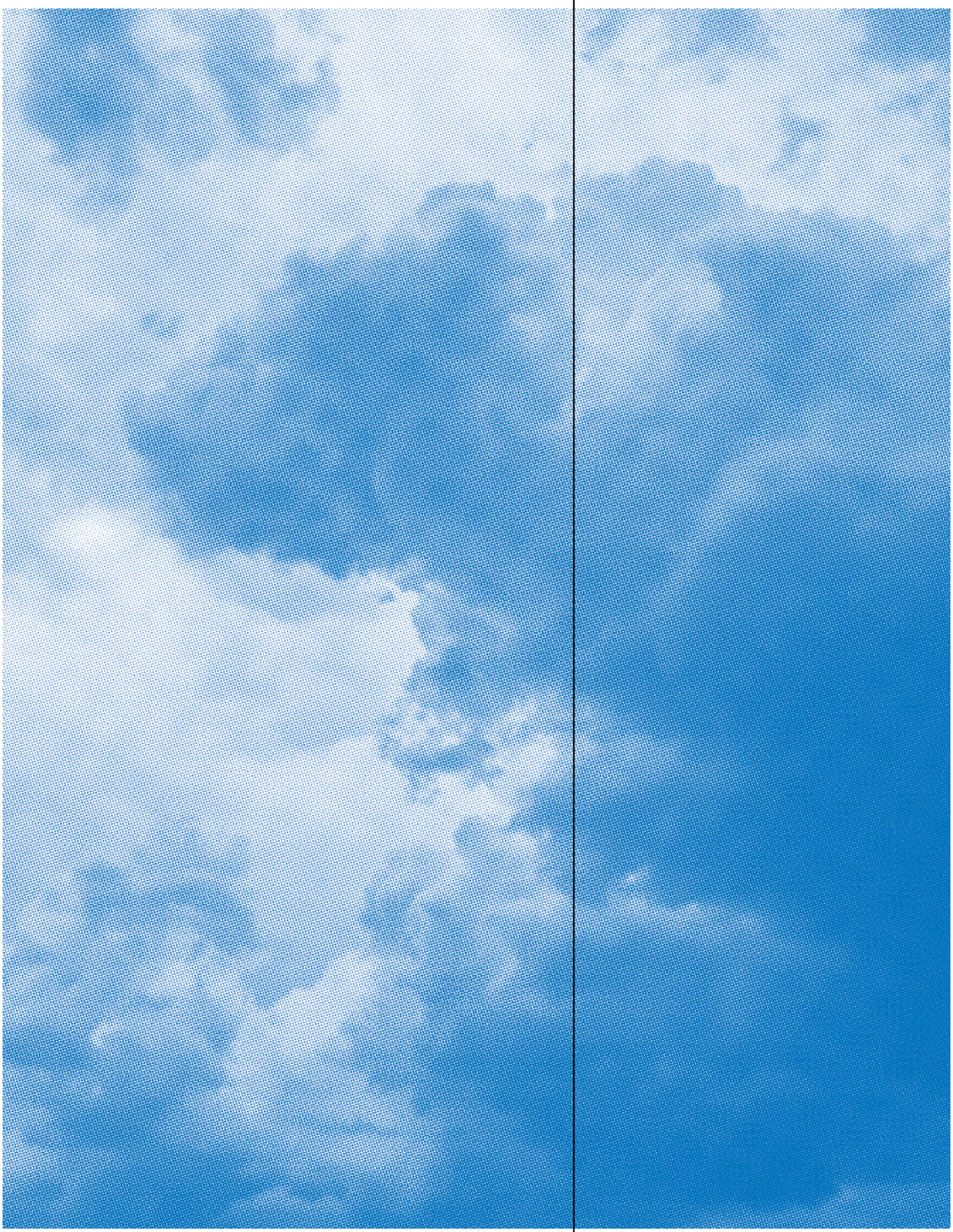
NATIONAL REPORT
AUSTRIA

Assessing the risk of flight during pre-trial detention



# FLIGHT RISK

LUDWIG BOLTZMANN INSTITUTE
Fundamental and Human Rights

# AUTHORS & ACKNOWLEDGMENTS

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# 1. INTRODUCTION

## 1.1 EXECUTIVE SUMMARY

This report is based on research carried out by the Ludwig Boltzmann Institute of Fundamental and Human Rights, as one component of a wider European Commission funded project "FLIGHTRISK: Assessing the risk of flight during pre-trial detention". The project considers the national experience of five European Union (EU) Member States (Austria, Belgium, Bulgaria, Ireland and Poland) with a view to conducting comparative research and providing a regional overview of the situation pertaining to flight risk across the EU.

The focus of this project is the analysis of judicial assessment of flight risk, with a view to enhancing judicial assessments, strengthening fundamental rights and bolstering mutual trust and recognition in cross-border criminal justice cooperation. This research looks at how domestic judicial authorities assess flight risk in the context of pre-trial detention proceedings and considers the existing legal framework, the procedures applied, and the key stakeholders involved in the use of pre-trial detention, when there is a perceived danger that the individual will seek to evade justice.

This report presents a comprehensive analysis of the judicial decision-making process regarding the assessment of flight risk in pre-trial detention in Austria. It explores how flight risk is defined in national law and practice, what arguments are commonly presented to support flight risk as a ground for pre-trial detention or the (un)suitability of alternative measures, and if and how individualised assessments are carried out by judges.

The research highlights the need for individualised assessment practices and the importance of ensuring access to effective legal representation. Through desk research, analyses of case files and interviews with legal practitioners, the report identifies key areas where systemic challenges may influence assessments of flight risk, particularly affecting foreign nationals. These insights point to a need for reforms that address these disparities, ensuring that pre-trial detention is used as a means of last resort. Furthermore, the report highlights the essential role of defence counsel in navigating the complexities of pre-trial detention proceedings. It underscores the necessity of adopting more nuanced and individualised methods for assessing flight risk and enhancing the use of alternatives to detention.

## 1.2 KEY OBJECTIVES

Through the lens of the national context and experiences, the broader objective of the project "FLIGHTRISK: Assessing the risk of flight during pre-trial detention" is to raise awareness of the standards outlined in the European Convention on Human Rights (ECHR), as well as the regional situation, measures and guidelines concerning the day-to-day decision-making on flight risk as a ground for pre-trial detention. In this context, it aims to identify and tackle obstacles for preventing the overuse of pre-trial detention fuelled by the concerns of flight risk, which may contribute to overcrowding and in turn undermine mutual trust between Member States. The research should facilitate a deeper understanding of the reality of judicial and prosecutorial decision-making when assessing flight risk as a ground for pre-trial detention.

As one component of the FLIGHTRISK project, the research underpinning this Austrian national report aims to facilitate comparative analysis of legal frameworks and decision-making pertaining to flight risk across EU Member States, as well with respect to the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR).

## 1.3 METHODOLOGY

The research underpinning this report consisted of desk research, review and analysis of judicial decisions on pre-trial detention and stakeholder consultations. The desk research examined the Austrian legal framework as it pertains to pre-trial detention and flight risk as a ground for pre-trial detention, the respective roles of legal practitioners (judges, prosecuters and defence counsel), relevant case-law from the constitutional court and higher regional courts, as well as selected literature on flight risk as a ground for pre-trial detention, procedural rights and fair process guarantees.

In order to review judicial decision-making on flight risk, the Austrian Ministry of Justice provided a list of 100 cases where pre-trial detention was ordered. The researchers then contacted several regional courts to request access to these case files and acquire copies of the relevant court orders. Case files pertaining to pre-trial detention decisions were collected from ten regional courts (Innsbruck, Graz, Eisenstadt, Korneuburg, Krems, Linz, Salzburg, Wels, Wien and Wiener Neustadt) from seven different states in Austria (out of nine), as well as one higher regional court (Innsbruck). In total, from the 100 cases provided by the Ministry of Justice, 39 pertained to flight risk as a ground for pre-trial detention, comprising 59 accused and 129 individual court orders (imposing or extending pre-trial detention).

The project also involved stakeholder consultations with judges, prosecutors and lawyers to discuss the preliminary research findings and gain deeper insight into the decision-making practices for individual assessments of flight risk. In total, five in-depth semi-structured interviews with stakeholders (two judges, two lawyers and one prosecutor) were conducted, as well as one written interview with a lawyer. The findings from these interviews provided more detailed insights into legal processes and discrepancies between legal standards and practical implementation of pre-trial detention proceedings and have informed the implementations set out in this report.

With respect to the particular (legal) terminology used in this report, the authors recognise that different sources of literature, previous projects (see DETOUR[1] and PRETRIAD[2]), or unofficial print translations of the relevant legislation[3] rely on slight variations in terminology when translating Austrian legal terms into English.[4] The authors of this report aimed to employ the most commonly used and easily comprehensible translations.

## 1.4 BACKGROUND AND DATA

In Austria, pre-trial detainees, as defined by national law, are individuals awaiting trial or who have not yet received a final sentence and are either appealing the conviction or are within the time frame to do so. As of 1 January 2024, a fifth (19.71%) of all detained persons in Austria are in pre-trial detention, according to the Ministry of Justice.[5] This amounts to 1,791 persons (out of a total of 9,089 detained persons). This figure is lower than the European average of 24.8%, according to the Council of Europe Space I Report 2022.[6]

According to the latest security report ("Sicherheitsbericht"), published by the Ministry of Justice in 2022, the daily average number of people in pre-trial detention in the year 2021 was 1,465 persons, with an absolute figure of 6,507 new entries into pre-trial detention.[7] The average de facto time spent in pre-trial detention amounted to 63 days in 2003 and had risen to 81 by 2008. At the end of 2021, it amounted to around 90 days; that is one day less than in the previous year.[8]

A key challenge in Austria pertains to the high proportion of foreign nationals held in pre-trial detention. The regularly updated data on the website of the Ministry of Justice does not provide details concerning the nationality and/or ethnic background of pre-trial detainees. The security report 2021[9] states that the proportion of Austrian citizens opposed to non-citizens in pre-trial detention in 2021 was 51%. The report further outlines that the proportion of non-citizens in pre-trial detention has been growing steadily in recent years, with their proportion of the prison population in 2021 representing a 137% increase compared to the year 2001. In relative figures, out of all 6,507 new entries into pre-trial detention in the year 2021, 64% had been non-nationals. Conversely, the proportion of Austrian nationals in pre-trial detention has been continuously decreasing in the last 20 years. Furthermore, the data of the security report shows that across previous years, compared to the rest of Austria, a particularly large number of foreigners from third countries (non-EU-citizens) were detained in Vienna.

With respect to gender, according to the security report, 6.3% of people in pre-trial detention are women, compared to 5.3% of sentenced persons in prison. Both figures are lower than in previous years. Aggregated by citizenship, this is also true for women who are non-Austrians.

# 2. LEGAL CONTEXT

## 2.1 REGIONAL LEGAL FRAMEWORK

At the European level, the current legal situation is that there is no harmonisation or approximation of law specific to pre-trial detention and flight risk. Notwithstanding this gap, a set of European standards has emerged through other mutual recognition instruments, human rights standards, procedural rights and jurisprudence.

Article 82 (2) of the Treaty on the Functioning of the European Union (TFEU) provides the basics for judicial cooperation in criminal matters in the EU. It sets out that any cross-border cooperation in those matters is based on the principles of mutual recognition of judgments and judicial decisions. In order to follow these principles, it provides competence to establish minimum rules to harmonise criminal procedure.

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

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

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

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

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

The core elements consist of the aim of the detention, namely to bring the individual before a competent authority. It then sets out the test that must be satisfied; that of a reasonable suspicion that an offence has been committed, and that the detention is 'necessary' in order to prevent the individual from absconding.

The standard used to determine a "reasonable suspicion" that a criminal offence has been committed requires an "existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence".[10]

Recently, the Commission Recommendation 8.12.2022,[11] in a bid to consolidate the legal standards surrounding pre-trial detention across the EU, noted that Member States should impose pre-trial detention "only on the basis of a reasonable suspicion established through a careful case-by-case assessment, that the suspect has committed the offence in question and should limit the legal grounds for pre-trial detention to (a) risk of absconding; (b) risk of re-offending; (c) risk of interfering with the course of justice or (d) risk of a threat to public order."

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

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

> "The risk of absconding has to be assessed in the light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is prosecuted."[12]

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

> "The fact that the suspect is not a national of, or has no other links with, the statewhere the offence is assumed to have been committed is not in itself sufficient to conclude that there is a risk of flight."[13]

The case law of the ECtHR, has consistently emphasised the importance that these grounds be rooted in fact. In *Panchenko v. Russia*, the Court questioned whether the continued detention was justified on the grounds of a perceived risk of absconding. The Court found a breach of Art 5 (4) due to the absence of a factual basis, the use of generic terms supporting the perceived flight risk and a failure to properly take into account family ties, his permanent address and the fact that the applicant had no criminal record.

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

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

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

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

Considering the requirement to ensure surrender, the Court found that even in circumstances where time limits were exceeded, this would not preclude the execution of the warrant nor the continued detention. However, much like in the jurisprudence of the ECtHR, and in light of the fundamental rights at stake, a detailed, evidence-based 'concrete review' was set out which required the Court to consider:

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

## 2.2 NATIONAL LEGAL FRAMEWORK

### 2.2.1 NATIONAL LEGAL FRAMEWORK ON PRE-TRIAL DETENTION

At the core of the Austrian national legal framework are the Criminal Code (*"Strafgesetzbuch"*), which defines criminal offences, and the Code of Criminal Procedure (CCP) (*"Strafprozessordnung"*), which regulates the process of criminal prosecution by the police, the public prosecutor's office and the court.

Moreover, the Federal Constitutional Law of 1988 on the Protection of Personal Freedom (*"Schutz der Persönlichen Freiheit"*) contains critical provisions related to the protection of personal freedom amidst infringements, such as the importance of expeditious proceedings, regular reviews and ensuring compensation for cases involving unjust arrests or detentions. Supplementary to these regulations, the Juvenile Justice Act (JJA) (*"Jugendgerichtsgesetz"*) provides specific guidelines and *lex specialis* for cases involving children and young adults.

The Austrian criminal law is characterised by inquisitorial procedures. The foundations for current regulations regarding pre-trial detention were established through an amendment to the CCP in 1993 (*"Strafprozessänderungsgesetz"*).[14] This amendment strengthened the role of the so-called investigating judge (*"Untersuchungsrichter"*), who became the deciding authority for legal protection. However, Austria abolished the position of the investigating judge as part of another amendment to the CCP in 2004,[15] which came into effect in 2008. Since then, the public prosecutor's office has extended competencies and responsibilities, acting as the sole leader of the unified investigative proceedings. The public prosecutor cooperates with the police and decides about the initiations, progress and terminations of the investigative proceedings in accordance with Arts 20 (1) and 101 CCP.[16] Decisions regarding the rights of suspects and accused and regarding detention fall within the purview of the newly designated detention and legal protection judge (*"Haft- und Rechtsschutzrichter"*). The role of the trial judge has remained unchanged and the inquisitorial court still actively engages in questioning witnesses presented by the parties involved and independently summoned expert witnesses.

In Austria, the permissibility of imposing or continuing pre-trial detention, as well as the imposition of milder measures, are governed by Arts 173 et seq. CCP. Pre-trial detention (*"Untersuchungshaft"* – literally translating to "investigating detention") refers to the deprivation of liberty from the moment of arrest and while persons are awaiting trial and have not yet been convicted, as determined by the court.

The main goal of pre-trial detention is to secure the proceedings, so detention may not be ordered if this goal can be met through other means. The principle of proportionality must be adhered to; Art 173 (1) CCP states that pre-trial detention must not be imposed or extended if this is disproportionate to the significance of the matter or to the anticipated sentence, or if the objective of pre-trial detention can be achieved by using milder measures. This principle is also reinforced by Art 1 (3) of the Federal Constitutional Law of 29 November 1988 on the Protection of Personal Freedom which reads as follows: "The deprivation of personal liberty may be legally prescribed only if this is requisite for the purpose of the measure; deprivation of personal liberty may in any instance only occur if and inasmuch as this is not disproportionate to the purpose of the measure."

Besides the principle of proportionality, pre-trial detention must also adhere to the following: as set out in Art 173 CCP, the imposition or continuation of pre-trial detention must be requested by a prosecutor and is only permissible if the accused is under a strong suspicion of a particular criminal offence ("urgently suspected" of an offence),[17] if the accused has been questioned by the court and one of the following three grounds for the imposition of pre-trial detention listed in Art 173 (2) CCP is met: i) flight risk (risk of absconding); ii) risk of tampering with evidence and impeding the investigation; and iii) risk of reoffending/committing a new offence.

The risk of tampering with evidence and impeding the investigation is presumed if there are sufficient signs that it is to be expected that the accused will try to influence co-conspirators, destroy evidence or hinder the investigation in any way, if released. The risk of reoffending is presumed if there are sufficient signs that the accused will continue to commit offences if released. According to Art 173 (3) CCP, flight risk may not be presumed if the accused is suspected of an offence which is not punishable with a sentence of more than five years and if they demonstrate an 'orderly' living situation and a regular residence in the country.

In addition, pre-trial detention may not be ordered or continued if its purpose can be achieved through the application of milder measures listed in Art 173 (5) CCP (i.e. it should be applied as an ultima ratio).[18] The Austrian Supreme Court has established a three-step process for determining pre-trial detention,[19] which focuses on the expected sentence. First, the judge must consider the character and severity of the sentence that is likely to be handed down. Second, the judge must consider if a fine or conditional sentence is possible, meaning if the suspect will actually serve time in prison. Finally, when assessing the grounds for extending detention, the judge must consider the possibility of conditional release and when it would be relevant.

For children between 14 and 18 years of age and young adults up to 21 years of age, the process of determining the proportionality of a possible detention (*"Verhältnismäßigkeitsprüfung"*, Art 35 JJA) is stricter and carried out more thoroughly than with adults: Pre-trial detention may only be imposed if the disadvantages it poses for the individual's personality development and advancement are not disproportionate to the significance of the offence and the expected punishment. Milder measures are used more frequently and pre-trial detention is generally viewed as a last resort and is rarely employed for children who are of the age of criminal responsibility.

Since an amendment to the JJA in 2015 (*"Jugendgerichtsgesetz-Änderungsgesetz 2015"*), there is now the possibility of ordering a pre-trial detention conference (Art 35(a) JJA), a certain type of a social net conference (Art 29e Probation Assistance Act). Social net conferences require the consent of the accused at all times and aim to engage the support of the individual's social net (their parents, other family members, friends, neighbours, teachers, sports coaches, etc.) in addressing their situation and conflicts, developing together a plan for the future and preventing the accused from committing further offences. According to the security report 2022, in 2021, 153 new cases were dealt with in the context of social net conferences at the pre-trial stage.[20]

### 2.2.2 NATIONAL LEGAL FRAMEWORK ON ALTERNATIVES TO PRE-TRIAL DETENTION

Austrian law provides for a number of alternatives to pre-trial detention, so-called milder measures or less restrictive measures (*"Gelindere Mittel"*). A non-exhaustive list of milder measures is outlined in Art 173 (5) CCP, which reads as follows:

<u>The following may be used as milder measures:</u>

1. *the pledge to not abscond, go into hiding, or leave the place of residence without permission by the prosecution authority until the legally binding conclusion of the criminal proceedings,*

2. *the pledge not to make any attempt to obstruct the investigations,*

3. *in cases involving domestic violence (§ 38a National Security Police Act ("Sicherheitspolizeigesetz"), the pledge to refrain from any contact with the victim, not to enter a particular dwelling and its immediate vicinity, or not to violate any restraining order pursuant to § 38a para. 2 of the National Security Police Act or any interlocutory injunction pursuant to § 382b of the Foreclosure Regulations ("Exekutionsordnung"), along with removal of all key to the dwelling,*

4. *a directive to reside in a particular place, with a particular family, to avoid a particular dwelling, particular places, or particular contact, to refrain from consuming alcoholic substances or other drugs, or to pursue regular employment,*

5. *a directive to give notice of any change of residence or to report to the criminal investigation authority or other offices at regular intervals,*

6. *temporary removal of identity documents, motor vehicle documents, or other licenses,*

7. *provisional probation assistance under § 179,*

8. *furnishing of a security [bail] under §§ 180 and 181,*

9. *a directive, with the consent of the accused, to undergo withdrawal treatment, other medical treatment or psychotherapy (§ 51 para. 3 Criminal Code ("Strafgesetzbuch"), or other health-related measures (§ 11 para. 2 Controlled Substances Act ("Suchtmittelgesetz").*

This list of milder measures serves as a flexible framework, meaning the judge has discretion to impose any milder measure or combinations of milder measures they deem appropriate in an individual case.

Additionally, according to Art 180 (1) CCP, the accused may be released against bail and upon making the pledges in Art 173 (5) point 1 and 2 (the promise to not flee, hide, or remove oneself from one's place of residence without the permission of the prosecution until the final conclusion of the criminal proceedings; and the promise not to attempt to obstruct the investigations). However, this is only possible if the sole ground for detention is flight risk (Art 173 (2)); this must occur if the offence is not punishable with more than five years' imprisonment. As flight risk is seldom the only ground for pre-trial detention, bail has minimal significance in practice.

Since 2010, Austrian law also contains provisions for house arrest with electronic monitoring as an alternative to imprisonment, for not only sentenced persons (Art 156b Austrian Penal Code), but also for accused in pre-trial detention (Art 173a CCP).[21] However, electronically monitored house arrest is not construed as an alternative to pre-trial detention, but rather as another means to execute pre-trial detention. House arrest is regulated in Art 173a CCP, which states that an accused, at the request of the prosecution or themselves, may transition from pre-trial detention to house arrest, confined to their place of residence. House arrest is allowed if milder measures are insufficient to lift pre-trial detention but achieving the detention's purpose is feasible through this method. The accused must

consent to electronic monitoring. Electronically monitored house arrest can be revoked and pre-trial detention can be resumed under certain criteria. Electronically monitored house arrest means that the person under supervision must remain in their accommodation and pursue suitable employment. The accommodation may only be left for certain purposes and at certain times. If electronically monitored house arrest is ordered for sentenced persons, they must pay a contribution of 22 Euros per day, if they can afford it.[22] However, no costs incur to the accused when it is applied as another means to execute pre-trial detention.[23]

The use of electronically monitored house arrest for sentenced persons has been growing somewhat: at the beginning of January 2022, 355 persons had been serving house arrest via electronic monitoring, constituting around 4% of all detained persons in Austria.[24] A working group of the Ministry of Justice recommended in 2021 to further extend the application of electronic monitoring.[25] However, between its entry into force in 2010 and the end of 2021, only 66 persons had served pre-trial detention via electronically monitored house arrest.[26] As of January 2024, a total of 295 persons are under electronically monitored house arrest, of which only three were serving pre-trial detention in this manner,[27] indicating that its application for accused persons in pre-trial detention seems to be limited (see Section 3.5.2).

## 2.3 OVERVIEW OF KEY ACTORS

The police carry out arrests, which have to be ordered by the prosecutor and approved by a judge. However, the police may also carry out arrests without a prosecutor's order if a situation is deemed to be of "imminent danger" and reaching the prosecutor promptly is unfeasible (Art 171 (2) CCP). The police must keep documentary records of investigations such that the cause, implementation, and results of these investigations can be understood (Art 100 (1) CCP), and they must provide a report to the prosecutor (Art 100 (2) CCP). Previous research indicates that, in practice, the police often conducts investigations rather autonomously and the prosecutor takes a less prominent role in investigations.[28]

Pre-trial detention, as well as continuation of pre-trial detention, may only be requested by the public prosecutor (*"Staatsanwaltschaft"*). The public prosecutor's office, a distinct entity from the courts, primarily protects public interests in the management of criminal justice. They oversee initial proceedings, make decisions on indictments, and serve as prosecutors in criminal cases before the courts. While performing their duties, they operate independently of the courts.

Pre-trial detention must be authorised by a competent judge, the detention and legal protection judge (*"Haft- und Rechtsschutzrichter"*). The judge issues arrest warrants requested by the public prosecutor, conducts mandatory hearings and holds the responsibility for all decisions regarding the imposition or continuation of pre-trial detention. It is also the obligation of the judge to review the legality of pre-trial detention.

Representation by a defence counsel is mandatory for the accused during the entire proceedings, when and while the accused is placed in pre-trial detention ("indispensable defence"), in accordance with Art 61 (1) CCP). If the accused is not able to afford the full costs for the defence, the court will order the assignment of a legal aid defence counsel for the proceedings (Art 61 (2) CCP). Defence counsel funded through legal aid frequently represent accused persons. However, the provision of legal aid in Austria has faced some criticism, particularly due to the appointment of defence counsels with limited experience in criminal matters.[29] The assignment is effective for the entire remainder of the proceedings (Art 61 (4) CCP). Suspects are entitled to have a defence lawyer present during initial questioning which is part of the investigation concerning the criminal proceedings (Art 164 (2) CCP). However, the active involvement of the counsel is limited at this stage; the defence counsel must not participate in the questioning and the accused must not consult the defence counsel about answers to individual questions. It is only possible to curtail the right to have defence counsel present if this appears to be absolutely necessary for particular reasons in order to prevent a significant risk to the investigation or interfere with evidence. In accordance with Art 59 (3) CCP, the accused has the right to unmonitored communication with their defence counsel; however, contact with the defence counsel may be limited to general legal information if deemed necessary to prevent interference with the investigation or evidence (Art 59 (2)).

## 2.4 PROCEDURES SURROUNDING PRE-TRIAL DETENTION

The procedures following arrest are governed by Art 172 CCP. Upon arrest of a person, the police must notify the public prosecutor without delay if the arrest had been ordered by the public prosecutor (following judicial approval), and the public prosecutor must notify the court without delay. Within 48 hours after arrest ("the first 48 hours"), the accused must be placed in the detention facility of the competent court.

If the police have arrested the accused without direct order from the public prosecutor, they must question the accused without delay about the suspicion of the crime and the grounds for the arrest. If it becomes evident during this investigation that no further ground which warrant keeping the accused in custody exists, they must be released immediately. The accused must also be released immediately if the public prosecutor declares that it will not request pre-trial detention. At this point, if the purpose of the continuing arrest can be achieved using milder measures under Art 173 (5), the police must – at the direction of the public prosecutor – immediately make preparations for the necessary directives and/or pledges and release the accused. The court then makes decisions concerning the continuation of these milder measures.

Pursuant to Art 174 CCP, all persons who have been arrested by the police must, after admission to a detention facility, be questioned by a competent judge regarding the allegations and the grounds for detention. Defence counsel and the prosecutor must be afforded the opportunity to participate in the questioning, but it is not mandatory. When dealing with children and young adults, the court may utilise juvenile court assistance (*"Jugendgerichtshilfe"*) to gain insights into the individual and their social environment.

Prior to making a decision on whether to impose pre-trial detention, the court may conduct immediate investigations or instruct the police to do so, if this is deemed necessary in order to ascertain the suspicion or the grounds for pre-trial detention. In any case, within a maximum of 48 hours after admission to a detention facility ("the second 48 hours"), the court must decide whether the accused is to be released, where relevant, using milder measures (Art 173 (5) CCP), or whether to impose pre-trial detention.

The judge is required to promptly communicate the decision orally to the accused. If pre-trial detention is imposed, a written decision must be delivered to all relevant parties within 24 hours which must include the following elements: the offence that the accused is strongly suspected of having committed, the grounds for pre-trial detention, the particular material facts that give rise to the strong suspicion and the grounds for pre-trial detention, along with the reasons why the objectives of pre-trial detention cannot be achieved using milder measures; a note stating the maximum date until the court order remains valid (a pre-trial detention hearing must take place prior to any extension of pre-trial detention); a note stating that the accused may notify a defence counsel and that they must be represented by a defence counsel while on demand; and a note stating that the accused can raise a complaint (Art 174 (3) CCP). In cases where no decision is reached within 48 hours, the accused is to be released.

Pre-trial detention orders are only valid for a certain period of time. The timeframes governing the validity of pre-trial detention orders are stipulated in Art 175 CCP. A pre-trial detention hearing (*"Haftverhandlung"*) must be conducted i) prior to a pre-trial detention period lapsing; ii) without delay if the accused requests their release and if the public prosecutor objects to this requests or if a direction for house arrest (Art 173a CCP) has been requested; or iii) if the court has concerns regarding the continuation of pre-trial detention (Art 176 CCP). The hearing determines whether the conditions for detention continue to be met. If they are no longer met, the accused must be released.

The initial pre-trial detention hearing is mandated to occur 14 days after the imposition of pre-trial detention. Subsequently, the pre-trial detention may be prolonged for one month, followed by two additional months after each subsequent hearing and extension (Art 175 (2) CCP). The accused may, through their defence counsel, forego an imminent pre-trial detention hearing and in such cases, the court order to lift or extend pre-trial detention may be made in writing without a prior detention hearing (Art 175 (5) CCP).

Pre-trial detention hearings are closed to the public. First, the public prosecutor presents their motion to extend the pre-trial detention. The accused, the accused's legal representative and defence counsel have a right to respond. The court may hear witnesses or take other evidence if this is necessary to determine the question of pre-trial detention. The decision to lift or extend pre-trial detention must also be communicated in writing.

Maximum durations of pre-trial detention are established in Art 178 CCP. Until the start of the main trial, the duration of pre-trial detention must not exceed: two months if pre-trial detention is grounded solely in the risk of collusion or tampering with evidence; six months if the accused is detained on suspicion of a misdemeanour; or one year if the accused is detained on suspicion of a felony and two years if the accused is detained on suspicion of a felony punishable by imprisonment for more than five years (Art 178 (1) CCP). Generally, extensions beyond six months must be justified by specific difficulties and complexities in the investigations, contingent upon the weight of the grounds for pre-trial detention (Art 178 (2) CCP). There is no provision for release from pre-trial detention due to illness or injury. If a defendant who was released because the pre-trial detention period lapsed must be detained again in order to conduct the main trial, this may only occur for a further period of six weeks (Art 178 (3) CCP), but in principle, this scenario could recur multiple times.

### 2.4.1 PROCEDURAL GUARANTEES

Austrian law provides for several rights of the accused in criminal proceedings. Art 49 CCP lists the following rights:

The accused has, in particular, the right to

1. *receive information about the content of the suspicion held against him or her and receive instructions concerning his or her principal rights in the proceedings (§ 50),*
2. *appoint a defence counsel (§ 58) and obtain a legal aid defence counsel (§ 61 and § 62),*
3. *gain access to files (§§ 51-53),*
4. *respond to the allegations, not to make a statement, and, subject to §§ 58, 59 and § 164 (1), contact and consult a defence counsel,*
5. *consult a defence counsel during questioning under § 164 (2),*
6. *request the taking of evidence (§ 55),*
7. *raise objections because of a violation of personal rights (§ 106),*
8. *lodge a complaint against the authorisation by the court to employ coercive means (§ 87),*
9. *request the discontinuation of investigation proceedings (§ 108),*
10. *participate in the main trial, in the adversarial questioning of witnesses and co-accused (§ 165 (2)), and in re-enactments of the crime (§ 150),*
11. *raise appellate instruments and seek legal redress,*
12. *receive interpretation assistance (§ 56).*

According to Art 171 (4) CCP, immediately upon arrest, accused have to be provided written information regarding their rights, in a language they can understand. In Austria, the Letter of Rights is available in 47 languages.[30]

Art 56 CCP sets out the rights of an accused in a criminal case who does not speak or understand the language of the proceedings. The accused has the right to interpretation and, if necessary for the defence and a fair trial, the right to written translations of key documents within a reasonable time frame. The accused also has the right to request additional specifically identified documents to be translated if necessary for the defence. If interpretation services cannot be provided promptly, they may be provided remotely. Court interpreters are only admitted in Austria if they have obtained certain professional qualifications and if they have passed a state-certified examination at the Austrian Association of Sworn and Court Certified Interpreters.[31]

With regard to the right to a lawyer, the accused is required to have a defence counsel throughout the entire criminal proceedings (Art 61 (1) CCP). If the accused cannot afford the full defence costs, they can request the court to appoint a defence counsel without having to bear all or any costs. The appointment of a defence counsel is in any case required in this sense if the accused is in need of protection because they are blind, deaf, mute, or similarly disabled, or suffering from a mental illness or a comparable impairment of their decision-making capacity, and therefore unable to defend themselves (Art 61 (2) CCP).

A 2004 amendment to the CCP (*"Strafprozessreformgesetz"* 2004) gave accused and their lawyers the right to review and examine all documents in police and court files related to the case from the start of the pre-trial detention. However, this right can be limited until the pre-trial periods have lapsed to protect ongoing investigations that may otherwise be hindered (Art 51 CCP).

For the detention hearings, the accused must be brought before the court unless it is not possible due to illness or the accused is held outside of the jurisdiction of the court (Art 176 (3)). In such cases, the direct examination can be conducted using technology for word and image transmission (Art 153 (4) CCP).

With regard to appeals, in principle, every court order regarding pre-trial detention is subject to appeal (Art 87 CCP) and complaints must be filed within three days after the order is delivered (Art 176 (5) CCP). Also, after exhausting all regular remedies, the accused/defendant is entitled to lodge a fundamental rights complaint with the Supreme Court if their fundamental right to personal freedom has been violated by a criminal court decision or order, pursuant to Art 1 (1) of the Fundamental Rights Appeals Act (*"Grundrechtsbeschwerde-Gesetz"*).



# 3. FLIGHT RISK AS A GROUND FOR PRE-TRIAL DETENTION

In contrast to many other European countries, flight risk is not the most commonly applied ground for pre-trial detention in Austria. Previous research has shown that the risk of reoffending was the most frequently applied ground for pre-trial detention, followed by flight risk – which, crucially, is seldom the sole ground for detention but rather is applied in conjunction with the risk of reoffending.[32] A study from 2010 has found that in 89% of cases where pre-trial detention is ordered, the risk of re-offending was stated as a ground, whereas in 70% of cases, flight risk was determined as a (additional) ground for imposing pre-trial detention.[33] There has not been any quantitative examination into the relative frequency of grounds for pre-trial detention since and no disaggregated record is made (centrally, by the courts or the Ministry of Justice) of the grounds on which pre-trial detention is imposed.

Though the case files consulted in the present research may not be an entirely representative sample, they seem to confirm the above mentioned findings: out of the 59 pre-trial detention orders that were examined, over half of them (32) contained flight risk and the risk of re-offending as grounds, and about a third of the orders (22) contained all three possible grounds for pre-trial detention; flight risk was the sole ground in only two orders (in three orders, the grounds were not specified). In the two orders where flight risk was the sole ground, milder measures were applied (see also Section 3.6.1).

Also, the interviews with legal practitioners overwhelmingly confirmed the findings from previous research with regard to the supremacy of the risk of reoffending as a ground for pre-trial detention. All interview partners agreed that the risk of reoffending is most often applied, by a wide margin: "everything simply runs under risk of reoffending"[34] and also, that it is applied with relative ease, calling it "the panacea of pre-trial detention".[35] Especially if the accused has already had some prior convictions, even more so if they were convicted for relevant offences, the risk of reoffending is quickly applied, in accordance with Art 173 (2) (3b) CCP.

In line with previous research, flight risk, as the sole ground for pre-trial detention was perceived to be extremely rare by the interview partners. Instead, the interview partners confirmed, flight risk is rather used as an "add-on" in addition to and in conjunction with the risk of reoffending: "They are very happy to accept the risk of flight, but it is more of a decoration for us, to sprinkle on top, because with us they mainly argue with the risk of re-offending."[36]

Previous research indicates that risk of reoffending is applied more often because it is considered a more reliable ground in ensuring that detention will be imposed. In contrast, justifications for flight risk are considered more difficult to substantiate, given the relatively high threshold concerning the anticipated sentence and the obligations related to considering bail. With regard to flight risk, the legal requirements are more stringent as flight risk may not be assumed if the accused is living in Austria in orderly circumstances and if the expected sentence does not exceed five years (Art 173 (3) CCP) – and, moreover, if flight risk is the only ground, pre-trial detention must be substituted with bail (Art 180 (1) CCP).[37] Interviewed legal practitioners have contended that there is a perceived presumption of pre-trial detention with judicial authorities being wary of alternatives to pre-trial detention. Hence, flight risk may not be viewed as a "reliable" ground for pre-trial detention.

However, despite the apparently stringent requirements for applying flight risk as a ground for pre-trial detention, the examination of case files as well as the interviews with practitioners have indicated that in practice, it is assumed frequently, and almost automatically (as an "add-on" to the risk of reoffending) if the accused is a foreign national without a proven residence status or social ties in Austria (see Section 3.1.1). With regard to the practical considerations of applying the grounds of risk of reoffending and flight risk on the part of the judiciary, the following quote by a lawyer is illuminating: "The reason for detention that I find is most frequently used is the risk of reoffending, and in practice this is used very easily. Yes, 1–2 previous convictions are sufficient, so that if an incident occurs and pre-trial detention is applied for, it is quickly imposed on the basis of the risk of reoffending. If there is also the fact that someone is not a resident of Austria, is not socially integrated here, and the like, then flight risk is quickly added cumulatively. And you only need one reason for detention, but of course the more reasons for detention that are allegedly present, the more challenging it becomes to obtain release and to be able to offer milder measures."[38]

It appears that there is a presumption of pre-trial detention on part of the judiciary and the manner of applying the grounds ascertains this outcome. This may also relate to the rather limited role of the risk of tampering with evidence or impeding the investigation as a ground for pre-trial detention,[39] as this ground can only be valid for a maximum of two months (Art 178 (1) CCP), making it an unreliably substantiation for ensuring pre-trial detention. An interviewed lawyer has also confirmed a tendency to "tick more boxes" rather than fewer when it comes to the grounds for pre-trial detention: "Flight risk is also used for maintenance, because of course, at some point the risk of tampering with the investigation will fall away […] I also learned in court back then, it's better to tick more than fewer grounds for arrest or pre-trial detention."[40]

## 3.1 CRITERIA FOR ASSESSING FLIGHT RISK

The criteria for assessing flight risk derive from Art 173 (3) CCP, which states: “The risk of flight is not to be assumed if the accused is suspected of a crime that is not punishable by a sentence of more than five years’ imprisonment, if they have orderly personal circumstances and a permanent residence in the country, unless they have already made preparations for flight.”

In Austria, as a civil law country, the Supreme Court’s judgements are not regarded as precedents formally binding the lower courts. In its jurisprudence, the Supreme Court has concretised the requirements for the acceptance of flight risk as a ground for pre-trial detention.[41] It has made clear that relying solely on a lack of social integration of the accused is not sufficient to justify the requirement of flight risk. Rather, an evaluative consideration of the individual case is necessary. Decisive is a cumulative consideration of the social, family, and economic circumstances both domestically and abroad.[42] Possible criteria can for example be: lack of integration domestically, family ties in the home country, property and ownership conditions in the respective country and close contacts abroad.

Based on desk research and publically available information, no guidelines (soft-law) for judicial authorities on the assessment of flight risk in individual cases could be obtained and it can be presumed that none exist. A prosecutor also confirmed during the interviews, that there are no internal guidelines for assessing flight risk, "That doesn't really exist, the law is relatively loose."[43] Instead, the decision-making by the prosecutor comes down to an "individual assessment by the officer who is a trained public prosecutor and studies the file and thinks, ok, that's enough for me, that's not enough for me."[44] The individual assessment comes down to weighing up the different factors regarding the accused that are known to the prosecutor: "you basically look to see if he has a place of residence. Does he have any outstanding warrants? And what is the expected penalty? Does he have a job, of course, which also plays a role, i.e. is he socially integrated, does he have a family? But I don't think that's something where we have any specific requirements in terms of content […] it's often a question where many things interact, firstly proportionality, grounds for detention, the suspicion."[45]

Pre-trial detention orders often cite the level of the threat of punishment, the nationality of the accused, their lack of residence or lack of integration in Austria as factors for the flight risk. "These are the factors that are almost like a prayer mantra in the pre-trial detention orders in all cases involving non-EU citizens."[46] A combination of these factors were found in the present research examining court orders imposing pre-trial detention: out of the 59 individual court orders imposing pre-trial detention (57 male and two female), five accused were Austrian nationals, flight risk is justified by a lack of social integration in 24 orders, a lack of residence in 23 orders, the threat of punishment in 23 orders and the foreign nationality of the accused in 17 orders.

As previous research has demonstrated,[47] the foreign nationality and regular place of residence abroad of the accused is considered to be of great importance by Austrian courts, as both factors are often seen as an indication of the flight risk (see Section 3.1.1). While no robust conclusions can be drawn based on the current data, the information gleaned from the case files would support such an argument. Previous convictions are not predominantly cited as one of the main factors for presuming flight risk within pre-trial detention orders but they are occasionally mentioned. It is not possible to state based on the case files whether previous convictions lead to higher likelihood of being deemed a flight risk, and for many accused, it could not be ascertained from the available court documents whether they had any previous convictions. However, legal practitioners also deemed this a valuable factor in assessing flight risk, as one judge argued: "I think it is also important when assessing flight risk how many previous convictions this person has, for example. The more previous convictions, especially relevant previous convictions, this person has, the higher the sentence to be imposed will be and the greater the incentive to flee will simply be."[48]

### 3.1.1 DISCRIMINATORY EFFECT

It is apparent that when it comes to assessments of flight risk, some of the criteria have a discernible discriminatory quality, especially as it relates to the nationality of accused. In practice, there is almost an automatism when the suspect is not an Austrian national. As a judge confirmed, pre-trial detention based on flight risk "actually almost always happens if the person does not have Austrian citizenship."[49] Indeed, a lawyer has commented, that a lack of citizenship is often conflated with a lack of ties to the country: "the moment a person is a non-Austrian citizen, the risk of flight is automatically assumed because there is always a confusion between rootedness and social network."[50]

Previous research has also found that flight risk is more readily assumed for foreigners with no proven residence status and for those perceived not to be socially integrated in Austria.[51] However, in principle, according to law, there should not be a distinction between Austrian nationals and other EU nationals when it comes to attributing flight risk. The Austrian Supreme Court has stated that a lack of integration in Austria does not immediately mean that there is a flight risk if the accused is integrated in another EU country and there are no other sufficient concrete indications that they will be able to evade domestic criminal proceedings. If the accused has plausible accommodation and social integration in another EU country, there is no flight risk.[52]

Within the court orders examined in the present research, five accused were from Austria, 28 from EU countries other than Austria and 26 from non-EU countries. Only for eight accused it was mentioned that they had a legal residence in Austria. For 25 accused, it was noted that they had had a previous conviction. In terms of other characteristics of the accused, some orders contain information on whether the accused is living in Austria or has social ties in Austria and whether they have pending asylum status. Additional information is sometimes present in the case files in other documents such as police interrogations. However, many case files were incomplete, compounding robust comparisons.

However, these pre-trial detention orders have indicated what interview partners have also confirmed: that, in practice, not much distinction is made between EU nationals and third country nationals. This appears to be partly due to constraints in verifying the accused’s circumstances in another country: "the information is not so easy to check. […] If a Slovakian national says he lives at this address in Bratislava, it takes days, or rather weeks, before I get an answer from the Slovakian authorities."[53] Verifying an accused’s address in another EU country could constitute an important factor in assessing their individual risk of absconding to evade the proceedings; but when asked whether there is a mechanisms whereby they could verify an address in another EU country, a judge responded: "no, I wouldn't even know who to call."[54] In the absence of such a mechanism, judges tend to err on the side of caution and consider non-Austrians to be ex ante flight risks. Some interview partners commented that an EU-wide register of residents would be helpful for them in their practice and could reduce the classification of non-Austrians as de-facto flight risks; as one judge said: "I can immediately check the residence details of someone living in Austria by looking in the central residents' register. I would love to have an EU-wide register of residents, that would be very practical."[55]

In principle, there should also be no distinction between Austrian nationals and EU-nationals when it comes to flight risk because should an EU-national abscond to another EU-country, it would be possible to issue a European Arrest Warrant (EAW) to return them to Austria for the proceedings. However, as previous research has also noted, there appears to be some reluctance in the Austrian judiciary to apply this cross-border instrument; "I actually believe that many judges are simply not aware that it is possible to work outside our Austrian borders (...) the tools are not used either out of ignorance or, for many, fear of the effort involved."[56] Given the anticipated delays in legal proceedings and administrative challenges, there is a temptation to opt for keeping the accused in custody instead.

While other EU countries may more readily issue an EAW for also minor offences, the interviewed legal practitioners have noted that in Austria this tool is rather more reserved for serious offences: "Unless it's something really serious, I don't think there's a massive interest in any country in bringing back any burglar with a European arrest warrant."[57] Though, this selective approach might be changing, as one prosecutor noted that the field of applications is becoming wider in practice and usage of the EAW seems to be increasing somewhat.[58]

There are social reasons that make it more likely that a flight risk will be presumed. Besides a non-Austrian nationality and lack of proof of residence, the level of integration might be considered and may facilitate the substantiation of grounds for pre-trial detention for foreigners. For example, the assumption of flight risk appears to be even more prevalent for non-citizens who are refugees; the perspective of an interviewed prosecutor appears to be common: "if someone is working, has a family, then they won't flee as easily as someone who is an asylum seeker, for example, and has only been in Austria for 3 days so far and can try again in another country, so to speak, at the drop of a hat."[59] In other words: "refugees are simply assumed to be a flight risk per se because they have also fled to Austria."[60] However, on the other hand, one lawyer argued, decision-makers don’t seem to understand that there are much fewer incentives for accused who are in the asylum process to attempt to abscond, "as they often have no documents and have provided their fingerprints".[61] Additionally, it would threaten the outcome of their asylum process. Hence, in the lawyer’s view, clients who have experienced horrific refugee experiences would be far less inclined to attempt flight.

Moreover, there is a perception that accused who come from a lower socioeconomic background, might be more likely to flee: "People who have no money and are desperate, don't know how to help themselves, or simply want to run away from their problems, and perhaps can do so because it doesn't tie them down to one place so much, I can imagine that the

risk of running away then hits the poorer ones harder."[62] Similarly, homeless persons without a registered address are also deemed more likely to abscond, even though, as one lawyer put it, "people who are marginalised in life anyway are often much more dependent on their structures."[63]

Overall, the criteria that are applied in assessing whether an accused is a flight risk, whether intended or not, disadvantage accused persons because of their individual circumstances and background – regardless of the offence they are accused of. "If an Austrian resident sells narcotics in a public place for the first time, he will not be put in pre-trial detention. And if someone does it without a residence, then they go into pre-trial detention."[64]

It is not possible to say with any certainty whether non-nationals, non-residents, poorer persons or homeless persons actually have higher propensity to abscond, as there are no available statistics, but one lawyer argued, "The clients I know who fled were not poor and were not foreign nationals (…) An Austrian citizen finds it a hundred times easier to flee; you have a passport, you know your way around, you probably even have a car and a driver's license."[65]

## 3.2 FLIGHT RISK AND THE BURDEN OF PROOF

There is no formal rule on the burden of proof explicitly outlined in Austrian law. Although the prosecutor is responsible for carrying out the investigation, in practice, the responsibility often falls on the defence counsel to present circumstances favourable to the accused's defence, particularly regarding factors that could mitigate the risk of flight. Prosecutors often seem inclined towards advocating for pre-trial detention, although, in principle, they are also obliged to pursue factors that could potentially exonerate the accused.[66] This has been criticised by several of the interview partners: "In my opinion, the courts and the public prosecutor not only have a duty to investigate the facts of the case, but also a little more about the person."[67] It is mostly up to the defence counsel to deliver proof of employment, residence or social reintegration in Austria, which could determine whether flight risk is assumed in an individual case. As one lawyer argued, "The way it is interpreted in our country, the onus is on me. I have to deliver, the court would not pursue it on its own. Actually, the police could and, in my opinion, should investigate the person and their personality, i.e. what is the background, is there a family network?"[68] Similarly, when it comes to raising viable options for the application of milder measures, the onus is on the defence counsel to prepare options for concrete measures (see Section 3.6.1). For example, as a lawyer explained, if an accused is homeless, it would take a committed defence counsel to contact a service providing housing and to present their assurance that the accused could be accommodated to the judge. Without such commitment on the part of the defence counsel, it is difficult to receive milder measures.

## 3.3 DEFENCE LAWYERS' APPROACH TO REBUTTING FLIGHT RISK

While the accused must be represented by defence counsel during the entire proceedings (Art 61 (1) CCP), the presence of a defence counsel is only mandatory at the pre-trial detention hearings (where the judge decides whether to continue pre-trial detention), not, however, when the judge decides on imposing pre-trial detention within the second 48 hours (see Section 2.4). One interviewed lawyer saw this as a failed opportunity to rebut grounds for pre-trial detention and highlighted the importance of an effective defence counsel: "Pre-trial detention is regularly imposed without the lawyer being present. That's basically where it starts, because I could already go in there. Basically already at the police station, if I'm already present at the first police interrogation, there are opportunities for arguing [...] yes, the client will remain reachable."[69]

The court orders imposing pre-trial detention do not mention whether a defence counsel was present, but the decisions continuing pre-trial detention do mention the name of the defence counsel present in the detention hearing. However, it is not possible to infer from the decisions whether this counsel was court-appointed. This information could only be gleaned in some instances where access to the entire case file was possible and documentation of legal aid or appointment of a counsel was evident.

Court orders imposing pre-trial detention do not contain which – if any – arguments defence counsels used to rebut flight risk. This information is not documented. It is also not evident whether and how defence lawyers propose milder measures as an alternative to pre-trial detention. Arguments for rebutting flight risk as a ground for pre-trial detention require a close examination of the accused's personal circumstances: i.e. whether they have a proof of address, ties to the country, a social network, proof of being in employment, vocational training or education and so on. Similar considerations are also relevant for proposing certain milder measures as an alternative to pre-trial detention. However, defence counsel, especially if they are court-appointed, may not always have the required resources.

In addition, interview partners have expressed the view that such arguments rebutting flight risk may not be effective anyway, because of the strong presumption of pre-trial detention on part of the judiciary: "So pre-trial detention, there are very, very few cases where I have the feeling that it was actually only decided at the detention hearing, or the judge wanted to decide differently beforehand, and it was then decided that way on the basis of the submissions [note: by the lawyer]. But otherwise it was always clear beforehand."[70]

With regard to appeals to pre-trial detention decisions, previous research has also noted that methods to challenge court decisions before the main trial stage are generally underutilised.[71] This is partly due to concern by defence counsel that decisions from the higher court may adversely impact the final verdict.[72] Also, a prosecutor mentioned that even if those decisions are appealed, the likelihood that appellate courts will quash them is rather low.[73]

## 3.4 JUDICIAL DELIBERATIONS ON FLIGHT RISK

Judicial decisions imposing or continuing pre-trial detention are incredibly short and contain very little information from which judicial deliberations could be inferred. The stereotypical language used leaves little room for inferring the depth of judicial deliberations. The grounds for pre-trial detention are frequently presented as boxes, which just have to be ticked and justifications for why these grounds apply are mostly limited to one formulaic sentence. If the prosecutor and the defence counsel bring forward certain submissions, these are not recorded in the decisions. Also, for this reason, an interviewed lawyer recommended that audio-visual recordings should be made.

Decisions on the continuation of pre-trial detention are even shorter, often limited to less than one page. Sometimes, the exact same language of previous decisions is used and sometimes even less justification is given for the grounds of pre-trial detention or the unsuitability of milder measures. This also reflects the brevity of the duration of the detention hearings, which is routinely recorded in the decisions. In the present research, the longest duration of such a hearing was 25 minutes; however, most were between 5 and 10 minutes, and a significant number of hearings only lasted 2 minutes. Within such a time span, few deliberations are possible.

As the previous sections have shown, generally, flight risk is quickly assumed if an accused is a foreign national and considerations of the justifications of flight risk in individual cases are very limited. Among the 39 case files consulted, initial pre-trial detention orders were present for 59 individuals. However, in the current sample, over 90% of accused for whom pre-trial detention based on flight risk was ordered were foreign nationals. Only for eight accused it was mentioned that they had a legal residence in Austria.

The automatism with which flight risk is assumed for foreign nationals may be related to a general presumption of pre-trial detention, which has been noted by the interviewed legal practitioners: "In adult criminal law, you are very quickly put in pre-trial detention, let's put it that way, here, especially in the East."[74] Indeed, research has indicated some regional variation in the application of the flight risk as a grounds for pre-trial detention, with legal practitioners in the East of Austria favouring its use compared to their colleagues in the West. The DETOUR project has shown that especially in the eastern region of Austria, courts regularly deem an accused's lack of a regular place of living in Austria and an expected significant sentence to be determinant factors for flight risk without much additional elaboration.[75] Lawyers interviewed in the context of the DETOUR project noted little distinction between EU nationals and other foreign individuals. Even if EU nationals have a permanent residence in an EU country, authorities often believe that they may not comply with court appearances, making it difficult to enforce their attendance. In the West of Austria, it was noted that flight risk is not much of a factor in practice.[76]

Due to the limited number of case files obtained from western Austrian courts, an empirically sound comparison between pre-trial detention decision-making practices of different regions is not feasible within the scope of this research project. However, one interviewed lawyer from a western state commented that, in their experience, flight risk is seldom applied for EU nationals, giving credence to the observation of regional differences: "EU and EEA citizens are certainly less likely to be placed under general suspicion. In Vorarlberg, due to our proximity to Liechtenstein and Switzerland, we deal a lot with clients from these countries who are not subject to pre-trial detention due to the flight risk."[77]

A lawyer has stated that the decision on whether to impose pre-trial detention is not contingent on what happens during the questioning, but rather, it seemed to be clear beforehand: "I myself was assigned to a detention and legal protection judge as a legal trainee, I prepared the decisions. Prepared – not only is there a prepared piece of paper anyway, where you just

have to put a cross in the end, but you also already prepare the cross."[78] One potential reason for this presumption of pre-trial detention is the rather harmonious professional relationship between judges and prosecutors. In most instances, judges endorse pre-trial detention as proposed by the public prosecutor, arguing that those applications are generally well-founded.[79] With regard to the deference of judges to the pre-trial detention applications by prosecutors, one interviewed prosecutor stated: "We are mostly on the same page with the judges, we have the same training [...] so I think it's in the nature of things that we often have similar opinions"[80] and also: "if the on-call public prosecutor says he is going into custody, then 97-98% of the time he will go into custody."[81] It appears that such practices and decisions also often remain unchallenged by defence counsel, partly due to strategic considerations (see Section 3.3). However, it has been noted by commentators that a more conflict-oriented approach by all involved actors would contribute to enhancing the legal culture and safeguarding the rights of individual accused.[82]

## 3.5 ALTERNATIVE MEASURES IN THE CONTEXT OF FLIGHT RISK

### 3.5.1 MILDER MEASURES

As mentioned in Section 2.2.2, the list of available milder measures (Art 173(5) CCP) serves as an illustrative framework, meaning the judge has the discretion to impose any milder measure or combinations of milder measures they deem appropriate. There is no official publicly available data nor any academic research into the frequency of the application of milder measures. Hence, it is not possible to state how frequently such measures are applied in the cases of assumed flight risk nor in general, as an alternative to pre-trial detention.

Typically, orders pertain to the place of residence, obligations not to leave it, refraining from obstructing proceedings, regular reporting to the police and directives to stay away from certain areas (e.g., in cases of domestic violence) or avoid contact with specific individuals. To curtail mobility, authorities may seize passports or other travel documents, and in cases where alcohol or substance use is identified as a factor connected to the offence, an order to undergo treatment may be considered. Financial bail bears minimal significance as an alternative to pre-trial detention, primarily because it may only be mandated when flight risk is the sole ground for pre-trial detention.[83]

When asked which milder measures are applied most frequently in practice, an interviewed lawyer reiterated that the provision of stable housing or therapy, especially in cases of drug-related offences, can increase the likelihood that the accused can be reached during the proceedings and is seen as reducing the risk of flight.[84] Indeed, directives that are targeted at ensuring the court's ability to reach the accused or at curtailing mobility are – for obvious reasons – attractive in cases of flight risk: "A roof over your head if you're at flight risk, yes, a classic; what is not the most effective, but it's always offered if a passport can be surrendered with the judiciary, then you take away the travel document."[85] Indeed it seems that surrendering the accused's passport alongside a pledge to report to a local police station regularly is a commonly utilised proposal by defence counsel.

In the case files examined for the present research, only six instances of applications of milder measures were identified (in one additional case, bail was ordered but not paid by the accused and they were not released and remained in pre-trial detention). In two out of the six instances where milder measures were applied, flight risk was the only ground for pre-trial detention. Mostly, a combination of pledges in addition to bail were ordered; bail was ordered in four instances and varied between 4,000 and 10,000 Euros. The court order contains the reasoning for the amount at which financial bail was set, taking into account the seriousness of the offence and the income and financial circumstances of the accused, whether they own any properties, have any outstanding loans to pay or dependants for whom they pay child support.

The pledge not to abscond, go into hiding, or leave one's place of residence without permission by the public prosecutor (Art 173 (5) 1 CCP) was always applied; where flight risk was the only ground for pre-trial detention this pledge was the sole pledge that accompanied financial bail. The other four instances also contained the directive to reside in a particular place and the directive to give notice of any change of residence and two instances also contained the additional instruction to refrain from contact with co-accused or accomplices.

With regard to the timing of when milder measures are applied during the proceedings, in only two instances milder measures were applied right at the beginning as an alternative to imposing pre-trial detention. For four accused, milder measures were only applied at the first detention hearing on continuation of pre-trial detention (i.e. after the accused had been in pre-trial detention for two weeks already). One accused was released on milder measures after the third pre-trial detention hearing after serving three-and-a-half months in pre-trial detention. In this instance, it is unclear which circumstances had changed in this period to make milder measures more applicable than they had been initially. A prosecutor explained that sometimes, this might have something to do with a belief on the part of the judge that an accused should experience imprisonment first, almost like a deterrent, to render the milder measures more effective: "one also hopes that a certain time in detention has, so to speak, contributed to the point that one no longer necessarily wants to go into custody and will follow the directives [...] It's not meant to be punitive, but it is, of course, said that someone who has already experienced the hardship of detention for 6 weeks will probably strive not to break the directives."[86] An interviewed judge also reiterated this sentiment: "For example, I can say, ah, now he has already felt the pain of imprisonment for two weeks, possibly even for the first time, and I believe that this has made an impression on him and that he is now actually deterred from committing further crimes, and then sometimes it is enough for me if he simply promises me that he will not contact his accomplices."[87] They added that other reasons related to the grounds of pre-trial detention could also lead to milder measures becoming more suitable at a later detention hearing. For instance, due to some investigation developments, the urgent suspicion that the accused has committed the offence has been weakened or a place of residence has been confirmed which would diminish the accused's presumed risk of absconding.

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

There was no pattern discernible with regard to the application of milder measures and type of offence; among the seven instances where milder measures were applied, the offences ranged between drug dealing, grievous bodily harm and theft. In three instances it was evident that there was a defence counsel present, but unclear whether court-appointed.

Pre-trial detention should be employed only as a last resort, giving precedence to alternatives (Art 173 (1) CCP).[88] Consequently, the written decision imposing pre-trial detention must contain the grounds for pre-trial detention along with, *inter alia*, a note on the reasons why the objectives of pre-trial detention cannot be achieved using milder measures (Art 174 (4) CCP). All the orders examined in the context of this research contain such a note; however, it is limited to a formulaic statement without reference to any individual factors or circumstances of the case – indeed, most decisions, regardless of the issuing court, contain the exact same wording: "The aforementioned detention purposes cannot be achieved by the use of milder measures", without any additional explanation why this is the case. Sometimes, this statement is extended to "The aforementioned detention purposes cannot be achieved by the use of milder measures because suitable milder measures are not available"; however, again, no explanation is offered on why suitable milder measures are not available.

With regard to the decisions to continue pre-trial detention, those justifications are even sparser. Out of 60 decisions on continuation of pre-trial detention, only 17 even mentioned milder measures – containing the same formulaic statement as mentioned above. Based on the decisions themselves, it is not possible to infer whether defence counsel submitted any possible milder measures to substitute pre-trial detention. No such information is recorded in the court decisions.

The present findings are in accordance with previous research indicating that alternatives to pre-trial detention are rarely used. According to estimates from the DETOUR project, milder measures are applied in 5-15% of cases where pre-trial detention is sought.[89] This seems related to the prevailing presumption of pre-trial detention (see Section 3.5) and a lack of trust on the part of the judges and prosecutors in the potential of milder measures to substitute pre-trial detention and adequately mitigate risks.[90] As one prosecutor put it:

"in minor cases where only the risk of flight exists, bail is mandatory anyway, and in more significant cases, one might say that the expected penalty is so high that it is too risky to release the person on bail with milder measures. And other things like confiscation of travel documents, instructions, well, honestly, 'nice,' but in the EU, one can quickly be in another country, and with the directive to report, you know two weeks later that he is no longer there, so that doesn't help much either."[91]

Furthermore, as outlined above (see Sections 3.2 and 3.3), despite judges being obliged to assess the suitability of milder measures, in practice, it is incumbent upon the defence counsel to explore the possibility of alternatives. It can be difficult to gather the required information about the accused's circumstances in order to provide options for possible alternatives and this deficiency in information may contribute to the infrequent application of milder measures. Furthermore, this difficulty is compounded for accused without a permanent residence, employment or social ties in Austria: "one cannot fail to mention that it will be easier to obtain milder measures and release for Austrian citizens and probably also for EU citizens in general than for persons who are perhaps in transit, who are not integrated here, who are of course also fleeing, i.e. asylum seekers [...] it is simply a fact that it is of course more difficult."[92]

Whereas alternatives to pre-trial detention are rarely applied with adults, they are fairly common with regard to children and young adults. Courts regularly utilise the juvenile court assistance (*"Jugendgerichtshilfe"*) in such cases, which assesses the social context and the circumstances of the individual. This can highlight particular measures deemed appropriate instead of detention and aid the judge in their decision-making on pre-trial detention. Furthermore, in cases involving children and young adults, social net conferences can be conducted (see also Section 2.2.1). These conferences aim to find suitable alternatives to persuade the judge to refrain from detention through involving the social network of the individual and finding suitable milder measures.

However, the relevance of the social net conference concerning children and young adults who are detained due to flight risk is rather low because they often do not have a strong social network within Austria. If they have a history of migration or a refugee status, they might not be (perceived as) "integrated" into society, they might not have family or other deep interpersonal relationships linking them to Austria. These are all factors which are considered when assessing flight risk. Unfortunately these factors also play a role in the success of a social net conference. Without a network, a conference is not possible. As a judge stated, "[t]he problem is, of course, that this only applies to people who are already integrated here in some way. In other words, someone who has the misfortune of being alone, or who has no documents, no home or anything else because they had to flee, actually has little chance of escaping pre-trial detention."[93] However, a lawyer has argued, that the "social net" is sometimes conceived too narrowly: "for a long time, the courts told me that if the family wasn't there, then the social net conference couldn't take place. I then tried to explain that a social network can be more than that."[94] Apart from immediate family, other persons could also constitute the social net of the individual concerned, such as teachers. However, they may not be identified immediately.[95]

Both court assistance and social net conferences are not available for adults in criminal proceedings. Nevertheless, several interviewed practitioners have argued that it could be immensely valuable to extend them to adults too. As one judge argued: "In Germany, they also have court assistance for adults [...] Court assistance for adults that is really used consistently, just like in Germany, just like with us with young people, that assesses their past life, their future, their career orientation, etc. That would help a lot."[96] Especially, the opportunity to take time and resources to look into the personal circumstances, the background and needs of the accused is perceived to be crucial in forging possible options for alternatives.

Among the pre-trial detention decisions examined within this project, there were seven accused persons between the ages of 16 and 20 years old. None of them were Austrian nationals; three were Romanian nationals and the other four were third-country nationals. No discernible differences were apparent between cases where the accused was tried as a child/young adult, compared to where the accused was tried as an adult. Even though the proportionality is mentioned more thoroughly (in reference to Art 35 JJA) in cases involving young adults, it is rarely elaborated in more depth. Mostly, it is simply mentioned that pre-trial detention is proportionate. Aside from referencing Art 35, Art 35a, Art 46a JJA, there is virtually no difference between adult and young adult cases within these decisions. In one instance, the possibility of a social net conference was assessed, but dismissed due to a lack of social network.

### 3.5.2 HOUSE ARREST WITH ELECTRONIC MONITORING

The option of house arrest with electronic monitoring (see Section 2.2.2) is extremely seldom utilised as a manner of serving pre-trial detention. The research project DETOUR found that electronically monitored house arrest was considered by practitioners as an inadequate, time-consuming tool for the supervision of a person and therefore not a practical way of executing pre-trial detention.[97] This rare application was reflected in the interviews: "I've been doing this for 8 years, and in all my time I've never seen an ankle bracelet instead of pre-trial detention, or pre-trial detention instead of an ankle bracelet. I've never experienced that."[98]

The limited role of electronically monitored house arrest at the pre-trial stage may be partly explained by a lack of knowledge on the part of practitioners when it comes to the particularities of its implementation. Also, according to previous research,[99] legal practitioners share a prevailing view that electronically monitored house arrest is not sufficient to achieve the purpose of pre-trial detention, and in instances where it might, milder measures may actually apply anyhow. This scepticism with regard to the effectiveness of electronically monitored house arrest as a form of pre-trial detention, as well as its applicability and required effort was also reiterated by the legal practitioners in the present research: "I think it's a question of resources, because firstly, of course, it has to be an ankle tag that works like that, and secondly, I would have to have the police who can locate him with the technical possibilities [...] I don't think we really have anything against it in principle, but again, the question is whether the scope of application is that big."[100]

With regard to the potential of electronic monitoring to eliminate the flight risk, an interviewed judge framed their doubts as the following: "I usually only have a flight risk with people who live abroad. And I can't practically order it in that case. I've never had it ordered. And the prerequisite for me being able to give the electronic ankle tag is that he is living in orderly circumstances. Not only residence, but also work and/or education."[101] Indeed, the legal requirements for electronically monitored house arrest are considered to be a hindrance to its implementation: "A large number of documents and confirmations must be submitted (tenancy agreement, job confirmation, consent of roommates, all loan commitments, list of monthly costs). In my opinion, however, electronically monitored house arrest should only ever be sought by the defence as a second alternative, because house arrest, as sweet as it may sound, is also associated with a great deal of stress for those affected; they are constantly monitored, have to adhere to all requirements in terms of time, etc. It represents a restriction of freedom."[102] Nonetheless, some interviewed legal practitioners also advocated for its increased application to alleviate the overreliance on imprisonment.

### 3.5.3 THE EUROPEAN SUPERVISION ORDER

The "Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention"[103] introduced the European Supervision Order (ESO) as a tool to reduce pre-trial custody for non-resident defendants in the EU. It enables a judicial authority in one Member State (issuing state) to impose supervision measures instead of pre-trial detention on a non-resident accused. This decision can be sent to the accused's state of residence (executing state), which must recognise and supervise the defendant accordingly. The ESO includes standard supervision measures such as reporting a change of residence, staying away from certain places, and adhering to specific conditions and other additional measures which Member States can choose to accept or decline.

The ESO was introduced in Austria in 2013. However, so far, its application has remained extremely rare. Given the significant number of non-Austrian nationals in pre-trial detention in Austria, this raises questions about the underutilisation of the ESO. Previous research indicated that most legal practitioners were either not familiar with the ESO or concerned about creating more administrative burdens and difficulties in the ESO's implementation due to a lack of appropriate supervision measures.[104] The legal practitioners interviewed within the context of this project did not have any direct experience with implementing an ESO and largely concurred with these concerns. A prosecutor also contended that the scope of applicability is rather limited: "there have to be open probation conditions that you can reasonably fulfil there and I think the scope of application is just relatively small [...] it makes sense, for example, if someone has been instructed to undergo therapy and is considering leaving the country, so to speak, although I think if you have ongoing therapy, you might anyway not tend to leave the country."[105]

# 4. CONCLUSIONS

This project unveiled critical insights into the judicial decision-making process and the application of legal standards regarding assessments of flight risk as a ground for pre-trial detention in Austria. Individual assessments of flight risk in pre-trial detention proceedings require a balancing between the need to prevent absconding with the imperative to uphold individual liberties and the integrity of the legal process.

The analysis offered in the report is based on desk research, analysis of case files pertaining to pre-trial detention decisions and interviews with legal practitioners. The findings showed a strong reliance on pre-trial detention, particularly in cases involving foreign nationals. Assumptions about flight risk are influenced by an individual's nationality, their place of residence and assumed level of social integration. Foreign nationals are often presumed to be de facto flight risks, owing to these unfavourable social circumstances, which also render the application of milder measures less suitable. The discriminatory impact observed, whether explicit or implicit, underscores the need for a more nuanced and equitable approach to assessing flight risk.

The research also highlights the challenges and limitations associated with the current methods for assessing flight risk. It reveals that the criteria used to determine flight risk are frequently applied in a manner that does not adequately consider the individual circumstances of the accused. This one-size-fits-all approach reigns supreme over a case-by-case analysis.

The findings underscore the necessity for judicial authorities to adopt a more individualised approach to flight risk assessments, with full consideration of the suitability of milder measures. Milder measures, as an alternative to pre-trial detention, are critically underutilised, especially with regard to foreign nationals.

Furthermore, the report emphasises the critical role of defence counsel in the pre-trial detention proceedings. The findings suggest that individuals with access to experienced and proactive defence counsel are better positioned to challenge pre-trial detention decisions and advocate for alternatives.

The reliance on pre-trial detention on the ground of flight risk also has broader implications, including in respect of prison overcrowding and the potential for undermining mutual trust between Member States. There is a need for reforms to reduce the reliance on pre-trial detention through the promotion of milder measures and by ensuring that pre-trial detention decisions are made in a manner that is fair, proportionate, and grounded in a comprehensive understanding of the individual circumstances of the accused.



# 5. RECOMMENDATIONS

In light of the findings and analysis presented throughout this report, it is suggested that stakeholders in the criminal justice system consider a series of measures aimed at refining the assessment and application of pre-trial detention, particularly concerning the evaluation of flight risk. First, it is advisable for national **decision-makers**, including legislators, to engage in a review of the current frameworks governing pre-trial detention with a view to expanding the application of milder measures and imposing pre-trial detention as a measure of last resort. For example, through a requirement to thoroughly substantiate reasons for the unsuitability of milder measures.

In addition, an expansion of the promising practises of the juvenile court assistance and the social net conference to the adult criminal proceedings should be considered.

For **judges** and **prosecutors**, a recommendation is made to approach the assessment of flight risk with a heightened sense of individualised examination. Given the complexity of factors contributing to flight risk, a deeper engagement with each case's specifics could foster a more just application of pre-trial detention. This approach would naturally extend to thoroughly considering the suitability of milder measures before deciding on pre-trial detention, including for foreign nationals, where factors which could potentially mitigate flight risk might not be overtly apparent and require a closer examination of individual circumstances.

**Defence lawyers** are encouraged to persist in their efforts to highlight elements that may mitigate the perceived flight risk of their clients. By actively presenting comprehensive evidence of their clients' ties to the community, employment status and family responsibilities, they can challenge assumptions about flight risk more effectively. Developing specialised training for defence lawyers on how to gather and present such evidence could enhance their capacity to argue against the necessity for detention. In doing so, defence lawyers play a critical role in ensuring that the rights of the accused are robustly protected and considered in the pre-trial detention decision-making process.

Regarding **European cooperation**, enhancing communication and information sharing between Member States can significantly reduce the perceived need to use pre-trial detention as a precautionary measure against flight risk. Efforts to streamline processes for verifying individuals' status and background across borders, perhaps through the use of digital platforms and databases (e.g. a European registry of addresses), could alleviate concerns about the enforceability of judicial decisions across the EU. Enhancing the use of tools such as the European Supervision Order could alleviate some concerns related to flight risk for EU nationals in cross-border cases.

## ENDNOTES

1 For more information on the project DETOUR see: https://www.uibk.ac.at/irks/projekte/detour.html.de (last access: 30.01.2024).

2 For more information on the project PRETRIAD see: http://www.pretrial-detention.org/ (last access: 30.01.2024).

3 Schloenhardt/Eder/Höpfel (eds.). Austrian Code of Criminal Procedure. Wien-Graz: Neuer Wissenschaftlicher Verlag, 2019.

4 For instance, various translations exist for the term "Gelindere Mittel" ("milder measures", "less restrictive measures", "more lenient measures"). All terminologies are used interchangeably in the existing literature to describe alternative measures through which the objective of pre-trial detention can be achieved in accordance with the criteria incorporated in Art 173 (1) CCP.

5 The Austrian justice system, Distribution of Inmates, 2024, available at: https://www.justiz.gv.at/strafvollzug/statistik/verteilung-des-insassinnen-bzw-insassenstandes.2c94848542ec49810144457e2e6f3de9.de.html (last access: 30.01.2024).

6 Council of Europe, Space I report 2022, 2023, available at: https://wp.unil.ch/space/files/2024/01/240111_SPACE-I_2022_FinalReport.pdf (last access: 30.01.2024).

7 Austrian Federal Ministry of Justice, Security Report 2021, 2022, available at: https://www.justiz.gv.at/justiz/daten-und-fakten/sicherheitsberichte.bc7.de.html;jsessionid=050897268CCF73E645D94D2EC50B6931.s2 (last access: 30.01.2024).

8 Ibid.

9 Ibid.

10 ECtHR, Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security updated on 31). August 2002, para 90, available at: https://www.echr.coe.int/documents/d/echr/guide_art_5_eng (last access: 17.04.2024).

11 Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.

12 ECtHR, Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security updated on 31. August 2002, para 213, available at: https://www.echr.coe.int/documents/d/echr/guide_art_5_eng (last access: 17.04.2024).

13 Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.

14 528. Federal Act: Amendment of the Austrian Federal Act on temporary measures for detention in pre-trial detention and in the execution of sentences, BGBl. Nr. 526/1993.

15 19. Federal Act: Austrian Federal Act reforming the Code of Criminal Procedure 1975, BGBl. I Nr. 19/2004

16 For further information, see: Hammerschick/Luef-Kölbl/Soyer/Stangl, Projekt zur Implementierungsbegleitung des Strafprozessreformgesetzes Endbericht [Project to support the implementation of the Criminal Procedure Reform Act], available at: https://www.uibk.ac.at/irks/publikationen/2020/pdf/projekt-zur-implementierungsbegleitung-der-stpo-reform.pdf (last access: 30.01.2024).

17 The ECtHR employs the 'reasonable suspicion' standard which requires "an existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence", see ECtHR, Guide on Article 5 of the European Convention on Human Rights – Right to liberty and security updated on 31 August 2002, para 90 et seq., available at: https://www.echr.coe.int/documents/d/echr/guide_art_5_eng (last access: 17.04.2024).

18 For further information see: Hammerschick/Reidinger (2017), „Untersuchungshaft als Ultima Ratio" [Pre-trial detention as ultima ratio"], Journal für Strafrecht, 2, pp 121 – 124.

19 OGH 08.03.1994, 14 Os 30/94.

20 Austrian Federal Ministry of Justice, Security report 2021, 2022.

21 64. Federal Act: Amendment Act to the Austrian Prison Act, the Code of Criminal Procedure, the Probationary Services Act, the General Social Insurance Act, the Industrial Social Insurance Act, the Farmers' Social Insurance Act, the Civil Servants' Health and Accident Insurance Act, the Notaries' Insurance Act and the Unemployment Insurance Act, BGBl. I Nr. 64/2010, latest modification by BGBl. I Nr.2/2013.

22 Verordnung der Bundesministerin für Justiz über den Vollzug von Strafen und der Untersuchungshaft durch elektronisch überwachten Hausarrest (HausarrestV) StF: https://www.ris.bka.gv.at/eli/bgbl/II/2010/279 (last access: 30.01.2024).

23 Austrian Federal Ministry of Justice, Final Report of the Working Group "Strafvollzugspaket NEU / Safe ways out of crime".

24 The Austrian justice system, Distribution of Inmates, 2024, available at: https://www.justiz.gv.at/strafvollzug/statistik/verteilung-des-insassinnen-bzw-insassenstandes.2c94848542ec49810144457e2e6f3de9.de.html (last access: 30.01.2024).

25 Austrian Federal Ministry of Justice, Final Report of the Working Group "Strafvollzugspaket NEU / Safe ways out of crime".

26 Austrian Federal Ministry of Justice, Security Report 2021, 2022.

27 The Austrian Judiciary, Distribution of Inmates, 2024.

28 Birklbauer/Stangl/Soyer, Die Rechtspraxis des Ermittlungsverfahrens nach der Strafprozessreform. Eine rechtstatsächliche Untersuchung [The legal practice of pre-trial proceedings after the criminal procedure reform]. Wien-Graz: Neuerer Wissenschaftlicher Verlag, 2011.

29 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

30 For further information, see: Ed Lloyd-Cape, Comparative Report of the Project "Inside Police Custody 2: Suspects' rights at the investigative stage of the criminal process", 2018, available at: https://gmr.lbg.ac.at/wp-content/uploads/sites/12/2021/09/iccl_ipc2_comparative_report.pdf (last access: 30.01.2024).

31 "Österreichischer Verband der allgemeinen beeideten und gerichtlich zertifizierten Dolmetschern", available at: https://www.gerichtsdolmetscher.at/ https://www.gerichtsdolmetscher.at/Menu/Nutzliche-Informationen/Gerichtsdolmetscher(last access: 30.01.2024).

32 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

33 Birklbauer/Stangl/Soyer, 2011.

34 Interview with a lawyer, 14.09.2023.

35 Interview with a lawyer, 14.12.2023.

36 Interview with a lawyer, 14.09.2023.

37 The ECtHR has also repeatedly found that flight risk alone cannot give rise to pre-trial detention, where sufficient guarantees can be given which could ensure court attendance; e.g, see: ECtHR, Letellier v. France, No. 12368/86, judgment of 26 June 1991, para 46.

38 Interview with a lawyer, 14.12.2023.

39 Birklbauer/Stangl/Soyer, 2011.

40 Interview with a lawyer, 14.09.2023.

41 In the case OGH 17.11.2009, 11Os31/08f, the Austrian Supreme Court ruled that the petitioner Laszlo M was violated in his fundamental right to personal freedom. According to the Court, the lack of social integration in Austria does not constitute a valid ground for pre-trial detention, considering the claimant's social integration in Hungary, an EU Member State. On the lack of social integration as a criteria for assuming flight risk, see also: OGH 10.08.2000, 14 Os 95/00; OGH 17.11.2009, 14 Os 137/09t; OGH 28.05.2014.

42 The case-law of the ECtHR also demonstrates that a case-by-case analysis of a whole set of

circumstances of the accused is required; e.g. see: Neumeister v. Austria, No. 1936/63, judgment of 27 June 1968, para 10; Becciev v. Moldova, No. 9190/03, judgment of 4 October 2006, para 58; Stögmüller v. Austria, No. 1602/62, judgment of 10 November 1969, para 15.

43 Interview with a prosecutor, 07.09.2023.

44 Interview with a prosecutor, 07.09.2023.

45 Interview with a prosecutor, 07.09.2023.

46 Interview with a lawyer, 12.09.2023.

47 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

48 Interview with a judge, 06.10.2023.

49 Interview with a judge, 06.10.2023.

50 Interview with a lawyer, 14.09.2023.

51 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

52 OGH 17.11.2009, 11 Os31/08f.

53 Interview with a prosecutor, 07.09.2023.

54 Interview with a judge, 06.10.2023.

55 Interview with a judge, 06.10.2023.

56 Interview with a lawyer, 14.09.2023.

57 Interview with a judge, 13.09.2023.

58 Interview with a prosecutor, 07.09.2023.

59 Interview with a prosecutor, 07.09.2023.

60 Interview with a lawyer, 12.09.2023.

61 Interview with a lawyer, 14.09.2023.

62 Interview with a lawyer, 14.12.2023.

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71 Birklbauer/Stangl/Soyer, 2011.

72 Hammerschick (2019), Empirische Forschung zur Praxis der Anordnung von Untersuchungshaft als Reflexionsangebot [Empirical research on the practice of ordering pre-trial detention as an opportunity for reflection], Journal für Strafrecht, 3, pp 221-227.

73 Interview with a prosecutor, 07.09.2023.

74 Interview with a judge, 13.09.2023.

75 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

76 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

77 Interview with a lawyer, 12.09.2023.

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79 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

80 Interview with a prosecutor, 07.09.2023.

81 Interview with a prosecutor, 07.09.2023.

82 Hammerschick, “Pre-trial detention in Austria: a preventive approach.” In: Morgenstern/Hammerschick/Rogan (eds.), European Perspectives on pre-trial detention: a means of last resort?, London: Routledge, 2023.

83 Hammerschick/ Reidinger, Detour – 2nd Austrian National Report.

84 Interview with a lawyer, 14.12.2023.

85 Interview with a lawyer, 14.12.2023.

86 Interview with a prosecutor, 07.09.2023.

87 Interview with a judge, 06.10.2023.

88 The ECtHR has held that the duty to consider alternatives is reflected in the ‘purpose’ of Art 5 ECHR; e.g. see: Jabolonski v. Poland, No. 33492/96, judgment of 21 December 2000, para 84; Idalov v. Russia, No. 5826/03, judgment of 22 May 2012, para 140; Merabishvili v. Georgia, No. 72508/13, judgment of 28 November 2017, para 223.

89 Hammerschick/Reidinger, Detour –2nd Austrian National Report.

90 Ibid.

91 Interview with a prosecutor, 07.09.2023.

92 Interview with a lawyer, 14.12.2023.

93 Interview with a judge, 13.09.2023.

94 Interview with a lawyer, 14.09.2023.

95 Interview with a judge, 13.09.2023.

96 Interview with a judge, 13.09.2023.

97 Hammerschick/Reidinger, Detour, 2nd Austrian National Report.

98 Interview with a lawyer, 14.12.2023.

99 Hammerschick/Reidinger, Detour, 2nd Austrian National Report.

100 Interview with a prosecutor, 07.09.2023.

101 Interview with a judge, 06.10.2023.

102 Interview with a lawyer, 12.09.2023.

103 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32009F0829 (last access: 30.01.2024).

104 Hammerschick/Reidinger, Detour – 2nd Austrian National Report.

105 Interview with a prosecutor, 07.09.2023.


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