The practice of pre-trial detention in Lithuania

Research report

2015

Human Rights Monitoring Institute

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Fair Trials

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About the Human Rights Monitoring Institute

The Human Rights Monitoring Institute (HRMI) is a non-governmental, non-profit organization that aims to contribute to the development of open and democratic society that ensures human rights and freedoms.

HRMI constantly monitors the human rights situation in Lithuania, takes part in the legislative process, analyzes and assesses the work of the authorities, prepares alternative reports to international human rights supervisory bodies, organizes human rights education events, conducts studies and initiates strategic litigation with respect to systemic violations of human rights.

HRMI is primarily active in the following areas: criminal justice, rights of children, disabled and persons in closed-type institutions, fight against discrimination and intolerance, protection of the rights of victims of domestic violence, trafficking in human beings and other crimes. HRMI work also encompasses the right to respect for private life, as well as the freedoms of assembly, speech and information.

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Foreword

Prof. Dr. Rimvydas Norkus, President of the Lithuanian Supreme Court

The study "The practice of pre-trial detention in Lithuania", carried out in 2015 by the Human Rights Monitoring Institute in collaboration with Fair Trials, confirms the Institute's ongoing priority interest in the field, its aim to continuously deepen and broaden its analysis and to not let the broader professional and public debate, encouraged in large part by HRMI itself, die out. It is in no danger of becoming irrelevant – we mustn't forget that when Lithuania began its accession to the European Union, one of the European Commission's complaints regarding the Lithuanian legal system was in fact related to the use of this restrictive measure in a way that violated human rights. The fact that certain aspects of this problem persist to this day, in the eleventh year of Lithuania's membership in the EU, is unacceptable.

Just as before, the Institute in its newest study reminds us once again that the law postulates that "pre-trial detention should be an exceptional measure, used only in extreme cases", at the same time stressing that all coercive measures must be proportional and have a real and justified need for them.

Compared to other works most often focusing on the problems relating to the legal regulation of detention, the presenth as certain peculiarities: namely, the scope of the study and certain completely new aspects. The study was carried out in 10 EU Member States, which provides an exceptionally wide scope for comparison and drawing general conclusions. The scope of the study also lead to the use of adequate methodology –applying the very same standards, several states with different legal traditions were compared using a survey, continuous monitoring and document analysis.

What makes this work particularly valuable is the fact that, in addition to the theoretical aspects, it examined the use of pre-trial detention in practice: it assessed the subjective professional experiences of actual people, uncovering the driving factors behind the actions of advocates, prosecutors and judges when considering pre-trial detention; it analysed the reasoning of specific rulings on pre-trial detention (comprehensiveness, depth, adequacy); it summarized the impressions of the researchers observing the trials.

It is impossible to disagree with the proposed recommendations. That being said, some conclusions may have gone too far based on very little data: the study relied on only a few speakers' opinions and only analysed cases where pre-trial detention was ordered, without analysing those where it was rejected. While it is agreed that the activities of the courts are fraught with procedural

difficulties, it is regrettable that no approach or recommendations have been proposed to protect judges from public pressure so that only the best decisions are made. Is the media also not at least partially responsible for the overuse of pre-trial detention, since it shows exceptional enthusiasm in informing the public about people who were ultimately not detained prior to trial or whose pre-trial detention was not extended? This study would have also seemingly benefited from at least a short analysis of one other aspect – namely, if it examined the responsibility of and practical steps taken not only by judges, prosecutors and defence lawyers when selecting restrictive measures, but also by officers when implementing them. An analysis of those cases where pre-trial detention was refused would have also surely contributed to the comprehensiveness of the study, as well as the objectivity and reliability of its conclusions.

Without a doubt, this study, much like any endeavour focusing on the problems of pre-trial detention, has borne fruit. Statistics show that in recent years the use of pre-trial detention in Lithuania has dropped significantly, with 2014 reaching the lowest number of pre-trial detentions in the last decade. In addition to all of the other benefits, this study also means that the reform of pre-trial detention in Lithuania, which was started in 2015, was provided with significant additional material. We hope that the relevant authorities pay attention to the recommendations of the study. For example, the Supreme Court of Lithuania has already started preparing an overview of the standards established by the European Court of Human Rights on the use of pre-trial detention, aimed at the national courts.

I. Executive Summary

Overuse of pre-trial detention (PTD) is a recognised issue in Lithuania: PTD is applied significantly more often than its closest alternatives and prosecutors' applications for it enjoy a success rate of over 95%. Although this problem is oft-talked about in the media and in professional discussions amongst legal practitioners, there is little research analysing the nature of pre-trial detention decision-making and the extent to which it contributes to the overuse of PTD.

As part of an EU funded project, a common research methodology was applied in 10 EU Member States, with research data gathered through monitoring of PTD hearings, analysing case files, as well as surveying defence lawyers and interviewing judges and prosecutors. In the course of the Lithuanian research, 20 PTD hearings were observed, 61 case-files analysed, 36 defence lawyers surveyed, and 4 judges and 5 prosecutors interviewed.

The key findings regarding pre-trial detention decision-making in Lithuania were as follows:

1. Decision-making procedure: Although the presence of a defence lawyer is ensured in all PTD hearings, the majority of suspects are represented by legal aid lawyers who often provide legal services of insufficient quality. In a significant number of cases it was observed that the legal aid lawyer first met with the defendant in the court room and was inadequately prepared for the hearing. While the reasons for this were not identified through this research, such situations do jeopardise the suspect's defence. Research findings also indicate a lack of real equality of arms between the defence and the prosecution, as the defence has limited access to case-file, and the arguments put forward by the prosecution are often given more weight than those of the defence.

2. The substance of decisions: PTD is most often ordered to prevent suspect's flight, with the possibility of a long-term prison sentence, weak social ties and previous convictions being the predominant reasons given to justify a finding of this risk. Risk of re-offending is also a fairly often employed PTD ground, with the likelihood of criminal activities having become the suspect's primary source of income being cited as the source of such risk. However, PTD on these grounds is often ordered based on very general arguments and assumptions, without due attention to specific circumstances and individualization of the decision to the case at hand. A tendency to overly-rely on the possibility of a long-term prison sentence as a basis for ordering PTD, which is in contravention to the European Convention of Human Rights, was also observed.

3. Use of alternatives to detention: Decisions ordering PTD rarely provide reasoning as to why alternative measures are unable to achieve the same goals. Where such reasons are given, they often rely on generic arguments without relating specifically to the case at hand. Alternative measures to PTD are not trusted by judges and prosecution and are accordingly underused.

4. Review of pre-trial detention: Decisions extending the period of PTD often rely on overly general and formulaic arguments and in almost all cases PTD extension is ordered. Suspects are not always present in review hearings. Most defence lawyers believe that investigations involving pre-trial detainees are not conducted more diligently or efficiently, as the case law of the European Court of Human Rights suggests is required.

5. Case outcomes: Persons placed in PTD mostly receive custodial sentences. Situations where a person serves the full sentence in PTD are not uncommon, and make up over 10% of the cases analysed in the course of this research. However, no instances were observed where a custodial sentence shorter than the period of PTD was ordered. This circumstance gives reasons to believe that judges may be unwilling to order imprisonment for shorter periods than those actually spent in PTD so as not to raise questions about the legality of the PTD period.

The conclusions of the research indicate that the practice of pre-trial detention decision-making in Lithuania falls short of the European Court of Human Rights standards in a number of areas. In light of these findings, the main recommendations are the following:

- Further research into the reasons for the unsatisfactory quality of legal aid must be conducted and a mechanism for ensuring effective supervision of the legal aid lawyers' services quality must be established by the Lithuanian Bar Association and Ministry of Justice in mutual cooperation;
- The courts must ensure observance of equality of arms between prosecution and defence in all PTD hearings, and equal weight must be given to submissions of both the prosecution and the defence;
- There needs to be further guidance to prosecutors and judges on the standards of ECtHR jurisprudence available for judges and prosecutors, informing them when applying for and deciding on PTD;
- Courts deciding on PTD must request specific evidence and reasons for ordering and extending PTD, as opposed to general and vague arguments, and must ensure the decisions ordering PTD give clear and individualized reasons for doing so;
- Courts should ensure that the possibility of using alternatives to PTD is extensively discussed and analysed in PTD hearings and decisions.

For a full list of conclusions and recommendations please see section X, "Conclusions and recommendations", at the end of this report.

II. Introduction

1. Background and objectives

This report is one of 10 country reports outlining the findings of an EU-funded research project conducted in 10 EU Member States in 2014 – 2015.

More than 100,000 suspects are currently detained pre-trial across the EU. While pre-trial detention has an important part to play in some criminal proceedings, ensuring that certain defendants will be brought to trial, it is being used excessively at huge cost to the national economies. Unjustified and excessive pre-trial detention clearly impacts on the right to liberty and to be presumed innocent until proven guilty. It also affects the ability of the detained person to access fully their right to a fair trial, particularly due to restrictions on their ability to prepare their defence and gain access to a lawyer. Furthermore, prison conditions may also endanger the suspect's well-being.[1] For these reasons, international human rights standards including the European Convention on Human Rights (ECHR) require that pre-trial detention is used as an exceptional measure of last resort.

While there have been numerous studies on the legal framework governing pre-trial detention in EU Member States, limited research into the practice of pre-trial detention decision-making has been carried out to date. This lack of reliable evidence motivated this major project in which NGOs and academics from 10 EU Member States, coordinated by Fair Trials International (Fair Trials), researched pre-trial decision-making procedures. The objective of the project is to provide a unique evidence base regarding what, in practice, is causing the use of pre-trial detention. In this research, the procedures of decision-making were reviewed to understand the motivations and incentives of the stakeholders involved (defence practitioners, judges, prosecutors). It is hoped that these findings will inform the development of future initiatives aiming at reducing the use of pre-trial detention at domestic and EU-level.

This project also complements current EU-level developments relating to procedural rights. Under the Procedural Rights Roadmap, adopted in 2009, the EU institutions have examined issues arising from the inadequate protection of procedural rights within the context of mutual recognition, such as the difficulties arising from the application of the European Arrest Warrant. Three procedural rights directives (legal acts which oblige the Member States to adopt domestic provisions that will achieve the aims outlined) have already been adopted: the *Interpretation and Translation Directive* (2010/64/EU), the *Right to Information Directive* (2012/13/EU), and the *Access to a Lawyer Directive* (2013/48/EU). Three further measures are currently under negotiation – on legal aid, safeguards for children, and the presumption of innocence and the right to be present at trial.

The Roadmap also included the task of examining issues relating to detention, including pre-trial, through a Green Paper published in 2011. Based on its case work experience and input sought through its Legal Expert Advisory Panel (LEAP),[2] Fair Trials responded to the Green Paper in the report "Detained without trial" and outlined the necessity for EU-legislation as fundamental rights

[1] For more detail see: http://website-pace.net/documents/10643/1264407/pre-trialajdoc1862015-E.pdf/37e1f8c6-ff22-4724-b71e-58106798bad5

[2] http://www.fairtrials.org/fair-trials-defenders/legal-experts/

of individuals are too often violated in the process of ordering and requesting pre-trial detention. Subsequent Expert meetings in 2012 – 2013 in Amsterdam, London, Paris, Poland, Greece and Lithuania affirmed the understanding that problems with decision-making processes might be responsible for the overuse of pre-trial detention, and highlighted the need for an evidence base clarifying this presumption. Regrettably, no action has been taken to date with regards to strengthening the rights of suspects facing pre-trial detention. However, the European Commission is currently conducting an Impact Assessment for an EU measure on pre-trial detention, which will hopefully be informed by the reports published under this research project.

2. Regional standards

The current regional standards on pre-trial detention decision-making are outlined in Article 5 of the European Convention on Human Rights ("ECHR"). Article 5(1)(c) ECHR states that a person's arrest or detention may be "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". Anyone deprived of liberty under the exceptions set out in Article 5 "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful" (Article 5(4) ECHR). The European Court of Human Rights (ECtHR) has developed general principles on the implementation of Article 5 that should govern pre-trial decision-making and would strengthen defence rights if applied accordingly. These standards have developed over a large corpus of ever-growing case law.

I) Procedure

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly[3] or "speedily"[4] before a judicial authority, and the "scope for flexibility in interpreting and applying the notion of promptness is very limited".[5] The trial must take place within a "reasonable" time according to Article 5(3) ECHR and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.[6] Whether this has happened must be determined by considering the individual facts of the case.[7] The ECtHR has found periods of pre-trial detention lasting between 2.5 and 5 years to be excessive.[8]

According to the ECtHR, the court imposing the pre-trial decision must have the authority to release the suspect[9] and be a body independent from the executive and from both parties of the

[3] *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.

[4] The limit of acceptable preliminary detention has not been defined by the ECtHR, however in *Brogan and others v UK,* App. 11209/84; 11234/84; 11266/84;11386/85, 29 November 1988, the court held that periods of preliminary detention ranging from four to six days violated Article 5(3).

[5] Ibid para 62.

[6] *Stogmuller v Austria,* App 1602/62, 10 November 1969, para 5.

[7] *Buzadj v. Moldova*,App 23755/07,16 December 2014, para 3.

[8] *PB v France*, App 38781/97, 1 August 2000, para 34.

[9] *Singh v UK,* App23389/94, 21 February 1996, para 65.

proceedings.[10] The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to participate effectively.[11]

II) Substance

The ECtHR has repeatedly emphasised the presumption in favour of release[12] and clarified that the state bears the burden of proof on showing that a less intrusive alternative to detention would not serve the respective purpose.[13] The detention decision must be sufficiently reasoned and should not use "stereotyped"[14] forms of words. The arguments for and against pre-trial detention must not be "general and abstract".[15] The court must engage with the reasons for pre-trial detention and for dismissing the application for release.[16]

The ECtHR has also outlined the lawful grounds for ordering pre-trial detention to be: (1) the risk that the suspect will fail to appear for trial;[17] (2) the risk the suspect will spoil evidence or intimidate witnesses;[18] (3) the risk that the suspect will commit further offences;[19] (4) the risk that the release will cause public disorder;[20] or (5) the need to protect the safety of a person under investigation in exceptional cases.[21] The mere fact of having committed an offence is not a sufficient reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.[22] Pre-trial detention based on "the need to preserve public order from the disturbance caused by the offence"[23] can only be legitimate if public order actually remains threatened. Pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.[24]

With regards to flight risk, the ECtHR has clarified that the lack of fixed residence[25] alone or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.[26]

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[10] *Neumeister v Austria,* App 1936/63, 27 June 1968, para 24.
[11] Göç *v Turkey, Application* No 36590/97, 11 July 2002, para 62.
[12] *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.
[13] *Ilijkov v Bulgaria,* App 33977/96, 26 July 2001, para 85.
[14] *Yagci and Sargin v Turkey,* App 16419/90, 16426/90, 8 June1995, para 52.
[15] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.
[16] *Buzadj v. Moldova*,App 23755/07,16 December 2014, para 3.
[17] *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 59.
[18] Ibid.
[19] *Muller v. France*, App 21802/93, 17 March 1997, para 44.
[20] *I.A. v. France*, App 28213/95, 23 September 1988, para 104.
[21] Ibid para 108.
[22] *Tomasi v France,* App 12850/87, 27 August 1992, para 102.
[23] *I.A. v. France*, App 28213/95, 23 September 1988, para 104.
[24] *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 149.
[25] *Sulaoja v Estonia,* App 55939/00, 15 February 2005, para 64.
[26] *Tomasi v France,* App 12850/87, 27 August 1992, para 87.

The risk of re-offending can only justify pre-trial detention if there is actual evidence of the definite risk of re-offending available;[27] merely a lack of job or local family ties would be insufficient.[28]

III) Alternatives to detention

The case law of the European Court of Human Rights (ECtHR) has strongly advocated that pre-trial detention be imposed only as an exceptional measure. In *Ambruszkiewicz v Poland,*[29] the Court stated that the

> "detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances."

Furthermore, the ECtHR has emphasised the use of proportionality in decision-making, in that the authorities should consider less stringent alternatives prior to resorting to detention,[30] and the authorities must also consider whether the "accused's continued detention is indispensable".[31]

One such alternative is to release the suspect within their state of residence subject to supervision. States may not justify detention in reference to the non-national status of the suspect but must consider whether supervision measures would suffice to guarantee the suspect's attendance at trial.

IV) Review of pre-trial detention

Pre-trial detention must be subject to regular judicial review,[32] which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.[33] A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.[34] This might require access to the case files,[35] which has now been confirmed in Article 7(1) of the *Right to Information Directive*. The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention. [36] Previous decisions should not simply be reproduced.[37]

When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains[38] and continued detention "can be justified in a given

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[27] *Matznetter v Austria (*2178/64), 10 November 1969, concurring opinion of Judge BalladorePallieri, para 1.
[28] *Sulaoja v Estonia* (55939/00), 15 February 2005, para 64.
[29] *Ambruszkiewicz v Poland* (38797/03). 4 May 2006, para 31.
[30] *Ladent v Poland* (11036/03), 18 March 2008, para 55.
[31] Ibid, para 79.
[32] *De Wilde, Ooms and Versyp v Belgium* (2832/66, 2835/66, 2899/66), 18 June1971, para 76.
[33] *Rakevich v Russia* (58973/00), 28 October2003, para 43.
[34] Göç *v Turkey* (36590/97), 11 July 2002, para 62.
[35] *Wloch v Poland* (27785/95), 19 October 2000, para 127.
[36] *Rehbock v Slovenia*(29462/95), 28 November 2000, para 84.
[37] *Ilijkov v Bulgaria* (33977/96), 26 July 2001, para 85.
[38] *Michalko v. Slovakia*(35377/05), 21 December 2010, para 145.

case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention".[39] The authorities remain under an ongoing duty to consider whether alternative measures could be used.[40]

V) Implementation

Yet, these guidelines are not being upheld in national courts and EU countries have been found in violation of Article 5 ECHR in more than 400 cases in 2010 – 2014.[41]

Notwithstanding any possible EU-action on this issue at a later stage, the ultimate responsibility for ensuring that the suspect's rights to a fair trial and right to liberty are respected and promoted lies with the Member States that must ensure that at least the minimum standards developed by the ECtHR are complied with.

3. Pre-trial detention in Lithuania

The available statistical data suggests that pre-trial detention is overused in Lithuania. Prosecutors' applications for pre-trial detention (PTD) enjoy a success rate of 95%, and PTD is vastly more used than is closest, less strict alternatives.[42] Reports from former detainees[43] and defence lawyers[44] indicate that PTD is being used as a measure to coerce suspects into giving evidence. This gives rise to well-grounded concern about vast abuse of this measure. Although significant research has been carried out in this area, there are still uncertainties about the reasons for overuse of PTD, especially where the motives of judicial decisions are concerned.

The Human Rights Monitoring Institute (HRMI) has extensive experience in conducting PTD-related research, and has previously published a study on the legal framework of PTD in Lithuania[45] as well as a study on the attitudes of police, prosecutors and judges on the use of PTD.[46] However, there is little research available which analyses the actual PTD decisions and the reasons given for them. This makes the current study particularly interesting and valuable, as it deals with the judicial decision making in such cases and encompasses first-hand experience of PTD hearings, providing an intimate glimpse into how PTD decisions are made.

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[39] *McKay v UK (*543/03),3 October 2006, para 42.

[40] *Darvas v Hungary* (19574/07), 11 January 2011, para 27.

[41] http://echr.coe.int/Documents/Overview_19592014_ENG.pdf.

[42] See IV, Context – Relative statistical indicators.

[43] Group surveys of former detainees on detention conditions and implementation of their rights, 2012. http://www.hrmi.lt/uploaded/TYRIMAI/2012-06-05%20Priedas%201%20-%20Suemimu%20Fokus%20analize.pdf

[44] Numerous such claims were in the defence practitioners' survey.

[45] http://www.hrmi.lt/uploaded/PDF%20dokai/ZTSI_Sulaikymas_Ir_Suemimas_2.pdf

[46] http://www.hrmi.lt/uploaded/Documents/Pre-trial%20detention%20-%20Practitioners%20attitudes_EN_Final_1.pdf

Until relatively recently, overuse of PTD has not been an often discussed problem. Media reactions were mostly limited to individual cases where PTD was refused or a person was released from PTD. Such court decisions, especially where more serious crimes are concerned, are received very negatively by the media. Several examples of headlines reacting to releases from PTD:

"Officers shocked: the judge felt sorry not for the raped minor, but for the man accused of defiling her"[47]

"Ineffable judge's kindness to a foreigner suspected of smuggling heroin to Lithuania worth millions of Litas"[48]

However, high profile cases involving questionable use of PTD in 2012[49] and early 2013,[50] coupled with HRMI's advocacy on this issue,[51] sparked wider discussions on this problem and eventually prompted its recognition by members of Parliament and Ministry of Justice, as well as high-ranking judges and even the Prosecutor General's Office.[52] Thus, the current research is not only interesting but also comes in a very timely manner so as to possibly shift the debate towards specific solutions of the existing problems.

It should be noted that some legislative steps to tackle the problem of PTD overuse have been taken while this research was being conducted.[53] On the 1st of January, 2015 a new alternative to PTD was introduced – "intensive supervision", a form of house arrest with electronic monitoring, which will hopefully prove to be a viable alternative to detention. Also, on 25 June 2015 significant amendments were made to the Lithuanian Code of Criminal Procedure, which seek to promote the use of PTD alternatives and to reduce the length of PTD.

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[47] http://www.delfi.lt/news/daily/crime/pareigunai-priblokSti-teisejui-pagailo-ne-iszagintos-nepilnametes-o-jos-isniekinimu-kaltinamo-vyro.d?id=52973521

[48] http://www.delfi.lt/news/daily/crime/neispasakyta-teisejo-malone-uzsienieciui-itariamam-atgabenus-i-lietuva-heroino-uz-milijonus-litu.d?id=63931382

[49] http://www.delfi.lt/news/daily/lithuania/stt-sulaikyta-lobista-aromanovski-teismas-sueme-15-paru.d?id=58965993

[50] http://www.delfi.lt/news/daily/lithuania/teismas-leido-mbalciuna-suimti-20-paru-advokatas-skus-sulaikyma-kuris-perzenge-48-val.d?id=60387437

[51] http://www.delfi.lt/news/ringas/lit/kliutkevicius-mbalciuno-sulaikymas-galimas-zmogaus-teisiu-pazeidimas.d?id=60394405

http://www.bernardinai.lt/straipsnis/2013-01-18-zmogaus-teisiu-instituto-atstovas-suemimas-tai-spaudimas-itariamajam/93929

[52] http://www.alfa.lt/straipsnis/15081639/Teisininkas..vieno.suimtojo.paros.islaikymo.kaina..per.50.Lt=2013-02-21_11-18/

[53] See section IV "Context", II "PTD reforms" for more information on this.

III. Methodology of the research project

1. General methodology information

This project was designed to develop an improved understanding of the process of the judicial decision-making on pre-trial detention in 10 EU Member States. This research was carried out in 10 Member States with different legal systems (common and civil law), legal traditions and heritage (for example Soviet, Roman and Napoleonic influences), differing economical situations, and importantly strongly varying usage of pre-trial detention in criminal proceedings (for example 12.7% of all detainees in Ireland have not yet been convicted[54] whereas in the Netherlands 39.9% of all prisoners have not yet been convicted[55]).

The choice of participating countries allows for identifying good and bad practices, and proposing reform at the national level as well as developing recommendations that would ensure enhanced minimum standards across the EU. The individual country reports focusing on the situation in each participating country will provide in-depth input to the regional report which will outline common problems across the region as well as highlighting examples of good practice, and will provide a comprehensive understanding of pan-EU pre-trial decision-making.

Five research elements were developed to gain insight into domestic decision-making processes, with the expectation that this would allow for a) analysing shortfalls within pre-trial detention decision-making, understanding the reasons for high pre-trial detention rates in some countries and establish an understanding the merits in this process of other countries, b) assessing similarities and differences across the different jurisdictions, and c) the development of substantial recommendations that can guide policy makers in their reform efforts.

The five-stages of the research were as follows:

(1) Desk-based research, in which the partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms.

Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to specific local conditions – explore practice and motivations of pre-trial decisions and capture the perceptions of the stakeholders in all participating countries.

(2) A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.

(3) Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.

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[54] http://www.prisonstudies.org/country/ireland-republic, data provided by International Centre for Prison Studies, 18 June 2015.

[55] http://www.prisonstudies.org/country/netherlands, data provided by International Centre for Prison Studies, 18 June 2015.

(4) Case file reviews, which enabled researchers to get an understanding of the full life of a pre-trial detention case, as opposed to the snapshot obtained through the hearing monitoring.

(5) Structured interviews with judges and prosecutors, capturing their intentions and motivation in cases involving pre-trial detention decisions. In addition to the common questions that formed the main part of the interviews, the researchers developed country-specific questions based on the previous findings to follow-up on specific local issues.

2. Methodology in Lithuania

It should be noted at the outset that the number of cases analysed and the number of practitioners surveyed and interviewed are limited, and thus should not be considered a precise representation of the scope of problems associated with PTD decision-making in Lithuania. The collected data nonetheless does illustrate the prevalence of PTD-related issues discussed in this study.

In the course of the research 36 defence lawyers were surveyed, 20 PTD hearings were attended and observed by one or more HRMI representatives, 61 case-files were reviewed, and 4 judges and 5 prosecutors were interviewed. Of the 20 attended PTD hearings 19 were first hearings and 1 was a review hearing on the extension of PTD term. Of the 61 reviewed case-files 44 also included reviews of PTD which were also analysed.

The defence lawyers' survey was conducted through the use of an online questionnaire (Annex 1). Invitations to participate in the survey were disseminated through HRMI's, Lithuanian Bar Association's and legal news websites, as well as sent directly to lawyers specializing in criminal justice. The survey was anonymous.

All of the PTD hearings were monitored in the Vilnius City District Court in the course of January – March 2015. The case-files review was carried out in the district courts of Kaunas, Klaipėda and Šiauliai, as well as Vilnius Regional Court. The reviewed case files were selected randomly by the courts' administrations or the researchers from cases that were closed in the period of 2011-2014.

The interviews with the 4 judges were arranged by contacting presidents of the courts. The courts selected the judges to be interviewed internally, on a voluntary basis. Similarly, interviews with prosecutors were arranged through the Prosecutor General's Office public relations department, and the prosecutors were also selected internally in regional offices, also on a voluntary basis.[56]

Of the four principal methods of research data collection – defence practitioner survey, PTD hearings monitoring, case files review and judges and prosecutors interviews – the hearings monitoring proved to be the most complicated from the legal and practical standpoint. Under the Lithuanian Code of Criminal Procedure, PTD hearings are usually closed.[57] Thus, special access for research purposes had to be negotiated by HRMI with the Vilnius City District Court and the Prosecutor General's Office.

[56] The specific courts or prosecutors' offices that participated in the interviews are not indicated to preserve the anonymity of the judges and prosecutors that have participated in the interviews.

[57] Code of Criminal Procedure of the Republic of Lithuania, Article 9 paragraph 2 http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=494181

However, this general agreement did not guarantee access to all of the PTD hearings in the court: the decision whether to grant HRMI representatives access to a specific hearing was ultimately up to the judge presiding over the hearing, subject to the lack of objections from the participating prosecutor and defence lawyer. Instances where HRMI representatives were refused access toa specific hearing by a judge or prosecutor, ora judge or prosecutor refused to cooperate at, all did occur. Sensitivity of the case materials examined and the ongoing investigation was the predominantly cited reason for refusal.

Some technical challenges were also faced when accessing the case files. Though under court's rules access must be granted to resolved cases for research purposes,[58] due to the structure of the courts' database only cases where PTD was requested and granted, but not cases where PTD was refused by the court, could be identified. Thus, this report only analysed case files in which pre-trial detention was ordered by the courts, while case files were pre-trial detention was requested but never once ordered could not be examined.

It should be pointed out that, despite some difficulties described above, HRMI representatives were generally met with openness and helpfulness by the courts and the Prosecutor General's Office, which understood the need for this type of research and expressed support for it.

[58] Rules on access to case-files resolved by courts,
http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=439220&p_tr2=2

IV. Context

The Republic of Lithuania is a Northern/Eastern European country, the most Southern of the three Baltic States. It is situated along the south eastern shore of the Baltic sea, and bordered by Latvia to the North, Belarus to the East, Poland to the South and Kaliningrad Oblast (Russia) to the West. It is a relatively small country with a population of 2.9 million.[59]

Lithuania was occupied by the Soviet Union for the majority of the second half of the 20th century. In 1990 it regained its independence and decisively shifted its focus towards closer ties with Western Europe and the rest of the Western world. In 2004 Lithuania joined NATO and the European Union.

Lithuania operates under a civil-law system. The majority of criminal law related issues are covered by two sets of codified laws – the Criminal Code and the Code of Criminal Procedure, both of which came into force in early 2000s after a complete reform of the criminal justice legal framework.

I) PTD procedure

The Code of Criminal Procedure (CCP) explicitly establishes pre-trial detention (PTD) as a measure of last resort. Under the CCP, PTD "may only be ordered in cases when [the same] results cannot be achieved by more lenient restrictive measures."[60] A person who has been placed under arrest must be brought before a court within 48 hours to decide on PTD.[61] The Constitution of the Republic of Lithuania establishes this as an absolute rule.[62]

The PTD procedure, as described below, was applied at the time of this research. Some amendments to it were made after the data collection for this study was complete; please see section (II) "PTD reforms" for further details.

The CCP provides for a number of alternative, non-custodial and less restrictive measures:[63] House arrest, obligation to live separately from the victim, monetary bail, confiscation of documents, obligation to periodically register at the local police office, written commitment not to depart, supervision of the military unit's command (for soldiers), and supervision of parents or legal guardians (for minors). From the 1st January 2015 intensive supervision was also added to this list.[64]

Intensive supervision, house arrest and obligation to live separately from the victim may only be ordered by court, while obligation to live separately from the victim may only be ordered if there is a reasonable suspicion that the suspect may unlawfully influence the victim or commit further criminal offences against the victim or persons living with the victim.[65]

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[59] May 2015 estimate, Statistics Lithuania
http://osp.stat.gov.lt/en/statistiniu-rodikliu-analize?portletFormName=visualization&hash=ed31cbb8-93dd-4677-92f4-8c2c620b8111

[60] The Code of Criminal Procedure, Article 122, paragraph 7

[61] The Code of Criminal Procedure, Article 140

[62] The Constitution of the Republic of Lithuania, Article 20,
http://www3.lrs.lt/home/Konstitucija/Constitution.htm

[63] The Code of Criminal Procedure, Articles 120, 121

[64] See section IV "Context", II "PTD reforms" for more information on this measure.

[65] The Code of Criminal Procedure, Article 121

All other restrictive measures can be ordered by either court or prosecutor, without a judicial order.[66] Some of the measures – confiscation of documents, obligation to periodically register at the local police office, written commitment not to depart, supervision of the military unit's command (for soldiers), supervision of parents or legal guardians (for minors) – may also be ordered by the investigating officer in urgent cases.

Under the CCP, there are four possible grounds for ordering PTD[67]:

a) Reasonable suspicion that the person will flee or hide from law enforcement officers, prosecutor or court;

b) Reasonable suspicion that the person will hinder the proceedings by influencing witnesses or tampering with the evidence;

c) Reasonable suspicion that the person will commit further crimes;

d) Pending extradition request or European Arrest Warrant.

An application for PTD and decision to order it can rely on more than a single ground, and usually does so, as was observed in the course of this research. Also, certain mandatory conditions set out in the PTD must be met when ordering PTD[68]:

I) Sufficient evidence must exist for a reasonable suspicion that the person has committed the criminal offence;

II) PTD may only be ordered when more lenient alternatives are unsuitable to achieve the same results;

III) The criminal offence must be punishable by imprisonment of more than one year.

The decision whether to use alternatives or apply for PTD is essentially up to the prosecutor. Only the prosecutor can request PTD during the pre-trial investigation.[69] After receiving the request the court may only order detention or refuse it, the court cannot order an alternative measure on its own initiative. A prosecutor is also under obligation to terminate detention or any other restrictive measure immediately if its application is no longer necessary.[70]

If the person does not want to or cannot afford to contract a defence lawyer for the PTD hearing, a state-funded lawyer, called the state guaranteed legal aid lawyer, is appointed. Participation of a defence lawyer in PTD hearings is mandatory.[71]

The case-file materials are not provided to the defence as a matter of course, and must be requested

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[66] The Code of Criminal Procedure, Article 121

[67] The Code of Criminal Procedure, Article 122

[68] The Code of Criminal Procedure, Article 122

[69] However, once the pre-trial investigation is completed and the case is handed over to the court, the court decides on whether to apply and extend PTD on its own motion.

[70] The Code of Criminal Procedure, Article 139

[71] The Code of Criminal Procedure, Article 51

by the defence in order to obtain them. Under the Code of Criminal Procedure, the suspect or his lawyer can access the case file at any stage of the pre-trial investigation.[72] This, however, is subject to approval of the prosecutor overseeing the investigation, who can deny access to a portion of the case file or all of it if "such access, in the prosecutor's opinion, could prejudice the success of the pre-trial investigation". In practice, defence lawyers are usually granted partial access to the case file but refusals to access the full case are common.[73]

It is also worth noting that under the Code of Criminal Procedure the prosecutor has no obligation to provide the full case file to the judge when requesting pre-trial detention and can freely choose what documents are submitted to the court along with the application for PTD.

The court's decision to order pre-trial detention, or to extend pre-trial detention, can be appealed by the detainee or his defence lawyer to the regional court within 20 days.[74] The appellate court must consider the appeal within 7 days of receiving it.[75] The decision of the appellate court is final and not subject to further appeal. There is no other formal procedure for requesting pre-trial release.

PTD is ordered in increments up to 3 months each. When detention is nearing its expiry – no less than 10 days before its expiry, or 5 days, if detention was ordered for less than 1 month – the prosecutor may ask for an extension of PTD. The extension, again, can be ordered for up to a maximum of 3 months. Thus there is a *de facto* review at least every 3 months.[76] The maximum period of PTD during the pre-trial investigation is 18 months for an adult, and 12 months for a minor.

However, once the pre-trial investigation is concluded and the case was handed over to the court, there was no maximum period for extending detention. This rule has been changed as of 25 June 2015.[77] In 2014, on average, it took almost 3 months for a court of first instance to deal with a criminal case once it is handed over by the prosecution.[78]

II) PTD reforms

On 25 June 2015 the Lithuanian Parliament adopted significant amendments to the CCP on the use of pre-trial detention.[79] The amendments seek to promote the use of alternatives to PTD and to reduce the length of pre-trial detention, as well as to guarantee the defence at least partial access to the case file, when PTD is being sought.

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[72] The Code of Criminal Procedure, Article 181

[73] See section V "Procedure of pre-trial detention decision-making" (III) "Access to case file" for further details.

[74] The Code of Criminal Procedure, Article 130

[75] The Code of Criminal Procedure, Article 130

[76] The Code of Criminal Procedure, Article 127

[77] See section IV "Context", II "PTD reforms" for more information on these changes.

[78] 2014 statistics on criminal cases in courts of first instance, the National Courts Administration http://www.teismai.lt/data/public/uploads/2015/02/baudziamosios.xls

[79] http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=1047560&p_tr2=2

The principal changes to the PTD procedure introduced by the amendments are as follows:

1) When considering a prosecutor's application for the use or extension of PTD, judges may now not only order or reject PTD, but also select a more suitable restrictive measure at their discretion;

2) When ordering PTD, judges are now under an explicit duty to indicate the factual circumstances and arguments that led them to believe that less strict restrictive measures were not appropriate in that case. In practice, prior to these reforms, our research has shown that these were usually limited to formulaic statements, as discussed below;

3) The longest permissible period for PTD during the pre-trial investigation for minor or semi-serious crimes was reduced from 18 to 9 months, with maximum PTD for minors being reduced from 12 to 6 months;

4) The period of PTD in the entirety of criminal proceedings may not exceed two thirds of the maximum imprisonment term that can be ordered for the crime in question;

5) Appeals from a court ruling ordering or refusing to order PTD will no longer be examined by a single judge of a higher court, but instead by a panel of three judges;

6) When applying for the use of PTD, the prosecution must in all cases allow the defence lawyer to access the pre-trial investigation material that the application is based on. This requirement also applies when applying to the court for the use of other restrictive measures: intensive surveillance, house arrest and the imposition of an obligation to live separately from the victim.

As the above amendments were adopted after this research has been completed, they are not taken into consideration in the following report and analysis.

In 2013 an amendment was made to the CCP introducing a new restrictive measure, an alternative to custody, – "intensive supervision".[80] It is, essentially, electronic surveillance of the suspect via an ankle bracelet, otherwise very similar to house arrest. The amendment came into force on the 1st of January, 2015. However, this measure is not currently being used as the bracelets themselves are not currently available.[81]

III) Relevant statistical indicators

PTD application success rate in Lithuania is very high: over 95% of all prosecution's requests to order or extend PTD are granted, and less than 10% of appeals against orders of PTD are successful. This is one of the highest success rates in all of the European Union.[82]

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[80] http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=453253&p_tr2=2

[81] http://www.policija.lt/index.php?id=31090

[82] Hungarian Helsinki Committee, "Promoting the Reform of Pre-trial Detention in CEE-FSU Countries – Introducing Good Practices", 2013, page 14.
http://www.hrmi.lt/uploaded/TYRIMAI/Pre-trial_detention_in_CEE-FSU_countries.pdf

Table 1 – Success rates of applications for PTD and appeals

[83]Year	PTD requests	Granted	Granted %	Appeals against PTD	PTD repealed	PTD repealed %
2014	4017	3838	95.54	1978	172	8.7
2013	4779	4556	95.33	2158	200	9.27
2012	5239	4981	95.07	2309	179	7.75
2011	5366	5120	95.42	2056	173	8.41
2010	4428	4263	96.27	1699	112	6.59

The number of persons placed in PTD versus the number put under other available strictest alternatives also points towards excessive use of PTD. Under the CCP, PTD is the strictest measure and can only be used when more lenient alternatives are unsuitable. Thus, it could be expected that PTD's alternatives should be used more frequently than detention. However, in practice PTD is vastly more used than its alternatives. It must be noted nonetheless that the overall use of PTD is decreasing: the number of PTD requests has decreased by 16% between 2013 and 2014.

Table 2 – Use of PTD's most similaralternatives

[84]Year	Persons in PTD	Persons on bail	Persons in house arrest
2014	1642	162	34
2013	1734	139	37
2012	1869	127	44
2011	1792	118	39
2010	1920	120	37
2009	1797	124	64

According to statistics for 2009 – 2013 the average length of pre-trial detention was between 7 and 8 months.

Table 3 – Average length of PTD

[85]Year	Average length of PTD
2013	8 months
2012	7 months 15 days
2011	7 months 18 days
2010	7 months 9 days
2009	7 months 11 days

[83] Statistical data provided by the National Courts Administration under freedom of information inquiries on 7 February 2014, 3 June 2013, and 6 June 2012. Statistics for 2009 and before are unavailable.

[84] Statistical data provided by the Information Technology and Communications Department under the Ministry of the Interior, available at: http://www.ird.lt/statistines-ataskaitos/

[85] Data provided by the Prison Department under a freedom of information inquiry on 11 July 2014. This does not include the time spent in police detention facilities.

V. Procedure of pre-trial detention decision-making

I) Participation in pre-trial detention hearings

Physical presence of the suspect in the court room is a fundamental element of effective participation in pre-trial detention (PTD) proceedings, as it ensures the best defence of the suspect by allowing the suspect to directly defend herself or himself in the court, as well as ensures that the defendants perspective on the facts of the case is taken into consideration. The European Court of Human Rights (ECtHR) has clearly established that PTD proceedings must be adversarial and ensure equality of arms between the parties.[86] ECtHR has also stressed on numerous occasions that as a general rule, a person should have a right to participate in the hearing where his detention is discussed.[87]

Suspect's participation in the first PTD hearing is an imperative requirement under the Code of Criminal Procedure (CCP) of Lithuania.[88] The findings of the research indicate that this requirement is observed: the suspect was always present in the first hearing in the analysed cases.

However, participation of the suspect in hearings on PTD extension or appeal hearings is not mandatory, and is decided upon by the court.[89] In practice this means that the suspect is usually not present for such hearings.[90] The suspect did not participate in a part of PTD hearings (extension or appeal) in almost 70% of cases reviewed in the course of the research.[91]

In some instances this lack of detainee's participation might contravene the standards set out by the ECtHR, discussed above. Even though the ECtHR has ruled that exceptions to the rule of personal participation "are conceivable", the court went on to stress that the detainee's presence is always required when his personality, the risk of his absconding or his predisposition to further offences are assessed, and when PTD is extended after a significant lapse of time.[92]

Therefore, in order to ensure maximum compliance to the standards under the European Convention of Human Rights, detainee's personal participation in all court hearings in which her or his detention is considered should be ensured.

The requirement to bring the suspect before the court within 48 hours of arrest was also respected in all cases analysed in this research. The exact amount of time from time of arrest to the first court hearing depends heavily on the individual circumstances of the case and no clear pattern regarding this could be established. Only a general observation can be made that at least 24 hours were required to bring the suspect before a court in the majority of cases.

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[86] Korneykova v. Ukraine (39884/05), 19 January 2012, para. 68.

[87] Lebedev v. Russia (4493/04), 25 October 2007, para. 113.

Korneykova v. Ukraine (39884/05), 19 January 2012, para. 69.

[88] The Code of Criminal Procedure, Article 123

[89] The Code of Criminal Procedure, Articles 127, 130 and 131

[90] It should be noted that suspect's participation for PTD extension hearings for PTD lasting over 6 months is mandatory, and observed in practice.

[91] In the course of the case-file analysis 47 cases in which PTD reviews – PTD extension and appeal hearings – took place were identified. The suspect was not present in part of the PTD in 32 of these cases.

[92] Lebedev v. Russia (4493/04), 25 October 2007, para. 113.

Under the European Convention of Human Rights, a person with criminal charges against him has a right to the free assistance of an interpreter; this is an element of a right to fair trial, and is guaranteed under Article 6 of the European Convention on Human Rights. This guarantee also applies to pre-trial proceedings.[93] The participation of an interpreter if the suspect does not understand or speak Lithuanian is also mandatory under the Code of Criminal Procedure.[94]

In the course of the research an interpreter was required only in several monitored cases, and was present in all of them. The interpretation was provided to two Russian speaking suspects and one Polish speaking suspect. The observers were unable to assess the quality of the interpretation, but no complaints regarding the interpretation services were put forward before the court during the hearings.

Although this research did not reveal any problems concerning interpretation in PTD hearings, as only several cases in which interpretation was provided were observed, the findings cannot attest with any certainty to the overall quality of interpretation services in PTD hearings. Further research into this area is recommended, as complaints about poor quality of interpretation services have been voiced by defence lawyers in the past.[95]

II) Legal aid

Legal assistance in PTD hearings, i.e. representation by a defence lawyer, is a particularly important factor for mounting effective defence before the court deciding on detention. PTD hearings often deal with questions of law and require knowledge of the PTD legal framework while the suspect is rarely legally experienced. Thus, participation of a lawyer can be instrumental in successfully contesting a prosecutor's application for PTD.

Under the European Convention for Human Rights the state is not required, as a general rule, to provide the detainee with free legal representation for the PTD hearing.[96] However, the ECtHR has ruled that certain special circumstances, e.g. being before a foreign jurisdiction with no legal knowledge and insufficient interpretation, may make legal assistance indispensable to effectively challenging detention.[97]

Lithuania has set higher standards in that regard: participation of a defence lawyer is mandatory in all PTD hearings. If the person cannot afford a privately contracted lawyer or does not want one, a legal aid lawyer, who is state-funded, will be appointed.[98] The official name for state-funded legal aid in Lithuania is "state guaranteed legal aid".

Findings of this research confirm that this rule is respected in practice – a defence lawyer was present in all cases observed in the PTD hearings monitoring and the case-files review.

A legal aid lawyer may also sometimes be appointed temporarily, when the contracted lawyer

[93] Kamasinski v. Austria (9783/82), 19 December 1989, para. 74.
[94] The Code of Criminal Procedure, Articles 8 and 44
[95] https://www.hrmi.lt/en/new/974/
[96] Lebedev v. Russia (4493/04), 25 October 2007, para. 84-85.
[97] Kyriacou Tsiakkourmas and Others v. Turkey (13320/02), 2 June 2015, para. 209.
[98] The Code of Criminal Procedure, Article 51

cannot participate in a PTD hearing or PTD extension hearing. This may be detrimental to the defence of the suspect, as a lawyer with no prior knowledge of the case is brought in, one who cannot ensure proper representation. One defence lawyer surveyed in the course of this research pointed out that the power to summon a legal aid lawyer when the contracted lawyer is unavailable is sometimes consciously abused:

Quote: "There are cases where the court does not summon the contracted defence lawyer but the state guaranteed legal aid lawyer." Defence lawyer

Representation by legal aid lawyers makes up the overwhelming majority of cases analysed in the course of this research. A legal aid lawyer was appointed in 93% of the cases observed and analysed in the course of this study. This is worrying, as the quality of services provided by legal aid lawyers, observed in the PTD hearings, was very poor.

The following observations refer only to data collected in the course of the PTD hearings monitoring. The case files provided insufficient information to assess the quality of legal services provided by legal aid lawyers.

A striking observation was made that the first meeting between the legal aid lawyer and her or his client will often take place in the court room, a few minutes before the PTD hearing. Such situations occurred in more than two thirds of the monitored PTD hearings in which the defence lawyer was state-appointed. The lawyer would speak with the suspect for several minutes before the start of the hearing, and that was essentially all of the defence lawyer's preparation for the hearing.

Observed situation: In a single instance a suspect who was brought to the court for a PTD hearing had no defence lawyer. As participation of a defence lawyer in PTD hearings is mandatory, this would have resulted in a procedural violation. However, when the problem became apparent, the prosecutor simply stopped and brought in another legal aid lawyer who by chance happened to be walking down the court corridor next to the court room. The lack of knowledge of any of the case-related facts and not meeting the client beforehand did not stop the lawyer from representing the suspect. PTD was ordered.

In almost 90% of the hearings observed, legal aid lawyers did not request access to case file or additional time to prepare for the hearing. It can hardly be argued that no requests were made due to the lack of chance of success: in the 2 instances in which legal aid did lawyers request access to case file, it was granted without any objections.

Lack of knowledge of the circumstances of the case was also evident from the legal aid lawyers' oral submissions before the court. The lawyers tended to rely on overly general arguments. As several of

the legal aid lawyers were observed in more than one hearing in the course of the PTD hearings monitoring, it became evident that some of them tend to rely on formulaic arguments which are reproduced in every PTD hearing. Such arguments consisted out of suggestions of using alternatives to pre-trial detention, without referring to any specific measures, and general statements stressing that detention is the strictest measure and thus should not be applied. These arguments were mostly reproduced verbatim in different hearings without much attempt to adapt them to the current case.

The major flaws observed in the state guaranteed legal aid services are unacceptable and can be seen as impeding the suspect's right to defence and fairness of the proceedings. However, there is currently no quality assurance mechanism for legal aid services in place. It is therefore recommended that a system be set up for ensuring adequate quality of services provided by legal aid lawyers. Additional research into the possible reasons for the poor quality of legal aid services, such as poor financing of the legal aid or lack of motivation of legal aid lawyers, as well as others, is necessary.

III) Access to the case file

Access to case file can be essential for the defence in order to effectively challenge the prosecutor's application for PTD, especially if the application relies heavily on the findings of investigatory actions. Thus, the defence's right to access the case file is a necessary element of ensuring the equality of arms between the parties in PTD proceedings. This has been established by the ECtHR in numerous cases.[99]

Access to case file by the defence is also required by the EU Directive on the right to information in criminal proceedings (Directive on the right to information).[100] Under the Directive all case documents essential to effectively challenging the lawfulness of PTD must be provided to the defence with no possible derogations.

Under the CCP, the suspect or the defence lawyer can access the case file at any stage of the pre-trial investigation.[101] However, at the time of this research, the prosecutor in charge of the investigation could deny access to a part or all of the case file, if "such access, in the prosecutor's opinion, could prejudice the success of the pre-trial investigation". This prosecutor's power to deny all access to the case file was at odds with the requirements of the Directive on the right to information outlined above.

The defence lawyer survey conducted in this research indicates that lawyers are allowed to access the case file during the PTD hearings in majority of cases. Most (70%)of the surveyed defence practitioners indicated that they are indeed allowed at least partial access to the case file.[102] This is also confirmed by the data from the hearings monitoring: defence lawyers requested access to case file in four instances and were granted access in all of them.

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[99] Kehayov v. Bulgaria (41035/98), 18 January 2005, para. 84.
Nikolova v. Bulgaria (31195/96), 25 March 1999, para 58.
[100] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Article 7.
[101] The Code of Criminal Procedure, Article 181
[102] 25 out of 36 defence practitioners, who filled out the questionnaire

Observed situation: In one event after a PTD hearing was concluded and the legal aid lawyer had left the room, a disgruntled judge addressed the HRMI observer and expressed his exasperation with the defence lawyer. The judge requested the observer to note the lack of preparation on the lawyer's part, which was reflected by the vague arguments he had made which had little bearing on the case. The judge also stressed that the lawyer had not even bothered to request for access to the case-file, yet the judge would have happily granted it.

In the observed cases, defence lawyers were given access to the part of the case-file which the prosecutor has presented to the judge deciding on PTD. This was done, in one instance, before the PTD hearing, when the prosecutor allowed the defence lawyer to read through the case-file brought before the court, and in the other three observed cases, at the beginning of the hearing. In the latter cases the defence lawyer formally requested that she or he be granted access to the case file by the court. The defence lawyers were allowed around 30 minutes to read through the case materials, though depending on the size of the case-file the lawyer can request and be granted more time.

However, the surveyed defence practitioners opined that there are restrictions regarding access to the case file. Most of them indicated that they are only allowed to access a portion of the case-file which contains too little information to effectively contest PTD – more than half (53%) of the surveyed lawyers believed that in practice they are provided with insufficient access to case file to effectively challenge the legality of detention.

Two surveyed lawyers also claimed that in some instances the judge deciding on PTD is unofficially supplied with more information from the case file before the hearing, while the defence lawyers are provided with only a restricted portion of the case file, which omits any exonerating evidence gathered by the prosecution. These lawyers believed that, as access to the full case-file is rarely allowed, this makes it difficult to effectively contest PTD and impairs the fairness of the proceedings.

The findings of the research suggest that undue restrictions on access to case file may be a common occurrence, thus prejudicing the fairness of PTD proceedings. In order to ensure the equality of arms of between the parties in PTD proceedings, full access to the case-file should be provided to the defence whenever possible without jeopardizing the pre-trial investigation, as per the Directive on the right to information.

This was addressed to some extent by the amendments to the CCP on PTD adopted in June 2015: when submitting an application for the order of PTD, the prosecution must now in all cases allow the defence lawyer to access the pre-trial investigation material that the said application is based on.[103]

However, current CCP provisions on access to case file should be amended: the prosecutor's

[103] See section IV "Context", II "PTD reforms" for more information on this.

opinion that full access to the case file "could prejudice the success of the pre-trial investigation" should not be a sufficient reason to deny access. Arguments proving necessity to refuse full access should be required under the CCP from the prosecutor each time when refusing access to case file.

IV) Approach to defence and prosecution arguments

One of the elements of equality of arms between the parties, which has been deemed an essential principle of fair PTD proceedings by the ECtHR,[104] is giving equal weight to arguments of both the prosecution and defence.

However, a predominant sentiment amongst the surveyed defence lawyers (over 90%) is that arguments presented by the defence and prosecution are not treated equally, with the latter having significantly more sway over the court. More than half defence lawyers surveyed in the research (56%) commented that the defence arguments are rarely listened to or included in the PTD decision, while the prosecutor's arguments are transferred, sometimes verbatim, as grounds for ordering PTD.

Quote: "In one pre-trial detention hearing, despite countless arguments presented to the court on why detention could not be ordered, [the judge], when retiring to make a decision, said that it will be pronounced in 10 minutes. You couldn't even draw up a ruling in such time, so no one really bothered answering any of my arguments." Defence lawyer

Most of the interviewed prosecutors and judges have a different perspective. All of the judges stressed that they evaluate the arguments of both sides equally and place most importance on whether the arguments are backed up by information in the case-file. Most (four out of five) of the interviewed prosecutors shared similar views and considered that both sides' arguments are assessed fairly. Their general belief was that the adversarial nature of the proceedings is observed. However, an opinion that the prosecutor is in a more advantageous position in some cases was also expressed by one prosecutor.

Quote: "Where pre-trial detention is concerned, in practice the prosecutor is the stronger party, he has better knowledge [of the facts of the case], knows that material. Of course we allow the lawyers to familiarize themselves [with the case file] before the pre-trial detention hearing, if they so wish. But it is usually the prosecutor who is the stronger party, he has more arguments and they are better reasoned than those of the defence." Prosecutor

[104] Korneykova v. Ukraine (39884/05), 19 January 2012, para. 68.

Observations made in the course of the case-file review seem to confirm the bias in favour of the prosecution: defence arguments were referred to in detail in around 15% reviewed PTD decisions, while the prosecutors' arguments were incorporated into the decisions in more than 70% of the decisions.

As equality of arms is an essential element of fairness of the PTD proceedings, favouring of arguments presented by the prosecution over those of the defence must be seen as a violation of suspect's rights. Thus, greater care must be taken to ensure equal footing of both the prosecution and defence in PTD proceedings.

V) Speed of the proceedings

A general requirement arising out of Article 5 of the European Convention on Human Rights is that criminal proceedings involving a pre-trial detainee must be conducted with special diligence and speed, as established in the ECtHR case-law.[105]

The CCP does not contain provisions dealing specifically with imposition of PTD-related deadlines on the investigating authorities. However, under the CCP the court cannot order an extension of PTD if during the last two months of detention no investigative actions were carried out and no objective grounds for this are given.[106]

The Defence practitioners surveyed mostly do not find that the use of PTD is accompanied by more efficient or speedy investigation. Only 20% of lawyers opined that PTD does indeed result in more speedy proceedings. Several surveyed lawyers have also commented that the investigation only intensifies towards the end of the PTD term set by the court, so as to demonstrate that the investigation is being conducted before a PTD extension is requested.

Quote: "The only effectiveness is that the pre-trial investigation is usually completed within the maximum period for detention in the pre-trial investigation stage – 18 months; usually that is exactly how long the investigation takes." Defence lawyer

Defence lawyers who participated in the survey seem to have differing views on whether this system results in imposition of deadlines on the investigation in practice. The majority – two thirds – of surveyed lawyers believed that no such deadlines are imposed or observed by the courts. A third of the lawyers, however, suggested that such deadlines are set in practice. Imposition of such investigation-related deadlines was not observed in the course of the PTD hearings monitoring and the case-file review.

In order to observe requirements arising out of the European Convention of Human Rights, it is recommended to establish the duty of diligence and speedy conduct of proceedings in the CCP

[105] Stogmuller v Austria (1602/62), 10 November 1969, para 5.
[106] The Code of Criminal Procedure, Article 127 paragraph 7.

more robustly, while making it a necessary requirement for continuation of PTD after an initial period.

VI) Evidence in PTD hearings

The ECtHR has established in numerous cases that arguments for and against release from PTD must not be general and abstract.[107] However, in the cases observed in the hearings monitoring and the case-file review, the court was rarely (only in around 30% of cases) presented by the prosecution with evidence collected specifically to support the need for PTD.

The presented evidence, that was observed, included recordings of telephone conversations and witness testimonies of suspects' plans to abscond, witness testimonies of threats to victims made by suspects, and evidence of prior absconding from the investigation.

In most cases observed in the course of the research, however, the prosecutor presented the judge with excerpts from the case-file relevant to the question of PTD, and conclusions were drawn and assumptions made based on this information. The defence lawyers rarely brought forward evidence of their own to contest PTD, and mostly relied on general arguments. Evidence to specifically counter the need for PTD were presented by defence lawyers in less than 10% of the cases observed in the research.[108]

The bulk of the case-related information which the prosecutor submits to the court consists of evidence on the offence committed and information from the state registries on the suspect: employment and social security information, information on spouse and dependants, state residents' register information on education and residence, information on previous convictions and similar information.[109]

Prosecutors mostly find that this information is sufficient for them to prepare for PTD hearings. However, according to one of the interviewed prosecutors, whether there is enough evidence in a specific application for PTD depends heavily on how much the prosecutor is invested in the case, i.e. whether the prosecutor actively seeks evidence or simply relies on the general investigation information provided by the police investigators. Due to these differences in approach applications for PTD with only superficial evidence do happen.

Quote: "In most cases, if the prosecutor were not active, I would think that perhaps the evidence would not be sufficient [to request pre-trial detention]." Prosecutor

The findings of the research indicate that courts, as well as the parties, sometimes tend to rely solely

[107] Smirnova v. Russia (46133/99 and 48183/99), 24 July 2003, para. 63.

[108] Such evidence included witness interviews and documents of familial financial obligations, used to demonstrate a low risk of flight by the suspect.

[109] As seen by the HRMI researches during the case-files review and related by prosecutors and judges during interviews.

on general data available in the case file, which are extracted from state registers, such as whether the suspect is employed, married, currently studying, and has a permanent residence, or not. And arguments are then formed based solely on this information, rather than seeking information specifically related to the need for PTD or lack thereof.

It is important to note that under the ECtHR jurisprudence, when deciding to place a person in PTD the existence of concrete facts outweighing the rule of respect for individual liberty must be convincingly demonstrated.[110] Therefore the courts should require a higher standard of evidence, i.e. evidence specifically indicating the existence of risks of the suspect absconding, tampering with the investigation or re-offending, when assessing the need for ordering PTD, rather than relying solely on arguments based on general information about the suspect's life style, so as to respect the standards established in the ECtHR case-law.

[110] Ilijkov v. Bulgaria (33977/96), 26 July 2001, para. 84.

VI. Substance of pre-trial detention decision-making

The success rate of pre-trial detention (PTD) requests by prosecution is extremely high: PTD was ordered in all of the 20 court hearings attended in the course of this research. This coincides with the general statistical data, indicating a success rate of over 95%.[111] The case-file review cannot offer further insight into the success rates of PTD requests, as only cases in which PTD was ordered were reviewed.[112]

Under the European Court of Human Rights (ECtHR) case-law, in every decision ordering PTD, justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. This requires examining "all the facts arguing for or against the existence of a genuine requirement" for detention, and such arguments must be set out in the court's decisions on PTD.[113]

It is important in this context to look at the content of the PTD decisions, and analyse the reasoning for ordering detention therein, so as to see how it complies with the human rights standards set out by the ECtHR.

I) Allegations leading to application of PTD

Most interviewed judges and prosecutors indicated allegations of violence and drugs related offences as most likely to result in an order of PTD. Most prosecutors also stressed in the interviews that detention is often sought in fraud related cases, especially where multiple offences are alleged.

Interviewed practitioners' opinions differed on whether the gravity of a crime itself can be a decisive feature in whether PTD should be applied. While many of the interviewed judges and prosecutors did believe so, one prosecutor expressed an opposing opinion.

> **Quote: "The characteristics of the crime itself, the mechanism may affect [the decision to apply for PTD], but not the gravity of the crime. I have more than a single case where the person has committed a grave crime but there isn't even a thought about pre-trial detention [...], even though there is a real possibility of imprisonment." Prosecutor**

It should be noted that reliance only on the seriousness of the alleged criminal offence as a reason for ordering PTD is in contravention of the principles set-out by the ECtHR: the severity of a possible sentence may not form the sole basis for ordering PTD.[114]

II) Reasoning in PTD decisions

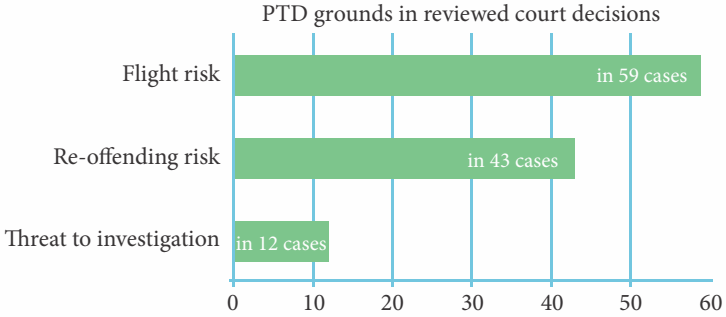
There are three main legal grounds for ordering PTD under Lithuanian law: risk of flight, risk of re-offending and threat to the investigation, i.e. tampering with evidence or other suspects and

[111] See Table 1.
[112] See section III "Methodology".
[113] Buzadji v. Moldova (23755/07),16 December 2014, para. 30-31.
[114] Cabala v. Poland (23042/02), 8 August 2006, para. 31.

witnesses. The fourth ground, pending extradition request or European Arrest Warrant against the person, was not observed in any of the cases analysed in the course of this research, and is thus not discussed here.

Interviewed prosecutors and judges pointed out that risk of flight is the most common reason for placing persons in PTD. This is confirmed by the PTD decisions observed and analysed in the course of this research: flight risk was clearly the leading reason for detention, and the risk of re-offending was also used in a significant portion of detention decisions. Threat to investigation is a distinctly less-used ground for ordering PTD, according to the research. In many cases more than one reason was used to justify the PTD order. The comparison of the use of these grounds in 73 of the observed or reviewed cases can be seen in Chart 1.

Chart 1[115]



In the course of the research these decisions were analysed to see how well the need for PTD is reasoned. The ECtHR has laid out a clear requirement in its case-law that the arguments in PTD decisions must not be "general and abstract".[116] Accordingly the decisions were evaluated on whether the reasoning given for ordering PTD is clear and tailored to the specific circumstances of the case, or formal and abstract.

Interestingly enough, threat to investigation, the least used ground for PTD, is also the ground that is substantiated the most clearly and best adapted to the specific circumstances of the case, when actually relied on, according to our research. This is in stark contrast with flight risk, which was reasoned well, according to the criteria set out above, in less than half of the reviewed decisions, and especially risk of re-offending which was substantiated sufficiently in less than one third of decisions in which it was used, as seen in Chart 2.

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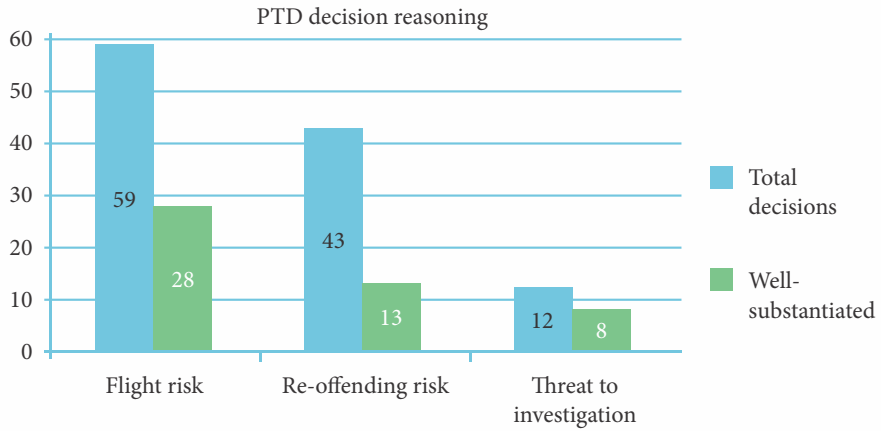
[115] Calculated based on PTD decisions in 73 cases observed or reviewed in the course of this research. 8 PTD decisions could not be included as researchers did not have the opportunity to familiarize themselves with their reasoning. Please note that more than one ground for ordering PTD can be given in a court decision.

[116] Smirnova v. Russia (46133/99 and 48183/99), 24 July 2003, para. 63.

Chart 2



It is also interesting to note that the risk of re-offending is distinctly the leading reason given for PTD in theft and drugs related cases. Around 80% of decisions to order PTD in such cases were reasoned by the need to counter the risk of re-offending. The usual argument in such decisions was a formulaic one – that the criminal activity in question is likely to have become the suspect's primary source of income and it will be pursued further is the person is not detained, while providing no other, specific evidence proving such risk. Reliance on such motives is in contravention to the ECtHR-set standards for PTD decisions, which specifically point out that PTD cannot be ordered based on "general and abstract" arguments, as discussed above.

Concerns about unfair use of PTD grounds are prevalent amongst Lithuanian defence lawyers. Almost 90% of the surveyed lawyers opined that judges are rarely or never fair in their evaluation of risks of suspect absconding, tampering with investigation and re-offending, i.e. the existence of the grounds for PTD.

More than 80% of the interviewed lawyers also believe to have detected unlawful justifications or reasons for PTD in their practice. Most often these are the possibility of a long-term sentence being the main reason for PTD, attribution of undue importance to previous convictions and succumbing to media pressure. A particularly stressed illicit reason for ordering PTD was its use to exercise pressure on the suspect. A third of all surveyed defence lawyers raised the issue that the real reason for requesting or ordering PTD in some cases is to coerce the suspect into giving evidence and possibly confessing.

Quote: "The main non-official purpose of pre-trial detention is the pressure to give evidence that the prosecutor needs in the investigation. In 9 out of 10 cases the prosecutor offers to negotiate not ordering detention if the evidence he needs and a confession will be given." Defence lawyer

Quote: "Investigators often use pre-trial detention as pressure to extract a confession." Defence lawyer

Quote: "The majority of decisions to detain a person are only a means of forcing the defendant to give evidence and confess. The investigating officers tell this to the arrestees' face." Defence lawyer

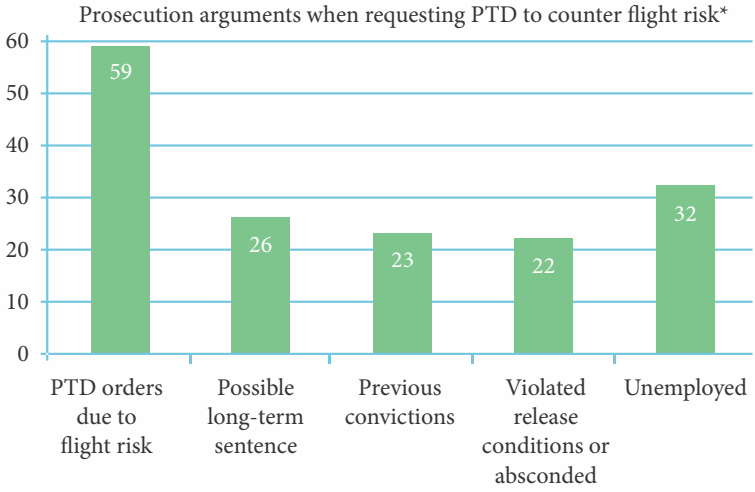
III) Evaluation of suspects' characteristics

Half of the interviewed judges stated that they have no preconceived notions about suspects' characteristics warranting a PTD order, and that they assess all situations individually. However, all interviewed judges pointed to some qualities, which were considered unfavourable and would result in PTD more frequently. Amongst these were: unemployment, which is seen as demonstrating lack of social ties and thus increasing the probability of a suspect absconding, previous convictions and drug addiction, which are also considered as pointing to the need of PTD.

Most of the interviewed prosecutors indicated that they first pay attention to the suspect's social ties or lack thereof, and, in cases where absconding is perceived as a threat – to ties abroad, i.e. whether the person has relatives, friends or business partners abroad, as these are seen as increasing the likelihood of the person fleeing. Previous convictions were also mentioned as an important factor by all of the interviewed prosecutors.

This somewhat coincides with observations made in the course of this research. The PTD-related cases observed and reviewed during this research suggest that when coming to a conclusion that a significant flight risk exists some flawed assumptions are relied on fairly often. When arguing for the need of PTD, the prosecutor will base the need for it on suspect's previous convictions and possibility of long-term imprisonment as often as on evidence of violations of release conditions or attempted absconding by the suspect. While the argument that the suspect is unemployed and thus presents a flight risk will be employed even more frequently, as indicated in Chart 3.

Chart 3[117]



* More than one justification can be and often is used when ordering PTD.

This may be seen as problematic where compliance with the ECtHR practice is concerned. Under the ECtHR jurisprudence, possibility of long-term imprisonment is not sufficient reason to conclude that PTD is necessary.[118] While overreliance on factors such as unemployment or lack of a family when ordering PTD may also give rise to a violation of the European Convention of Human Rights, as the ECtHR has pointed out that the mere existence of these factors does not form a sufficient basis for detention.[119]

Of course such arguments are not mutually exclusive and are sometimes presented together or along with other reasons for ordering PTD. Yet they are clearly prevalent amongst the reasons put forward before the court, as indicated in Chart 3.Bearing this mind, over-reliance on possibility of a long term sentence and previous convictions forms a doubtful basis for deducing a flight risk, and may result in breaches of suspects' rights.

IV) Knowledge of ECtHR standards

It is important to note in this context that half of the interviewed judges and most interviewed prosecutors indicated that they receive relatively little training on ECtHR standards where use of PTD is concerned. Ultimately it boils down to the ability and willingness of the individual judge or prosecutor to seek out and inform herself or himself of the ECtHR jurisprudence on the matter.

Opinions on the need for this seem to differ markedly: about half of the interviewed judges and

[117] Calculated from cases observed in the court hearings monitoring and case-files review.

[118] *Tomasi v France,* App 12850/87, 27 August 1992, para 86-89.

[119] Sulaoja V. Estonia (55939/00), 15 February 2005, para. 64.

prosecutors expressed an active interest in ECtHR case-law and claimed to seek it out individually, while others felt little need or interest to do so and found national legal provisions and case-law to be sufficient guidance.

Quote: "As far as the European Court of Human Rights case law is concerned, it is presented somewhat narrowly [in the trainings]. Of course every time we hear about it, it is useful [...], however you cannot research all of it yourself. Of course it's best when something is provided to you, summaries, overviews, conclusions, selected cases, in which human rights were actually violated, and what has to be taken into account, these kind of things – succinct, clear, laconic are what is necessary [...]." Prosecutor

The findings of this research indicate a tendency to rely on flawed arguments in PTD decisions, in some instances in evident contravention to the European Convention of Human Rights. Allegations of PTD's use to coerce suspects into giving evidence are especially worrying, as it is a flagrant violation of defence's rights and national laws. Further research into this matter is necessary.

Under these circumstances, there is a clear need for training and periodic renewal of knowledge on the ECtHR case-law related to PTD for both prosecutors and judges, who request for and decide on the use of PTD. A clear codification of ECtHR standards on the use of PTD should be prepared as a tool for practitioners when applying for and deciding on PTD.

VII. Alternatives to detention

Pre-trial detention (PTD) imposes severe restrictions on an individual's liberty, which causes a plethora of negative consequence for the detainee, such as loss of employment, deterioration of physical and mental health, family relationship issues etc. Therefore the use of alternative, less intrusive measures is always preferable.

Under the European Convention on Human Rights, national courts, when deciding whether a person should be placed in PTD or released, must consider alternative methods of ensuring that the person appears in trial.[120] Similarly, under the Lithuanian Code of Criminal Procedure (CCP) PTD may only be ordered when less strict measures are unsuitable to achieve the same results.[121]

The judge, at the time of the research, when considering a prosecutor's request for PTD, could only order PTD or refuse it, and could not order an alternative measure instead.[122] It should be noted that this has been addressed by June 2015 amendments to the CCP, which enabled the judge to order an alternative measure when deciding on a prosecutor's application for PTD.[123]

Most alternative measures can be ordered by the prosecutor directly.[124] However, unsuitability of less strict measures is a mandatory condition for ordering PTD: the judge must always consider whether these alternatives could be sufficient, and the decision to order PTD must contain reasons for why such measures are unsuitable.[125]

Accordingly, during PTD hearings observed in the research, defence lawyers often argued that more lenient measures, such as bail, house arrest or confiscation of documents, would be suitable to achieve the same results as PTD. However, these were very often just brought forward as formulaic arguments, and no evidence was provided nor did judges inquire about the issue raised in detail. Wider, more detailed discussions on the suitability (or lack thereof) of alternatives to PTD have not been observed in the courtrooms during the course of this research.

Lack of discussions on the use of PTD alternatives was also noticed in most decisions ordering PTD, reviewed in the course of this research. The requirement to provide arguments why other measures are unsuitable is mostly treated as a formality in practice. Single-sentence, non-specific justifications are often given, such as "other measures are unsuitable because there is a risk that the suspect might abscond or flee from the investigation". PTD decisions containing no references to the suitability of PTD alternatives were also not uncommon.

More than 90% of the surveyed defence lawyers believed that judges rarely seriously consider the use of alternatives to PTD and most (almost 80% of the surveyed lawyers) thought that judges have little trust in these measures. Almost a third (10 out of 36) of lawyers participating in the survey commented that their suggestions to use more lenient alternatives during the PTD hearings are either considered only as a formality or simply ignored by the judge.

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[120] Jablonski v. Poland (33492/96), 21 December 2000, para. 83.
[121] The Code of Criminal Procedure, Article 122 paragraph 7
[122] The Code of Criminal Procedure, Article 123 paragraph 4
[123] See section IV "Context", II "PTD reforms" for more information on this.
[124] See section IV "Context", I "PTD procedure" for details.
[125] The Code of Criminal Procedure, Article 125 paragraph 2

Quote: "Very often it is viewed as a pure formality, as a non-procedural action, because other restrictive measures are granted by the prosecutor. During my whole work experience only several times has the court listened to these arguments and indicated to the prosecutor in the ruling what other restrictive measures would be sufficient and recommended." Defence lawyer

The vast majority of surveyed defence lawyers (over 90%) felt that generally alternatives to PTD are sorely underused, with bail especially being pointed out as a measure that could and should be employed more frequently. Half of the surveyed lawyers specifically commented that monetary bail is an underused measure. Several of these lawyers noted that they believe the financial surety provided under bail is sufficient to counter the risk of a suspect absconding.

Quote: "Sometimes a significant loss of property (bail) is more intimidating to the person than spending several months in detention." Defence lawyer

All of the interviewed prosecutors claimed that they view the use of PTD alternatives positively and try to employ them whenever possible. However, most of them stressed that these measures cannot be trusted in all instances and find that they are not sufficient to counter the risk of flight, threats to investigation or the possibility of re-offending in all cases.

House arrest was particularly pointed out by two of the interviewed prosecutors as lacking effectiveness, as information technologies can be used by a suspect under arrest to contact other suspects or witnesses and possibly exert influence over them, thus jeopardizing the investigation. Also the court order for house arrest usually allows the person to leave the house for at least half a day for work, school and other necessary reasons. The interviewed prosecutors felt that there is little control over the suspect during that time window, and it can be used to flee or hinder the investigation.

Quote "House arrest [allows for] correspondence through other means. Not even email or "Skype", all other internet [apps] – "Whatsapp", "Viber" and so on. [...] However, if we allow [the suspect] to access networks, he continues the same crime and influences his accomplices, since this is how this crime is committed. He does that while he is isolated, even though house arrest is a very strict and physically limiting measure. But this does not work, at all, we tried numerous times, dozens of times we have tried this." Prosecutor

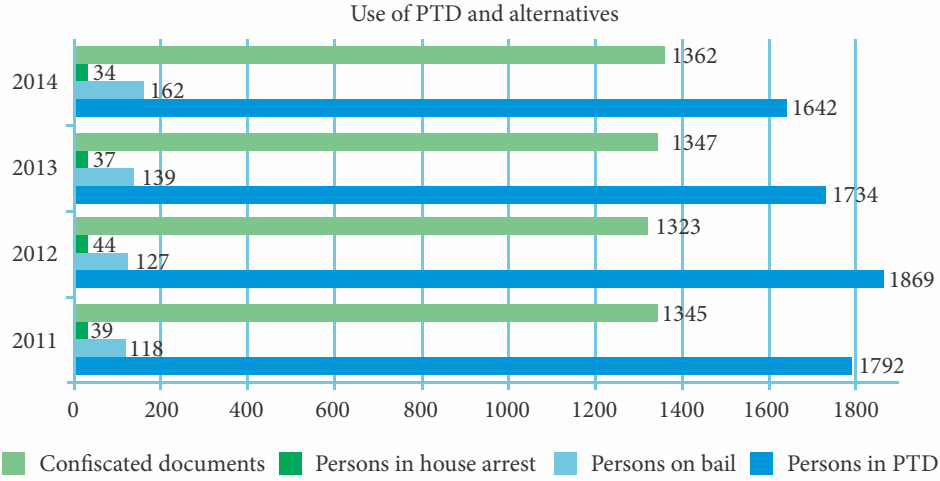
Monetary bail, on the other hand, was recognized as a more effective measure by most interviewed prosecutors, as the financial restriction is recognized to be suitable to counter the risks associated with releasing a suspect.

Quote "If, for example, [the suspect] can pay a sufficient bail, it is effective enough, this measure. Either himself, or his relatives for him. [...] if, for example, he admits his guilt and can pay the bail, in that case he is sufficiently bound by the bail." Prosecutor

Available statistical data also indicates that more lenient alternatives are underused, as seen in Chart 4. Measures that impose significant restrictions on the suspect but are less severe than PTD – monetary bail, house arrest, confiscation of documents – were chosen for comparison, as closest available alternatives to detention.

As PTD is clearly established in the CCP as a measure of last resort, these alternatives should be turned to first in most cases. And, thus, they can realistically be expected to be used more frequently than PTD. However, statistical data on the use of these measures indicates that detention is often preferred over these alternatives.

Chart 4[126]



It is interesting to note that the use of monetary bail, even if relatively low, is at least noticeably increasing, while the use of house arrest remains very low. The lack of trust in house arrest is partially explained by the reasons given by the interviewed prosecutors, i.e. it still allows the suspect

[126] Statistical data provided by the Information Technology and Communications Department under the Ministry of the Interior, available at: http://www.ird.lt/statistines-ataskaitos/

relative freedom and offers limited control. A new restrictive measure, intensive supervision, which has been introduced at the beginning of 2015, attempts to mitigate some of these issues.

Intensive supervision is essentially house arrest with the addition of an ankle bracelet placed on the suspect for electronic surveillance. However, it has yet to be applied in a single case. This is because the State has not yet acquired the electronic bracelets required to implement this measure.[127] Nonetheless, some of the interviewed judges and prosecutors seem optimistic about the new measure and expressed willingness to place their trust in, as well as hope that it will allow for a reduction in PTD rates.

The findings of the research and the available statistical data point towards a general lack of trust in PTD alternatives amongst prosecutors and judges. In some instances the possibility of using alternatives to PTD seems to be only a formal consideration and is not given due attention, in contravention to standards established by the European Court of Human Rights.

Suitability of alternatives to detention should be discussed more rigorously and in greater depth in the PTD hearings, as well as the court decisions ordering detention. This is partially addressed by the June 2015 amendments to the CCP, which established explicitly that the factual circumstances and arguments that led the court to believe that less strict restrictive measures were not appropriate in that case must be stated in the decision to order PTD.

It is also necessary to expand the use of monetary bail and finally enable the use of intensive supervision, which is thought by practitioners to be a more reliable measure than house arrest, and thus could decrease the use of PTD.

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[127] See section IV "Context", II "PTD reforms".

VIII. Review of pre-trial detention

A review procedure for pre-trial detention (PTD) is essential in ensuring the lawfulness of prolonged detention and assessing whether reasonable grounds to continue restriction of an individual's liberty exist. Under the European Convention on Human Rights, detainees have a right to actively seek judicial review of their detention, as established by the European Court of Human Rights (ECtHR).[128]

Under the Code of Criminal Procedure (CCP), PTD can be ordered for up to 3 months at a time. At the end of the ordered detention period the prosecutor may request an extension of PTD for up to another 3 months.[129] This results in a *de facto* review of PTD at least every 3 months. The suspect placed in PTD or the defence lawyer cannot initiate additional reviews but they may appeal the decision to order or extend PTD. However few such appeals and their outcomes were analysed in the course of this research, thus they were not included in discussions on PTD review.

When requesting an extension of PTD there is no requirement in the CCP to provide new or additional evidence. But there is a specific provision under which in the stage of pre-trial investigation the judge is under an obligation to refuse extension of PTD if no investigatory actions took place in the last two months of PTD, and no objective reasons for this are provided.[130] No other specific requirements for considerations of PTD extension are included in the CCP.

I) PTD length

The average length of PTD in cases reviewed for this study was 6 months. This is fairly consistent with the available statistical data from state institutions, which indicates that the average length of PTD is between 7 and 8 months.[131] The discrepancy can, at least partially, be attributed to the fact that most of the case files reviewed in the course of the research were made available by district courts. District courts store cases concerning lesser crimes punishable by shorter terms of imprisonment.[132] The majority of cases concerning grave crimes, punishable by more than 6 years imprisonment, are stored in regional courts.[133]

Over 80% of the defence lawyers surveyed in the course of the research thought that there are common reasons for long periods of detention. The most often indicated reason for long-term detention was allegations of grave crimes – over 20% of all interviewed lawyers specified this as one of the most common reasons for long term PTD. This is consistent with the findings of the research. In cases analysed during the case-file review more than half (53%) of instances of PTD in excess of 6 months occurred in cases concerning grave crimes.

While there is no basis to assert that PTD length of around 6 months contravenes the European

[128] Rakevich v. Russia (58973/00), 28 October 2003, para. 43.
[129] The Code of Criminal Procedure, Article 127 paragraph 1
[130] The Code of Criminal Procedure, Article 127 paragraph 7
[131] See IV, Context, Table 3.
[132] 56 case files were made available by district courts in Kaunas, Klaipėda, and Šiauliai, and 5 case files by Vilnius regional court.
[133] The Code of Criminal Procedure, Article 225

Convention on Human Rights by itself, it is worth reiterating in this context that reliance solely on the seriousness of the alleged criminal offence as a reason for continuing PTD is in contravention to the ECtHR case-law.[134]

II) Decision-making in PTD reviews

For a PTD review to constitute a real assessment of the lawfulness of continued detention, it must meet certain criteria. The ECtHR has established, amongst other standards, that in the judicial review of detention equality of arms of the parties must be ensured,[135] the reviewing court must act under the presumption of release,[136] and that continued detention may only be justified if there are specific indications of a genuine requirement of public interest which outweighs the rule of respect for individual liberty.[137] Finally, decisions ordering continued detention should give sufficient motives for its need, and not simply reproduce previous decisions.[138]

Surveyed defence lawyers mostly do not find that the current system ensures sufficient scrutiny of the need for PTD extension: over 80% of surveyed lawyers believed that the judge does not give an adequate consideration to the relevant factors in the review hearings, and almost 90% believed that the reviews themselves are too infrequent to properly take account of changed circumstances of the suspect or the case.

Six surveyed lawyers commented that in some cases such review hearings are simply a formality which results in formulaic decisions ordering PTD extension, containing no deeper analysis of the circumstances of the cases. They pointed out that decisions ordering extensions are often based on a general finding that "the grounds for pre-trial detention have remained", and contain no further analysis while usually being worded very similarly or identical to previous decisions.

Quote: "After detention is ordered, decisions extending it are simply copied – it is obvious from the wording and repeated grammar mistakes." Defence lawyer

Half of the judges interviewed in this research did emphasize that establishing whether the original grounds for which PTD was ordered are still in place is their primary concern when deciding on PTD extension. The other two interviewed judges noted that their first concern was whether investigatory actions are being carried out that justify the need for detention, and whether more evidence against the detained suspect is being collected.

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[134] Cabala v. Poland (23042/02), 8 August 2006, para. 31.
[135] Reinprecht c. Austria (67175/01), 15 November 2005, para. 31.
[136] Michalko v. Slovakia (35377/05), 21 December 2010, para. 145.
[137] McKay v. the United Kingdom (543/03), 3 October 2006, para. 42.
[138] Yağci and Sargin v. Turkey (16419/90 and 16426/90), 8 June 1995, para. 52-55.

Quote: "Even if other grounds for detention exist, I always look at whether there is more information being collected, whether the [allegations] are growing stronger that [the suspect] may have committed the offence." Judge

Some of the issues raised by the defence lawyers were indeed observed in the course of the case-file review. In almost all (93%) of the cases where PTD extension was requested, it was granted. Instances where new evidence demonstrating the need of further detention, or lack thereof, was presented by the prosecution or the defence were rare – this happened in only around 15% of analysed cases.

The research demonstrated a worrying tendency of the courts to provide very general arguments in decisions ordering extension of PTD. The court had relied on a general finding that "the grounds for pre-trial detention have remained", sometimes accompanied by a repetition of earlier arguments, in 40% of the analysed decisions extending the detention period. Detailed reasons for the extension were provided in only one quarter of the reviewed cases.

This type of reasoning may sometimes give basis to indefinite PTD: if the risk of a suspect fleeing was established based on lack of social ties – unemployment, absence of fixed residence, spouse or dependents – these grounds are rather unlikely to disappear while a person is held in detention.

These findings on PTD reviews raise concerns about the PTD extension proceedings being in fact only a formality in many cases, rather than the means to effectively scrutinize the need for continued detention. As such, they can be considered falling short of the requirement to demonstrate the existence of specific indications of the need for continued detention, outweighing the rule of respect for individual liberty, as stipulated by the ECtHR.

Quote: "[The decision to extend PTD] says "the grounds for detention have not disappeared". I find that very funny, because the grounds will not disappear as long as the provision establishing them exists in the law. On the other hand, if the prosecutor were to release a detainee, he would show that detention was unnecessary [in the first place]." Defence lawyer

When reviewing pre-trial detention, the courts should take care to demand evidence demonstrating specific need for continued detention, and base their decisions to extend detention on clear arguments that are tailored specifically to the circumstances of the case at hand. A general finding that "the grounds for pre-trial detention have remained" should not be considered an adequate reason for extending pre-trial detention.

IX. Outcomes of criminal proceedings that involve pre-trial detention

In the course of the case-file analysis the final outcome of the case was looked at to see whether the accused was acquitted or found guilty, and, in the latter, whether a custodial sentence was ordered. This is important, as placement in pre-trial detention (PTD) is likely to have lasting negative consequences to a person's life despite being found not guilty later.

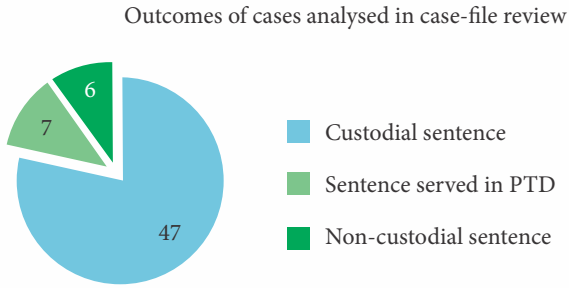
Similarly, ordering PTD in cases where there is little or no chance of a custodial sentence might be disproportionate, as PTD is equivalent in its conditions to imprisonment. On the other hand, instances where the detainee serves the full sentence in PTD before the final court decision and is then immediately released on sentencing are also problematic, as a person is being punished before being found guilty. Such verdicts, if given on a regular basis, would also give rise to the suspicion that judges are actually deciding to not or to order a lesser – and perhaps more appropriate sentence – in order to avoid for possible compensation claims for unlawful PTD.

One of the interviewed prosecutors stressed that, when deciding on whether to request detention, one of the major factors considered is the probability of a real[139] imprisonment sentence. Indeed, the findings of this study indicate that acquittals or withdrawal of charges for persons who have been placed in PTD seem to be rare. No such cases were encountered during the casefile analysis in this research. However, such instances are not unheard of. Two defence lawyers surveyed in this research provided examples of charges being dropped due to statute of limitations or a detainee being acquitted in a case where PTD was a result of illicit investigatory actions in the first place.

Quote: "A 20 year old girl was placed in detention for 6 months. She, being naive, allowed her friend to use her bank account. Unknown to her, the friend was committing telephone fraud. Despite her giving detailed evidence, which were fully confirmed, the prosecutor stubbornly requested extension of detention. And the courts would extend it and reason that she has relatives in Russia and may abscond. After half a year in Lukiškės [remand prison] she was released, and two weeks later the charges were dropped. The prosecutor explained that it was his way of intimidating her and the he was expecting different evidence, and the courts viewed everything very formally and without delving into the defence arguments or suggestions to apply a different measure instead of detention." Defence lawyer

[139] As opposed to a suspended sentence, under which the person is not actually placed in prison, if she or he commits no further offences during the period of the original sentence's suspension.

Chart 5[140]



Based on the findings of the case-file review, non-custodial sentences for pre-trial detainees seem to be an occasional occurrence. In the course of the research, 6 such instances were recorded which make up 10% of the case-files analysed. However, it must be pointed out that at least in half of these cases PTD was ordered after and because the suspects violated the conditions of alternative restrictive measures or failed to appear before court.

The Criminal Code specifically establishes that time spent in PTD is deducted from the final sentence ordering imprisonment.[141] The PTD period is also converted and deducted from sentences imposing fines, community service, and other penalties. According to the findings of the case-file review, instances where the suspect serves the full sentence in PTD before actually being sentenced, and is then released on sentencing, also occur occasionally. 7 such instances, or a little over 10% of cases reviewed, were recorded during the research. The longest period of PTD in such case was 16 months.

However, not a single case was observed, where the sentence handed down by the court was shorter than the period of PTD. Complete absence of sentences shorter than the period of PTD is somewhat surprising given that instances where the sentence is served in full in PTD are not entirely rare.

Some criminal law scholars suggest that this no coincidence, and that judges consciously try to "pack" the full detention term into the final sentence.[142] Judges may be wary to order imprisonment for a period shorter than at least the time spent in PTD, as this may raise legal issues of illegal detention and encourage the former detainee to sue for damages. One of the interviewed judges opined that the court may find it easier to order a custodial sentence if the accused has been placed in detention during the proceedings, or to hand down a sentence which is equal to the time spent in PTD.

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[140] Data collected in the course of the case-file review. 1 case omitted due to insufficient information in the case-file.

[141] The Criminal Code, Article 66

[142] G. Goda, M. Kazlauskas, P. Kuconis, „Baudžiamojo proceso teisė". Vilnius, 2011.Pages 236-237.

Quote "In certain cases, I think, it is easier to order imprisonment and deduct pre-trial detention and release the person almost immediately. [...] Seemingly [pre-trial detention] does have some influence, it is easier for the court to order imprisonment then, psychologically, that is my subjective opinion [...]" Judge

According to the findings of this research, instances where former detainees are given non-custodial sentences or serve the full sentence in PTD both make up a noticeable portion, over 10% each, of case outcomes. The number of PTD orders in cases with non-custodial sentences can be mostly explained by necessity of detention after violations of release conditions, as discussed above.

However, prevalence of instances where the full sentence is served in PTD is worrying. First, it points towards a practice of artificially "inflating" custodial sentences, so as to fit the full PTD period. Second, in such cases the fundamental principles of the justice system and the purpose of the trial may come into question, as the punishment comes before the person is actually found guilty by the court.

Due concern should be afforded by the judges to such flawed practice and sentences, especially in the courts of appellate instance, and sentences should be handed down according to the requirement of the law, rather than the time spent in PTD.

X. Conclusions and recommendations

I) Conclusions

1) Pre-trial detention (PTD) is overused. Even though it is clearly established as a measure of last resort under Lithuanian laws, it is used significantly more often than its closest alternatives, which should be the first option, and over 95% of prosecutors' requests for PTD are granted.

2) Legal representation is guaranteed in all PTD cases. This representation is mostly provided by legal aid lawyers who often provide poor services. Given the large portion of cases in which legal aid is relied on, this is severely detrimental to the suspect's right to defence and the fairness of PTD proceedings.

3) The defence is generally allowed access to the case file, however, concerns were raised that defence is only allowed partial rather than full access, thus impeding the defence's ability to effectively challenge PTD.

4) Although the adversarial nature of the PTD proceedings is observed in the court hearings, arguments and submissions made by defence lawyers and prosecutors are not always treated equally. The prosecutors may be identified as the stronger side, as their arguments have more impact on the court's decision and their requests are granted more often.

5) Evidence specifically tailored to support or contest the need for PTD is rarely used in PTD proceedings; the parties and the court usually rely on available case material and suspect's characteristics, and form their arguments as well as draw conclusions based on that information.

6) Most court decisions ordering PTD are insufficiently reasoned and tend to rely on overly general and formulaic arguments, with little individualisation to the case at hand. Decisions ordering PTD on grounds of preventing threats to investigation are an exception to this and are mostly well reasoned.

7) A significant amount of defence lawyers believe that pre-trial detention is occasionally used unlawfully, to pressurize suspects into giving evidence or confessing.

8) Certain social qualities possessed by the suspect, such as unemployment or previous conviction, and the possibility of long-term imprisonment if sentenced are over-relied on by the courts as reasons for ordering PTD.

9) The suitability of applying alternative measures instead of detention is not discussed and analysed sufficiently in PTD proceedings. Court decisions ordering detention generally contain none or little analysis on why other measures could not have been applied.

10) Use of monetary bail, although very low, is somewhat increasing, but there is very little trust in house arrest amongst prosecutors and judges. A new measure, electronic monitoring, is being introduced, as an additional alternative to detention, though it is not yet being used due to lack of required equipment. Some prosecutors and judges demonstrate positive attitudes towards it.

11) Courts deciding to extend PTD often provide unsatisfactory reasoning for doing so and base their decisions on overly general arguments, while new evidence supporting the need for continued detention is rarely provided.

12) Most persons placed in PTD receive custodial sentences. A noticeable portion of detainees serve their full sentence in PTD. If a person has been placed in PTD, courts are unlikely to order a sentence shorter than the time actually spent in custody, which might lead to courts ordering longer sentences than necessary under law.

13) Judges and prosecutors receive very limited training on the European Court of Human Rights standards concerning use of PTD, and consequently lack knowledge on international human rights standards in this area.

II) Recommendations

- **To the Parliament**

Certain legislative changes are required to address shortcomings in the current PTD legal framework:

1) Detainee's personal participation in all court hearings in which her or his detention is considered should be ensured;

2) Grounds for refusing the defence full access to the case file in the pre-trial investigation should be reviewed and arguments proving necessity to refuse full access should be provided by the prosecutor when doing so;

3) During PTD reviews new evidence supporting the need for continued detention and clear motives for decision to extend PTD should be required by law, and judges should be able to imposition investigation-related deadlines, when extending PTD.

- **To the courts**

The June 2015 Code of Criminal Procedure amendments to the PTD legal framework should be duly implemented, and great care should be taken to change the case-law in accordance to the new requirements set out in these amendments.

There is also a strong need for improvements in the decision making process regarding PTD and reasoning of the decisions ordering PTD:

1) Care must be taken to give equal weight to arguments presented by both the prosecution and the defence;

2) Evidence specifically supporting the need for PTD or its extension should be requested for in more cases;

3) Reasons for ordering or extending PTD should be clearly stated in the decision and tailored specifically to the case at hand, without relying on general and formulaic arguments;

4) Individual circumstances of each suspect should be analysed, and qualities such as previous convictions or unemployment should not be afforded undue weight when making decisions on PTD;

5) The perspectives of using alternatives to PTD or their unsuitability should be extensively discussed in PTD hearings and analysed in the decision ordering or refusing PTD, as per the June 2015 amendments to the Code of Criminal Procedure;

6) The practice of ordering sentences equal to time spent in PTD should be reviewed.

- **To the Lithuanian Bar Association and the Ministry Justice**

  The current state guaranteed legal aid system should be reviewed, and a mechanism ensuring effective supervision of legal services quality and accountability of lawyers should be set up. Performance of legal aid lawyers should be periodically reviewed.

  Also, additional research into possible reasons for the poor quality of legal aid services should be conducted, such as adequacy of the legal aid financing and motivation of legal aid lawyers.

- **To the Ministry of Justice**

  Further research into the quality of interpretation and translation in criminal proceedings should be conducted, so as to establish whether services provided are of sufficient quality to ensure the rights of the defence.

- **To the Prosecutor General's Office**

  Further research into allegations that pre-trial detention is used to coerce suspects into giving evidence or confessing should be carried out. Prosecutors should be instructed on relevant European Court of Human Rights established standards.

- **To the Ministry of the Interior and the Police Department**

  Steps should be taken to introduce electronic bracelets for electronic monitoring (intensive supervision) without further undue delay, as this measure could have a strong effect on reducing the use of PTD.

- **To the National Courts Administration and the Prosecutor General's Office**

  Training for both judges and prosecutors should be organized on the European Court of Human Rights established standards concerning the use of pre-trial detention and human rights protection, as part of compulsory professional development.

  A clear codified guide of European Court of Human Rights established standards on the use of PTD should be prepared, as a resource for both judges and prosecutors when applying for and deciding on PTD.

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The Human Rights Monitoring Institute (HRMI) is a non-governmental, non-profit organization that aims to contribute to the development of open and democratic society that ensures human rights and freedoms.

HRMI constantly monitors the human rights situation in Lithuania, takes part in the legislative process, analyzes and assesses the work of the authorities, prepares alternative reports to international human rights supervisory bodies, organizes human rights education events, conducts studies and initiates strategic litigation with respect to systemic violations of human rights.

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