REPORT REGIONAL RESEARCH

Available statistical data and research on flight risk in pre-trial (detention) proceedings

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Introduction

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

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

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

Methodology

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

For the literature review, several sources were consulted: (1) relevant articles in five criminological journals published (in English) in the period 2010-2023 (see below), (2) other literature (in jurisdictions within the EU) that we – as researchers – had knowledge of through personal contacts, previous collaborations or own scientific work, and/or (3) literature found through an additional search on the Internet, via Google Scholar and Research Gate, using

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keywords such as 'pre-trial detention' and 'flight risk'[1]. The information we collected thus includes both 'official' publications (as an edited book, book chapter, or journal article) and 'grey' literature in the form of a (research) paper or report. For this latter type of information, the work and output of some EC-funded projects, such as DETOUR[2] and PRE-TRIAD[3], proved to be particularly useful. In addition to our own search strategy, relevant literature was sometimes also suggested or referred by respondents in the questionnaire that we developed, and this in response to specific questions (see *infra*).

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

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

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

The concept and design of the questionnaire was discussed during a consultation meeting, in December 2022, together with the project coordinator, Fair Trials Europe (FTE), and the other FLIGHTRISK-partners from Austria (AT), Bulgaria (BG), Ireland (IE) and Poland (PL). The questionnaire was then sent out, in January-February 2023, to one contact person within each EU Member State. A step-by-step strategy was followed to identify potentially relevant respondents. The initial contact group targeted the FLIGHTRISK-partners (AT, BG, IE, PL). For

[1] Most of the research was carried out in English, but we also took into account work carried out in French and Dutch.
[2] DETOUR – Towards Pre-trial Detention as Ultima Ratio, funded by the Justice Programme of the European Union (JUST/2014/JACC/AG/PROC/6606; see Hammerschick *et al.*, 2017).
https://www.uibk.ac.at/irks/projekte/detour.html
[3] http://www.pretrial-detention.org/
[4] https://academic.oup.com/bjc
[5] https://brill.com/view/journals/eccl/eccl-overview.xml
[6] https://journals.sagepub.com/home/euc
[7] https://www.springer.com/journal/10610/
[8] https://onlinelibrary.wiley.com/journal/20591101

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the remaining countries we contacted researchers involved in previous large-scale research on pre-trial detention in the DETOUR-project (DE, LT, NL, RO), personal contacts in the framework of past collaborations and/or authors who had already published on the topic or who were mentioned in leaflets published by FTE (DK, EE, EL, ES, FI, FR, IT, LU, LV, MT, PT, SE, SI, SK), and/or, finally, national correspondents involved in the data-collection for the *European Sourcebook on Crime and Criminal Justice Statistics* (ESB: CY, CZ, HR, HU, LU, SI)[9]. For countries for which we received no response after a reminder, we then contacted the Ministry of Justice or local human rights organisations. Questionnaires were completed by the requested respondent, or else by another person or service referred to us by our local contact person or whom we contacted ourselves at a later stage.

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

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

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

[9] https://wp.unil.ch/europeansourcebook/

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Results

Preliminary remark: definition of 'flight risk'

In the literature, indeed, it can be observed that different terms are used to address the issue of the risk of flight: the risk of absconding, the risk of fleeing, the risk of evading (not from a prison, but from a particular country), the risk of hiding. We have taken these different concepts into account in our study, while noting, however, that some domestic legislations make a distinction between these terms. In Germany, for example, '*the term Flucht (flight) covers two alternative actions, which can exist contemporaneously and which both lead to the imposition of pre-trial detention: The action of absconding itself (fliehen) and the action of going into hiding (sich verborgen halten). Both alternatives require the accused's will to evade ensuing criminal proceeding*' (Jung *et al.*, 2021: 307; see also Morgenstern, 2023).

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

Official (national) statistics

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

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

- Number of inmates and prison population rates (adjusted and non-adjusted) on 31 January 2022 *[including pre-trial detainees]* (SPACE I, 2022: Table 3)
- Prison populations by gender on 31 January 2022 (numbers & percentages) *[of which the number of inmates 'not serving a final sentence']* (SPACE I, 2022: Table 7)

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

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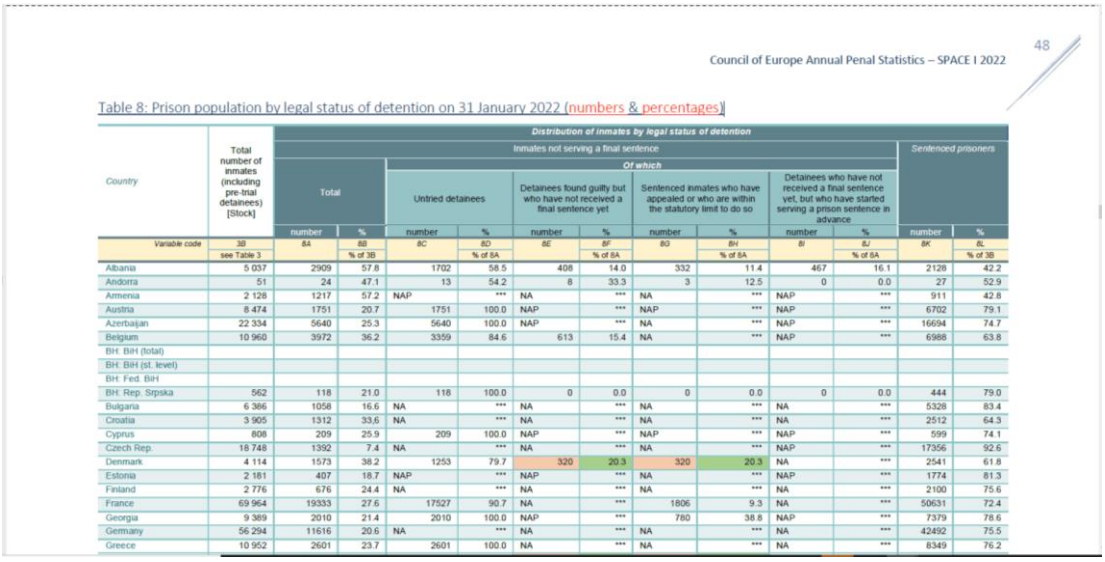
- Prison population by legal status of detention on 31 January 2022 (numbers & percentages) (SPACE I, 2022: Table 8) (See Figure 1, below)
- Prison populations by nationality and legal status of residence on 31 January 2022 (numbers) (SPACE I, 2022: Table 12)
- Prison capacity by type of institution on 31 January 2022 *[of which capacity for pre-trial detainees]* (SPACE I, 2022: Table 17)
- Releases from penal institutions during 2021 (numbers & percentages) [*releases of detainees 'not serving a final sentence'*] (SPACE I, 2022: Table 27)
- Inmates who died inside penal institutions (during 2021) (numbers, percentages & rates) *[suicides, of which the number of detainees 'not serving a final sentence']* (SPACE I, 2022: Table 28)
- Average length of imprisonment (during 2021) [*number of days spent in penal institutions by inmates not serving a final sentence in 2021; average number of inmates not serving a final sentence in 2021; number of admissions (flow) before final sentence in 2021; indicator of the average length of remand in custody, in months (based on the total number of days spent in penal institutions*] (SPACE I, 2022: Table 31)
- Expenses in penal institutions (during 2021) [*average amount spent per day for the detention of one inmate, of which detainees not serving a final sentence; estimation of the total amount spent for detainees not serving a final sentence*] (SPACE I, 2022: Table 33)



Council of Europe Annual Penal Statistics – SPACE I 2022 48

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

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

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

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

In Germany, such information can be found in the report '*Rechtspflege. Strafverfolgung*', published by the *Statistisches Bundesamt* (Destatis).[11] One of the tables in this report presents figures on the number of suspects in a given year, the number of pre-trial detention orders and the number of cases in which the main motive (among other possible motives) was the risk of flight (Table: *6 In der Strafverfolgungsstatistik 2021 erfasste Personen mit Untersuchungshaft - 6.1 Nach Grund und Dauer der Untersuchungshaft* – see Figure 2 below). The figures are presented for the whole population (all the crime categories taken together), and by specific crime category. For example, for the year 2021, it is reported that most pre-trial detentions refer to the risk of flight: out of 25,460 persons with a pre-trial detention order (*mit Untersuchungshaft*), this was the case in 23,719 of the cases (Statistisches Bundesamt [Destatis], 2022: 374), or 93.2 per cent. This finding is striking from a European-comparative perspective, given that in other jurisdictions it is rather the risk of recidivism that is the main grounds for pre-trial detention. The statistical data are (of course) also confirmed by specific (scientific) research conducted on the application of pre-trial detention in Germany (*infra*).

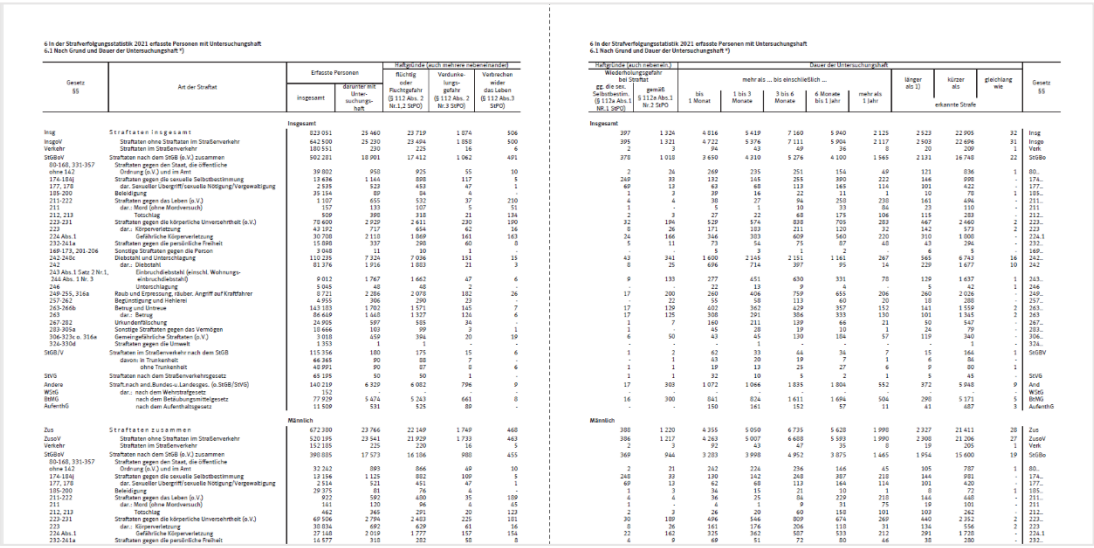


Figure 2: Number of pre-trial detention orders and the grounds for PTD (Statistisches Bundesamt [Destatis], 2022, p. 374-375)

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

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

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

detention, such as periodic appearance before the court or prohibition to leave the national territory.

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

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

Results from the research literature (and respondents' observations)

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

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

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

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

An earlier study focusing specifically on the situation in Spain shows that the most important objective mentioned in decisions relating to pre-trial detention was to ensure the defendant's appearance at the trial or, in other words, to avoid the risk of escape (48%). The second goal was to avoid re-offending (20%), followed by protecting evidence (15%) and protecting the

victim (11%) (Diez-Rippolés & Guerra-Pérez, 2010: 394). In a more recent study regarding the practice of pre-trial detention for a small sample of cases (n=55) between 2001 and 2014, it was found that pre-trial detention was based on the risk of absconding in half the cases (50,9%), and in 18% of the 55 cases on the risk of recidivism (APDHE, 2015: 40, note 67).

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

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

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

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

In Belgium, the risk of recidivism is preponderant, even if the risk of absconding is mobilised to a significant extent locally (Burssens, 2021: 21). In an earlier study, it was observed that the grounds for an arrest warrant most often mentioned by the investigating judge were the risk of recidivism (91%), seriousness of the offence (51%), risk of flight (39%), importance of the investigation (32%) and having no fixed residence (15%) (Snacken *et al.*, 1997: 151).

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

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

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

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

One of the results of the DETOUR study, therefore, is that '*the grounds for detention to some extent seem interchangeable. We had responses indicating that the grounds for detention applied are not necessarily the ones considered most relevant in individual cases. In Austria for instance, we heard about cases in which a central motivation for PTD was to avoid*

absconding, while a risk of reoffending was central to the formal motivation of detention. This was explained by the risk of reoffending being the ground which was easier to substantiate and because it would make it more certain that a suspect will remain in detention. In Germany it was explained the other way around: there were indications that the ground of a risk of absconding may be applied in cases in which a risk of reoffending is, in fact, essential to the actual motivation for PTD. As mentioned before, here the risk of absconding is considered the stronger ground and easier to apply. This gives rise to the impression that the normative framework for the legal grounds may be of lesser importance once decision-makers are convinced that PTD is necessary' (Hammerschick *et al.*, 2017: 20).

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

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

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

For example, in Poland, it was pointed out that '*the severity of the penalty is an important element in the assessment of the risk of absconding or relapsing into crime* (…) *When assessing whether the likelihood of imposing a severe penalty gives rise to the risk of hiding, absconding or obstructing, the court should take into account the capacities of the alleged perpetrator to destabilize the criminal proceedings or to evade justice. This method of assessment was presented in the decision of the Court of Appeal in Kraków of 13 February 2019:35 "Before his arrest, the suspect was a 'mobile' person; he permanently lived in Germany, worked there, and also ran a business in other European countries. Taking into account his 'mobility', experience and professional possibilities as well as the ability to function outside Poland, when he is facing severe punishment, this justifies the fear of his escape and hiding*.' (Tarapata, 2023: 248 and 250).

Conversely, a less severe sentence may mean that the risk of absconding is no longer grounds for pre-trial detention. In Austria, for example, '*the risk of absconding or hiding does not apply*

if a fully integrated person is suspected of a crime that carries a maximum penalty of up to five years unless concrete preparations to flee have been made' (Hammerschick, 2023).

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

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

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

Another general observation can be made, concerning weaknesses in the motivation of the flight risk. For instance, in the Netherlands, the Netherlands Institute for Human Rights concluded in 2017 that the 'risk of flight' ground was not thoroughly motivated in most of the cases in which it was used. In three of the 28 'remand in custody'-decisions, the ground was mentioned but not motivated. In the other 25 decisions the ground was motivated, but in 15 cases with a standard motivation. (College voor de Rechten van de Mens, 2017)

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

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

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

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

3. The specific case of 'foreign nationals'

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

Statistical data demonstrate '*consistently that a disproportionate number of defendants are held in pre-trial detention in Europe are foreign nationals*' (Hucklesby, Boone & Morgenstern, 2023). '*While approximately 22% of detained persons in Europe are held pre-trial detention,*

almost 60% of foreign people detained in European prisons in 2019 were waiting for their trial of final sentence' (Fair Trials, 2021: 28). However, a distinction must be made between the Eastern and the Western States of the EU because '*Migrants inflows into the Eastern states of the EU is significantly lower than into the Western states of the EU. The numbers of foreign suspects and foreign pre-trial detainees also significantly differ*' (Bikelis, 2023).

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

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

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

Behind the flight risk is a form of selectivity in the judicial decision-making process in relation to the person and their ethnic origin (Maes, 2016: 87). This situation exists in several European countries, as indicated in a recent report by Fair Trials (Fair Trials, 2021).

Research shows the diversity of the concept of foreign nationals and the fact that is not a homogenous group (Hucklesby, Boone & Morgenstern, 2023: 250; PRE-TRIAD, 2021b: 15): whether or not one is a citizen of a EU Member State or of a third country, whether or not one has no fixed residency, whether or not one has ties such as a family, a job, etc., all these factors influence the decision on pre-trial detention. Some research also points out that not all citizens are equal even within the EU. This is the case for people of Romanian nationality, for whom the risk of absconding is easily invoked when they are involved in 'itinerant crime

groups' (Boone, Jacobs & Lindeman, 2019: 174; see also Hammerschick *et al.*, 2017: 22-23). In England and Wales, racial and ethnic disparities in sentencing are reported: barristers interviewed revealed '*that ethnic minority defendants, and in particular Black defendants, are more likely to be detained pretrial*', namely due to their socio-economic conditions (Veiga, Pina-Sanchez & Lewis, 2023: 173).

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

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

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

Having links in a country other than your country of residence is also considered to be a risk situation. In Poland '*in the case of foreigners whose life's focus is outside Poland or who, despite living in Poland, have strong links with their country of origin, there is a greater risk that the accused may take flight or go into hiding, which is in fact one of the criteria for the application of the most severe preventive measure*' (Sitarz, Wieloch & Bek, 2019: 8).

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

Sometimes it is the law that encourages it. For example, in a comparative study of pre-trial detention in Sweden and Ukraine, Melnykova (2023) points out that the Swedish Code of Judicial Procedure makes special provision for detainees who are not domiciled in Sweden

and for which there is '*a risk that by evading Sweden, the suspect evades prosecution or penalty*', which implies '*that foreigners are almost in all cases put in pre-trial detention*' (Melnykova, 2023: 83).

4. Specific analyses

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

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

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

Studies of this type are an important reminder of the need – but also the difficulty – of determining objectively the risk of absconding in concrete terms. The problem is that the same situation can be assessed in different ways: '*In theory, judicial officers' pretrial release and detention decisions are rational because they are based upon an acquired expertise about the risk factors presented by individual defendants. The theory has, however, not been substantiated by studies of bail decisions. In fact, in risk-of-flight studies, similarly situated defendants have received significantly different bail decisions*' (Schönteich, 2014: 53)[13].

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

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

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

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

In Bulgaria, the annual activity reports of the Public Prosecutor's Office include data which, to our knowledge, is not available in other European countries, namely data relating to the number of cases in which pre-trial detention was discontinued before the end of the proceedings, namely for 'disappearance' of the reasons justifying the detention, without however distinguishing the risk of abscond and the risk to commit another crime. These data show that in 2019, 5.1 per cent of the pre-trial detainees were released because the reasons justifying their detention were no longer present (PRE-TRIAD, 2023b: 27-28/48). This is an opportunity to point out that the existence of a risk of absconding must be assessed throughout the proceedings; moreover, some consider that the importance of this risk necessarily decreases with the time spent in detention awaiting trial (Giannoulis, 2016: 251).

In addition to respecting the fundamental rights of detainees during pre-trial detention, it is important to emphasise that the use of pre-trial detention can have a significant impact on sentencing. Persons who are detained are more likely to plead guilty or be convicted at trial (Dhami & van den Brinck, 2022: 382; Morgenstern, 2023). Wermink, Light and Krubnik (2022: 376) also noted that '*Persons who are detained are over 50 percent more likely to have their final sentencing outcome result in incarceration in comparison to those who were free throughout the adjudication.*'

Conclusions

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

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

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

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

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

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

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Questionnaire Flightrisk & Pre-trial detention and other measures

I. LEGAL FRAMEWORK

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

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

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

II. USE IN PRACTICE

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

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

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

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

III. SOURCES – DOCUMENTATION

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

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