Fair Trials

IMPROVING JUDICIAL ASSESSMENT OF FLIGHT RISK (FLIGHTRISK)

BELGIAN NATIONAL REPORT

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NICC INCC

Improving Judicial Assessment of Flight Risk (FLIGHTRISK)

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1. Introduction

1.1. Executive Summary

The crux of this project is the analysis of judicial assessment of Flight Risk, with a view to enhancing judicial deliberations, strengthening fundamental rights and bolstering mutual trust and recognition in cross-border criminal cooperation. This study is one component of a wider European Commission funded project which considers the national experience of five EU Member States (Austria, Belgium, Bulgaria, Ireland and Poland) with a view to conducting comparative research and providing a regional overview of the situation pertaining to Flight Risk across the EU.

This study looks at how domestic judicial authorities assess Flight Risk in the context of pre-trial detention proceedings. It considers the existing legal framework, the procedures applied, and the key stakeholders involved in the application of pre-trial detention, when there is a perceived danger that the individual will seek to evade justice.

The study found that the right to liberty of person is enshrined in law, both in the Constitution and in separate legislation, in particular the 1990 Pre-trial Detention Act (PTDA). Legally-technically, the law can be evaluated positively. The law specifically provides for the criterion of Flight Risk as a possible ground for pre-trial detention. Flight Risk is often used as a criterion (62%), but is very rarely the sole ground for pre-trial detention (2.4%). The other two criteria (recidivism and collusion) are used much more often (93% and 73% respectively). In very many cases, all three criteria are used together (44%).

1.2. Key Objectives

Through the lens of the national context and experiences, the objectives of this project are to firstly raise awareness of the application of the regional situation and standards outlined in the ECHR, and regional measures and guidelines in the day-to-day decision-making on Flight Risk as a ground for pre-trial detention.

Thereafter to identify and tackle obstacles for preventing the overuse of pre-trial detention fuelled by the concerns of Flight Risk, which may contribute to overcrowding and in turn undermine mutual trust between Member States.

Through these findings we hope to promote a deeper understanding of the reality of judicial decision-making when assessing Flight Risk in the context of pre-trial detention and how prosecutors present, and judges consider Flight Risk. It will also consider the evidence that may be presented by defence lawyers to oppose any perceived danger of Flight Risk.

Central to this study is a risk assessment, with focus on any differences in Flight Risk assessment based on status or residence, belonging to a minority group, specific

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socio-economic background, and other similar criteria. This risk assessment, combined with an identification of legislative, institutional, or knowledge gaps should provide basis for further initiatives at EU or Member State level to effectively address the issues at stake.

1.3. Methodology

This study started with an **in-depth study** of Belgian **law** on pre-trial detention. In addition, a study was also made of the **jurisprudence** and **doctrine** on the subject,[1] in particular with regard to Flight Risk. The study was also able to build on the results of previous studies on pre-trial detention conducted at the NICC.[2]

Subsequently, a **file study** of some 50 criminal dossiers was carried out. The aim of this study was to gain a thorough insight into the concrete motives and reasons for applying pre-trial detention in general and Flight Risk in particular.

It was finally[3] opted to study pending cases **at the clerks** of the courts themselves, this at the time of the review of remand cases by the investigating courts (*infra*, 2.4.).

The major practical advantage lies in the fact that these files are automatically accessible at the courts as part of the periodic review of pre-trial detention (*infra*, 2.4.iii), where they normally are spread out over the various offices of the investigating judges. This way of working does not impose any additional inconvenience on the courts: this greatly increases the willingness of the judiciary to cooperate.

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[1] H. BOSLY, "La nouvelle loi belge sur la détention préventive", *RDPC* 1991, 163-224; Ph. DAENINCK, *Praktische gids voorlopige hechtenis*, Mechelen, Wolters Kluwer Belgium, 2020, 198p.; R. DECLERCQ and R. VERSTRAETEN (eds.), *Voorlopige hechtenis. De wet van 20 juli 1990*, Leuven, Acco, 1991, 231p.; B. DEJEMEPPE (ed.), *La détention préventive*, Brussel, Larcier, 1992, 411p.; E. MAES, Ph. DAENINCK, S. DELTENRE and A. JONCKHEERE, " 'Oplossing(en)' gezocht om de toepassing van de voorlopige hechtenis terug te dringen" *Panopticon* 2007, nr. 2, 19-40; A. JONCKHEERE, S. DELTENRE, E. MAES and Ph. DAENINCK, "Garantir l'usage exceptionnel de la détention préventive: du seuil de peine à une liste d'infractions comme critère de gravité?" *RDPC* 2007, 50-63, I. MENNES, "Potpourri II-wet: gerichte verbeteringen aan de Wet Voorlopige Hechtenis", *NC* 2016, 204-222.

[2] Ph. DAENINCK, S. DELTENRE, A. JONCKHEERE, E. MAES and Ch. VANNESTE, "Onderzoek inzake de voorlopige hechtenis. Analyse van de juridische mogelijkheden om de toepassing van de voorlopige hechtenis te verminderen", Eindrapport onderzoek 2004-2005; E. MAES, A. JONCKHEERE, M. DEBLOCK and M. HOVINE, "DETOUR. Towards pre-trial detention as ultima ratio. 1st Belgian National Report", 2016; E. MAES, A. JONCKHEERE and M. DEBLOCK, "DETOUR. Towards pre-trial detention as ultima ratio. 2nd Belgian National Report", 2017.

[3] Initially, the bar associations were contacted in order to obtain the necessary files. The disadvantage of this choice was that only files in which Flight Risk had effectively played a role were selected. As a result, less insight would have been gained into the role of Flight Risk as a criterion in general. Moreover, it could not be ruled out that the selection made by the lawyer would also have a substantive influence on the results of the research.

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As these are ongoing files, the information is also extremely up-to-date, allowing the entire investigation conducted up to that point to be examined in its entirety.

Finally, an important advantage was that a global overview could be obtained of ongoing judicial investigations, without having to select files beforehand.

Given the secret nature of criminal investigations, it was necessary to ask for admission to look into the files. Permission was sought and obtained from the College of Procurators General, from the Presidents of the Courts and, if necessary, from the investigating judges in charge of the investigation.

The selection of the files themselves was made *at random* by the clerks - the researchers were not involved in this in any way. Care was taken to obtain as diverse a sample of files as possible (not all from the same investigating judge) and as wide a variety as possible was also sought in the choice of districts in order to obtain as much representativeness as possible (spread across the country, in both language groups, both larger and smaller districts, both border and central districts).

In the end, 46 files were studied at 7 different clerks' offices (four Dutch-speaking, three French-speaking), resulting in the study of 94 decisions of 32 different investigating judges, of 82 arrest warrants and of over 280 decisions of investigating courts in total. Of the 46 files, 25 were Dutch and 21 were French.

For the file study, the registration schedule provided by Fair Trials was used.

In order to test and deepen the results of the file study, **Focus Groups** (FG) were organised. 3 separate professional groups were distinguished: magistrates at court, magistrates at the Public Prosecution Service and lawyers.

Given the explicit endeavour to ascertain whether the research findings could be validated by the working field, a number of methodological choices were made. After all, respondents had to be in a position to express themselves as freely and adequately as possible. For this reason, it was chosen to organise the FG by language group (so that everyone could comfortably express themselves in their mother tongue), live rather than online and by professional group (in order to avoid not daring to make certain comments in the presence of representatives of another professional group).

A total of 6 FG were organised, half of which were Dutch-speaking and the other half French-speaking. 7 magistrates at court participated in these FG, 5 magistrates from the Public Prosecution Service and three lawyers. The respective central departments were contacted for the selection of respondents.[4]

[4] The College of Courts and Tribunals, the Association of Investigating Judges, the College of Procurators General, the Council of Public Prosecutors, the “Orde van Vlaamse Balies” and “l'Ordre des Barreaux Francophones et Germanophones”.

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It was chosen to work exclusively through reporting, and to not make recordings, so that no one would feel inhibited from speaking freely. It was also explicitly mentioned at the beginning of the FG that the FG were conducted completely anonymously, so that everyone could express themselves freely. Given the openness with which respondents expressed themselves during the FG, this objective certainly seems to have been achieved.

During the FG, the results of the study were discussed on the basis of a pre-prepared paper presented step by step by the principal investigator. During the FG, the principal investigator was always assisted by a colleague from the NICC for reporting.

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2. Legal Context

2.1. Regional Legal Framework

The current legal situation is that there is no harmonisation or approximation of law specific to pre-trial detention and Flight Risk. Notwithstanding this gap, a set of standards have emerged, through other mutual recognition instruments, human rights standards, procedural rights, and jurisprudence.

Article 82(2) TFEU provides the basics for judicial cooperation in criminal matters in the Union, and it is the starting point in any discussion relating to cross border cooperation. It sets out that such cooperation is based on the principles of mutual recognition of judgments and judicial decisions, and in order to do so provides a competence to harmonise rules of criminal procedure.

The particular rights relied upon relevant to the question of pre-trial detention include Article 5; the right to liberty of the person, Art. 6 of the ECHR due process, and the absolute prohibition of cruel, inhuman, and degrading treatment contained in Article 3 ECHR. In addition, the core principles underpinning pre-trial detention include the presumption of innocence, which is crucial to counter arguments favouring pre-trial detention, and is enshrined in Article 48(1) of the Charter of Fundamental Rights and Freedoms and elaborated upon in Directive 2016/343 on the Presumption of Innocence in criminal proceedings.

Article 5 ECHR is perhaps the most often cited right in this context. In proclaiming the "right to liberty", Article 5 contemplates the physical liberty of the person. Its aim is to ensure that no one should be deprived of that liberty in an arbitrary manner. The right to liberty along with the right to life, prohibition of torture, inhuman and degrading treatment, and prohibition of slavery, is one of the so-called 'core' fundamental rights, it contains also a positive obligation to take active steps to provide protection against unlawful interference with the right to liberty.

Any deprivation of liberty, however short, interferes with the core fundamental right to liberty and in all cases must be based in law. Pre-trial detention must be seen by legislators, judges, prosecutors, and law-enforcement officers as an exceptional measure.

Therefore, the starting point for consideration of the legal basis for pre-trial detention and Flight Risk, is grounded in Article 5, and specifically to the provisions contained in para (1)(c)

> *"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;"*

The core elements consist of the aim of the detention, namely to bring the individual before a competent authority. It then sets out the test that must be satisfied; that of a

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reasonable suspicion that an offence has been committed, and that the **detention is 'necessary'** in order to prevent the individual from absconding.

The standard or test applicable to a "reasonable suspicion" that a criminal offence has been committed, requires an *"existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence"*

Recently the Commission Recommendation 8.12.2022 in a bid to consolidate the legal standards surrounding pre-trial detention across the EU, noted that Member States should impose pre-trial detention "*only 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-trial 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*." (*emphasis added)*

Crucially, the Recommendation states that consideration of the specific circumstances of the case but also of the individual themselves must be examined. It provides that every decision by a judicial authority imposing pre-trial detention is duly reasoned, and justified and refers to the specific circumstances of the suspect or accused person. The individual affected should be provided with a copy of the decision, which should also include reason why alternatives to pre-trial detention are not considered appropriate. These principles clearly were borne from the previous jurisprudence of ECtHR and the CJEU and serve to provide a template of criteria and grounds for judges deliberating on pre-trial detention in the context of Flight Risk.

Case law has established principles in assessing the suitability for bail or alternative measures pending the disposal of the case. At the outset, the Court has often commented that the severity of the offence, and the likely sentence that would follow, cannot alone demonstrate Flight Risk. Rather, the Court must consider a number of factors specific to the individual.

> "*The risk of absconding has to be assessed in the light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted."*

Although community links can and do form part of the factual matrix when conducting an in-depth analysis on Flight Risk, as the case law and Commission recommendations have both noted, a lack of community ties alone is insufficient to prove Flight Risk,

> *"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 Flight Risk."*

The case law of the ECtHR, has consistently emphasised the importance that these grounds be rooted in fact. In *Panchenko v. Russia,* which questions whether the continued detention was justified on the grounds of a perceived risk of absconding, the Court noted that it was the absence of any specific facts, and the use of generic

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terms supporting the perceived Flight Right as well a failure to properly take into account family ties, his permanent address and the fact that the applicant had no criminal record, amounted to a breach of his Article 5(4) rights.

More recently, in the case of *Kotov v. Russia* the Court rejected the arguments of Flight Risk in circumstances where the risk of the applicant's absconding was not rooted in facts.

A series of cases before the Court of Justice of the European Union, raised the issue of detention in European Arrest Warrant (EAW) cases pending the decision of the executing authority on the validity of the warrant.

The issues stem from the the Framework Decision on the EAW which provides for a 90-day time limit, (an initial 60-day period with a possible 30-day extension) when considering the warrant. The case of *Lanigan* which involved the execution of an EAW in Ireland issued in the UK, questioned the validity of the pre-trial detention where the time limits provided for were exceeded. The Court considered firstly the spirit of the FD EAW, and the rationale for pre-trial detention pending surrender, which is firmley rooted in Flight Risk.

> *"Pursuant to Article 12 of the Framework Decision, the executing judicial authority is to take a decision on whether a person arrested on the basis of a European Arrest Warrant should remain in detention, in accordance with the law of the executing Member State. That article also states that that person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding."*

Considering the requirement to ensure the surrender, the Court found that even in circumstances where the time limits were exceeded this would not preclude the execution of the warrant, or the continued detention. However, much like in the jurisprudence of the ECtHR, and in light of the fundamental rights at stake, a detailed, evidence-based 'concrete review' was set out which required the Court to consider;

> *"all of the relevant factors with a view to evaluating the justification for the duration of the procedure, including the possible failure to act on the part of the authorities of the Member States concerned and any contribution of the requested person to that duration. The sentence potentially faced by the requested person or delivered in his regard in relation to the acts which justified the issuing of the European Arrest Warrant in his respect, together with the potential risk of that person absconding, must also be taken into consideration."*

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2.2. National Legal Framework

The Belgian criminal justice system[5] is characterised by the fact that it distinguishes two different types of criminal investigation, 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 acts that can be carried out. Roughly speaking, the investigating judge has more far-reaching authorities. Thus, it is only the investigating judge who can order a house warrant, a wiretap or - relevant here - an arrest warrant. In practice, a criminal investigation frequently starts as an information investigation, and when more far-reaching investigative acts are required, the investigation turns into a judicial investigation. To this end, the public prosecutor will request for a judicial investigation, after which an investigating judge will be appointed. On this occasion, the public prosecutor may also request that a suspect be put in pre-trial detention.

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).

The right to personal liberty is guaranteed by art. 12 of the **Constitution**. Except in case of discovery in the act of committing a crime, no one can be deprived from his liberty except on the basis of a motivated warrant issued by a judge, to be taken within 48 hours after the deprivation of liberty (art. 1. PTDA). Previously, the time limit was 24 hours, but it was extended by the law of 31 October 2017 because the suspect acquired the right to the assistance of a lawyer as a result of successive Salduz-legislation. The (practical) implications of this assistance necessitated an extension of the time limit.

The matter of pre-trial detention is governed by a separate **law of 20 July 1990**, being the Pre-trial Detention Act (PTDA). The law itself does not provide a definition of pre-trial detention, but it is described in case law and legal doctrine as the deprivation of liberty before definitive sentencing. A characteristic feature of the law on pre-trial detention is the fact that the exceptional nature of pre-trial detention is explicitly expressed: "*Only in cases of absolute necessity for public safety*" can an arrest warrant be granted. Several subsequent legislative amendments also explicitly aimed to further emphasise this exceptional character.[6]

[5] The Belgian criminal justice system is mixed inquisitorial - accusatory. In principle, the investigation phase is predominantly inquisitorial (secret, written, non-adversarial), while the judgment phase is rather accusatory (public, oral, adversarial).

[6] The legal-technical evaluation of the law on pre-trial detention is positive. In this context, see also the findings during the DETOUR project: E. MAES, A. JONCKHEERE and M. DEBLOCK, "DETOUR. Towards pre-trial detention as ultima ratio. 2nd Belgian National Report", 2017, part 3, 1.

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Usually[7] pre-trial detention takes place in the context of an ongoing judicial[8] investigation and commences with an order for arrest. It is the investigating judge[9] who can issue such an order for arrest (art. 16 PTDA). The issuance of an arrest warrant can only be done when it is absolutely necessary for public security. As cited, this requirement constitutes an explicit reference to the exceptional nature of pre-trial detention. In addition, the law states that pre-trial detention may not be affected for the purpose of immediate punishment, nor for the purpose of exercising any other form of coercion. This requirement articulates the presumption of innocence.

Before an arrest warrant can be delivered, there must be serious indications of guilt against the suspect.

In order to limit the application of pre-trial detention, a sentence threshold was introduced. The investigating judge can only issue an arrest warrant if the offence could result in a correctional prison sentence of one year or a more severe sentence.

Finally, there are **limitative grounds** on which the arrest warrant can be based if the maximum penalty provided for by law does not exceed 15 years' imprisonment. These grounds are present if there are serious reasons to fear that the released suspect would commit new crimes, evade the criminal procedure, attempt to make evidence disappear or would commit collusion with third parties (Article 16, §1, paragraph 4 PTDA). However, the latter criterion can only constitute grounds for pre-trial detention for the arrest warrant itself and for the first two assessments by the investigating courts (*infra*, 2.4.).

When the maximum penalty provided for by law exceeds 15 years' imprisonment, these criteria do not apply. The danger to public safety constitutes the only criterion in that case.

The criterion relevant to the present study, namely Flight Risk, is thus expressly provided for by law as a ground for pre-trial detention. Here, however, we specify that the literal wording is: "evading the judicial procedure". This thus constitutes a broader definition than the classic danger of flight. After all, one can evade justice without effectively fleeing. Where necessary, the distinction between risk of evading the judicial procedure or absconding on the one hand, and Flight Risk on the other hand, will be made during the present study.

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[7] Where a defendant is in detention pursuant to a conviction in absentia and he lodges an appeal against it, such detention is also considered pre-trial detention. Detention pursuant to an immediate arrest at sentencing is also considered a form of pre-trial detention. These pre-trial detentions take place outside the framework of a judicial investigation.

[8] As indicated above, a distinction must be made between an information investigation and a judicial investigation. No arrest warrant can be issued during an information investigation.

[9] In very exceptional circumstances, the criminal court may also issue an arrest warrant. Given the extremely exceptional nature of this and its irrelevance to the research conducted here, it will be ignored in the following.

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The law of 27 December 2012 created the possibility of executing the arrest warrant not only in prison, but also by detention **under electronic surveillance** (ES). This is explicitly a modality of execution of the arrest warrant, and consequently cannot in any way be considered a form of release under conditions. ES can be described as detention in a place other than prison. It constitutes a so-called "cold" electronic surveillance: the suspect is not allowed to leave this place for employment or guidance.

The law itself provides for an **alternative** to pre-trial detention (art. 35 PTDA), namely **release under conditions** (RUC). The introduction of the RUC was considered one of the major innovations of the law of 20 July 1990. The RUC introduced a so-called "open category" of possible conditions, meaning that it did not provide an exhaustive list of possible conditions. Consequently, the court is free to determine those conditions it deems appropriate. However, these conditions must relate to the reasons justifying pre-trial detention and to the crime that is the subject of the judicial investigation. For the purpose of determining the appropriate conditions, the investigating judge may be assisted by the **probation officers** by ordering the preparation of a summary information report or conducting a social survey. During the investigation phase, the duration of the RUC is maximum 3 months, but this term can be renewed, with no maximum term provided for. During the judgment phase, the conditions in principle continue until a final judgment, or until a modifying decision intervenes.

Specifically with regard to Flight Risk, the possibility of the payment of a **bail** is provided for (art. 35, §4 PTDA). The legal text itself states that a bail can be imposed based on suspicions that funds or values originating from the crime have been placed or hidden abroad, but currently[10] this modality is mainly used in order to neutralise a possible Flight Risk. It is the judge who determines the amount of the bail, taking into account the possible Flight Risk and the financial capacity of the suspect.

2.3. Overview of Key Actors

The following provides a general overview of the actors involved in pre-trial detention. The specific role of the public prosecutor (2.4.i), of the defence (2.4.ii) and of the magistrates at court (2.4.iii) will be discussed in more detail below.

As already mentioned, the **investigating judge** plays a crucial role in pre-trial detention. He is the one who decides autonomously whether or not to issue an arrest warrant. The legislator explicitly chose the investigating judge as the central figure, since he is the leader of the judicial investigation. Since pre-trial detention is linked to the proper conduct of the judicial investigation, it was considered that the investigating

[10] The bail system already existed before the 1990 Pre-trial Detention Act (art. 10 ev. PTDA of 20 April 1874). During the parliamentary discussions of the 1990 Pre-trial Detention Act, the justice minister specified that the purpose of this measure is to dissuade the suspect from absconding.

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judge is best placed to make a decision regarding pre-trial detention. Thus, as the investigation evolves, he can intervene immediately if necessary.

Neither the prosecution nor the defence can lodge any appeal against the decisions of the investigating judge. The investigating judge thus has a very far-reaching autonomy.

The initiative for pre-trial detention will often[11] come from the **public prosecutor's office**. It is the public prosecution that - as the prosecuting party - can request a judicial investigation (*infra*, 2.4.i). On that occasion, the public prosecutor can also specifically request that an arrest warrant be issued on behalf of certain suspects. The prosecution also plays an important role in the context of assessing pre-trial detention during periodic review (*infra*, 2.4.iii.)

It is the **police** who are responsible for gathering evidence during the investigation, this under the direction of the investigating judge. In practice, since the focus of both the investigating judge and the police is on conducting the investigation, there is not always enough time to specifically carry out orders relating to pre-trial detention.[12] As cited above, the investigating judge can be assisted by the **probation officers**, but in practice this possibility is rarely used.

After the issuance of the arrest warrant, the phase of automatic, periodic review of pre-trial detention begins (*infra*, 2.4. and 2.4.iii). This control is exercised by courts that are specifically tasked with ruling on whether or not to continue to maintain pre-trial detention, namely the **investigating courts**. The decisions of these investigating courts have a validity that is limited in time. In this way, the legislator introduced an automatic, periodic review of pre-trial detention.

Given the above, there is an important role for **lawyers**, particularly with regard to gathering evidence and documents that could support a possible release, or RUC.

With regard to Flight Risk, it are all the relevant deciding bodies (investigating judge and investigating courts) that will make an assessment of all the criteria at stake, including the risk of flight.

Besides the role of the legal actors, reference can also be made to other factors that play a role regarding the application of pre-trial detention in Belgium, such as, among others, the role of the media, the way in which sentences are carried out, the attitude of the suspect, etc.[13]

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[11] Once the judicial investigation is ongoing, the investigating judge can of course also issue an arrest warrant autonomously, without being requested to do so by the public prosecutor.

[12] For example, investigating the exact housing or employment situation, finding appropriate counselling etc.

[13] E. MAES, A. JONCKHEERE and M. DEBLOCK, "DETOUR. Towards pre-trial detention as ultima ratio. 2nd Belgian National Report," 2017, part 1, 18.

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2.4. Procedures Surrounding Pre-Trial Detention and Flight Risk

A suspect who has been deprived of his freedom must be brought before the investigating judge within a period of **48 hours**, otherwise he must be released (art. 12 Constitution). The fact that the decision lays with a judge is a guarantee of compliance with the constitutionally protected right to liberty.

Before the investigating judge can issue an arrest warrant, he must – under penalty of release of the suspect – interrogate the suspect (art. 16, §2 PTDA). During this interrogation, the suspect has the right to the **assistance of a lawyer** and this lawyer has the right to formulate comments, both in relation to the interrogation itself and to the possible deprivation of freedom (art. 16, §2, paragraph 2 PTDA). If the suspect does not yet have a lawyer, the investigating judge contacts the bar's on-call duty (art. 16, §4 PTDA). If the suspect does not understand the language, the interrogation must take place with the assistance of an **interpreter**. The suspect also has the right - when no oral translation was provided - to request a translation of the relevant passages of the arrest warrant so that he is informed of the charges against him and can effectively defend himself (art. 16, §6bis PTDA).

If the investigating judge issues an arrest warrant,[14] this title for detention has a validity for **a period of 5 days** (art. 21 PTDA). Within this 5-day period, the judicial council must decide whether the pre-trial detention should be maintained.

After this five-day period, the phase of **automatic, periodic review** of pre-trial detention begins (art. 22 et seq. PTDA). This control is exercised by the investigating courts, which will decide, based on the legal criteria, whether it is still absolutely necessary for public security to maintain pre-trial detention. The decisions of these investigating courts have a validity period that is limited in time (*infra*, 2.4.iii.).

When the judicial investigation is finished, a special procedure takes place. During this procedure, the judicial council will decide whether the investigation has raised sufficient elements to send the suspect to the criminal court.[15] On that occasion, it may also be decided to continue the pre-trial detention. This is done by means of a separate decision of the judicial council. Once the investigation phase is over and the pre-trial detention has been extended, in principle it runs until the definitive judgment. From then on - unlike during the investigation phase - the pre-trial detention no longer has to be reviewed periodically. However, the suspect has the possibility, during this phase of the procedure, to request his release by means of a **petition** (art. 27 PTDA). This petition can be filed with the court that will rule on the case. After filing the petition, the court must rule on this petition within a period of five days, under penalty of releasing the suspect.

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[14] At this moment, the suspect acquires the status of indicted person with corresponding rights such as the right to study the criminal file.
[15] In this study, abstraction is made of the specific procedure before a jury.

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With regard to the periodic monitoring outlined above, the following additional information can be mentioned:

- The defence receives a notice of the hearing at the investigating court and obtains **access to the file** for 1 (in the case of initial assessment) or 2 days before the hearing.
- At the hearing, the suspect may be **assisted by a lawyer** who can plead and file documents at the hearing. The suspect may attend the hearing himself or be represented by his lawyer.
- If additional interrogations are conducted during the investigation, the suspect is entitled to the assistance of his lawyer.

During the current investigation, it emerged that the formal legal requirements were complied with. In particular, with regard to the presence of a lawyer and the assistance of an interpreter, it can be noted that the legal provisions were seldom violated.

2.4.i. The Role of the Prosecution in Pre-Trial Detention Applications

As cited above (*supra*, 2.2.), the Belgian criminal justice system is characterised by the fact that there are two types of criminal investigation, namely the information investigation - led by the public prosecutor - and the judicial investigation - led by the investigating judge.

No arrest warrant can be issued during an information investigation. If, during an information investigation, the public prosecutor is of the opinion that a suspect should be put into pre-trial detention, he will first have to request a judicial investigation. After the start of the judicial investigation, it will be the investigating judge who makes an autonomous decision on whether or not to issue an arrest warrant. The investigating judge is not obliged to respond positively to the prosecution's request. During the judicial investigation, the investigating judge can autonomously decide to put suspects in pre-trial detention: he - as the leader of the judicial investigation - is not dependent on a request from the public prosecutor.

Although the public prosecutor's office has the right to set out a criminal policy via directives from the College of Prosecutors General, there are no separate guidelines regarding when a judicial investigation, or an arrest warrant, is requested. Nor are there any guidelines as to the specifics of Flight Risk.

During the FG, it came to light that there is ambiguity as to when*, in concrete terms,* the public prosecutor proceeds to requesting a judicial investigation.

The prosecution's role is to represent society. It does not specifically represent the interests of an individual victim. During the hearing of the case before the investigating courts, the public prosecutor may articulate the victim's situation, but strictly speaking

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it represents society. The victim's role in pre-trial detention proceedings can be called negligible. In any case, victims are not involved in the debates before the investigating courts that rule on pre-trial detention. This is a result of the presumption of innocence and the secrecy of the investigation. Currently, the law does provide for victims to be informed of the release of a suspect. When victims have declared themselves civil parties to the proceedings, they can submit a request to the investigating judge for access to the file.

2.4.ii. The Role of the Defence in Pre-Trial Detention Applications

For a long time, there was no role for lawyers at the start of pre-trial detention. Lawyers could only intervene after an arrest warrant had already been issued. Under the influence of the ECtHR's Salduz jurisprudence, access to a lawyer was significantly improved at this initial stage (Salduz laws dated 13/8/2011 and 21/11/2016; art. *47bis* CCP.).

At present, the assistance of a lawyer is provided by law from the moment of questioning by the police, as well as during the interrogation by the investigating judge. Prior to the police interrogation, the lawyer also has the possibility of confidential consultation with his client. The police services are obliged to inform the lawyer briefly about the facts (time and place) on which the suspect will be interrogated (art. *47bis*, §2 CCP.). At this stage, however, there is not (yet) a right to consult the file itself.

Of importance is the fact that after the actual interrogation by the investigating judge, the lawyer is given the opportunity to formulate comments both on the interrogation itself and on the possibility that an arrest warrant may be issued against the suspect (art. 16, §2, paragraph 5 PTDA). Current research has shown that lawyers frequently use this opportunity to suggest alternative measures.

It also showed that there were almost never any problems with regard to the presence of the lawyer. The Belgian bar associations have set up an adequate standby system, which allows a lawyer to be assigned quickly - which is important given the strict 48-hour deadline - whether or not under the pro bono system.

Given the short time frame and the fact that there is no right to consult the file at this stage, the lawyer's task is far from obvious. He is dependent on his client for the contents of the file. Obtaining documents[16] is logically difficult given the deprivation of his client's liberty.

During the period of the periodic review of pre-trial detention, the lawyer's role is multiple: 1 or 2 days before the hearing, he has the right to consult the file, can discuss the file with his client and can plead at the hearing of the investigating courts. He can

[16] Evidence related to residence, employment, client's allegations, etc.

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also have documents added to the file in order to reinforce his client's position or to support his release.

The fact that lawyers have an important role in this matter was also revealed by the survey (*infra*, 3.3. and 3.4.).

2.4.iii. The Role of Judges in Pre-Trial Detention Applications

As indicated above, the **investigating judge** plays a crucial role in this. He is the one who decides autonomously whether or not to issue an arrest warrant. Also throughout the investigation phase, the investigating judge maintains this central position: for example, he can at any time lift the arrest warrant, impose a release under conditions, or change the modality of execution of pre-trial detention (conversion into ES). There is no appeal against the decisions of the investigating judge, neither for the prosecution nor for the defence.

Besides the investigating judges, the **investigating courts** play a crucial role in the pre-trial detention procedure. The investigating courts are special courts whose specific task is to rule on whether or not to maintain pre-trial detention and on the modality of its execution (in prison or under ES). They should not in any way rule on the guilt or innocence of the suspect, but should limit themselves to the question whether the maintenance of pre-trial detention is still absolutely necessary, taking into account the legal criteria.

In the case of a decision to maintain pre-trial detention, this decision counts as a detention title, but for a period limited in time (1 month, 2 months from the 4^{e} decision of the judicial council). Through this system of issuing periodic detention titles, the Belgian legislator has installed an automatic and periodic control of pre-trial detention. The investigating courts must renew the detention title in time, otherwise it automatically extinguishes so that the suspect must be released.

Typically, hearings in pre-trial detention take place behind closed doors. The hearing is thus not public, partly because of the presumption of innocence.

The jurisdiction of investigating courts is determined territorially, depending on the location of the investigation conducted. In terms of jurisdiction, there is no distinction depending on the seriousness or nature of the facts. The gravity of the facts may only have an impact on the motivation of the arrest warrant (no need for recidivism, collusion or Flight Risk if the maximum sentence exceeds 15 years' imprisonment).

It is the judicial council that must automatically decides periodically (every month or every 2 months after the 4^{e} decision) whether or not to continue to maintain pre-trial

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detention. The judicial council is a court at the first instance level. During the hearing, the investigating judge reports on the state of the investigation, after which the public prosecutor claims on whether or not to maintain pre-trial detention. The defence (lawyer and accused) is given the floor last.

The decisions of the judicial council can be appealed by the prosecution and the defence. The case is then heard within 15 calendar days by the chamber of indictment, which sits at the level of the court of appeal. At the hearing, the public prosecutor reports on the state of the investigation (the investigating judge is not present at the hearing in appeal) and makes a claim with regard to whether or not the pre-trial detention is to be maintained. The defence (lawyer and accused) is given the floor last. The task of the chamber of indictment is the same as that of the judicial council: to rule on whether or not to maintain pre-trial detention and on the modality of its execution.

Finally, a full-fledged cassation procedure is also provided for, but it is classically limited to legal matters; the Supreme Court does not rule on factual findings.

There are no special guidelines on the concrete application of the criteria, including on Flight Risk. The Supreme Court - which in theory could observe a unifying function - does not rule on factual aspects of pre-trial detention. Wide variation between the different districts is thus possible. During the research - both during the file study and during the FG - it was also found that there is great variation between the different districts, and even between the different investigating judges and investigating courts themselves.[17]

[17] Thus, there is diversity on the role and importance of the suspect's nationality. On diversity in terms of the interpretation of Flight Risk: *infra,* 3.1. and 3.4. There is also great diversity on the application of bail: *infra*, 3.1.

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3. Flight Risk as a Ground for Pre-Trial Detention

This chapter examines in more detail the actual application of Flight Risk as a criterion for pre-trial detention. It was first examined how often Flight Risk was retained as a criterion and how Flight Risk compared to the 2 other criteria. To this end, the issued arrest warrants (AW) themselves were studied, and it was examined which of the 3 criteria were included.

The scheme below summarises the application of recidivism (R), collusion (C) and Flight Risk (F). It indicates which criteria were included in the investigating judge's decision. In this way, an overview of all possible combinations between the criteria was obtained. Here, a distinction was made between, on the one hand, the decisions of the investigating judges in general, regardless of the nature of the decision (release, RUC, ES, arrest) and, on the other hand, the actually issued arrest warrants.

SCHEME 1: Application of the criteria

		decisions IJ	**issued AW**
Criteria:	R / C / F	36	36
	R / C	20	20
	R / F	10	10
	C / F	3	3
	R	15	10
	C	2	1
	F	2	2
	No SIG[18]	1	
	No justification	3	
	File incomplete	2	
TOTAL		94	82
Files with	R	81/94 = 86%	76/82 = 93%
	C	61/94 = 65%	60/82 = 73%
	F	51/94 = 54%	51/82 = 62%

The above scheme shows that recidivism is by far the most frequently applied criterion. Flight Risk was often retained - in **the majority** of cases (62%) - but is clearly **the least used** criterion of the three (recidivism and collusion 93% and 73% respectively). Moreover, Flight Risk was retained as the sole criterion in only two cases (2.4%), noting that both files concerned investigations into offences with potential sentences

[18] Serious indications of guilt: no arrest warrant was issued because the incriminating elements were found to be too slight to justify an arrest warrant.

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exceeding 15 years' imprisonment (for which there is no legal requirement to mention one of the three criteria). In the hypothesis that Flight Risk would be abolished as a criterion for pre-trial detention, this would not have any impact on the number of pre-trial detainees.

During the FG, it appeared that these findings were entirely in line with experience in the field. In explanation of the broad application of **recidivism**, it was pointed out that in the application of pre-trial detention, securing society is paramount. One respondent stated that it is crucial to prevent the same facts from recurring. Very situational factors play a role here (addiction problems, income situation, nature of the offences, lucrative nature - often in the case of drug trafficking - of the offences, etc.).

Regarding the broad application of the recidivism risk, it was also noted that this could be explained by the relative vagueness of the criterion. There was also broad consensus on this. It was noted that in theory it could be claimed of any defendant that it was to be feared that he might commit offences again. This is a very broad category, easily justified.

Flight Risk was described during the FG as the most concrete criterion. One cannot simply say of every suspect that there is a Flight Risk. This requires some objectification.

Collusion was described as a criterion that is limited in time. As time passes, this criterion loses force. Recently, the legislature has also effectively limited this criterion in part over time.[19]

Very remarkable is the fact that in most cases (44%) **the 3 criteria** were retained **together**. This is surprising since 1 of the 3 criteria alone is sufficient to justify pre-trial detention. Only in 15% of cases only 1 criterion was used.

During the FG, it became clear that this observation did not surprise respondents in the least. On the magistrates' side, it was stated that efforts are being made to invoke as much legal criteria as possible. This is apparently in anticipation of the fact that the defence will challenge the merits of certain criteria during the proceedings, so that as many criteria as possible are included to be on the safe side. One respondent spoke of "concreting" the arrest warrant.

[19] Law of 31/7/2023.

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As a final point of interest, it may be pointed out that there is no systematic recording of data relating to the application of the 3 legal criteria. There are no figures on the application of the flight hazard in particular, nor on its application in relation to the other criteria.

3.1. Criteria for Assessing Flight Risk

To examine the actual assessment of Flight Risk, it is useful to return to the legal text itself, specifically "*if there are serious reasons that the suspect would evade the criminal procedure*".

As cited above, a distinction should be made between an effective *Flight Risk* (e.g. to a foreign country) and the fact that one would attempt to evade justice (which is possible without effectively taking flight).

With an **effective Flight Risk**, elements such as possible ties with foreign countries, having a foreign nationality, lack of ties with Belgium, the fact that the other family members still reside in the homeland, etc., play a role - according to the research conducted. Financial aspects may also play a role, such as the nature of the crimes under investigation (the fear that funds are abroad) and the financial capacity of the suspect (having the financial ability to travel abroad).

When it comes to the **(wider) risk of evading the judicial procedure or absconding,** other elements rather come into play: is the suspect administratively in order, are there already convictions in absentia, is the suspect able to comply with conditions, can the suspect be monitored, etc.

This distinction also emerged during the FG. The effective Flight Risk would be more applicable for wealthy suspects or in cases where large financial gains are generated, where the risk of absconding is more retained for suspects who are more likely to be in a precarious financial situation.

Also, the FG specifically probed the application of **bail**, an alternative provided by law to neutralise Flight Risk. Opinions were divided in this regard. Some of the respondents were of the opinion that bail as an alternative was not yet sufficiently used. According to these respondents, a proposal for release on bail should be accepted more often, while pointing out that this proposal should come from the defence.

Other respondents were not in favour of wider use of bail as an alternative. They pointed to the danger of possible class justice whereby wealthy defendants would find their way to freedom more easily than less wealthy defendants, which would be unjust.

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They also pointed to the possible danger that bail - via a roundabout route - would thus serve rather to recover possible capital gains.

Finally, it was cited that - also with regard to bail - there are great differences between districts and even between different investigating judges and investigating courts.

The role of **the Immigration Department** also came up during the FG. The specific situation of suspects who stay illegally in the country and who should/could therefore be deported, was highlighted. If such suspects were to be released, the Immigration Department will also effectively seek to deport them from the country, so that the further proceedings would take place in the absence of the suspect.

In this regard, some respondents pointed to the fact that a judicial authority cannot be expected to co-perpetuate an illegal situation by, for example, imposing a LUC with the condition of remaining at the disposal of the investigation while the suspect is illegally residing in Belgium. Some respondents argued that, for these reasons, they felt obliged to keep certain suspects under arrest warrant.

Locally, however, agreements would be made with the Immigration Department. This is related to the hierarchy of decisions: which decision takes precedence? There was a unanimous call to settle this issue.

3.2. Flight Risk & the Burden of Proof

Belgian law recognises the presumption of innocence as a general principle of law, so that everyone is presumed innocent until proven guilty. The burden of proof regarding the question of guilt therefore undeniably rests on the shoulders of the public prosecutor. However, this presumption of innocence only plays a limited role in the context of pre-trial detention, where, by definition, guilt or innocence is not adjudicated, but rather serious indications of guilt. If an investigating judge or an investigating court were to rule on the guilt of the suspect, he would - given the state of the proceedings - disregard the presumption of innocence.

In the context of pre-trial detention, the investigating judge will only be able to issue an arrest warrant if he considers that the criteria of the Pre-trial Detention Act have been met. Through the obligation of justifying the decision, he will have to indicate on the basis of which elements he believes the legal requirements have been met. It will subsequently be up to the defence to demonstrate either that the criteria were wrongly retained or no longer apply, or that the danger pointed out can be neutralised subject to compliance with certain conditions or by means of conversion to another execution method (ES).

The "burden of proof" in this sense lies with the investigating judge, but the merits of the arrest warrant and the maintenance of pre-trial detention will just be the subject of the debates before the investigating courts. However, there is no obligation under

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Belgian law to state reasons in the sense that a possible alternative to pre-trial detention must first be examined, after which only an arrest warrant can be decided upon.

Specifically as regards Flight Risk, it will have to be demonstrated on the basis of the documents in the criminal file that this is so. Whether this danger is legitimately withheld can either be refuted on the basis of other documents or neutralised by, for example, the payment of bail or the imposition of specific conditions.

Finally, reference may be made to the observation that pre-trial detention is framed within an ongoing judicial investigation (*surpa*, 2.3.) and that the primary focus of the investigators lies there, much more than in examining the need for pre-trial detention. As already cited, the investigating judge may well be assisted by the Probation officers.

3.3. Defence Lawyers' Approach to Rebutting Flight Risk

The role of the lawyer is crucial in this matter. When a Flight Risk is withheld, it will be the defence's task to either refute or neutralise it. This will depend on the motives that were cited to withhold the flight threat.

Defence arguments may be made at any time: 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.

It is useful here to distinguish between the effective Flight Risk and the risk of absconding.

When Flight Risk is justified in the sense that it is feared that the suspect would effectively leave for a foreign country, the defence may try to refute this by showing that there are sufficient links with the territory. For example, evidence can be brought about social embedding in Belgium, employment in Belgium, the place where the children go to school, the residence of family members, etc. Bail can obviously also be a useful route in this case. During the FG, one respondent suggested that EU citizens should be treated equally to nationals.

If Flight Risk is rather motivated from a risk of absconding and finds grounds in the socio-economic situation of the suspect (*infra*, 3.4.), paying bail may not be among the possibilities. If there is ambiguity about the whereabouts or the possibility of contacting the suspect, the defence may try to neutralise this risk of absconding on the basis of documents. For example, statements from family members or housemates can be used to demonstrate a suspect's actual whereabouts.

The study found that lawyers can be creative in this regard. In one case, for example, Flight Risk was neutralised by including the lawyer's office address as a contact

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address for the suspect. All in all, the system of the "open category" of conditions leaves open the possibility of being creative in the interpretation of conditions.

Specifically on the issue of bail, it may be noted that it emerged during the FG that the proposal of bail is specifically supposed to come from the defence side.

3.4. Judicial Deliberations on Flight Risk

After the general study of the application of the three criteria outlined above (*supra*, 3.), we then zoomed in on the concrete interpretation of Flight Risk. Thus, the facts on the basis of which it was decided to withhold a Flight Risk were examined by means of a substantive study of the arrest warrants themselves. This study showed that having or not having a permanent residence (PR), together with nationality (but to a lesser extent) were the most important factors. Socio-economic factors also often played a decisive role. Finally, punctual facts and personal characteristics sometimes played a role.

The scheme below charts the presence of permanent residence and nationality:

SCHEME 2: Impact of nationality and permanent residence

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

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Very noteworthy is the fact that when no Flight Risk was retained, there always was a permanent residence. In that case, the suspects also usually had Belgian nationality. In cases where a Flight Risk was retained, the suspects often had a foreign nationality, often from outside the EU. However, these figures are to be nuanced, given the high degree of non-registration (nationality unknown, not verifiable, not included in the file - see also below).

Conversely, if the suspect did not have a permanent residence, a danger of flight was always retained if an arrest was made. Equally noteworthy is the fact that although some suspects did have a permanent residence, a Flight Risk was sometimes retained nonetheless (see also below).

In order to obtain more information with regard to those files in which no registration of nationality was made, the place of birth of that suspect was checked - specifically with regard to those files. In the 38 cases without registration of nationality, in 11 cases no place of birth was registered either. Otherwise, the following findings were made:

SCHEME 3: impact of birthplace

AW without Flight Risk:	**8**
Born in Belgium	4
Born abroad (within EU)	2
Born abroad (outside EU)	2
AW with Flight Risk:	**30**
Born in Belgium	7
Born abroad (within EU)	2
Born abroad (outside EU)	10
No registration	11

It is noteworthy that all the files where the place of birth was also not registered / known a Flight Risk was withheld.

As pointed out above, whether or not one has a permanent residence plays a decisive role in determining Flight Risk. When effectively justifying Flight Risk in the arrest warrant, the following motives were also retained, often in addition to not having a permanent residence:

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- Having ties with another country 8
- Precarious housing 5
- Living in the streets 3
- Previous convictions in absentia 3
- Despite permanent residence, living elsewhere 2
- Having no ties with Belgium 2
- Psychological problems 1
- Failure to comply with a previous RUC 1
- Having multiple aliases 1
- Plane tickets to Dubai found during house search 1
- Taking flight during arrest 1
- Defendant's own statement 1

It may be clear from the above that - in addition to having or not having a permanent place of residence - there is a large variety regarding the justification of Flight Risk.

Besides having or not having a permanent residence and nationality, **the socio-economic situation of the suspect** - the study found - plays a very important role. In the 51 cases where Flight Risk was used as a criterion, socio-economic issues were present 43 times. However, this did not always constitute the explicit justification for Flight Risk. Precarious living conditions, not having a legal income, etc. were mostly used in the context of the risk of recidivism, but a very strong link was found between the suspect's precarious socio-economic situation and a possible Flight Risk, whether or not explicitly motivated as such. The above should not be surprising in itself: many of the motives cited above and explicitly used for Flight Risk can point to a socio-economic problem. For instance, not having a fixed place of residence may already indicate socio-economic problems.

During the FG, the **diversity and variety** of Flight Risks also surfaced. Very specific circumstances and the nature of the facts can sometimes unexpectedly bring up issues of flight. In this sense, one respondent cited the issue of intra-family violence: when offender and victim live together, the suspect cannot return to the family home because of the possible risk of recidivism, which in turn can bring about a problem of housing, and thus of possible absconding. Some respondents noted that it seems strange that the suspect's dire financial situation could be a ground for Flight Risk: one could also argue that poor people are not in a position to take flight because of lack of money.

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Most remarkable was the fact that **the gender of the suspect** also seemed to play a role in assessing Flight Risk. Of the 8 decisions of the investigating judges that concerned female suspects - out of a total of 94 decisions - 3 of them immediately obtained a RUC. One 4th female suspect stayed in pre-trial detention for a relatively short time. Child custody was a factor here. During the FG, it was first confirmed that female suspects constitute a very large minority. It could then be confirmed that women seemingly often - though not always - could count on more lenient treatment. With regard to Flight Risk, it was noted that women would be more "sedentary" than men, partly due to childcare.

Examination of the files and the course of the investigation showed that the importance of Flight Risk should also be related to **the suspect's possible share in the offences**. Whereas at the beginning of the investigation, a Flight Risk was retained in addition to the collusion risk, the latter appears to lose importance if, in the course of the investigation, it turns out that the suspect's share is rather small. At the start of the investigation, maintaining the pre-trial detention will then be based mainly on the fact that there is not yet sufficient clarity about the suspect's precise share. If it turns out that the share is rather limited, the fact that a Flight Risk was initially retained will not prevent a possible release. Thus, suspects - against whom a Flight Risk was initially withheld - were released with or without conditions, without Flight Risk having been removed or without conditions being imposed that related to the previously withheld Flight Risk.

Indeed, in investigations where multiple suspects were arrested, the order of release appeared to follow the hierarchy of importance. The "little minions" were released first, only later suspects with a larger possible stake.

This finding was confirmed during the FG, but also nuanced. In certain cases of manifest and compelling Flight Risk, Flight Risk will indeed be the weightiest criterion.

Regarding **the justification** of Flight Risk, it can be said that it is almost always extremely limited, often limited to a few words. Whereas serious indications of guilt are usually substantiated in detail, this is generally not the case for the three criteria. Almost always, standard formulas are used. "Since the suspect has no permanent residence, it is to be feared that he might abscond..." is a commonly used formulation.

On the other hand, it should be noted that the 3 criteria are always clearly distinguished from each other in the motivation. Finally, it was striking that there are large differences regarding motivation between the different districts, and even between the investigating judges themselves within the same district.

During the FG, it was cited in this regard that limited time and overcrowded schedules do not leave room for more extensive justification. It was also stated that on the basis of the reasoning and with knowledge of the criminal file, it is sufficiently clear which

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arguments apply regarding pre-trial detention. The debates before the investigating courts provide an opportunity for defence in this regard.

3.5. How Flight Risk impacts on pre-trial detention in general

The schemes and figures quoted above show that Flight Risk as a criterion is frequently used to justify pre-trial detention, but extremely rarely as the sole criterion. The abolition of Flight Risk as a ground for pre-trial detention would - in the cases examined - **not result in any releases**. In this sense, the impact of Flight Risk as a criterion is extremely low.

Nevertheless, the presence of Flight Risk does have a certain impact on pre-trial detention in general. After all, Flight Risk concerns a **rather objective**[20] criterion, which will also tend to be **rather stable** over time. Where not having a permanent residence is the basis for withholding Flight Risk, this risk will probably not change during the detention. This distinguishes it from the collusion risk, which does lose importance as time evolves (*supra*, 3.).

It should be noted here, however, that Flight Risk may lose importance **as the investigation progresses** and the suspect is found to have a rather minor share in the offences (*supra*, 3.4.). Although Flight Risk has then not changed per se, in those cases this apparently does not prevent release or RUC.

As already cited, lawyers have an important role to play in contesting or neutralising Flight Risk (*supra*, 2.4.ii.).

3.6. Alternative Measures in the context of Flight Risk

The substantive study of arrest warrants, revealed a very strong link between the absence of Flight Risk and the possibility of imposing a RUC. In none of the initial RUCs ordered by the investigating judge a Flight Risk was withheld. The absence of Flight Risk seems to be a *conditio sine qua non* for the possibility of a RUC.

During the FG, this hypothesis was confirmed. Crucial to the success of a RUC, and especially the monitoring of compliance with conditions, appears to be the fact that there should be no risk of absconding available.

[20] For example, in comparison with the risk of recidivism: *supra*, 3.

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There were 9 initial RUCs imposed by OR:

3 times there was no justification, but a PR was always available
6 times there was: 5 times R as a unique criterion
1 time C as a unique criterion
0 occurrence of any F

Regarding the absence of any justification when imposing a RUC, it was noted during the FG that this may be due to lack of time and to the fact that the suspect will not object to it, as he will be released anyway, albeit conditionally.

When a RUC was imposed, there was never a combination of criteria, whereas in the bulk of arrest warrants combinations of 2 (33) or usually even 3 (36) criteria are made (= 69/82). The hypothesis that a RUC would be imposed in less complex cases was not supported during the FG. One and all was again seen in the less stringent duty to provide justification. There is no need to concrete the decision in that situation.

No link could be found between the nature of the facts and the possibility of a RUC:

Facts: 2 x partner violence
2 x trafficking in narcotics
2 x computer fraud
2 x human trafficking
1 x theft with burglary and violence

The **bail** is an alternative provided by law to neutralise a possible Flight Risk. The possible reservations regarding the use of bail were already mentioned above (*supra*, 3.1.). Opinions were divided in this regard.

Noteworthy is the fact that when a Flight Risk was withheld, an electronic surveillance is not considered impossible, although wearing an ankle bracelet does not physically make escape impossible. This may be explained by the fact that having a PR is necessary for carrying out an ES. If it can be sufficiently demonstrated that the suspect has a permanent residence, Flight Risk will thus be removed, and an electronic surveillance may become possible.

The role of the state of the investigation and the possible role of the suspects has already been pointed out above. Suspects against whom a Flight Risk was initially withheld were also released under conditions, without conditions being imposed that

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related to the previously withheld Flight Risk, but purely for the reason that in the meantime the investigation had shown that the suspect had a previously limited share in the facts. This fact proved to be of greater importance than the previously withheld Flight Risk.

The survey did not reveal any application of European regulations allowing the implementation of a supervisory measure in another Member State. During the FG, it emerged that the implementation of an RUC abroad was considered impossible or at least impractical, due to fears that conditions could not be/will not be sufficiently monitored. These findings are in line with the findings of previous research on the application of European regulations.[21]

[21] E. MAES, A. JONCKHEERE and M. DEBLOCK, "DETOUR. Towards pre-trial detention as ultima ratio. 2nd Belgian National Report", 2017, p. 70 of part 1.

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4. Conclusions

The survey conducted showed that Flight Risk is often retained as a criterion (62%), but the least of the 3 criteria. The risk of recidivism is by far the most frequently invoked as a ground for pre-trial detention (93%). However, Flight Risk is extremely rarely invoked as the sole ground for pre-trial detention. During the file study, this was the case in only 2.4% of the files, in which case this ground was not even legally necessary. Noteworthy was the fact that in many cases (44%) the three criteria were used together. This should be read in the context of the desire to concrete the arrest warrant.

As for Flight Risk, it was argued that Flight Risk was the most objective criterion of the 3, where the risk of recidivism is easily justified. Although Flight Risk was retained as the least of the 3 criteria, it was pointed out that in certain cases it constitutes the most weighty argument.

It was found that Flight Risk was rather summarily justified, often through standard formulations.

The investigation revealed a very strong link between Flight Risk and whether or not the suspect has permanent residence in Belgium. Nationality plays a certain role, but the link with permanent residence is more dominant. It was also found that when Flight Risk was retained, the suspect was often in a precarious socio-economic situation. This fact also translated into the retention of the risk of recidivism as an additional criterion.

Noteworthy was the fact that the absence of Flight Risk appeared to be a *conditio sine qua non* for granting a RUC. During the FG, it was confirmed that a RUC would only have a chance of success if there was certainty regarding the fact that the suspect would not evade.

Once Flight Risk was retained as a criterion to ground a pre-trial detention, the defence is mainly looked at to neutralise it. Both with regard to bringing documents and formulating a proposal for bail, an initiative is expected from the defence.

Finally, the research also found that violations of obligation to provide assistance of a lawyer or, if necessary, an interpreter were rarely found.

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5. Recommendations

The study of the Belgian legislation has shown that sufficient legal guarantees are provided in order to safeguard the exceptional nature of pre-trial detention. At the **legislative level,** therefore, few meaningful recommendations can be formulated. Moreover, this consideration is fully in line with the findings of the DETOUR project: *"First of all, it must be observed that Belgian law already contains important guarantees to preserve the principle of exceptionality of pre-trial detention and respect for the rights of the defence. Unless a drastic reduction of the use of pre-trial detention (for example by means of the installation of quotas) would be strived for, it would be recommended to act more on concrete practices than on further legislative reforms."*[22]

The survey found that the **European Supervision Order** was not being applied. Especially practical objections and a lack of trust in possible supervision emerged as causes. Enhanced cooperation and exchange of information between Member States is therefore recommended.

The situation of suspects with foreign nationality / no fixed residence in Belgium deserves special attention, especially in a research regarding Flight Risk in the context of pre-trial detention. During the investigation, the problem of conflicting decisions between judicial authorities on the one hand and the **Immigration Department** on the other came to light. Clear agreements (harmonisation / hierarchy ?) are insisted upon.

The survey revealed that very rarely, if ever, use was made of the legally provided opportunity to be assisted by the **probation officers** in the context of a possible RUC. It is recommended to continue to inform about the existence of this possibility and to remove practical obstacles in this regard. For example, the physical presence of the probation officers in the vicinity of the investigation cabinets could be considered. However, this should also highlight possible side effects. In this sense also: *"A permanent dialogue is nevertheless necessary; such a dialogue, for example, would allow probation officers to be physically present near the investigating judges' office and take in charge immediately and in a concerted way suspects who are released under conditions, or to prepare concrete alternative measures [...] Whilst such recommendations can be formulated for the local level, one has, however, to remain vigilant to two aspects. First, avoiding that the introduction of less severe measures would lead to an increase on the number of persons placed under one or another form*

[22] E. MAES, A. JONCKHEERE and M. DEBLOCK, "DETOUR. Towards pre-trial detention as ultima ratio. 2nd Belgian National Report", 2017, part 3, 1.

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of pre-trial supervision (control), and secondly, preventing that pre-trial measures would be used as a kind of 'short punishment'."[23]

The investigation conducted revealed that the role of the **lawyer** with regard to Flight Risk is very important. Both in contesting Flight Risk and in neutralising a retained Flight Risk, an initiative is expected from the defence. Further training and continued awareness-raising on this matter is therefore recommended.

Finally, it is recommended the practise of Fight Risk should be mapped out further through **additional scientific research**.

Thus, further investigation into the application of bail seems possible and appropriate. After all, bail is an important alternative to neutralise Flight Risk. It could also be investigated to what extent the bail sum achieves this objective: do suspects who have paid a bail sum remain at the disposal of the justice system or does the suspect nevertheless escape?

Alongside, it seems appropriate to examine the extent to which a Flight Risk was rightly deterred. Is there an overestimation of Flight Risk? Thus, the extent to which suspects effectively evade, the frequency of convictions in absentia, the consequences of a conviction in absentia, etc. could be examined.

[23] E. MAES, A. JONCKHEERE and M. DEBLOCK, "DETOUR. Towards pre-trial detention as ultima ratio. 2nd Belgian National Report," 2017, part 3, 2.

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