authority (Art 173 (5) 1 CCP) was always applied. In particular, in cases where Flight Risk was the only ground for pre-trial detention this pledge was the sole undertaking that accompanied financial bail. The other four instances also contained the requirement to reside in a particular place and notify the police of any change of residence. In two instances there was the additional requirement to refrain from contacting the co-defendants or accomplices.

In only two of the cases studied milder measures were applied at the outset of proceedings, as an alternative to imposing pre-trial detention. For four of the accused, milder measures were only applied at the first hearing on continuation of pre-trial detention, i.e. after the accused had been in pre-trial detention for two weeks already. One judge in interview found that the milder measures at times became more suitable at a later detention hearing, when more evidence can be gathered in respect of a place of residence, or as the case developed and more facts came to light.

Of the accused who received milder measures in this sample, none had a residence in **Austria** and none were Austrian nationals; five accused were EU nationals and two were from a third country. This might be explained by the nature of the overall sample, which only pertained to pre-trial detention decisions where Flight Risk was a ground, and out of 59 accused overall, only 5 were Austrian nationals.

In **Belgium** there are two main modes of release pending trial, the first is knowns as the 'Release under Conditions' (RUC) comprising of a non-exhaustive list of conditions which the investigating judge may apply to direct release. The Judge is at liberty to apply these as deemed fit, but there must be a nexus between the conditions invoked and any reasons cited in favour of pre-trial detention. The focus groups within the study found a significant link between the absence of Flight Risk and the possibility of imposing alternative measures, namely release

with conditions attached, known as RUC. The study into pre-trial detention revealed a very strong link between the absence of Flight Risk and the possibility of release under conditions. The absence of Flight Risk seems to be a *conditio sine qua non* for the possibility of a release under condition.[158] Furthermore, and at odds with the findings from the other partner studies, there was no link to be found between the nature of the alleged facts and the possibility of release under condition.

The second form of release is bail, and is essentially the lodgement of a sum of money by way of security.[159] It is not regularly used, and mainly applied in order to address Flight Risk concerns. The Focus Groups as part of the national study showed that opinion among practitioners are divided as to the benefits of its use, with concern that it gave unfair access to alternatives to an accused with means.

It is in interesting to compare this with the use of financial bail in **Ireland,** which is regularly a forms part of alternative measures. One of the guiding principles in terms of fixing a sum of money in Ireland for the purposes of bail is that the amount must not be so high to be tantamount to a refusal of bail. The seminal case of *O'Callaghan,* quoted below notes that bail for a person of limited means must be 'just and reasonable in all the circumstances.'

> *"…Fixing the amount of the bail is to be guided by the ability to give bail and the condition or quality of the prisoner, in addition, of course, to the other factors, such as the nature of the offence and the gravity of the evidence. If persons come from a humble walk in life or are of little means it is most likely that their friends or those of them who are prepared to go as surety for them are of the same condition and the amount of bail required must be just and reasonable in all the circumstances having regard to the condition and ability of the accused, bearing in mind all the time the overriding test of the probability of the accused failing to appear for trial"*circumstances of accused, and bearing in mind "the overriding test of the probability of the accused failing to appear for trial."
>
> *- AG v. O'Callaghan*[160]

Article 58 of the Criminal Procedure Code provides for the available alternatives measures in **Bulgaria** which include 'signed promise for appearance' and bail.

> *"The analysis of the case law shows that* ***in all 50 cases, the prosecutor requests the imposition of the most severe remand measure, "detention in custody,"*** *with the argument that "there is a real danger that the accused will "commit another crime" or "there is a danger that he will abscond."*[161]
>
> *-Bulgarian National Research*

Notwithstanding the availability of alternative measures, very often Judges in

158 FLIGHTRISK Belgian National Report, 2024, paragraph 3.6.

159 Article 35.4 Pre-trial Detention Act (Belgium).

160 The People (AG) v O'Callaghan IR 513, page 518.

161 FLIGHTRISK Bulgarian National Report, 2024, paragraph 2.4.1.

Bulgaria tend to favour pre-trial detention over release pending trial. Of the 50 cases examined in **Bulgaria** in only six cases (12%), the courts directed one of the alternative measures to detention in two of these cases, the courts ordered the adoption of 'house arrest' which constitutes a form of detention.

In **Bulgaria,** similar to **Belgium**, there is a provision for 'house arrest' but it is deemed to be a form of deprivation of liberty and not an alternative measure. In this regard Belgium, also employs Electronic Monitoring (EM), which it considered to be a means of executing an arrest warrant, as opposed to a 'real' alternative to detention.[162]

In **Poland** the catalogue of alternative measures to pre-trial detention is in theory extensive. Potentially, in lieu of pre-trial detention, the authorities may apply a condition of release in the form of a property or financial surety, pledges and mortgages. Additionally, there is measure known as a 'community guarantee' whereby a 'trusted person' such as the suspect's employer, school management or a social organisation declares that the suspect will attend court and not obstruct proceedings.[163] Additionally, the court or the public prosecutor's office may place the suspect under police supervision. The individual placed under supervision is obliged to comply with the requirements contained in the 'preventive measure order'. Examples of restrictions could include a prohibition to leave a specific place of residence, to report to the supervising authority at specified intervals, to notify the authority of any intended departure as well as the date of return, a prohibition to contact with the victim or with other persons, and a requirement to stay away from certain places, as well as other restrictions on the defendant's freedom necessary for the execution of the supervision.

The national research refers to the measures as 'anachronistic' and concludes that *'in the practical operation of the judicial system, the list of alternatives to pre-trial detention discussed is of limited relevance. They do not ensure the proper conduct of criminal proceedings against the risk that the suspect will flee or go into hiding."*[164]

Similar in nature to the extensive and adapted conditions, referred to above, **Ireland** also has an array of alternative measures that can be tailored to meet the particular circumstances of the alleged offence and alleged offender in order to satisfy the concerns raised by Flight Risk. Section 6 of the Bail Act, 1997 provides for conditions that may be attached to release on bail, including a residence condition, reporting requirement to a Garda Station (police station) and an order requiring the individual to stay away from certain locations or people. It was a strong belief amongst practitioners surveyed that generally judges consider pre-trial detention to be the option of last resort. In circumstances where bail is granted, in addition to the bail conditions fixed, the individual is required to enter into a bond to be of 'good behaviour and keep the peace,' with a view to securing the attendance of the accused at the next court date. The amount set is decided

162 NICC, *Available statistical data and research on flight risk in pre-trial (detention)proceedings,* 2024, page 16.

163 FLIGHTRISK Polish National Report, 2024, paragraph 3.9.

164 Ibidem.

in accordance with the probability of breaches being committed but cannot be so high that it effectively is tantamount to a denial of bail. The circumstances of the accused are therefore central to the Court's decision in this regard.

The Court enjoys a wide discretion to include conditions it deems appropriate, such as the requirement to reside at a particular place, surrender a passport, and all other travel documentation, and provide an undertaking that it will not apply for replacement travel documents. Other measures can include conditions requiring the accused to refrain from entering prescribed places or contacting certain people, abide by a curfew, or daily, weekly attendance at a police station, known as 'signing on.' The Court can further direct that the accused has a mobile phone on him or her at all times, and reachable by the prosecuting member of an Garda Síochána (Irish police) and also that the accused engage with probation services

Alternatives to Detention: Conditions to be released on Bail/Release under Conditions - RUC/ Gelindere Mittel	**Austria**	**Belgium**	**Bulgaria**	**Ireland**	**Poland**
Residence condition	•	•	•	•	
Reporting requirement to the police /police supervision	•	•		•	•
Stay away from specific from individuals or places	•	•		•	•
Be in possession of a mobile phone/reachable at all times		•		•	•
Surrender of passport/travel documentation	•	•		•	
Engage with probation services	•	•			
Independent surety				•	•
Curfew/Confinement in house at particular parts of the day		•		•	
Lodgement of a sum of money/ bail money	•	•	•	•	•
House arrest			•		
Undertaking not to make any attempt to interfere/obstruct with the investigations	•				
Requirement to undergo addiction treatment, or psychotherapy or other health-related measures	•				

or treatment as the facts of the alleged offence and personal circumstances of the accused dictate.

3.7. Judicial considerations and deliberations of the Flight Risk criteria

In line with the recognition in **Austria** of pre-trial detention as a measure of last resort,[165] written decisions imposing pre-trial detention must contain the grounds for pre-trial detention along with, *inter alia*, a note on the reasons why the objectives of pre-trial detention could not be achieved using milder measures.[166] Of the 39 cases examined in the context of this research, none contain such a note, beyond a limited formulaic statement without reference to any individual factors or circumstances of the case. In fact, most decisions, regardless of the issuing court, contained the exact same wording.

'*The aforementioned detention purposes cannot be achieved by the use of milder measures',* without any additional explanation why this is the case. Sometimes, this statement is extended to *'The aforementioned detention purposes cannot be achieved by the use of milder measures because suitable milder measures are not available.'* No explanation is offered as to why suitable milder measures are not available. Overall, the Judicial decisions imposing and continuing pre-trial detention were short, adopted stereotypical language and contained very little information from which the judicial deliberations process could be elicited. It became apparent that when applying the grounds that led to pre-trial detention the decision, did not go beyond a box ticking exercise, and any justifications bolstering the reason for pre-trial detention were limited to formulaic sentences. Absent also from the recorded decisions were the submissions made on behalf of the defence or prosecution.[167]
Review decisions on the continuation of pre-trial detention were found to be even shorter, often limited to less than one page. Sometimes the exact same language of the initial decisions were applied, with even less justification given for the grounds supporting pre-trial detention, over '*milder measures'*. Out of 60 decisions on continuation of pre-trial detention, only 17 even mentioned milder measures – containing the same formulaic statement as mentioned above. The brevity of the detention hearings was also noted with concern, making any in-depth evaluation of the merits of pre-trial detention unfeasible. While one hearing took 25 minutes; for the most part, the hearings took between 5 and 10 minutes, with a significant number of them taking only 2 minutes.

Similar to the **Austrian** experience described above, the **Belgian** research found that the reasoning demonstrated was 'extremely limited' often comprising of only a few words. In contrast to the details given when describing the strength of the evidence, the wording around Flight Risk was again described as formulaic. An example given of a repeatedly applied phrase was "*since the accused has no fixed abode, it is to be feared that he might evade the action of the court*."[168]

165 Art 173 (1) CCP.

166 Art 174 (4) CCP.

167 FLIGHTRISK Bulgarian National Report, 2024, paragraph 3.4.

168 FLIGHTRISK Belgian National Report, 2024, paragraph 3.4.

In **Bulgaria** the prerequisite conditions for pre-trial detention taken into account by the court were found to be scant and always objective, the decisions can therefore be characterised as 'typical' and 'formal'[169] In most cases, it was found that the court in practice tends to repeat the arguments of the prosecution, finding that the defence failed to rebut the presumptions under Article 63(2) of the Criminal Procedure Code. The reasoning is often abstract, general and stereotypical. If one of the prerequisites has been established, the court is not required to rule on all or any of the other reasons. Although in practice in most cases it is usually decided on all relevant grounds.[170] A review of case files in most cases, it was found that the court in practice tends to repeat the arguments of the prosecution, finding that the defence failed to rebut the presumptions under Article 63(2) of the Criminal Procedure Code.

In **Ireland** Section 9 of the Criminal justice Act 2017 provides that the courts must give reasons for the decision to grant of refuse the bail.
During the course of interviews undertaken in the **Irish** context, a recurring theme amongst practitioners cited a significant factor as to whether an accused was admitted to bail or not, was which judge heard the application. The focus groups considering the **Belgian** experience of Flight Risk made similar findings namely that there were diverging practices in relation to access to alternatives of pre-trial detention, on a national level, as between the different districts, and between the investigating judges or courts *inter se*.[171]

In **Ireland**, one of the principles which guide the Court in approaching an application such as this are to be found in the judgment of the Supreme Court in *Maguire v. Director of Public Prosecutions (No. 2)*.[172] In this case, the Supreme Court granted bail to the applicant in the interests of justice arising from a pre-trial incarceration period of 20 months, The Court held that:

> *"In these circumstances we consider that the interests of justice require the release on bail of an untried prisoner to whom the State cannot afford a trial until June, 2005. ... It is sufficient for the purpose of the application that, on the basis of the materials produced in this case, it appears to us that the interests of justice require the release of the applicant on bail."*
>
> *Maguire v. DPP*

This approach allows the Court to look at the circumstances surrounding any potential denial of bail in the context of how the system actually works in practice. However, while the Court will take periods of pre-trial delay into consideration, and cases where the accused is in pre-trial detention are given priority in the running of trial dates, practitioners reported during interviews that the system is strained by delay.[173]

169 FLIGHTRISK Bulgarian National Report, 2024, paragraph 3.4.

170 Ibidem.

171 FLIGHTRISK Belgian National Report, 2024, paragraph 3.6.

172 [2005] 1 IR 371, referred to in Irish National Report paragraph 3.5.

173 FLIGHTRISK Irish National Report, 2024, paragraph 3.5.

The law in **Poland** also regulates the way in which courts should justify an order for pre-trial detention. The order should include a presentation of the evidence supporting the claim that the accused has committed an offence, a demonstration of the circumstances indicating the existence of threats to the proper course of the proceedings or the possibility of the accused committing a new, serious offence if pre-trial detention is not applied, and the specific grounds for its application and the need for the measure. The court must also explain why it did not consider the application of another preventive measure sufficient. The decision of the court must also reflect the length of the detention in question.

In practice the national research noted that in the vast majority of the examined decisions, the courts set out the evidence supporting a 'high probability that the suspect had committed the alleged act in the case.' Of the 108 first-instance court orders for pre-trial detention examined, only in 17 cases did the courts fail to show any such evidence at all. Similar findings were made in respect of the reason given grounding the pre-trial detention. However, consideration of the use of alternative preventive measures featured less prominently in the written decision. In this regard, only in 9 decisions reviewed in the research did the courts substantively justify why they decided not to apply a non-custodial measure. In the vast majority of cases (75 cases), they only stated that other preventive measures would not allow securing the proper course of criminal proceedings, without specific detail. In 25 cases, despite the existence of a statutory obligation, they did not refer to this issue at all.[174]

4. How national assessments of Flight Risk compare with the regional standards

In this final section, the study will draw together the key themes that appeared in the national report and consider how these relate to the regional standards reflected in the ECtHR review and legal analysis. The recommendations emerge from these findings, in relation to the process of judicial assessment of Flight Risk and alternative measures, the link between procedural rights and the assessment of Flight Risk, and finally, the assessment of Flight Risk, and its fundamental rights impact on foreign nationals, homeless people and people with socio-economic circumstances.

174 FLIGHTRISK Polish National Report, 2024, paragraph 5.6.

4.1. Judicial assessment of Flight Risk as a ground for pre-trial detention

> "The Court finally observes that the decisions extending the applicant's detention on remand were stereotypically worded and in summary form. They did not describe in detail the applicant's personal situation beyond a mere reference to his "personality" and were not accompanied with any explanation as to what his personality actually was and why it made his detention necessary."[175]
>
> - Panchenko v. Russia

Although the jurisprudence of the ECtHR is clear in the need to avoid the use of stereotypical language and formulaic wording when ordering pre-trial detention, the national practice is inconsistent in the specific consideration and analysis detailed in a particular case and reflected in the written decisions. The research of Austria, Belgium, Bulgaria and Poland, all commented on the scant, formal and typical language used in the decisions. Often it was noted that the wording was taken verbatim from the prosecution submissions.

It was also noted through the focus groups in Austria, Belgium and Ireland that there lacked a uniform approach within the member state. The practice of pre-trial detention or the use of alternative measures varied across the country and was also highly dependent on the judge or decision-maker that heard the application.

4.2. Judicial assessment and application of alternative measures

Through an analysis of the ECtHR case law, and the NICC pan-European research[176] there emerges a clear obligation to consider alternative measures when considering how best to ensure the appearance at trial of the accused.[177] This is also reflected in the European Commission Recommendations on procedural rights of suspects and accused people subject to pre-trial detention.

> "Member States should impose pre-trial detention only where strictly necessary and as a measure of last resort, taking due account of the specific circumstances of each individual case. To this end, Member States should apply alternative measures where possible."[178]
>
> European Commission Recommendations (EU) 2023/681

175 ECtHR [First Section], *Panchenko v. Russia* No. 45100/98, judgment of 8 May 2005 para107.

176 NICC, *Available statistical data and research on flight risk in pre-trial (detention)proceedings,* 2024, page 12.

177 ECtHR [Fourth Section], *Jabolonski v. Poland*, No. 33492/96, judgment of 21 December 2000, para 83.

178 European Commission Recommendations (EU) 2023/681on procedural rights of suspects and accused people subject to pre-trial detention and on material detention conditions available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023H0681 .

This requirement is firmly embedded in the well-established principles of detention as a measure of last resort[179] and the presumption of innocence.[180] Despite this, the consideration of alternative measures and their application remains underutilised and inconsistent in practice.

Research in Poland noted that 'In the practical operation of the justice system, this catalogue of alternatives to pre-trial detention is of limited relevance.' According to the research conducted by NICC, this limited consideration and uptake of alternative measures stems from a '**lack of trust by the authorities**.'[181] The lack of control felt by the relevant authorities was considered to be one of the greatest hurdles in the application of alterative measures.[182]

In addition to a lack of trust placed in alternatives, the next obstacle to the implementation of alternative measures was the **lack of knowledge** of the existence and application of some of the available measures such as the European Supervision Order (*supra 2.5.)* by key actor. In the UK, a practitioner who did reply on the ESO on two occasions noted that key difficult in its application is the fact that' "*it is not entirely clear who is responsible for what"*[183] In the context of the Austrian study, one practitioner referred to the apparent reluctance amongst the Austrian judiciary to apply such a cross-border instrument.

> "I actually believe that many judges are simply not aware that it is possible to work outside our Austrian borders (…) the tools are not used either out of ignorance or for many, fear of the effort involved."[184]
>
> - Interview with a lawyer, 14.09.2023, Austria

To this end, basic **key practical challenges** were identified such as verifying an accused's address in another EU country, and the lack of mechanisms in place to coordinate, as one judge commented, *"I wouldn't even know who to call."*[185] In the absence of such a mechanism, judges tend to err on the side of caution and consider EU-nationals to be ex ante Flight Risks.

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179 Recitals Paragraph 4 of the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules No one shall be deprived of liberty save as a measure of last resort and in accordance with a procedure prescribed by law' available at https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae.

180 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343.

181 NICC, *Available statistical data and research on flight risk in pre-trial (detention)proceedings,* 2024 page 11 citing Hucklesby, Boone & Morgenstern, 2023: 251; Fair Trials, 2021: 23; Hammerschick *et al.*, 2017: 43.

182 NICC, *Available statistical data and research on flight risk in pre-trial (detention)proceedings,* 2024, page 12.

183 Tomkin, Zach et al, '*The future of mutual trust and the prevention of ill-treatment*: *Judicial cooperation and the engagement of NationalPpreventive Mechanism*, LBI 2016 available at https://atlas-of-torture.org/api/files/1535002993113w8oe0r00ex2u5bprhi4sa714i.pdf, page 224.

184 FLIGHTRISK Austrian National Report, 2024, paragraph 3.1.1.

185 Ibidem.

In **Belgium**, research highlighted that ESO was simply not being applied at all.[186] In **Ireland** the ESO was only transposed into legislation in late 2020 and came into force in 2021. Notwithstanding a deadline for transposition of 2012. In Ireland there is one example of an attempt to apply the ESO even in the absence of its implementation. In that case there were objections to bail on the ground of Flight Risk and lack of ties to the jurisdiction, and the fact that the accused was returned to Ireland for prosecution on foot of a European Arrest Warrant.

"The applicant relied on the CJEU decision of Pupino and it was submitted that the State, by objecting to the application should not be permitted to benefit from the fruits of a failure to implement. The Court, while critical of the failure to implement the decision, felt however that its hands were tied by the fact that it had not been implemented. However, in the interest of justice, the Court amended the terms of the bail without a supervision requirement, to allow the applicant to return to Hungary and only to return to Ireland for each court appearance, which she duly did to the conclusion of the case."[187]

In another example, also from Ireland one practitioner interviewed gave an example of where an application to vary bail conditions to allow for supervision abroad was refused as the Court found they were 'unlikely to return'.[188]

Across the domestic research carried out, there was a clear recognition of the influence of the prosecution in determining whether an accused could access alternative measures. In **Poland**, it was noted that of the 91 cases analysed during the course of the research, pre-trial detention was ordered in all but 2 cases, where the prosecution were seeking a remand in custody.[189] Furthermore, and notwithstanding the statutory requirement to consider the alternatives to pre-trial detention, in practice and from the cases reviewed the majority had little to no reference to alternative measures.

In **Ireland** participants of the focus groups commented that being admitted to bail or remanded in custody depended largely on which judge heard the application. This leads to inconsistencies in practice, and lacks legal certainty and clarity.

4.3. Adherence to procedural rights and its impact on pre-trial detention

> *"It can be argued that a limited exercise of procedural rights and/or a passive role by the defence may be at the origin of a lesser resort to alternatives, thus leading to a wider use of pre-trial detention"*[190]

186 BFLIGHTRISK Belgian National Report, 2024, paragraph 5.

187 Tomkin, Zach et al, '*The future of mutual trust and the prevention of ill-treatment*: *Judicial cooperation and the engagement of National Preventive Mechanism*, LBI 2016 available at https://atlas-of-torture.org/api/files/1535002993113w8oe0r00ex2u5bprhi4sa714i.pdf, page 55.

188 FLIGHTRISK Irish National Report, 2024, paragraph 3.5.2.

189 FLIGHTRISK Polish National Report, 2024, paragraph 5.

190 Martufi A, Peristeridou C. (2020), Pre-trial detention and EU law: Collecting Fragments of Harmonisation within the existing legal framework available at https://www.europeanpapers.eu/en/europeanforum/pretrial-detention-eu-law-collecting-fragments-harmonisation#_ftnref39.

Since 2009, the EU has adopted six directives on procedural rights for suspects and accused persons.[191] These instruments aim *'to ensure that the procedural rights of suspects and accused persons in criminal proceedings are respected, including where pre-trial detention is imposed*."[192] The impact of these legal safeguards, and notably where they absent or curtailed was a continuous thread throughout the research. Of real significance to the question of Flight Risk and pre-trial detention, these rights include the right to information, the right to interpretation and translations, the right to a lawyer, the right to legal aid, the presumption of innocence, and safeguards relating to child suspects.

A pattern emerged through the study demonstrating that where there was effective and meaningful access to a lawyer at the arrest phase and at the pre-trial detention court appearances, there was more accountability, transparency, and a greater likelihood of the implementation of alternative measures. Conversely, absent these safeguards, increased the risk of ongoing pre-trial detention.

In Ireland the leading case of *The AG v. O'Callaghan,* in recognition of the hardship of detention, provides for pre-trial detention only where it is deemed necessary.

> *"From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as possible who may safely be released pending trial. From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases "necessity" is the operative test. The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial."*[193]
>
> AG v Callaghan, Ireland

Generally, in practice there was "consensus that the operation of the rules surrounding bail applications in Ireland are well-founded in the right to liberty and due weight is afforded to the presumption of innocence."[194] **Ireland's** approach favouring alternative measures over detention can be attributed to a number of different factors, the practice of police releasing suspects on station bail prior to the commencement of any court proceeding, and an active role of the defence[195] from an early stage of proceedings, usually from the moment of

191 Directives 2010/64/EU (15), 2012/13/EU (16), 2013/48/EU (17), (EU) 2016/343 (18), (EU) 2016/800 (19) and (EU) 2016/1919 (20) of the European Parliament and of the Council, as well as Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.

192 European Commission Recommendations (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para 18.

193 The People (AG) v. O'Callaghan Supreme Court IR 513.

194 FLIGHTRISK, Irish National Report, 2024, paragraph 4.

195 Rogan M. (2022), Examining the Role of Legal Culture as a Protective Factor Against High Rates of Pre-trial Detention: the Case of Ireland. *Eur J Crim Policy Res* 28, 425–433. https://doi.org/10.1007/s10610-022-09515-9.

arrest. Studies attribute the particular legal system in Ireland, where barristers, (legal practitioners who tend to do most of the Court based advocacy) are independent, and often have a mixed practice of defence and state work.[196] This contributes to greater understanding of both sides of the legal system.

In **Poland** research found that notwithstanding the specific provision for legal aid in the Criminal Code, access to the assistance of a defence counsel immediately after arrest remains very difficult in practice.[197] In some limited cases, the participation of a defence counsel in the proceedings is mandatory. This applies, *inter alia*, in situations where the suspect is a minor or in cases where there are issues relating to mental health. Despite its mandatory nature, there are common situations in which a suspect subject to mandatory defence does not benefit from the assistance of a defence counsel at the stage of the first interrogation in the case.[198] Research undertaken in the context of the national study also pointed towards the interference by the executive into the administration of justice and the 'chilling effect' it has on judicial independence. This was highlighted by the disciplinary proceedings that issued against Judge Alina Czubieniak, on foot of a decision made to revoke the pre-trial detention on the basis that the individual did not benefit from legal assistance at the initial detention hearing.[199]

This case serves to highlight the following issues, firstly the inconsistent application of procedural rights. In the facts of that particular case, access to a lawyer was not ensured even where under national law such access mandated in pre-trial proceedings given the particular circumstances of the accused, and his ability to understand and participate in the proceedings. Secondly, the result of not having access to a lawyer at the pre-trial detention hearing phase, and the resultant deprivation of liberty of the accused. Finally, the effect on procedural rights, and the ability of the judiciary to enforce those safeguards where there is political interference in judicial decision-making.

There has also been a steady rise in the use of pre-trial detention since 2015 from 13.665, to 23.000 in 2023. In the national research, commented on the inextricable link between organisational changes in the prosecutor's office itself, including the reduction of its independence.[200]

Research in **Bulgaria** pointed towards a link between the nature and quality of the defence in the proceedings, and the reliance on pre-trial detention. In particular related to the reversal of the burden of proof when rebutting the presumptions under Article 63(2) of the Criminal Procedure Code. The effective participation of the defence was found to be of key importance. In this regard, of the 50 cases reviewed for this study, legal aid was mostly granted. Lawyers were involved in a total of 9 or 18% of all cases. This is significantly lower than the proportion of criminal defence attorneys involved in the substantive proceedings, which, according to a

196 Ibidem.

197 Helsinki Foundation for Human Rights, Impact of the Coronavirus Pandemic on the Criminal Justice System, Access to a Lawyer in Criminal Proceedings in Times of the Pandemic.

198 See, e.g., ECtHR judgment of 11 May 20023 in *Lalik p. Poland*, Application no. 47834/19.

199 Law.co.uk, SN: Judge Czubieniak guilty but not punished.

200 FLIGHTRISK, Polish National Report, 2024, paragraph 4.

representative survey of incarcerated persons as of 2021, was 43.7%.[201] Research indicated that as the detention proceedings are held immediately after arrest and indictment, defendants and their families had very little time to arrange for a lawyer.[202] The CPT noted similar findings in its recent visit and report."...Access to a lawyer was generally granted at best at the end of the 24-hour custody and, sometimes, only during the first court hearing or even after the person's arrival at the IDF. Consequently, as a rule, lawyers (almost always ex officio) only arrived after the detained person had already been interviewed and after his/her statement or confession had already been drafted by the police." [203]

In many of the cases studied, where there was representation available lawyers were found to be generally passive relying on formulaic defences to rebut the Flight Risk presumptions (most often having a permanent address, permanent employment, dependents, and health problems).

In this context procedural rights have mainly focused on issues relating to the effective access to lawyer, the provision of legal aid, and the interpretation and translation of information throughout the process. It is relevant also to consider the question of the right compensation for a breach of the rights guaranteed under the provisions of Article 5 ECHR.

> **"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."**
> **Article 5.5. ECHR**

For the enforceable right to compensation, the Applicant must show a breach of the procedural rights set out in Article 5. The Council of Europe's Guide on Article 5 of ECHR notes that this right to compensation is not contingent on a '*domestic finding of unlawfulness or proof that but for the breach the person would have been released*."204 The guide notes that if there is an entitlement on a national level to redress where an individual was held in pre-trial detained and then subsequently acquitted, as is the case in **Poland**, it does not automatically follow that there was a breach of Article 5.

Data from the Ministry of Justice in Poland shows that in 2023 alone, compensation for the use of 'manifestly unfair pre-trial detention' was awarded to 116 persons.[205] The total amount of reparations paid amounted to more than €1.17 million.

In **Bulgaria** compensation Is provided for under for State Responsibility for

201 Kanev, K. *The problems with the equal treatment of accused and defendants in pre-trial criminal proceedings in Bulgaria*. Sofia: BHC, 2022, p. 23.

202 FLIGHTRISK Bulgarian National Report, 2024, para 2.4.2.

203 Report to the Bulgarian Government on the periodic visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 13 October 2021 at para 23 available at https://rm.coe.int/1680a88ec1.

204 Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security 31 August 2022 page 52 available at https://www.echr.coe.int/documents/d/echr/guide_art_5_eng.

205 Ministry of Justice Statistical Guide, the exchange rate as of 12 March 2024, as referenced in FLIGHTRISK Polish National Report, 2024, paragraph 3.2.

Damage Act. In contrast with Poland, It is less often applied and more narrowly defined. The ECtHR in the case of *Yankov v. Bulgaria,* commented that *''the reported case-law under section 2(1) of the Act is scant*.'[206] In that case, the ECtHR found a violation of the applicant's rights to a trial within a reasonable time or to release pending trial in accordance with Article 5(3). On foot of this finding, the ECtHR found that the refusal to award compensation amounted to a breach of Article 5(5) ECHR.

4.4. The assessment of Flight Risk and the impact on particular groups

The emphasis placed by decision-makers on community ties and the requirement of a fixed address, embeds into the assessment of Flight Risk a level of integration that automatically excludes categories of individuals. **Foreign nationals, those who are homeless** and **of no fixed abode**, and individuals of **limited means and resources or socio-economic circumstances in general are excluded from meeting this criterion** and are more likely to **automatically face pre-trial detention.** This is contrary to the ECtHR standards where the Court has found that the '*mere absence of a fixed residence does not give rise to a danger of flight*.'[207]

4.4.1. Homelessness & precarious socio-economic circumstances

The disproportionate representation of vulnerable groups including **homeless individuals and individuals with precarious socio-economic circumstances** were reflected across the national studies.

Of the cases analysed as part of the research in **Poland** those who were affected by the homelessness crisis featured most frequently among the pre-trial detainees, as the lack of a permanent address is embedded in the assessment. It should also be noted, that in several cases, the research found that prosecutors submitted that the suspect's homelessness was a ground for pre-trial detention, as there was a risk that the suspect would flee or go into hiding. The requirement for a permanent residence appears to be firmly rooted in the assessment of Flight Risk, and the report highlighted that the most frequent premise justifying the risk of the suspect fleeing or hiding was the issue of the suspect's lack of permanent residence, which appeared in as many as 25 out of the 56 cases examined.[208]

The next most represented group of pre-trial detainees were foreign nationals followed **by individuals engaging in substance misuse or receiving drug treatment.**[209] In three cases, there was overlap with the category of people experiencing homelessness and those engaged in substance misuse. Overall, the Polish analysis revealed that 47 suspects fell into a vulnerable group, which corresponds to more than 50% of the sample analysed. The exact breakdown is as follows:

- Persons affected by the homelessness crisis (17).

206 ECtHR, [First Section] *Yankov v. Bulgaria,* Application number 39084/97, judgment of 11 December 2023, para 94.

207 ECtHR, [Fourth Section] *Sulaoja v Estonia* [2005], Application number 55939/00 paragraph 64.

208 FLIGHTRISK Polish National Report, 2024, paragraph 5.7.2.

209 FLIGHTRISK Polish National Report, 2024, paragraph 5.1.

- Foreign nationals (16).
- Persons who were addicted to drugs or undergoing drug treatment also formed a noticeable group (12 persons).
- Pre-trial detainees received psychiatric treatment (4).
- Members of an ethnic minority (2).[210]

Similar to Poland, in **Bulgaria,** judges during the research have shared that the factors that justify detention are most often the person's **social status, the lack of a permanent address, lack of employment.'**[211]

This issue was also highlighted in the **Austrian** report, which found that homeless individuals were more likely to be deemed a flight risk and placed in pre-trial detention due to their lack of a fixed address. In the absence of statistical data, it is not possible to show any definitive link between homelessness and Flight Risk, but through interviews with practitioners a common thread identified was that the people with more limited financial means and without a fixed abode in practice did not abscond.[212]

The question of permanent residence, employment status, and **socio-economic situation of the suspect** plays a very significant role in the **Belgian** context, too. **In the 51 cases where Flight Risk was used as a ground for pre-trial detention, socio-economic issues were present 43 times.**[213] While issues surrounding precarious living conditions were mostly used to support pre-trial detention in the context of the risk of reoffending, a very strong link was found between the suspect's precarious socio-economic situation and the finding of Flight Risk.[214]

4.4.2. Foreign nationality

In line with the ECtHR case law tackling the assessment of the risk of flight, in 2022 the EU Commission Recommendations noted that where a suspect is a foreign national with no links to the prosecuting state, this alone cannot be used as a reason to direct pre-trial detention on the basis of Flight Risk.

> *18. The fact that the suspect is not a national of, or has no other links with, the state where the offence is assumed to have been committed is not in itself sufficient to conclude that there is a risk of flight.*[215]
>
> - European Commission Recommendations (EU) 2023/681

Despite this requirement to consider the full factual matrix of each case and not to deny alternatives to detention solely due to tenuous community links, or a lack of family ties in the prosecuting state, there remains in practice an almost

210 Ibidem.

211 FLIGHTRISK Bulgarian National Report, 2024, paragraph 3.4.

212 Ibidem.

213 FLIGHTRISK Belgian National Report, 2024, paragraph 3.4.

214 Ibidem.

215 European Commission Recommendations (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para 18.

inextricable link between residence and risk of flight. Consequently, foreign nationals are more frequently denied release pending trial.

In **Austria,** the research concluded that Flight Risk is more readily assumed for foreigners with no proven residence status and for those perceived not to be socially integrated in Austria.[216] The information stemming from the case files supports this position which appears to favour Austrian nationals when considering milder or alternative measures. **Out of 59 accused who were deemed to be a Flight Risk, only 5 were Austrian nationals.** The foreign nationality was explicitly cited as a factor justifying Flight Risk for 17 accused.[217]

The Austrian Supreme Court has stated that a lack of integration in Austria does not automatically indicate a Flight Risk. In circumstances where the detainee has plausible accommodation and social integration in another EU country, there is no Flight Risk. Illustrative of this point is a decision of the Austrian Supreme Court wherein it held that the lack of social integration in Austria did not constitute as a valid ground for pre-trial detention, considering the claimant's social integration in Hungary, a member State of the European Union. The Court found therefore no reason to believe that there was a risk for Lazlo M to abscond to his residence in Hungary.[218]

In **Belgium** the national study found that those who do not ordinarily reside in the country were twice as likely to be detained pending trial. NICC's study found

Table 1.

Total number of Arrest warrants Studied :	**82**
Arrest warrant without Flight Risk:	**31 = 38%**
Belgian nation.	21
Foreign nation. (within EU)	1
Foreign nation. (outside EU)	1
No registration	8
Permanent Residence	31
No Permanent Residence	0
Arrest warrant with Flight Risk:	**51 = 62%**
Belgian nation.	6
Foreign nation. (within EU)	3
Foreign nation. (outside EU)	12
No registration	30
Permanent Residence	19
No Permanent Residence	32

216 Hammerschick and Reidinger, *DETOUR-Towards Pre-trial Detention as Ultima Ratio. 2nd Austrian National Report on Expert Interviews*, October 2017, p. 52.

217 FLIGHTRISK Austrian National Report, 2024, paragraph 3.1.

218 OGH 17.11.2009, Os31/08f, see also FLIGHTRISK Austrian National Report, 2024, paragraph 3.1.1.

that in Belgium '*foreign nationals without residence are almost automatically excluded from the granting of alternative measures.*'[219] As reflected in the table set out below, while nationality is a relevant consideration, it is the link with permanent residence which appears to be the more dominant criteria.

The research conducted in **Bulgaria**, concluded that individuals who have ties to a foreign country are considered to be a greater Flight Risk.220 Research in **Ireland** also indicated that emphasis was often placed on links to the state '*tipping the chances of bail more in favour of Irish nationals*.'221 Similarly, in **Poland**, research showed that in the assessment of Flight Risk, it was found that by being a foreigner or having ties with a foreign country, or by not having a fixed abode owing to homelessness that would tend to lead to pre-trial detention *(supra 4.4.ii).*[222]

5. Recommendations

5.1. EU Legislators

During the course of the research, two problematic aspects were identified in relation to the assessment of Flight Risk and pre-trial detention. Firstly, the lack of harmonisation of the rules surrounding pre-trial detention, which has resulted in significantly diverging approaches in the assessment of Flight Risk across the EU. These varying approaches hamper mutual trust between Member States, which is so fundamental to mutual recognition, and cross-border cooperation in criminal matters. Notwithstanding the legislative gaps identified during this research, case law from the ECtHR, and EC Recommendations have emerged to develop standards and tests in line with Article 5 ECHR and the core connected principles. These standards identified serve as a starting point, but more should be done to promote uniform practices in the area of pre-trial detention.

Secondly, alternative measures are underutilised, both on a national level, as well as the alternative measures that are designed for cross-border cooperation and pre-trial supervision. To address these two core issues, the following recommendations on a regional level are proposed:

- **Codify and harmonise existing standards across the EU relating to pre-trial detention.** In particular the permissible grounds to direct detention pending trial and the use of available alternatives, and how they might be best applied to meet the needs of each case.
- **Enhance communication and information sharing between Member States**, by providing practical guidance in the application of the **European Supervision Order** to address concerns related to Flight Risk for EU nationals in cross-border cases, and at the same time mitigate the plight of foreign nationals. To this end, developing and disseminating a handbook,

219 NICC, *Available statistical data and research on flight risk in pre-trial (detention)proceedings,* 2024, page 14 referencing Maes & Jonckheere, 2023.

220 FLIGHTRISK Bulgarian National Report, 2024, paragraph 3.1.

221 FLIGHTRISK Irish National Report, 2024, paragraph 4.

222 FLIGHTRISK Polish National Report, 2024, paragraph 5.1.

publishing examples of its application, promoting training programmes, and **establishing a focal point** would improve its implementation and daily application. Efforts to streamline processes for verifying individuals' status and background across borders, could address concerns about the enforceability of judicial decisions across the EU.

5.2. National Legislators

On a national level notwithstanding the different systems and practices involved in the assessment of Flight Risk as a basis for pre-trial detention, there were a number of issues and trends that appeared throughout the study. In the absence of a clear definition of Flight Risk, there are multiple broad terms applied to address a number of different situations. This leads to inconsistent practices and varying applications of pre-trial detention, not only between Members States, but also within Member States.

The lack of specific statistical data on Flight Risk on a national level is a recurring issue that needs to be addressed in order to fully understand how the risk of flight plays out in the courtroom and in the prisons. The impact of Flight Risk on specific groups such as foreigners, those in a precarious socio-economic situation, and those who on account of their homelessness fall foul of the assessment criteria, must be underscored as a particular issue that is embroiled in the assessment of Flight Risk. It results in discriminatory and arbitrary practices undermining the process, and the fundamental principles that define it. To this end, the study proposes the following recommendations on a national level:

- **Compile comprehensive statistics and data relating** to the grounds and the use of pre-trial detention including the reasons why alternative measures are refused, and bail conditions granted in addition to the number of detainees in pre-trial detention.
- Provide **guidance for courts in the criteria for the assessment** of pre-trial detention to ensure consistent application of the law in relation to pre-trial detention, as well as adherence to the fundamental principles underpinning pre-trial detention, including detention as a measure of last resort, the presumption of innocence.
- Ensure that the **procedural rights guarantees** and safeguards are fully implemented in practice at all stages of the criminal process, from initial apprehension of a suspect right through to the outcome of the proceedings. This includes regular, automatic reviews of pre-trial detention. To this end, procedural rights training should be given to all actors and stakeholders, including the police, prison officers, prosecution, defence and members of the judiciary.
- Ensure that **criminal trials are expedited** as quickly as possible where pre-trial detention is needed by increasing the number of criminal trial judges and courtrooms.
- Legislate for the **right to compensation** where a person is subject to lengthy pre-trial detention only to be later acquitted or given a non-custodial penalty. The provision for redress must be effective and attainable.
- Adopt **broad catalogues of alternative preventive measures** to pre-trial detention. These measures should make greater use of new technological

solutions. In this context, consideration should be given to the introduction of a preventive measure in the form of house arrest (in two forms - without electronic surveillance and with electronic surveillance) and a preventive measure in the form of permanent monitoring of the place of residence by means of GPS devices and permanent authentication of the place of residence.

- Remove from the legislation any criteria that references fixed residence which may lead to automatization of detention on the basis of Flight Risk
- Ensure that the release on bail connected with a lodgement of a sum of money is not an amount so high so to be prohibitive for accused with limited means.

5.3. Judges, Prosecutors and Defence Practitioners

For those at the frontline of applying, assessing and rebutting Flight Risk, the recommendations arising from the research relate to the creative application of alternative measures, in order to give real meaning to the values and principles that underpin procedural rights and inform pre-trial detention procedures. To this end, the recommendations are as follows:

- **For judges and prosecutors** to approach the assessment of Flight Risk with a starting point rooted in the presumption of innocence and **striving for liberty over pre-trial detention.**
- To apply in practice supranational guidelines such as the **EC Recommendations** as well as the standards set out in the case law of the ECtHR.
- In light of the complexity of factors contributing to Flight Risk, to promote a deeper engagement with the specifics of each case in order to foster a more just application of pre-trial detention. This requires **an increased focus on the characteristics of the individual and the circumstances of case,** and decision-makers should avoid reference to any perceived or hypothetical risk of obstructing criminal proceedings.
- To provide regular **training** on the rules surrounding pre-trial detention, alternative measures and bail for members of the judiciary who are tasked with decision-making at the pre-trial stage.
- **For defence lawyers** to persist in their efforts to highlight elements that mitigate the perceived Flight Risk of their clients. By actively presenting comprehensive evidence of the applicant's circumstances ties to the community, employment status, family responsibilities, or any rehabilitation efforts, they can challenge assumptions about Flight Risk more effectively.
- To develop specialised training for defence lawyers on how to gather and present such evidence could enhance their capacity to rebut the necessity for detention. By doing so, defence lawyers play a critical role in ensuring that the rights of the accused are robustly protected and considered in the pre-trial detention decision-making process.
- To provide **continuous training on Procedural Rights and in particular early and effective access** for legal practitioners to the accused and to the case file, including all relevant documents, evidence, and pleadings.
- To engage in specific training on the use of alternative measures, in particular the application of the **European Supervision Order.**

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