AVAILABLE STATISTICAL DATA AND RESEARCH ON FLIGHT RISK IN PRE-TRIAL (DETENTION) PROCEEDINGS

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IMPROVING JUDICIAL ASSESSMENT OF FLIGHT RISK (FLIGHTRISK)

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Introduction

As part of the FLIGHTRISK project ('Improving judicial assessment of flight risk'), approved by the European Commission (EC) under Grant Agreement No. 101046544, one of the work packages (WP2) and deliverables envisaged is to investigate whether (statistical) data and (scientific) research is available in the Member States of the European Union (EU) providing information about the use of the flight risk as a criterion within pre-trial (detention) procedures.

This work package was assigned to one of the partner organisations involved, the National Institute of Criminalistics and Criminology (NICC); the work was carried out during the period [July 2022-January 2024]. In particular, the scope of this work package, and the project in se, was explicitly limited to flight risk as grounds for pre-trial detention (or alternative measures).

In the following pages, we summarise the main findings of our research.

Methodology

This report on available (statistical) data and scientific research on the application of flight risk in pre-trial detention procedures within the EU Member States, employed two data collection methods: a literature review and a survey via a self-constructed (open) questionnaire.

For the literature review, several sources were consulted: (1) relevant articles in five criminological journals published (in English) in the period 2010-2023 (see below), (2) other literature (in jurisdictions within the EU) that we – as researchers – had knowledge of through personal contacts, previous collaborations or own scientific work, and/or (3) literature found through an additional search on the Internet, via Google Scholar and Research Gate, using keywords such as 'pre-trial detention' and 'flight risk'[1]. The information we collected thus includes both 'official' publications (as an edited book, book chapter, or journal article) and 'grey' literature in the form of a (research) paper or report. For this latter type of information, the work and output of some EC-funded projects, such as DETOUR[2] and PRE-TRIAD[3], proved to be particularly useful. In addition to our own search strategy, relevant literature was sometimes also suggested or referred by respondents in the questionnaire that we developed, and this in response to specific questions (see *infra*).

[1] Most of the research was carried out in English, but we also took into account work carried out in French and Dutch.

[2] DETOUR – Towards Pre-trial Detention as Ultima Ratio, funded by the Justice Programme of the European Union (JUST/2014/JACC/AG/PROC/6606; see Hammerschick *et al.*, 2017).
https://www.uibk.ac.at/irks/projekte/detour.html

[3] http://www.pretrial-detention.org/

Relevant articles were systematically traced in the following journals: the *British Journal of Criminology* (BJC)[4], the *European Journal of Crime, Criminal Law and Criminal Justice* (ECCL)[5], the *European Journal of Criminology* (EJC)[6], the *European Journal on Criminal Policy and Research* (EJCPR)[7] and the *Howard Journal of Crime and Justice* (HJCJ)[8]. Within these criminological journals, we searched for relevant articles by (separate) use of the keywords: 'flight', 'abscond*', 'pre-trial' or 'pretrial'. The search was limited to articles published from 2010 up to present day. All 'hits' obtained were carefully checked, and filtered based on their relevance to the topic studied in our research, namely: the use of flight risk in pre-trial (detention) proceedings in the Member States of the EU, along with the United Kingdom (UK) which was included. In the end, 8 articles were selected.

The literature was analysed inductively, identifying the themes relating to flight risk as analysed in scientific research; particular attention was paid to relevant statistical material.

The data collection we compiled ourselves via the questionnaire was (much) broader than just a survey of available (statistical) data and research literature. This questionnaire also integrated contextual elements, e.g., specifications related to the legal framework. Annex 1 shows the structure of the questionnaire and wording of the questions. More specifically, the questionnaire was divided into three parts: (1) Legal framework, (2) Use in practice, and (3) Sources - Documentation.

The concept and design of the questionnaire was discussed during a consultation meeting, in December 2022, together with the project coordinator, Fair Trials Europe (FTE), and the other Flightrisk-partners from Austria (AT), Bulgaria (BG), Ireland (IE) and Poland (PL). The questionnaire was then sent out, in January-February 2023, to one contact person within each EU Member State. A step-by-step strategy was followed to identify potentially relevant respondents. The initial contact group targeted the Flightrisk-partners (AT, BG, IE, PL). For the remaining countries we contacted researchers involved in previous large-scale research on pre-trial detention in the DETOUR-project (DE, LT, NL, RO), personal contacts in the framework of past collaborations and/or authors who had already published on the topic or who were mentioned in leaflets published by FTE (DK, EE, EL, ES, FI, FR, IT, LU, LV, MT, PT, SE, SI, SK), and/or, finally, national correspondents involved in the data-collection for the *European Sourcebook on Crime and Criminal Justice Statistics* (ESB: CY, CZ, HR, HU, LU, SI)[9]. For countries for which we received no response after a reminder, we then contacted the Ministry of Justice or local human rights organisations. Questionnaires were completed by the requested respondent, or else by another person or service referred to us by our local contact person or whom we contacted ourselves at a later stage.

[4] https://academic.oup.com/bjc
[5] https://brill.com/view/journals/eccl/eccl-overview.xml
[6] https://journals.sagepub.com/home/euc
[7] https://www.springer.com/journal/10610/
[8] https://onlinelibrary.wiley.com/journal/20591101
[9] https://wp.unil.ch/europeansourcebook/

In the end, we received a response from all EU countries. The last response was received on 30 November 2023. From Spain, three different respondents sent in answers to the questionnaire. Although almost all questionnaires were completely filled out, for some countries, we received only or mainly information on the legal framework, less or nothing at all on practices. The response time varied between 16 and (an extreme) 316 days; all but one reply was received within the first six months. A quick response came mainly from countries where some research had already been conducted on the topic, more generally on pre-trial detention; swift replies were also received by those who were directly involved in the Flightrisk project (received within less than 60 days). For some other countries the response time was considerably longer, usually because it was also harder to find a respondent/expert who could answer the questionnaire.

Finally, this part of WP2 of the Flightrisk project not only provided insight on presence of the flight risk criterion in national legislation and its use in practice; it also led to the creation of a list/network of possible national correspondents on this topic of pre-trial detention. In that sense, sometimes all the time spent searching for, and questioning, experts from the different EU Member States also turned out to be potentially beneficial for future research and/or collaborative work on the subject, on pre-trial detention in general, or related to more specific topics in this area of investigation. Some questionnaires also contained interesting references/internet links to relevant legislation and literature.

In this regional report, we focus on the question of the availability of official (statistical) data on the use of flight risk, and related research literature. Normative aspects are not (yet) discussed in further detail; this will be the subject of a later, more extensive report: *Flight risk in pre-trial (detention) proceedings: normative and practical aspects within EU Member States* (now attached to this report as an addendum, dated 30 April 2024). Although in no way can we claim to have been exhaustive, we have tried, to the best of our ability, to give at least some idea on (research on the) practical use of flight risk in pre-trial detention procedures, as well as present general trends in this area. Before dealing concretely with the relevant empirical research results, it is, however, also important to consider the definition of flight risk.

Results

Preliminary remark: definition of 'flight risk'

In the literature, indeed, it can be observed that different terms are used to address the issue of the risk of flight: 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. We have taken these different concepts into account in our study, while noting, however, that some domestic legislations make a distinction between these terms. 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).

Studies have been carried out in the United States specifically on the definition of the risk of flight, but no *similar* studies have been found on the European continent. These studies observe that '*it is clear that flight and nonappearance are not simply interchangeable names for the same concept, nor are they merely different degrees of the same type of risk*' (Gouldin, 2018: 677).

Official (national) statistics

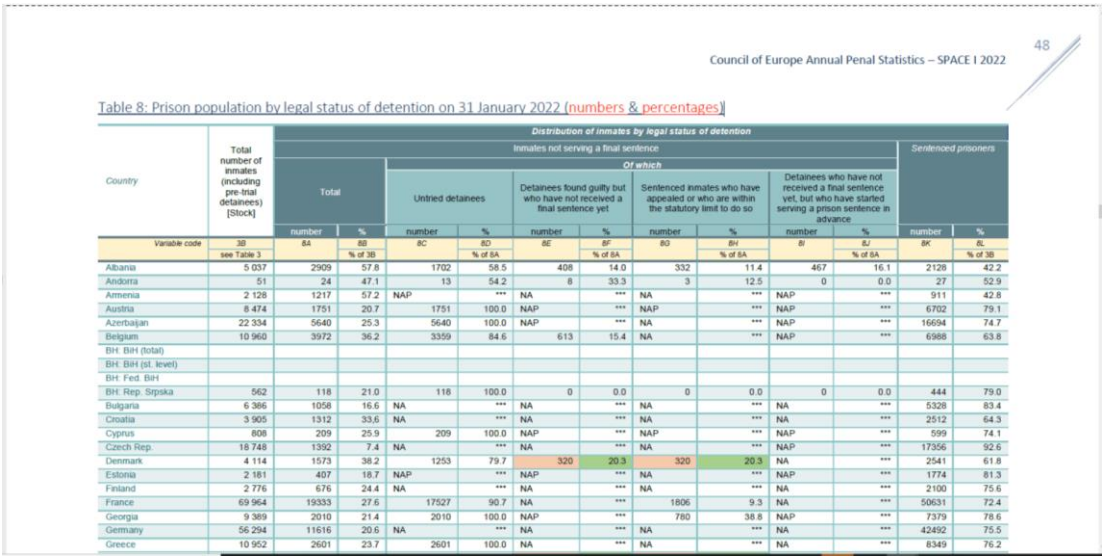
Another important – but empirical – finding of our study is that, within the EU, hardly any statistical data, emanating from (national) official bodies, are available on the (degree of) application of the 'risk of flight' criterion when ordering an arrest warrant/pre-trial detention. From several countries, we received no answer to our specific question: *Could you please refer us to/provide us with statistics and research material on the use of the criterion of risk of absconding/flight, available for your country?* (Question 8). Or, where they did reply, the answer was usually that such (official) figures were not available. Some made reference to more general data available, for example, including on the use of pre-trial detention (number of arrest warrants) and/or alternatives, the structure of the prison population by legal status (number or percentage of persons in pre-trial detention/remand custody).

A good overview of what is available at the European level – albeit, within the (broader) context of the Council of Europe – can be found, for example, in the annual SPACE I reports (*Statistiques Pénales Annuelles du Conseil de l'Europe*, or Council of Europe Annual Penal Statistics). Data are collected by the *Université de Lausanne* (UNIL, Switzerland) and published on behalf of the Council of Europe.[10] In these SPACE I-reports information now available includes the following subjects (in SPACE I, 2022):

- Number of inmates and prison population rates (adjusted and non-adjusted) on 31 January 2022 *[including pre-trial detainees]* (SPACE I, 2022: Table 3)
- Prison populations by gender on 31 January 2022 (numbers & percentages) *[of which the number of inmates 'not serving a final sentence']* (SPACE I, 2022: Table 7)
- Prison population by legal status of detention on 31 January 2022 (numbers & percentages) (SPACE I, 2022: Table 8) (See Figure 1, below)
- Prison populations by nationality and legal status of residence on 31 January 2022 (numbers) (SPACE I, 2022: Table 12)
- Prison capacity by type of institution on 31 January 2022 *[of which capacity for pre-trial detainees]* (SPACE I, 2022: Table 17)

[10] https://wp.unil.ch/space/space-i/annual-reports/ ; https://www.coe.int/en/web/prison/space

- Releases from penal institutions during 2021 (numbers & percentages) [*releases of detainees 'not serving a final sentence'*] (SPACE I, 2022: Table 27)
- Inmates who died inside penal institutions (during 2021) (numbers, percentages & rates) *[suicides, of which the number of detainees 'not serving a final sentence']* (SPACE I, 2022: Table 28)
- Average length of imprisonment (during 2021) [*number of days spent in penal institutions by inmates not serving a final sentence in 2021; average number of inmates not serving a final sentence in 2021; number of admissions (flow) before final sentence in 2021; indicator of the average length of remand in custody, in months (based on the total number of days spent in penal institutions*] (SPACE I, 2022: Table 31)
- Expenses in penal institutions (during 2021) [*average amount spent per day for the detention of one inmate, of which detainees not serving a final sentence; estimation of the total amount spent for detainees not serving a final sentence*] (SPACE I, 2022: Table 33)



Council of Europe Annual Penal Statistics – SPACE I 2022 48

Table 8: Prison population by legal status of detention on 31 January 2022 (numbers & percentages)

Country	Total number of inmates (including pre-trial detainees) [Stock]	Distribution of inmates by legal status of detention: Inmates not serving a final sentence: Total		Of which: Untried detainees		Of which: Detainees found guilty but who have not received a final sentence yet		Of which: Sentenced inmates who have appealed or who are within the statutory limit to do so		Of which: Detainees who have not received a final sentence yet, but who have started serving a prison sentence in advance		Sentenced prisoners	
		number	%	number	%	number	%	number	%	number	%	number	%
Variable code	3B	8A	8B	8C	8D	8E	8F	8G	8H	8I	8J	8K	8L
	see Table 3		% of 3B		% of 8A		% of 8A		% of 8A		% of 8A		% of 3B
Albania	5 037	2909	57.8	1702	58.5	408	14.0	332	11.4	467	16.1	2128	42.2
Andorra	51	24	47.1	13	54.2	8	33.3	3	12.5	0	0.0	27	52.9
Armenia	2 128	1217	57.2	NAP	***	NA	***	NA	***	NAP	***	911	42.8
Austria	8 474	1751	20.7	1751	100.0	NAP	***	NAP	***	NAP	***	6702	79.1
Azerbaijan	22 334	5640	25.3	5640	100.0	NAP	***	NA	***	NAP	***	16694	74.7
Belgium	10 960	3972	36.2	3359	84.6	613	15.4	NA	***	NAP	***	6988	63.8
BH. BiH (total)													
BH. BiH (st. level)													
BH. Fed. BiH													
BH. Rep. Srpska	562	118	21.0	118	100.0	0	0.0	0	0.0	0	0.0	444	79.0
Bulgaria	6 386	1058	16.6	NA	***	NA	***	NA	***	NA	***	5328	83.4
Croatia	3 905	1312	33.6	NA	***	NA	***	NA	***	NA	***	2512	64.3
Cyprus	808	209	25.9	209	100.0	NAP	***	NAP	***	NAP	***	599	74.1
Czech Rep.	18 748	1392	7.4	NA	***	NA	***	NA	***	NAP	***	17356	92.6
Denmark	4 114	1573	38.2	1253	79.7	320	20.3	320	20.3	NA	***	2541	61.8
Estonia	2 181	407	18.7	NAP	***	NAP	***	NA	***	NAP	***	1774	81.3
Finland	2 776	676	24.4	NA	***	NA	***	NA	***	NA	***	2100	75.6
France	69 964	19333	27.6	17527	90.7	NA	***	1806	9.3	NA	***	50631	72.4
Georgia	9 389	2010	21.4	2010	100.0	NAP	***	780	38.8	NAP	***	7379	78.6
Germany	56 294	11616	20.6	NA	***	NA	***	NA	***	NA	***	42492	75.5
Greece	10 952	2601	23.7	2601	100.0	NA	***	NA	***	NA	***	8349	76.2

Figure 1: Extract of Table 8 from SPACE I (2022, p. 48)

Based on the information we obtained through our questionnaire, only two countries in the EU appear to have national figures, published by official bodies, on the use of flight risk in pre-trial detention procedures: Germany and Spain.

In Germany, such information can be found in the report '*Rechtspflege. Strafverfolgung*', published by the *Statistisches Bundesamt* (Destatis).[11] One of the tables in this report presents figures on the number of suspects in a given year, the number of pre-trial detention orders and the number of cases in which the main motive (among other possible motives) was the risk of flight (Table: *6 In der Strafverfolgungsstatistik 2021 erfasste Personen mit Untersuchungshaft - 6.1 Nach Grund und Dauer der Untersuchungshaft* – see Figure 2 below). The figures are presented for the whole population (all the crime categories taken together), and by

[11] https://www.destatis.de/DE/Themen/Staat/Justiz-Rechtspflege/Publikationen/Downloads-Strafverfolgung-Strafvollzug/strafverfolgung-2100300217004.pdf?__blob=publicationFile

specific crime category. For example, for the year 2021, it is reported that most pre-trial detentions refer to the risk of flight: out of 25,460 persons with a pre-trial detention order (*mit Untersuchungshaft*), this was the case in 23,719 of the cases (Statistisches Bundesamt [Destatis], 2022: 374), or 93.2 per cent. This finding is striking from a European-comparative perspective, given that in other jurisdictions it is rather the risk of recidivism that is the main grounds for pre-trial detention. The statistical data are (of course) also confirmed by specific (scientific) research conducted on the application of pre-trial detention in Germany (*infra*).

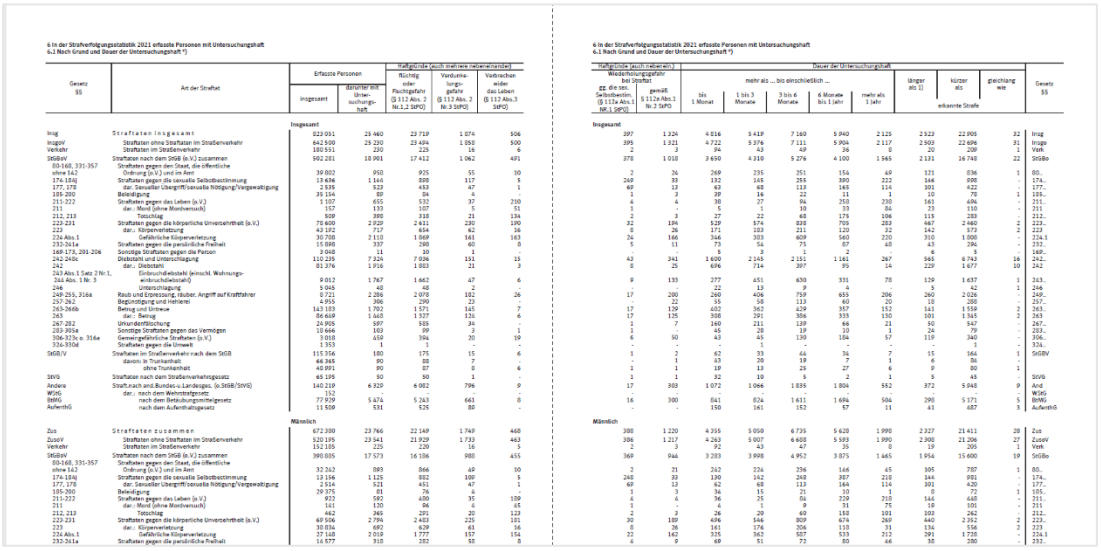


Figure 2: Number of pre-trial detention orders and the grounds for PTD (Statistisches Bundesamt [Destatis], 2022, p. 374-375)

One of the Spanish respondents also refers to available nationwide (and recurrent) statistical information. According to statistics published by the General Council of the Judiciary of Spain, (*Consejo General del Poder Judicial*),[12] in 2020, pre-trial detention was ordered in a total of 39,324 cases. Of these, 33.6 per cent (13,212) were ordered in virtue of the risk of flight or hiding evidence. Regarding alternative measures to pre-trial detention, during the same period, pre-trial detention was replaced by less restrictive measures in a total of 27,197 cases. Of these, 43.2 per cent (11,734) were replaced by precautionary measures other than detention, such as periodic appearance before the court or prohibition to leave the national territory.

Elsewhere, knowledge on the application of flight risk is generated by specific research on this topic (see e.g., Wolf, in Germany, *infra*), or by more general research on the application of pre-trial detention. As the editors of the very recently published book '*European perspectives on pre-trial detention: A Means of Last Resort?*' (Morgenstern, Hammerschick & Rogan, 2023) state, even this kind of more general or broader empirical research on pre-trial detention remains rather scarce: '*High levels of remand or pre-trial detention (PTD) is a matter of growing concern in many countries, and at a European level. Despite being responsible for a significant part of the prison*

[12] https://www.poderjudicial.es/cgpj/en/Subjects/Judicial-Statistics/

population, PTD practice is rarely the focus of criminological and criminal justice research.'

In the following section, we outline some key themes and trends emerging from this – rather small, but steadily growing – body of research, here specifically oriented towards use of flight risk as grounds. Our overview only concerns empirical research literature, not normative aspects (i.e., domestic legislation or European directives, etc.) concerning flight risk.

Results from the research literature (and respondents' observations)

In this section, we first present the (scientific) research that mentions the (relative) importance of flight risk in decisions on pre-trial detention (1). Next, we focus on the general elements taken into consideration in practice to justify judicial decisions (2), and then, we report on research that deals specifically with the situation of foreign nationals (3). We conclude this section with a few specific analyses relating to flight risk (4), namely on: (a) the role of artificial intelligence (AI) in identifying flight risk and electronic monitoring (EM) for controlling this risk, and (b) the 'disappearance' of flight risk and the consequences of pre-trial detention regarding the outcome of the trial (possible conviction).

Even though the research analysed is mainly based on qualitative data, we can nevertheless also highlight some statistical data. As the objective was to focus on research relating to practices, we excluded purely legal considerations (e.g., description of the legislation) from our analyses, as mentioned above.

1. The importance (prevalence) of flight risk in imposing pre-trial detention

Few studies have analysed the importance of flight risk in justifying pre-trial detention. One recent study should be mentioned, where interviews were conducted mainly with judges and prosecutors in 14 European countries. They were asked about grounds for pre-trial detention and the ones most often mentioned were mainly flight risk and failure to appear in court (PRE-TRIAD, 2021a: 31). However, the situation varies from country to country.

An earlier study focusing specifically on the situation in Spain shows that the most important objective mentioned in decisions relating to pre-trial detention was to ensure the defendant's appearance at the trial or, in other words, to avoid the risk of escape (48%). The second goal was to avoid re-offending (20%), followed by protecting evidence (15%) and protecting the victim (11%) (Diez-Rippolés & Guerra-Pérez, 2010: 394). In a more recent study regarding the practice of pre-trial detention for a small

sample of cases (n=55) between 2001 and 2014, it was found that pre-trial detention was based on the risk of absconding in half the cases (50,9%), and in 18% of the 55 cases on the risk of recidivism (APDHE, 2015: 40, note 67).

In Lithuania, the risk of absconding is the most commonly used ground for detention in practice (Bikelis, 2023). A file analysis of 63 court decisions on imposition of detention (in 2014-2015) indicated that this ground was employed in 89% of the decisions to detain suspects (often in combination with another ground for detention – risk of re-offending, which was cited in 56% of court decisions) (Bikelis & Pajaujis, 2017).

In England and Wales, an empirical study on observations and case files shows that '*the most common basis for detention was the 'likelihood of offending on bail' (61% and 44% respectively). This particular ground was normally accompanied by at least one other, with the next most common being 'fear of failure to surrender'* (Smith, 2020: 59).

A similar situation can be observed in Italy. A 2015 study by Parisi, Santoro and Scandurra, based on court observations, interviews and an analysis of a small sample of 43 case files, showed that prosecutors (100%) believe that the risk of reoffending is the main reason leading to the request for application of pre-trial detention. In 63% of the case files where pre-trial detention was ordered, the accused in pre-trial detention had a criminal record; furthermore, both the prosecutor's request and the motivations of the judge in the order to apply the measure, were based on the risk of reoffending. In 42% of the case files (where the pre-trial detention was ordered), the grounds stated by the judge was the risk of flight. According to the respondent to our questionnaire, the risk of flight is thus often invoked, albeit (probably) often in combination with other grounds for pre-trial detention. And this, despite the fact that a legal threshold applies to restrict its use: the judge had to foresee that, at the end of the trial, the prison sentence imposed would be more than 2 years (a further restriction was introduced as of 2015, in that the law provides that the risk of flight cannot be inferred by the seriousness of charges and that it must now be proved that the 'danger' is 'actual').

In the Netherlands, flight risk is only used rarely as a ground for pre-trial detention. In the 109 cases observed by Crijns, Leeuw and Wermink (2016), flight risk was only cited as grounds for pre-trial detention in 4% of the cases observed at the initial hearings and in 1% of the cases observed at the hearings in chamber (Crijns, Leeuw and Wermink, 2016: 36). The Netherlands Institute for Human Rights concluded that risk of flight was mentioned as a ground in 28 of 222 cases in 2017 concerning remand in custody, thus 13% (College voor de Rechten van de Mens, 2017). The observed difference in percentages can be explained by the fact that neither of the two studies worked with a large enough sample (response to Q4 of the questionnaire). The low occurrence of the risk of flight is confirmed by some of the respondents in the DETOUR-project (Hammerschick *et al.*, 2017), however, there did not seem to be much consensus as to the scrutiny applied by judges deciding on the grounds. For example, the view was put forward that it is quite easy to substantiate the risk of flight.

In Belgium, the risk of recidivism is preponderant, even if the risk of absconding is mobilised to a significant extent locally (Burssens, 2021: 21). In an earlier study, it was

observed that the grounds for an arrest warrant most often mentioned by the investigating judge were the risk of recidivism (91%), seriousness of the offence (51%), risk of flight (39%), importance of the investigation (32%) and having no fixed residence (15%) (Snacken *et al.*, 1997: 151).

In Finland, although no official national data are available (cf. response to Q8 of the questionnaire: '(…) *such statistics or research materials do not seem to exit* (*sic*!)'), our respondent to the questionnaire mentions (response to Q4) that, in 2022, pre-trial detention was ordered by a court of law in (altogether) 1,729 cases; in 346 (20%) of these cases the risk of absconding was (one of) the reason(s) for the pre-trial detention.

An Austrian study of 2010 (Birklbauer *et al.*, 2010) shows that in 89% of cases where pre-trial detention had been ordered, the risk of reoffending was stated as a ground, while in 70% of cases the risk of absconding/flight risk was determined as a ground for imposing pre-trial detention. Most often flight risk was applied in combination with the risk of reoffending. A more recent study shows that in Austria the risk of reoffending is still today applied in about 90% of all PTD-cases and that '*with an estimated rate of applications in about 60% of all PTD cases, the risk of absconding is also often applied*' (Hammerschick *et al.*, 2017: 14).

In Germany, as part of the DETOUR-project, it was observed that '*While in Austria available data shows that the risk of reoffending is applied in about 90% of all PTD-cases, it is the opposite in Germany with 90% of all PTD-cases based on a risk of absconding*' (Hammerschick *et al.*, 2017: 14). A research article stipulates that in this country '*flight and the risk of absconding are by far the most common reasons for imposing pre-trial detention* (…) *in 2017, 27,836 remanded prisoners from a total of 29,548 detainees were held in pre-trial detention on precisely these grounds*' (Jung *et al.*, 2021: 307) (see also above 'Official [national] statistics'). In 2019, the risk of absconding was involved in 92 per cent of all impositions of pre-trial detention (Morgenstern, 2023) while a few years before this percentage had been estimated at 94% (Wolf, 2017).

This contrasting situation between Germany and Austria, two neighbouring countries with similar legal traditions, seems to be due to specific regulations. The dominance of the risk of reoffending in Austria appears due to the legal requirements for the risk of absconding, more difficult to be fulfilled while the risk of reoffending is rather easily applied in many cases (Hammerschick *et al.*, 2017: 14-15). For example, the flight risk may not be assumed if the suspect is living in Austria in orderly circumstances and if the expected sentence does not exceed five years – if flight risk is the only ground, the payment of a security deposit must be considered (response to Q4 of the questionnaire; see below). By contrast, in Germany, despite some regional differences, the risk of absconding is '*the ground for detention applied more easily*' (Hammerschick *et al.*, 2017: 15).

One of the results of the DETOUR study, therefore, is that '*the grounds for detention to some extent seem interchangeable. We had responses indicating that the grounds for detention applied are not necessarily the ones considered most relevant in individual cases. 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. In Germany it was explained the other way around: there were indications that the ground of a risk of absconding may be applied in cases in which a risk of reoffending is, in fact, essential to the actual motivation for PTD. As mentioned before, here the risk of absconding is considered the stronger ground and easier to apply. 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' (Hammerschick *et al.*, 2017: 20).

Moreover, if flight risk is the ground for detention that is most often applied, '*It is interesting to note that* (…) *the real problem behind the assumed risks of absconding may be the lack of a postal address and linked uncertainties with respect to bureaucratic issues (e.g., a foreign national without permanent residence might not receive the necessary information to participate in the process and attend the trial)*' (PRE-TRIAD, 2021a: 33).

2. Factors taken into account to assess the risk of flight

The European Court of Human Rights (ECtHR) requires the risk of absconding to not be inferred solely on the basis of the sentence incurred (risk of facing long term imprisonment) or from the suspect's situation of residence (lack of fixed residence) (Crijns, Leeuw and Wermink, 2016: 14; Cape & Smith, 2016: 12; Mulcahy, 2016: 12; Corstens & Borgers, 2014: 454, referring to the case ECtHR 26 June 1991, appl. no. 12369/86, Letellier/France; Janssen, Van den Emster & Trotman, 2013: 434); '*rather, it must be assessed "with reference to relevant factors" which may confirm or rule out the existence of a risk of flight*' (Martufi & Peristeridou, 2020: 161). If the suspect offers guarantees, for example by posting bail, the remand in custody may not be based solely on the risk of flight (Corstens & Borgers 2014: 454, referring also to the case ECtHR 26 June 1991, appl. no. 12369/86, Letellier/France; Janssen, Van den Emster & Trotman, 2013: 436). Some research mentions the factors that authorities take into account when assessing flight risk.

For example, in Poland, it was pointed out that '*the severity of the penalty is an important element in the assessment of the risk of absconding or relapsing into crime* (…) *When assessing whether the likelihood of imposing a severe penalty gives rise to the risk of hiding, absconding or obstructing, the court should take into account the capacities of the alleged perpetrator to destabilize the criminal proceedings or to evade justice. This method of assessment was presented in the decision of the Court of Appeal in Kraków of 13 February 2019:35 "Before his arrest, the suspect was a 'mobile' person; he permanently lived in Germany, worked there, and also ran a business in other European countries. Taking into account his 'mobility', experience and professional possibilities as well as the ability to function outside Poland, when he*

is facing severe punishment, this justifies the fear of his escape and hiding.' (Tarapata, 2023: 248 and 250).

Conversely, a less severe sentence may mean that the risk of absconding is no longer grounds for pre-trial detention. In Austria, for example, '*the risk of absconding or hiding does not apply if a fully integrated person is suspected of a crime that carries a maximum penalty of up to five years unless concrete preparations to flee have been made*' (Hammerschick, 2023).

In research carried out in Belgium, Van Roeven and Vander Beken (2014) point out that for some judges, the fact of having committed a very serious offence is considered as an indication of flight risk (Van Roeven & Vander Beken, 2014: 506) (see also below about use of the criterion of being a member of a criminal organisation). The importance of this seriousness of offence criterion has also been noted in several European countries (Hammerschick *et al.*, 2017: 19).

Other factors are interpreted favourably regarding the risk of absconding, such as a daily occupation (work), a family (children), health issues… In Portugal, for example, some factors that may substantiate the determination of the risk of flight include the suspect's personality, his/her financial situation, professional, social and family life (PRE-TRIAD, 2021b: 17/59). In Bulgarian research, it was pointed out that '*the court can decide that the fact that the accused person has a permanent job or is enrolled in some form of education means that there is a lower risk of absconding*' (PRE-TRIAD, 2021b: 18/48). In Ireland, the factors that should be considered are namely the seriousness of the charge, the strength of evidence, the likelihood of sentence on conviction, the failure to answer bail in the past (Rogan, 2023). This last factor seems essential to such an extent that the Irish pre-trial detention decision-making focuses '*on past rather than future behaviour*': after interviewing practitioners, it emerged that '*the number of occasions where the person had failed to attend court was, for many participants, a much more important factor even that the number of prior convictions a person had*' (Rogan, 2023). The researcher therefore concludes that '*Practitioners in the Irish system examine past failures to turn up for court as evidence to predict the likelihood of turning up for court in the future*'.

These national studies should not obscure the fact that there may be differences in the way legislation is applied within the same country. In Austria, for example, it should be noted that there are indications for regional variations in the application of the risk of absconding as grounds for pre-trial detention, with legal practitioners in the east of Austria favouring its use compared to their colleagues in the western part of the country. In the eastern region of Austria, not having a regular place of living in Austria and an expected severe sentence are often considered as incentives for absconding without much additional consideration (Hammerschick & Reidinger, 2017). In the west of Austria, it was noted that the risk of absconding is not much of a factor in practice and the authorities align fully with a Supreme Court judgment, treating an EU residence as equivalent to an Austrian residence (Hammerschick & Reidinger, 2017).

Another general observation can be made, concerning weaknesses in the motivation of the flight risk. For instance, in the Netherlands, the Netherlands Institute for Human Rights concluded in 2017 that the 'risk of flight' ground was not thoroughly motivated

in most of the cases in which it was used. In three of the 28 'remand in custody'-decisions, the ground was mentioned but not motivated. In the other 25 decisions the ground was motivated, but in 15 cases with a standard motivation. (College voor de Rechten van de Mens, 2017)

Furthermore, it is assumed that the ECtHR considered that there authorities had an obligation to consider alternatives to detention where there is a flight risk (Cape & Smith, 2016: 58, referring to the case *Wemhoff v. Germany*): '*If the risk of absconding can be avoided by bail or other guarantees, the accused must be released*' (Partnership for Good Governance, 2017: 41, referring to the case *Mangouras v. Spain*, no. 12050/04, 28/09/2010, § 79).

Yet, although the existence of alternative measures to avoid the risk of absconding (surrendering identity documents; being required to appear periodically before a judicial authority; placing limits on engagement in particular activities or restricting the accused's movement to certain areas before trial; requiring supervision by an agency appointed by a judicial authority…: see Nagy, 2016: 161)…), research highlights a lack of trust by the authorities, which explains why these measures are under-used (Hucklesby, Boone & Morgenstern, 2023: 251; Fair Trials, 2021: 23; Hammerschick *et al.*, 2017: 43). Therefore, in the Netherlands as well as in England and Wales for instance, '*the main reasons for denying bail (i.e., for a remand in custody) are predominantly risk-based and include, inter alia, the risk of absconding, reoffending, and obstructing justice*' (Dhami & van den Brik, 2022: 386). In Ireland, '*while flight risk (usually phrased in terms of the likelihood of failing to appear) was the second most common reason for bail objections, invoked in respect of 35% (n=32) of bail applicants in hearings monitored, judges referred to flight risk as a reason for refusing bail in 18% of cases (n=16)*' (Mulcahy, 2016: 48).

The greatest problem is actually the monitoring of alternative measures (Jonckheere & Maes, 2019). In this respect, it is interesting to look at research carried out in the United States: *'A study of bail supervision programs for adult arrestees in three countries in New York found that intensive supervision was very effective in preventing flight and re-arrest. At one of the program sites, while eight percent of people on intensive supervision were re-arrested whilst on pretrial release and three percent failed to appear or absconded, 51 percent of people released without supervisions failed to appear at trial or absconded, and 42 percent were re-arrested before trial*.' (Schönteich, 2014: 171)

In the Netherlands, it was also pointed out that pre-trial detention may also be used '*as a means of punishment in and of itself for foreign defendants who are expected to be ordered to serve a prison sanction and who risk absconding before their sentencing'* (Wermink, Light & Krubnik, 2022: 368). The authors refer to this as a '*premature punishment phenomenon*' (*ibid.*: 376) described in the DETOUR-project as a '*pre-sentencing motivation*' (Hammerschick *et al.*, 2017: 23).

3. The specific case of 'foreign nationals'

The term 'foreign nationals' is used here to describe people '*who are not citizens of the country where they are accused of committing an offence*' which can refer to a variety of situations (Hucklesby, Boone & Morgenstern, 2023: 231).

Statistical data demonstrate '*consistently that a disproportionate number of defendants are held in pre-trial detention in Europe are foreign nationals*' (Hucklesby, Boone & Morgenstern, 2023). '*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*' (Fair Trials, 2021: 28). However, a distinction must be made between the Eastern and the Western States of the EU because '*Migrants inflows into the Eastern states of the EU is significantly lower than into the Western states of the EU. The numbers of foreign suspects and foreign pre-trial detainees also significantly differ*' (Bikelis, 2023).

We also observe in some European countries that the percentage of foreign nationals in pre-trial detention is systematically higher than the percentage of foreign nationals among convicted prisoners (Nagy, 2016: 166). Furthermore, in certain countries (e.g., Austria, Belgium, Germany), while foreign nationals are overrepresented in the pre-trial detention statistics, they are underrepresented in statistics on release under conditions (Hammerschick *et al.*, 2017: 41).

This disproportionality is explained '*by how the legal criteria of risk of flight/absconding is applied in case of involving foreign national defendants*' (Hucklesby, Boone & Morgenstern, 2023). Indeed, the '*non-nationals are often at a disadvantage in obtaining alternatives for detention because they are seen as a greater flight risk than national defendants. This includes pre-trial detainees from within the EU, even though authorities could issue a European Arrest Warrant to ensure the return of someone wanted for trial*' (Haijer, 2020: 6). In the Netherlands for instance, non-Dutch citizens are '*more likely to be viewed as flight risks, especially if they lack a permanent residence in the Netherlands*'. (Wermink, Light & Krubnik, 2022: 368; see also Boone, Jacobs & Lindeman, 2017: 41-43)

The available statistics show that the situation varies considerably from one country to another. In Austria, 68 percent of people in pre-trial detention are of foreign nationality, compared with just 5 percent in Bulgaria, 8 percent in Poland and 23 percent in Ireland (Hucklesby, Boone & Morgenstern, 2023: 233; see also van Kalmthout, Knapen & Morgenstern, 2009: 108). In Belgium, 45.8 percent of the persons held in pre-trial detention are not Belgian nationals (Burssens, Tange & Maes, 2015). People who do not live in the country are twice as likely to be held in pre-trial detention and those not born in Belgium are also more likely to be the subject of an arrest warrant than those born in Belgium (Tange, Burssens & Maes, 2019; for data from other countries (e.g., Germany), see also the DETOUR-research: Hammerschick *et al.*, 2017).

Behind the flight risk is a form of selectivity in the judicial decision-making process in relation to the person and their ethnic origin (Maes, 2016: 87). This situation exists in

several European countries, as indicated in a recent report by Fair Trials (Fair Trials, 2021).

Research shows the diversity of the concept of foreign nationals and the fact that is not a homogenous group (Hucklesby, Boone & Morgenstern, 2023: 250; PRE-TRIAD, 2021b: 15): whether or not one is a citizen of a EU Member State or of a third country, whether or not one has no fixed residency, whether or not one has ties such as a family, a job, etc., all these factors influence the decision on pre-trial detention. Some research also points out that not all citizens are equal even within the EU. This is the case for people of Romanian nationality, for whom the risk of absconding is easily invoked when they are involved in 'itinerant crime groups' (Boone, Jacobs & Lindeman, 2019: 174; see also Hammerschick *et al.*, 2017: 22-23). In England and Wales, racial and ethnic disparities in sentencing are reported: barristers interviewed revealed '*that ethnic minority defendants, and in particular Black defendants, are more likely to be detained pretrial*', namely due to their socio-economic conditions (Veiga, Pina-Sanchez & Lewis, 2023: 173).

As such, for years now, scientific research has shown that in practice, foreign nationality and/or foreign residence is considered '*as a determining factor in the risk of flight and evasion of justice by the suspect. Foreign nationality and residency are still perceived as opportunities to escape supervision by law enforcement authorities while trial is still pending and, ultimately, to flee justice*' (Fair Trials, 2021: 28). This is to the extent that the decision to detain them in pre-trial detention has become somewhat routine: '*This means that foreigners without a fixed address will normally be excluded from alternatives to pre-trial detention and be placed into pre-trial detention on a routine basis, even for minor offences*' (Hammerschick *et al.*, 2017: 108). This is the case, for example, in Belgium, where foreign nationals without residence are almost automatically excluded from the granting of alternative measures (Maes & Jonckheere, 2023).

We can talk about a presumed flight risk for a non-resident accused person, or for someone who is not an EU citizen (Fair Trials, 2021: 31; Ryan & Hamilton, 2015: 477). That discrimination remains frequent in practice even since the adoption of the European Supervision Order (ESO) (Fair Trials, 2021: 31).

What is more: the fact of having experienced migration in the past, even if the suspect has obtained the nationality of the host country, is in practice a factor justifying pre-trial detention. In Germany '*two grounds for arrest – the danger of absconding and the danger of tampering with evidence—justified the judges resorting to pre-trial detention. Although the claimant is a German citizen, he has an immigrant background, which would easily enable him to flee and remain abroad. Additionally, the evasion of criminal proceedings in Germany is facilitated through the suspect's membership in a criminal organization operating in Germany. Thus, both courts concurred that the suspect was a flight risk*' (Jung *et al.*, 2021: 308).

Having links in a country other than your country of residence is also considered to be a risk situation. In Poland '*in the case of foreigners whose life's focus is outside Poland or who, despite living in Poland, have strong links with their country of origin, there is a greater risk that the accused may take flight or go into hiding, which is in fact one of*

the criteria for the application of the most severe preventive measure' (Sitarz, Wieloch & Bek, 2019: 8).

From another point of view, being able to demonstrate good social integration in the country of residence is a factor that is likely to reduce the risk of absconding. But this link between social integration and the risk of absconding can lead to discriminatory practices with regards to foreigners, as highlighted in Austria (PRE-TRIAD, 2021b: 34/49).

Sometimes it is the law that encourages it. For example, in a comparative study of pre-trial detention in Sweden and Ukraine, Melnykova (2023) points out that the Swedish Code of Judicial Procedure makes special provision for detainees who are not domiciled in Sweden and for which there is '*a risk that by evading Sweden, the suspect evades prosecution or penalty*', which implies '*that foreigners are almost in all cases put in pre-trial detention*' (Melnykova, 2023: 83).

4. Specific analyses

(a) Artificial Intelligence for identifying and Electronic Monitoring for controlling flight risk

In research exploring the possibilities of using artificial intelligence (AI) in the European judicial area, Novokmet, Tomicic and Vinkovic (2022) analyse the potential benefits of risk assessment tools used in the US criminal justice system to determine the flight risk and the level of probability that the defendant will respond to the court summons. The authors explain some of the technical aspects of these instruments and their shortcomings and note that they can certainly not replace the decisive power of the judge: '*The judge must have autonomy to deviate from the mere risk factor calculated by the machine. The computer is not able to entirely individualize the risk for a particular perpetrator. Therefore, there is a certain possibility of error that can be eliminated only through a given degree of discretion of the judge to assess, according to his own knowledge and skills, the relevance of the risk factor in each case*' (Novokmet, Tomicic & Vinkovic, 2022: 9). In conclusion, they recommend great caution if European countries are to move towards the use of predictive tools.

Another article pertinently questions the advantages and disadvantages algorithms and big data in criminal justice settings. The author urges us not to overlook the advantages of a certain degree of automation in the justice system, but nevertheless '*shows how the trend towards de-subjectivation brought by technology may lead to unintended consequences, such as hindering legal evolution, reinforcing the "eternal past", eliminating case-specific narratives and erasing subjectivity. Moreover, automation in the criminal justice system directly interferes with several constitutional liberties and rights of defence in the criminal procedure*' (Zavrsnik, 2021: 637).

Studies of this type are an important reminder of the need – but also the difficulty – of determining objectively the risk of absconding in concrete terms. The problem is that the same situation can be assessed in different ways: '*In theory, judicial officers' pretrial release and detention decisions are rational because they are based upon an*

acquired expertise about the risk factors presented by individual defendants. The theory has, however, not been substantiated by studies of bail decisions. In fact, in risk-of-flight studies, similarly situated defendants have received significantly different bail decisions' (Schönteich, 2014: 53)[13].

In conclusion, decision-making tools exist and could perhaps be used in the future, whether there is transparency about the way in which they have been built and if they remain tools left to the discretion of the authorities.

Based on the Belgian situation, Maes and Mine (2013) studied the possible introduction of electronic monitoring (EM) as an alternative to pre-trial detention, when this technology was not yet in use in Belgium; since then, electronic monitoring has been introduced as a means of executing an arrest warrant, not as an 'real' alternative to detention. They pointed out that '*In the first instance, it seems possible through implementation of electronic monitoring to reduce a number of negative consequences of incarceration in certain circumstances and to better guarantee the legal principle of presumption of innocence. Nevertheless, with regard to the different goals (systemic, ethical-penal, legal, social and economical), which could be ascribed to electronic monitoring a priori, it seems to us that the application of electronic monitoring in the context of pre-trial detention would bring with it a significant financial cost, without really having a significant impact on the prison population in pre-trial detention*.' (Maes & Mine, 2013: 149). However, they were very cautious in estimating that a 24-hour monitoring could be imposed '*to those cases which have the highest risk that the suspect absconds or bothers victim(s) and/or witnesses*' (Maes & Mine, 2013: 155).

(b) The 'disappearance' of the flight risk and consequences of pre-trial detention on the outcome of the trial (possible conviction)

In Bulgaria, the annual activity reports of the Public Prosecutor's Office include data which, to our knowledge, is not available in other European countries, namely data relating to the number of cases in which pre-trial detention was discontinued before the end of the proceedings, namely for 'disappearance' of the reasons justifying the detention, without however distinguishing the risk of abscond and the risk to commit another crime. These data show that in 2019, 5.1 per cent of the pre-trial detainees were released because the reasons justifying their detention were no longer present (PRE-TRIAD, 2021b: 27-28/48). This is an opportunity to point out that the existence of a risk of absconding must be assessed throughout the proceedings; moreover, some consider that the importance of this risk necessarily decreases with the time spent in detention awaiting trial (Giannoulis, 2016: 251).

In addition to respecting the fundamental rights of detainees during pre-trial detention, it is important to emphasise that the use of pre-trial detention can have a significant impact on sentencing. Persons who are detained are more likely to plead guilty or be convicted at trial (Dhami & van den Brinck, 2022: 382; Morgenstern, 2023). Wermink,

[13] There is a specialised literature on this subject on the other side of the Atlantic. Given the scope of this study, it cannot be taken into consideration (see, among others, an analysis on the conflation of flight risk and danger in Gouldin, 2016).

Light and Krubnik (2022: 376) also noted that '*Persons who are detained are over 50 percent more likely to have their final sentencing outcome result in incarceration in comparison to those who were free throughout the adjudication.*'

Conclusions

This regional research on the available statistical data and research on flight risk in pre-trial (detention) proceedings is part of the FLIGHTRISK project and was conducted by the NICC. Two data collection methods were used: a literature review and a survey via an open-ended questionnaire constructed for the purpose of this project. We would like to express our sincere gratitude to all contact persons in the European Union Member States who responded to our questions, sometimes in great detail. Thanks to their engagement, we now have an overview of the situation in all EU countries.

Firstly, we note that little (empirical) research has been conducted on pre-trial detention in general, and even less on the grounds for detention, particularly on the role/assessment of the risk of flight. Moreover, we encountered additional difficulties in finding recurrent official (national) data on the use of criteria for pre-trial detention.

Our study is consistent with previous research findings regarding differences in the use of these criteria between EU Member States (predominance of flight risk over recidivism, and vice versa - but also regional differences within the same jurisdiction/country). The application of either criterion may depend on legal constraints/requirements. Often, in practice, both criteria (risk of flight and risk of re-offending) are used (it seems that these terms are somewhat 'interchangeable', as has already been pointed out in previous research).

In general, it seems that pre-trial detention decisions based on the risk of flight are mostly not motivated substantially. The factors used to determine/justify flight are the seriousness of the offence, the estimated sentence severity, the suspect's residency status or nationality, his/her mobility (assessed based on past or future travel possibilities), and the elements that 'tie' the suspect to the country (family, professional occupation, etc.). In other words, there is a combination of elements from the past and the future, without it always being possible to determine whether one or the other perspective predominates.

The situation of foreigners is specific and locally problematic. In some countries, they are over-represented in pre-trial detention statistics, generally because they are treated differently in criminal proceedings. The risk of flight is sometimes systematically presumed, especially if they have no income or permanent residence. This is a form of discrimination that has already been denounced in previous research.

Finally, and this is undoubtedly a new development, few studies offer a critical analysis of the development of assessment tools that could be used in the future to objectify the risk of flight.

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Questionnaire Flightrisk & Pre-trial detention and other measures

I. LEGAL FRAMEWORK

1. **What legal preconditions are there in your country for an order of pre-trial detention? Is the risk of absconding/flight one of the grounds for an arrest warrant and/or alternative measure?**

2. **Are there any specific conditions/limitations to the use of the risk of absconding/flight as a ground for pre-trial detention/other measures according to your national legislation?**

3. **Which alternatives to PTD or conditions for remaining at liberty pending trial are provided for in your national system?** [- Electronic monitoring (EM), - Home arrest (without EM), - Financial bail, - Release under (specific) conditions: (specify)]

II. USE IN PRACTICE

4. **Do you have any information on how often (in absolute or relative terms (%)), pre-trial detention and/or alternatives are applied in practice in case of risk of absconding/flight?**

5. **If 'alternative' or 'less severe' measures are applied in case of risk of absconding/flight:**
   5a. What type of specific conditions are then usually imposed?
   5b. Which amount of money is then usually requested as a deposit for financial bail?

6. **In which types of cases (offense types, specific profile of the suspect) risk of absconding/flight is usually invoked?**

7. **In case of 'alternative' measures to pre-trial-detention: how is compliance with these measures supervised/controlled (in practice) and how can/is non-compliance sanctioned (legal provision/practice)?**

III. SOURCES – DOCUMENTATION

8. **Could you please refer us to/provide us with statistics and research material on the use of the criterion of risk of absconding/flight, available for your country?**

Addendum

FLIGHT RISK IN PRE-TRIAL (DETENTION) PROCEEDINGS: NORMATIVE AND PRACTICAL ASPECTS WITHIN EU MEMBER STATES

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Introduction

In a previous report, completed in January 2024, we reported on '*Available statistical data and research on flight risk in pre-trial (detention) proceedings*'. Information for this study was gathered through a literature review and a questionnaire sent to experts/respondents in the Member States of the European Union. This report focused on the question of available data and scientific research on (the extent of) the use of flight risk as a ground for pre-trial detention, limiting itself to some specific questions from the developed questionnaire (Q4 and 8). However, the questionnaire also included some questions on some other issues, namely normative (legal framework: risk of flight as an additional ground, available alternatives; Q1-3) and (other) practical aspects (alternatives in the event of flight risk, scope of application of flight risk in practice, supervision and control, and sanctions in case of non-compliance; Q5-7). The main results of the survey on these topics are summarised here.

Legal framework

Risk of absconding/flight in pre-trial detention legislation

Flight risk as an additional ground for pre-trial detention

Virtually all EU Member States' legislation lists several similar elements that must be met in order to justify an arrest warrant/pre-trial detention.

First, there must be 'serious indications of guilt' (BE, LU, IT) or a 'reasonable suspicion' ('grave suspicion', NL: '*ernstige bezwaren*'; AT: 'urgent' suspicion) that the person concerned has committed the offences of which the competent authorities have become aware.

In addition, an arrest warrant can only be issued for offences of a certain degree of seriousness, often referred to the specific nature of the penalty or a specific 'threshold'. The offences must be punishable by a (prison) sentence of at least a certain duration (possible sentence *in abstracto*, as provided for by the law) or the expected (imposed) sentence must be of a certain duration (expected sentence length *in concreto; cf. Germany:* '[remand detention] may not be ordered if it is disproportionate to the significance of the case or to the penalty or measure of reform and prevention likely to be imposed'). Some examples: in *Belgium* and *Sweden* it must concern offences punishable by imprisonment of 1 year or more, in *Denmark* 1 year and 6 months or more, in *Luxemburg* 2 years or more, in *France* 3 years, in the *Netherlands* 4 years, in *Italy* 5 years, … In *Austria*, the Code of Criminal Procedure states that pre-trial detention may not be imposed or continued if it is disproportionate to the expected sentence (or if its aim may be achieved through less severe measures; § 173(4)). Therefore, the Austrian Supreme Court has set out a three-step procedure for determining pre-trial detention, focusing on the expected sentence (Supreme Court

judgment OGH Erk 14 Os 30/94). The judge must consider (1) the character and severity of the sentence that is likely to be handed down, (2) whether a fine or conditional sentence is possible (in others words, will the suspect actually serve time in prison?), and (3), assuming that a sentence of imprisonment might be a likely outcome, the plausible relevance and a possible date of conditional release (questionnaire completed for AT).

These thresholds are sometimes subject to specific exceptions, depending on the characteristics of the case or of the person of the defendant. For example, under *Dutch* law, a pre-trial detention order can be issued regarding suspects for whom no permanent address or place of residence in the Netherlands can be established and who are suspected of an offence which carries a sentence of imprisonment (i.e., an exception to the 4-year sentence threshold, see also below, Facilitating the use of the ground of flight risk and/or the justification of pre-trial detention).

Another important element in the use of pre-trial detention are the so-called additional grounds. Classically, these are the risk of recidivism, the risk of collusion or disappearance or tampering with evidence, and the risk of flight or absconding. The (legal) terms used in relation to flight vary, but are understood here in a general, broad sense as evading the action of the court. In *France*, for example, it is expressed as '*Garantir le maintien de la personne mise en examen à la disposition de la justice*' ('Ensuring that the accused person remains at the disposal of the court'). In some legislations, the wording of the relevant legal provisions contains further specifications in (e.g., *Germany*; see report on 'Available statistical data…').

Our research shows that in every EU country the risk of flight or absconding is explicitly mentioned as one of the additional (necessary) grounds or criteria for pre-trial detention, in addition to serious indications/reasonable suspicion and references to the nature or seriousness of the offence or the expected or foreseeable punishment. This finding has already been confirmed by other research, such as the comprehensive study on pre-trial detention in the EU by Van Kalmthout *et al.* (2009: 71-72). With some exceptions (see below, Facilitating the use of the ground of flight risk and/or the justification of pre-trial detention), at least one of the criteria of recidivism, collusion or flight risk must be present to justify pre-trial detention.

Some countries provide for some additional requirements that *must* be met (BE), or mention some other grounds that *may* be invoked (NL, FR). In *Belgium*, for example, there *must* be an '*absolute necessity for public safety*'. In the *Netherlands,* the existence of a serious reason of public safety requiring immediate deprivation of liberty has been further defined in the relevant legislation. Thus, Article 67a, section 2 of the Dutch Code of Criminal Procedure refers not only to fear of reoffending or fear of obstruction of justice, but also to so-called '12-years/shocked legal order' ground, i.e., 'fear for serious upset to the legal order' due to the very serious nature of crimes carrying a sentence of 12 years imprisonment or more (questionnaire completed for NL). Similarly, in *France*, except for 'correctional' offences, pre-trial detention may also be ordered or extended in order to put an end to 'the exceptional and persistent disturbance of public order caused by the seriousness of the offence, the circumstances in which it was committed or the extent of the damage it caused'

('*Mettre fin au trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction, les circonstances de sa commission ou l'importance du préjudice qu'elle a causé*') (questionnaire completed for FR). Another ground, which was only recently introduced into *Dutch* law (in 2015), is the 'need to facilitate expedited proceedings against suspects of unsettling crimes in public areas or against public officials (policemen, firemen, and ambulance staff)' (questionnaire completed for NL). It is also interesting to note that in *Croatia* the fact that the 'defendant who has been duly summoned, avoids coming to the hearing' is a separate ground (Article 123 of the Criminal Procedure Act), in addition to the fact of being on the run or the risk of running away (questionnaire completed for HR); a similar situation exists in Malta where the belief that the suspect 'will not appear when ordered by the authority specified in the bail bond' is a separate ground (Article 575 (1) of the Criminal Code; questionnaire completed for MT). In *Portugal*, the relevant legislation, without directly referring to a risk of absconding or flight, states that 'preventive custody' may be applied 'if it concerns a person who has entered or is staying illegally in national territory, or against whom extradition or deportation proceedings are in progress' (Article 202 of the Code of Criminal Procedure; questionnaire completed for PT).

Importance and application of flight risk

The report on available (national) statistical data and scientific research (responses to Q4 and 8 of the questionnaire) showed that the application of the additional grounds, in particular the risk of flight versus the risk of recidivism, varies considerably. Not infrequently, both criteria are used at the same time (in combination), but sometimes one or the other predominates. There are big differences between countries, even neighbouring countries (e.g., between *Germany* and *Austria*). As in *Germany* (as evidenced by the official data collected there, see 'Report on available statistical data…'), in *Poland*, for example, the risk of recidivism is used only very rarely, and flight risk predominates (questionnaire completed for PL).

Even within the same jurisdiction, practices often differ (see the difference between eastern and western *Austria*). Austrian research has shown that West Austria, the risk of absconding is not much of a factor in practice and authorities fully align with the Supreme Court judgment and treat EU residence as equivalent to Austrian residence (Hammerschick & Reidinger, 2017). In contrast, in the eastern region of Austria, the lack of a regular place of living in Austria and the expectation of a severe sentence are often seen as an incentive for absconding, without much additional consideration (questionnaire completed for AT).

Differences between Member States in the use of (additional) grounds for pre-trial detention may be partly explained by legal restrictions on their use (or, conversely, 'facilitating' factors) (see below, Facilitating the use of the ground of flight risk and/or the justification of pre-trial detention) and by the concrete objectives pursued by pre-trial detention. Where securing the criminal investigation and proceedings is predominant, the focus is more likely to be on the risk of absconding (in addition to the risk of collusion), whereas the risk of recidivism is prominent when (also) the security of society is strongly emphasised. It has also been suggested that such differences in

emphasis are related to differences in pre-trial detention rates: '(…) PTD-rates (…) suggest that the countries focusing on preventive aspects in PTD decisions in the tendency have higher pre-trial detainee rates than the others focussing primarily on securing the criminal investigation, the trial and punishment.' (Hammerschick *et al.*, 2017: 17). In order to understand the extensive use of the risk of absconding as a ground for pre-trial detention in *Germany* compared to other countries (e.g., the Netherlands), it is also important to know that in Germany it is obligatory to appear in court , whereas in the *Netherlands* [note: also in *Belgium*, for example] trials can also take place in the absence of the suspect (see Hammerschick *et al.*, 2007: 10).

In this context it is also worth noting that in *Ireland* the risk of fleeing was for a long time the only (additional) ground on which bail could be refused. The risk of reoffending was introduced much later. In the leading case on the right to bail under Irish law (People (AG) v O'Callaghan in 1966, IR 501), the Irish Supreme Court held that the right to bail and the presumption of innocence could only be interfered with if there was a risk that the accused would attempt to evade justice. No other principles were to be considered, and it was only after political pressure (perceived threat of gangland crime in the 1990s) that a constitutional amendment and the subsequent Bail Act 1997 led to a new ground for refusal of bail, namely the risk of committing another 'serious' offence (i.e., offences which carry a penalty of at least 5 years of imprisonment). (questionnaire completed for IE)

Limitations on the use of flight risk

Some legislation/jurisprudence provides that a flight risk cannot simply be presumed, and legal requirements for the application of the flight risk ground are more stringent. In *Austria*, for example, according to § 173(3) of the Code of Criminal Procedure, flight risk is not to be assumed if the accused is suspected of an offence not punishable by more than five years' imprisonment, if s/he is in orderly living conditions and has a permanent residence in the country, unless s/he has already made preparations to flee. And if the flight risk is the only ground, the payment of a security must be considered (§ 180(1) Code of Criminal Procedure). In addition, the Austrian Supreme Court ruled in 2008 that the risk of flight cannot simply be assumed and that the fact of being a regular resident of an EU Member State negates the assumption of flight risk (questionnaire completed for AT; Supreme Court judgment OGH 11 Os/08f). The same applies in *Ireland* to the absence of a fixed address (O'Callaghan case 1966). In *Greece*, even if one of the 'objective' conditions for a presumption of flight risk is met (see below, Elements for assessing the risk of flight), it will not be possible to presume flight risk and impose pre-trial detention if there is no 'intention' to flee on the part of the perpetrator (subjective element) (questionnaire completed for EL).

Risk of flight is often used in combination with other grounds and when the same objectives cannot be achieved by less severe or intrusive measures. In *Italy*, for example, it is explicitly stated that the risk of flight cannot be inferred from the seriousness of the offence alone; there must also be an expected sentence of more than 2 years (see below, Facilitating the use of the ground of flight risk and/or the justification of pre-trial detention, and the measure must be 'proportionate'.

Facilitating the use of the ground of flight risk and/or the justification of pre-trial detention in general

In some countries, the use of flight risk as a justification for pre-trial detention is facilitated or, in certain circumstances, made redundant. In *Belgium*, for example, any justification based on the risk of recidivism, collusion or flight is not (no longer) required for offences punishable by more than 15 years' imprisonment, or, in the case of terrorist offences, 5 years' imprisonment. In other words, the requirement of a risk of recidivism, collusion or flight applies only to offences punishable by less severe penalties.

Exceptions, in particular with regard to the possible application of the risk of flight, are sometimes provided for in relation to the (possible) severity of the penalty. For example, in certain cases there is a 'legal presumption' of flight risk at a certain level of penalty, e.g., in *Luxembourg* for offences punishable by 'criminal' sentences: '*le danger de fuite est légalement présumé, lorsque le fait est puni par la loi d'une peine criminelle*' (Article 94 of the Code of Penal Procedure). Similarly, according to Article 258, § 2 of the *Polish* Code of Criminal Proceedings 'the need to apply provisional detention to secure the correct conduct of proceedings may be justified by the severe character of the penalty that may be imposed on the defendant' ('where the defendant has been charged with a felony or delinquency punishable by imprisonment of a maximum of at least 8 years or where the court of first instance has sentenced him to a penalty of imprisonment of not less than 3 years') (questionnaire completed for PL). And in *Italy*, where pre-trial detention can only be applied for offences for which the statutory penalty is equal or higher to 5 years of imprisonment, the risk of flight or absconding can be invoked if the judge foresees that the sentence imposed, at the end of the trial will be more than 2 years' imprisonment (questionnaire completed for IT).

Sometimes there are very specific exceptions, based on residence, identity (nationality) which facilitate the application of pre-trial (detention) measures in general. In *Luxembourg*, for example, the requirement of a minimum sentence and the existence of additional grounds (such as the risk of flight) for issuing a '*mandat de dépôt*' do not apply if the accused does not reside in the Grand Duchy (Article 94 of the *Code de procedure pénale*; questionnaire completed for LU). In the *Czech Republic*, the statutory term of imprisonment shall 'not apply, amongst others, if the accused has a) fled or gone into hiding, b) repeatedly failed to respond to summons and failed to present or otherwise ensure their participation in an act of criminal proceedings, c) an unknown identity and the available means failed to reveal such identity, (…).' (Section 68 of the Code of Criminal Procedure; questionnaire completed for CZ) In *Germany*, even for less serious offences, remand detention may be imposed on the grounds of flight risk if the accused has previously evaded the proceedings against him or has made preparations for flight, has no permanent residence or residence within the territorial scope (of the Code of Criminal Procedure), or cannot establish his identity (Section 113 of the Code of Criminal Procedure; questionnaire completed for DE). Under *Finnish* legislation (Coercive Measures Act, No 806/2014), a person can apparently be arrested, regardless of the sentence threshold and

additional grounds, if his/her identity is unknown and s/he refuses to disclose his/her name or address or gives obviously false information about it; or when s/he does not have a permanent residence in the country and it is probable that s/he will evade criminal investigation, trial or the enforcement of punishment by leaving the country (Section 5; questionnaire completed for FI). In Sweden there is a 'qualified flight risk' in the sense that 'any person suspected on probable cause of an offence may be detained regardless of the nature of the offence if he does not reside in the Realm and if there is a reasonable risk that he will avoid legal proceedings or a penalty by fleeing the country'. Thus, a person may be detained regardless of the nature of the offence if the person does not live in the country and risk of flight is obvious (Code of Judicial Procedure, Chapter 24, Section 2; questionnaire completed for SE). And in *Poland*, 'precautionary measures' may be ordered if there is a justified risk that the accused may take flight or go into hiding, 'particularly if their identity cannot be established or the accused has no permanent residence in the country' (Article 258 of the Code of Criminal Proceedings). This provision seems to lead courts to automatically assume that there is a risk of flight because the defendant does not have a permanent residence (questionnaire completed for PL). Also in *Slovenia*, pre-trial detention may be ordered if a person 'is in hiding, if his/her identity cannot be established or if other circumstances exist indicating the risk of his or her flight' (Article 201 of the Criminal Procedure Act; questionnaire completed for SI).

Elements for assessing the risk of flight

The reference to elements for objectification/assessment relates both to criteria for pre-trial detention in general and to flight risk in particular.

In the *Czech Republic*, for example, accused persons may be arrested on the basis of the risk of flight or hiding, 'so as to avoid criminal prosecution or punishment, in particular if it is difficult to immediately determine their identity, when they do not have permanent residence, or if they are facing a high penalty' (Section 67 of the Criminal Procedure Act; questionnaire completed for CZ; see similarly, the situation in *Slovakia*, Section 71(1) of the Slovak Criminal Procedure Code). In *Greece*, pre-trial detention 'may be imposed instead of a) house arrest with electronic surveillance, when this measure is not sufficient or cannot be imposed due to the lack of known residence of the accused in the country or due to the failure of the latter to submit to it, and b) prohibitive conditions, if it is reasonably considered that [specified measures] (…) are not sufficient and (…) if the accused is prosecuted for a felony and has no known residence in the country or has taken preparatory steps to facilitate his or her escape, or has in the past been a fugitive or absconder, or has been found guilty of escaping as prisoner in the past or violating residence restrictions, and it is clear from the above elements that he or she has an intention to abscond or it is reasonably considered that if released it is very likely that he or she will abscond (…)' (Article 286 of the Code of Criminal Procedure; questionnaire completed for EL). In order to assess whether there is a risk of absconding, the *Spanish* Criminal Procedure Act (Article 153) stipulates that account must be taken of the nature of the offence, the severity of the sentence that may be imposed on the accused, his/her family, employment and financial situation, and whether the oral trial is imminent (particularly in cases that are dealt with

under the accelerated procedure provided for in the relevant provisions of the Act) (questionnaire completed for ES).

More generally, i.e., not limited to the risk of flight or absconding, the *Hungarian* Code of Criminal Procedure, Section 277 (4), provides that pre-trial detention may be ordered, taking into account 'a) the nature of the criminal offense, b) the state and interests of the investigation, c) the personal and family situation of the defendant, d) the relationship between the defendant and another person involved in the criminal proceeding or any other person, e) the behaviour of the defendant before and during the criminal proceeding', and if the 'coercive measure affecting personal freedom subject to judicial permission may not be achieved by way of a restraining order or criminal supervision' (questionnaire completed for HU).

In *Lithuania*, when deciding whether to impose a 'preventive measure' and choosing its type, the competent judicial actors must take into account 'the seriousness of the suspect's criminal act, the suspect's personality, whether s/he has a permanent place of residence and a job or other legal source of livelihood, the suspect's age, state of health, marital status and other circumstances' that may be relevant in deciding on a pre-trial measure (Article 121 Sec 4 of the Code of Criminal Procedure; questionnaire completed for LT). More specifically, the ground of absconding must be assessed in the light of 'factors relating to relating to the person's character, home (permanent residency), occupation (employment), health condition, previous convictions, family and social ties abroad as well as other relevant characteristics' (Article 122, paragraph 2 of the Code of Criminal Procedure; questionnaire completed for LT). Similar wording is used in *Latvian* legislation (with regard to the choice of a procedural coercive measure), namely 'the nature and harmfulness of the offence, the personality of the suspected or accused person, his/her family situation, health, and other circumstances' (Article 244 of the Criminal Procedure Law; questionnaire completed for LV).

Information to be provided

Sometimes it is explicitly stated that elements should be provided to the decision-maker (judge) in order to obtain bail. For example, in *Ireland*, section 1A of the Bail Act 1997 provides that 'a person who is charged with a serious offence and applies for bail shall furnish to the prosecutor a written signed statement containing information such as their occupation, income, previous convictions, history of bail applications/bail conditions if granted bail and property' (questionnaire completed for IE).

Other interesting principles or criteria

In addition to principles of subsidiarity and proportionality of pre-trial measures (pre-trial detention and 'alternatives' or 'less severe' measures), other requirements or principles are sometimes provided for. An interesting example is the 'anticipation requirement' in *Dutch* legislation (Article 67a, Section 3 of the Code of Criminal Procedure) which implies that 'an order for pre-trial detention should not be issued if it is expected that the pre-trial detention is to exceed the custodial sentence or measure applied by the trial judge' (questionnaire completed for NL).

Available 'alternatives' or 'less severe measures'

Regarding the legal framework, three types of alternatives to pre-trial detention or 'less severe measures' (compared to incarceration under arrest warrant) can be distinguished: (1) electronic monitoring, and house arrest without electronic monitoring, (2) financial bail, and (3) release under conditions (or 'judicial supervision with conditions'). In some countries, these alternatives can only be applied if all (and the same) criteria as for pre-trial detention are met (BE), and therefore one of the additional grounds must be present. Other legislations allow their use in such cases or provide for different rules for the use of alternatives (e.g., in relation to the sentence threshold; cf. *France* where there is a graduated system and alternatives can be used for lower thresholds).

Electronic monitoring

Electronic monitoring is legally provided for in more than half of the EU Member States (AT, BE, BG, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, NL, RO, (PT?)) – and in an increasing number of EU Member States compared to the situation in 2015 (cf. FRA, 2016, Table 9, p. 62: AT, BE, DE, EL, FR, IT, NL, RO) –, but is not yet or hardly used in some, e.g., *Romania* (lack of infrastructure), *Ireland* (legal provision not in force), *Germany* (only in 1 Land). Moreover, *Germany* is very reluctant to apply electronic monitoring in general (see e.g., Haverkamp, 2019).

It is also sometimes not provided at the pre-trial stage, but only after the trial (e.g., in *Sweden*, and in *Latvia* in the case of a suspended prison sentence with probation supervision).

Where electronic monitoring is provided as a pre-trial measure, in some countries (such as *Belgium* and *Austria*) it is considered a form of pre-trial detention (modality of execution), in others – and in most countries – as an 'alternative' measure. If electronic monitoring is considered an execution modality of pre-trial detention, one consequence is that the time spent under electronic monitoring is deducted from the final (prison) sentence. This is in contrast to other legal systems where time spent on electronic monitoring is not considered as time in custody or under arrest and is not counted as time spent for sentencing purposes (e.g., EE).

The technologies used and the content of electronic monitoring in the pre-trial phase also differ between countries. In Belgium, only a very limited number of movements outside the assigned place of residence can be authorised (for reasons related to the criminal investigation, medical reasons, force majeure), which means that a very strict EM-regime is applied; the technology used in the pre-trial phase is GPS-tracking. In other countries, suspects can (or must) be allowed to leave the assigned place of residence within certain time frames, e.g., for work, education, therapy. The most common technology is radio frequency (RF), although in some countries GPS-tracking is also possible (AT) and used in specific cases, e.g., in the Netherlands for 'location bans', whether or not combined with a location order (movement restriction). (For further details see also Hammerschick *et al.*, 2017: 46; Jonckheere & Maes, 2023)

House arrest without electronic monitoring

A number of countries provide for an obligation for the suspect to remain at a fixed location for at least a significant number of hours per 24-hour period. In *Ireland*, for example, this ('curfew') means that 'the accused person shall be at a specified place between specified times during the period commencing at 9.00 p.m. on each day and ending at 6.00 a.m. on each following day' (questionnaire completed for IE). Other countries do not explicitly mention this possibility of restricting freedom of movement. In *Belgium*, where the judge is free to impose conditions, it was explicitly stated during the parliamentary preparation of the new law on pre-trial detention (in 1990) that house arrest cannot be imposed as a condition, as it should be considered a real deprivation of liberty. Such a severe restriction of freedom is provided for in the framework of electronic monitoring (see above, Electronic monitoring), but this measure is considered a detention (not an 'alternative').

Financial bail

Financial (or money) bail is provided for in the legislation of almost all EU Member States. Interestingly, this alternative is not provided for, for example, in *Finland* and *Italy*. In *Sweden* and *Finland*, on the other hand, there seems to be a strong commitment to '(intensified) travel ban' as an alternative to pre-trial detention. Whereas in some Member States the requested bail has to be paid by the defendant himself (BE, IE: 'own bond'), in other legal systems a third party may also guarantee the bail (e.g., DE, HR, IE: 'independent surety'), or guarantee that that the person will comply with the conditions imposed (e.g., CY, CZ, SK). In Ireland, financial bail is usually granted in addition to other 'bail' conditions – in the broader sense – as part of a so-called 'recognisance'.

Release under conditions

In addition to possible electronic monitoring, house arrest or bail/guarantee almost all countries, with the exception of *Estonia* (?), provide that other specific conditions may be imposed. Some countries, such as *Belgium*, do not specify which specific conditions can be imposed (see also: CY, ES, with the exception of drug treatment in a treatment centre), legislation in other countries provides a list of possible conditions. Money bail/guarantee is sometimes included in such a list or, alternatively, regulated as a separate measure. Sometimes it is also stated that (some of) the conditions provided for can be controlled by technical means.

Possible conditions to be imposed are very diverse and include both prohibitions and obligations. In some countries, the list of conditions (types of conditions) is quite similar, even in its exact wording (e.g., in *France* and *Luxembourg*, although the French list is more extensive and, in some respects, quite exceptional; see below); or these lists look the same (cf. the *Czech Republic* and *Slovakia*), which is not so surprising.

These conditions include the following:

- ✓ Ban to travel abroad (CZ, EL, FI, (FR), (HU), (LU), PL, SE, SK)
- ✓ Expatriation ban (IT)
- ✓ Prohibition to visit certain places (AT, EL, ES, (FR), HU, IE, IT, LU, LV, RO, SK)
- ✓ Prohibition to drive/Obligation to transfer driving licence (AT, FR, IE, (LT), LU, PL, RO, SK)
- ✓ Prohibition to take part in public demonstrations (FR)
- ✓ Prohibition to write certain cheques (FR)
- ✓ Prohibition to stay near the home of a certain person or in a designated place where such person is staying/visiting – Obligation not to go beyond a certain territorial limit (AT, CY, EL, ES, FR, HU, IT, LT, LU, LV, NL, RO, SI, SK)
- ✓ Promise not to leave place of residence – Obligation to reside or remain in a certain district or place of the country (DE, DK, HR, HU, IE, SI)
- ✓ Prohibition/restriction of contact in any form, incl. electronic communication (CY, ES, FR, HU, IE, LU, SK)
- ✓ Prohibition to make contact with a person/to deliberately approach a person [at a distance less than 5 metres (SK)] (AT, CY, ES, FR, HU, IE, IT, LT, LU, LV, NL, RO, SI)
- ✓ Obligation not to approach other persons involved in the offence (AT, CY, DK, EL, FR, IE, LU, LV, NL, RO)
- ✓ Obligation to abstain from alcohol/drugs (AT)
- ✓ Obligation not to return to the family home (RO)
- ✓ Obligation to surrender legally possessed weapons – not to possess, use or carry weapons (FR, (LT), LU, RO, SK)
- ✓ Seizure of passport or personal documents (AT, CY, CZ, DK, FR, IE, LT, LU, NL, Pl, LT)
- ✓ Freezing of assets (IE)
- ✓ Prohibition to engage in an activity where a criminal offence has been committed (DK, FR, IT, PL, PT, RO, SK)
- ✓ Obligation to report/attend to a public authority designated by the court (CY, DE, DK, EL, ES, FR, HU, IE, IT, LT, LU, MT, NL, PL, PT, RO, SE, SI, SK) – or, in the case of *Greece*, even to appear before a (Greek) consular authority abroad!
- ✓ Obligation to be permanently available by mobile phone (IE, the so-called 'mobile phone'-condition, see also, FRA, 2016: 64)
- ✓ Obligation to support (the family) – contribute to family expenses (FR, LU)
- ✓ Duty to regularly provide relevant information on means of subsistence (RO)
- ✓ Duty to notify any change of residence (LV)
- ✓ Obligation to undergo medical supervision, care or treatment, in particular for the purpose of detoxification (AT, DK, ES, FR, LU, NL, RO)
- ✓ Obligation to pay funds to ensure the victim's right to compensation (RO, SK)
- ✓ Supervision (AT, DK, LV, NL, RO, SE)

- ✓ Promise/written order not to leave – to lead an orderly life, not to commit crimes, to appear in court, not to flee, not to hide – not to attempt to obstruct – to refrain contact with the victim (AT, BG, CZ, HR, LT)
- ✓ Disqualification of parental rights (IT)
- ✓ Suspension (disqualification) from public service (IT)
- ✓ Temporary disqualification from public service contracts (IT)

Use in practice

In addition to the information on the prevalence of the use of flight risk (see report 'Available statistical data…' and above, Importance and application of flight risk), we also asked about some other aspects of its practical application, such as: (1) specific conditions imposed in the case of flight risk, the amount of bail set, (2) case and personal characteristics taken into account in the assessment, (3) supervision and control, and sanctions in case of non-compliance.

Alternatives

Specific conditions relating to flight risk

It can be observed that specific conditions may be imposed when applying 'alternative' or 'less severe' measures in case of risk of absconding/flight. The following conditions have been reported in several Member States: not to leave the country or a specific area without special authorisation, to report regularly to the police, to surrender the passport or identity document (or – in *Sweden* – a vehicle or other property that could be used in an attempt to flee the country) to the competent authorities.

(Amount of) financial bail

A deposit for financial bail may sometimes be required to prevent the risk of absconding. This measure does not exist in all countries: for instance, *Finnish* law does not recognise financial bail and no bail is provided for under the *Italian* law (see above, Financial bail).

Where it does exist, it is generally a court or the pre-trial judge who can set the amount of the bail, taking into account, as *Austrian* legislation states, 'the weight of the offense charged to the accused, his personal and economic circumstances, and the assets of the person providing the security' (questionnaire completed for AT). Similarly, in *Estonia*, when setting the amount of cash bail, the court takes into account the severity of the sentence that may be imposed, the extent of the harm caused by the criminal offence, and the financial situation of the suspect or accused person (questionnaire completed for EE).

Furthermore, as in *Cyprus*, there are almost no specific guidelines or legal provisions in the Member States regarding the amount of money required as a deposit for financial bail. In *Lithuania*, however, there are recommendations from the Prosecutor General: the recommended minimum bail is € 1 500. In practice, however, prosecutors would never consider financial bail of less than € 3 000 (questionnaire completed for LT). This amount is quite high compared to a country like *Romania*, where 'the Code of Criminal Procedure provides only for a minimum bail amount of 1000 lei (approx. 200 Euro). The maximum limit is not set.' (questionnaire completed for RO). In *Estonia*, the minimum amount of cash bail is 500 daily wages (§ 135 of the Code of Criminal Procedure; questionnaire completed for EE), in *Hungary* the amount of bail cannot be less than 500 000 Hungarian forints (Section 286 of the Code of Criminal Procedure).

Member States do not always have databases allowing them to determine the amounts generally required, although there are exceptions, such as the *Czech Republic*, where 'the amount of bail can be traced in the internal judicial statistical system for individual cases for each year. For example, in 2022 the bail amount ranged from EUR 2 000 to EUR 400 000.' (questionnaire completed for CZ).

Some respondents gave examples of the amounts demanded in their countries. In *Bulgaria*, for example, the following amounts are mentioned: for possession of narcotic substances, BGN 500 (or approximately € 255); for murder committed with hooligan, racist or xenophobic motives, BGN 25 000 (or approximately € 12 775); for fraud with extensive damages, BGN 5000 (or approximately € 2 555) (questionnaire completed for BG). In *Ireland*, it is estimated '*for a defendant with little means around 200 euro up to 1 000-2 000 for defendants with more money*.' (questionnaire completed for IE)

Case and personal characteristics

In the absence of official data on the specific grounds invoked for pre-trial detention, there is little information available on the types of cases (types of offences, specific profile of the suspect…) where there is a risk of absconding.

However, research has shown that the risk of flight is often invoked in cases involving accused persons who are non-nationals and not considered to be in orderly living conditions, who do not have a permanent residence in the country where they are being prosecuted, and who are not socially integrated.

As far as the type of offence is concerned, there seem to be two tendencies among the countries for which information is reported: either there are no typical offences that regularly recur in cases where the risk of absconding is invoked to justify pre-trial detention (DE, EL), or specific offences are mentioned, as in *Ireland* (organised crime and murder) or *Cyprus*: 'The risk of absconding is usually invoked in cases concerning serious offences such as murder, homicide, drug trafficking, rape, serious fraud, high-value financial offences, human trafficking, etc.' (questionnaire completed for CY). These two tendencies are in fact converging, because in general there is such a wide range of serious crimes that can give rise to pre-trial detention on grounds of risk of absconding that it is no longer possible to speak of specific offences… As already

mentioned above (see Facilitating the use of the ground of flight risk and/or the justification of pre-trial detention), the situation in *Luxembourg* is somewhat specific in this respect, since the risk of absconding is legally presumed for all offences punishable by a criminal penalty.

It should also be noted that in some countries (FR, LT, PT) respondents point out that it is not the (nature of the) offence that is taken into account when considering the need for pre-trial detention in order to ensure that the defendant remains at the disposal of the courts. The circumstances of the case and the profile of the person are analysed more broadly. This is in line with the answer provided by the respondent for *Hungary*: 'it must be emphasized that, according to consistent legal practice, the gravity [of the offense] and range of punishment in itself does not establish the risk of escape and hiding. In order to establish such a risk, the defendant's personal circumstances and other factors also need to be examined', such as the ties of relationships of the suspect, his conduct in the earlier stage of the proceeding or during another criminal procedure, the modus operandi of the crime' (questionnaire completed for HU).

Finally, in many countries it seems that the risk of a severe punishment increases the risk of flight. For example, in the case of *Sweden*: 'When it comes to serious crimes, where the risk of a severe punishment is high, flight risk is more likely to be referred to as a ground for an arrest warrant. However, the more serious the offence the more likely that the other grounds for detention also will be applicable.' (questionnaire completed for SE)

Supervision/control and sanctioning

Supervision and control of conditions

In case of 'alternative' measures to pre-trial-detention: how is compliance with these measures supervised/controlled (in practice)?

Two types of measures have to be distinguished: alternative measures in general and electronic monitoring, where it should be noted that in some countries (BE) electronic monitoring is considered as pre-trial detention (deprivation of liberty in a private place) and in most other countries as an alternative to pre-trial detention (see above, Electronic monitoring).

In the case of electronic monitoring, compliance is monitored by monitoring centres, the police, prisons and, more rarely, by probation services (which sometimes have a supporting rather than a controlling role). Alternative measures in general, are generally supervised by the police. In some countries, probation services (in a supporting and/or controlling role), prisons or immigration services may be involved.

Sanctioning in case of non-compliance

In case of 'alternative' measures to pre-trial detention: how can/is non-compliance sanctioned (legal provision/practice)?

In general, with regard to financial bail, the property or obligations constituting the bail are subject to forfeiture or confiscation if the defendant takes flight or goes into hiding.

As regards other conditions imposed as part of a release under conditions, in *Denmark* a breach of these other conditions can be sanctioned by a fine or imprisonment. In addition, the use of less restrictive measures is subject to the consent of the suspect. If the defendant no longer consents, s/he must be detained in pre-trial detention (questionnaire completed for DK). A similar situation can be observed in *Ireland*: 'Failure to surrender to bail is a criminal offence. Such an offence can be prosecuted within 12 months from the date of its commission.' (questionnaire completed for IE) In *Hungary*, the law also provides for sanctions in case of violation of the rules of conduct/behaviour for criminal supervision or a restraining order: disciplinary fine, custody (if case of repeated serious violation), criminal supervision (in place of or in addition to a restraining order), placing under a tracking device, etc. In *Portugal*, the Code of Criminal Procedure provides for the possibility of replacing a pre-trial measure by a more severe one in the event of a breach of the obligations imposed by a pre-trial measure.

Thus, in many countries, breaches of conditions are not without consequences. Different national situations can be described. In *Austria*, if the accused fails to comply with the conditions, the order for pre-trial detention is issued by the public prosecutor. In *Belgium*, the same reaction can be observed on the part of the investigating judge: failure to comply with the conditions can lead to the revocation of the release under conditions and the issuance of an arrest warrant. In *Spain* and *Finland*, the measure may also be revoked, and the suspect arrested and remanded in custody in the event of a serious breach of the conditions. In *Finland*, a written warning may also be issued to the suspect in the case of a minor breach. Furthermore, and in practice, in cases where a suspended prison sentence would in principle be possible, non-compliance can be used as an argument against such a suspension (BE, DE).

Finally, it is important to stress that little information is available on the effectiveness of control, especially when they are carried out by the police. It is interesting to note the analysis of the situation in *Lithuania*: an excessive use of alternative measures may lead to weaker control and tolerance of breaches of their conditions, so that 'reported breaches of the duty to report to the police (especially if the infringements of duty were occasional) might be tolerated and ignored by the courts or prosecutors as far as suspects appear in the proceedings' (questionnaire completed for LT). Such a situation was also denounced in *Malta*, where it was reported in the press: 'However, in a number of stations across Malta, officers are turning a blind eye to these infractions, with a cursory glance at station's bail books revealing patterns ignoring conditions.' (Garzia, 2023)

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Questionnaire Flightrisk & Pre-trial detention and other measures

I. LEGAL FRAMEWORK

1. **What legal preconditions are there in your country for an order of pre-trial detention? Is the risk of absconding/flight one of the grounds for an arrest warrant and/or alternative measure?**

2. **Are there any specific conditions/limitations to the use of the risk of absconding/flight as a ground for pre-trial detention/other measures according to your national legislation?**

3. **Which alternatives to PTD or conditions for remaining at liberty pending trial are provided for in your national system?** [- Electronic monitoring (EM), - Home arrest (without EM), - Financial bail, - Release under (specific) conditions: (specify)]

II. USE IN PRACTICE

4. **Do you have any information on how often (in absolute or relative terms (%)), pre-trial detention and/or alternatives are applied in practice in case of risk of absconding/flight?**

5. **If 'alternative' or 'less severe' measures are applied in case of risk of absconding/flight:**
   5a. What type of specific conditions are then usually imposed?
   5b. Which amount of money is then usually requested as a deposit for financial bail?

6. **In which types of cases (offense types, specific profile of the suspect) risk of absconding/flight is usually invoked?**

7. **In case of 'alternative' measures to pre-trial-detention: how is compliance with these measures supervised/controlled (in practice) and how can/is non-compliance sanctioned (legal provision/practice)?**

III. SOURCES – DOCUMENTATION

8. **Could you please refer us to/provide us with statistics and research material on the use of the criterion of risk of absconding/flight, available for your country?**