REPORT REGIONAL RESEARCH

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

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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 and 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)

References

FRA (European Union Agency for Fundamental Rights), *Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfer*, 2016.

Daniel Garzia, "People Are Failing To Sign Bail Books And Breaching Curfews As Maltese Inspectors Turn A Blind Eye", 14 May 2023. See https://lovinmalta.com/opinion/analysis/people-are-failing-to-sign-bail-books-and-breaching-curfews-as-maltese-inspectors-turn-a-blind-eye/ (consulted on 5 April 2024).

Walter Hammerschick and Veronika Reidinger, *DETOUR – Towards Pre-trial Detention as Ultima Ratio – 2nd Austrian National Report on Expert Interviews,* Vienna, October 2017. https://www.uibk.ac.at/irks/publikationen/detour-publikationen/2nd-austrian-repor_interviews.pdf

Walter Hammerschick, Christine Morgenstern, Skirmantas Bikelis, Miranda Boone, Ioan Durnescu, Alexia Jonckheere, Joep Lindeman, Eric Maes and Mary Rogan, *Comparative Report. DETOUR – Towards Pre-trial Detention as Ultima Ratio*, Vienna, December 2017. https://www.uibk.ac.at/irks/publikationen/2020/pdf/detour_comparative-report-fin.pdf

Rita Haverkamp, "Le développement de la surveillance électronique en Allemagne : mise en œuvre, technologie et tendances", *in* René Lévy, Laurence Dumoulin, Annie Kensey and Christian Licoppe, *Le bracelet électronique : action publique, pénalité et connectivité* (Collection Déviance et Société), Chène-Bourg, RMS Éditions/Médecine & Hygiène, 2019, 87-99.

Alexia Jonckheere & Eric Maes (2023). "Dilemmas in the use of alternatives to pre-trial detention in prison", *in* Christine Morgenstern, Walter Hammerschick and Mary Rogan (Eds.), *European Perspectives on Pre-Trial Detention.* A *Means of Last Resort?*, 2023, 214-229. https://doi.org/10.4324/9781003159254

Anton M. Van Kalmthout, Marije M. Knapen and Christine Morgenstern (Eds), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the grounds for Regular Review in the Member States of the EU*, 2009, Nijmegen, Wolf Legal Publishers.

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