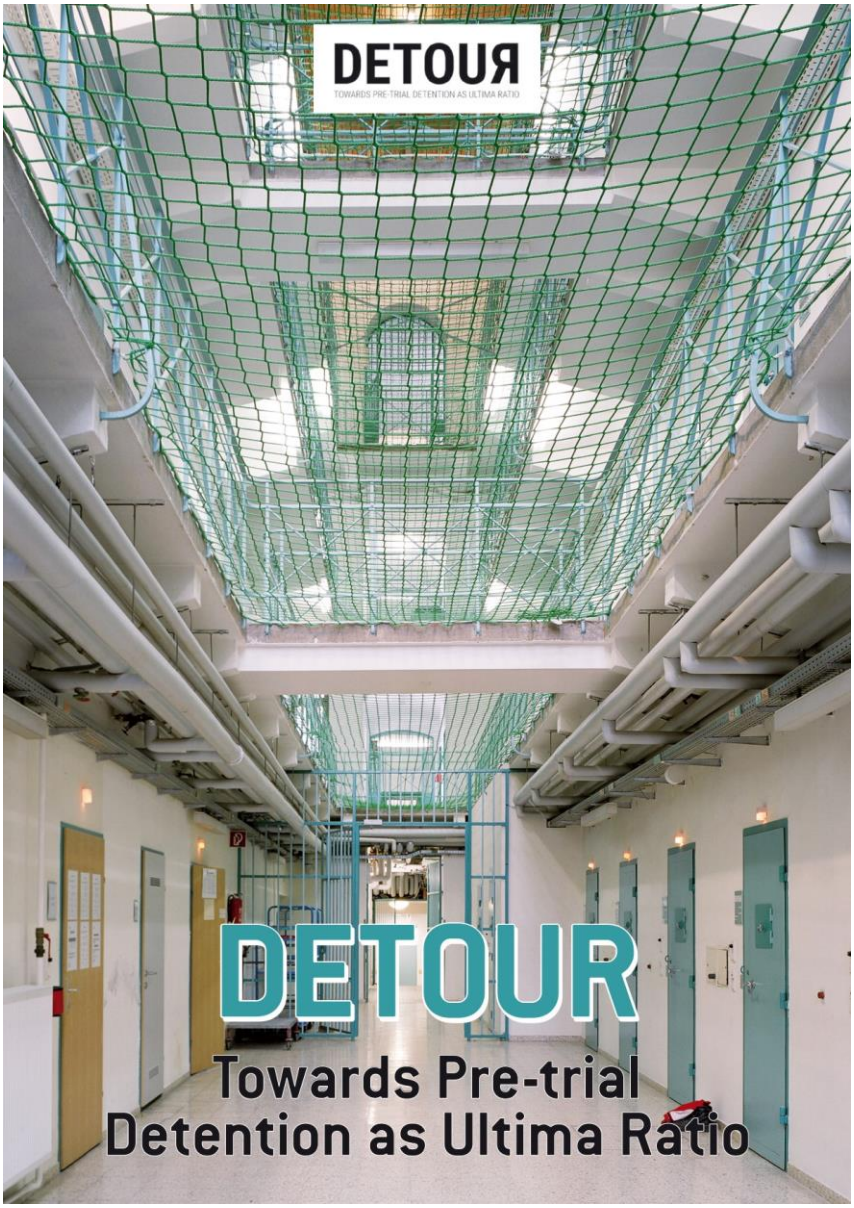
LIETUVOS TEISĖS INSTITUTAS

DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO



2nd *Lithuanian* National Report on Expert Interviews

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1. Research questions

Main question: what are the reserves for more limited use of provisional measures and in particular pre-trial detention (PTD)?

Is there any shift in practices of application of provisional measures in recent years? If so, what are the drivers of the shift?

Do the choice of the measures and every measure in particular satisfy the needs of the practitioners? Is the list of measures comprehensive enough?

What are the practical limitations for the use of the measures, in particular other measures than PTD?

Are there any signs of over-use of PTD and other measures (incl. least severe measures)?

How do the practitioners interpret the risks that justify provisional measures (risks of absconding, re-offending, impeding the proceedings)? How sensitive (tolerant) are they to these risks? How do they draw a balance between the interest to avoid (minimize) these risks and the interest to minimize limitations of the rights of the suspects by imposing the measures?

How do the practitioners assess the effectiveness of the European Arrest Warrant (EAW) system? Does it influence their tolerance to the risk of absconding?

Does European supervision order (ESO) operate in practice? How the practitioners assess the effectiveness of the ESO? Do they see it as promising opportunity for decrease of the need to use PTD?

Who are the key players in the decision making and how effective are their roles?

What external or internal factors make influence on the decision making?

Is the control of the decisions on measures effective?

2. Methodology

The second national report is based on results of 37 face-to-face interviews with the parties in the decision making on PTD and other measures: prosecutors, judges and defense attorneys.

In the pre-trial investigation, the prosecutors are the decision makers regarding the least severe measures, also they play the key role in decision making on other measures, including PTD. Therefore the number of interviewed prosecutors made the biggest share among the respondents – 18 out of 37. We interviewed one prosecutor from the office of Prosecutor General, who deals with international matters (we intended to learn about international execution of EAW and ESO), three prosecutors from the higher Vilnius district prosecution office (we intended to learn about measure application practices in the cases for serious crimes: smuggling, drug trafficking and murders) and 14 prosecutors from the lower prosecution districts, most of whom work with the common property and other offences. Geographically prosecution districts covered bigger part of Lithuania - districts in the biggest five cities and in two small towns. Three of prosecutors work in capital city Vilnius (the southeastern part of Lithuania), one in second largest city Kaunas (central part), two in third biggest city Klaipėda (western part, seaport), two in the fourth biggest town Šiauliai (western North), one in fifth biggest town Panevėžys (central North). Also, two prosecutors from the small town near Šiauliai – Radviliškis and three from the small town in the northeastern part of Lithuania Anykščiai have been selected. The respondents were appointed by the chief district prosecutors.

We interviewed 15 judges in total. Two of them sit in the Higher Vilnius court, they hear both appeals against PTD decisions of pre-trial investigation judges, also make decisions upon extension of detention for more than six months and hear cases and impose measures in the trials for serious criminal offences. The other 13 work in the first instance courts. The judges sitting in lower courts geographically also represented most of the territory of the State. We interviewed four judges in Vilnius lower district court – two pre-trial investigation judges and two trial judges. Two of our respondent judges work as pre-trial judges in Kaunas district court (the central city of Lithuania), two in Šiauliai district court (northern West), one in Klaipėda court (West). Judges from smaller district courts Anykščiai and Utena (both northern East) periodically switch their functions from pre-trial judge to trial judge. Contacts with Vilnius judges were made directly by the researchers, other judges were communicated via the presidents of the courts. Both judges

and prosecutors have showed interest in participating in the research. There were no refuses among prosecutors to participate in the research and only two presidents of the courts refused to cooperate.

We contacted only four defense attorneys successfully. Many attorneys made excuses with reference to their workload or little experience in work with PTD and other measures.

However, our interviewed attorneys gave us very comprehensive interviews and fairly presented the attorneys' perspective in our research. Three of attorneys work mostly with serious offences (drug trafficking-related, economic, financial crime, corruption-related offenses). One of them works as State-paid attorney. He is mostly invited to represent suspects in cases for property and State border infringement offences. One of the attorneys had rich professional experience as a prosecutor, and one as an investigator. That gave some additional perspectives to their experiences.

Interview questions were based on the uniform questionnaires, agreed and jointly prepared by the Project partners. The questionnaire consisted of two parts - the vignette with the particular hypothetical case, the list of vignette related questions and the list of general questions. The respondents were asked to answer questions following their direct professional experience. Every interview took place in the respondents' work office and lasted from 45 minutes to two hours[1].

[1] We want to express special thanks to Ana Kozlovskaja, Agnė Lotužytė, Monika Naujalė, Kotryna Raulinaitytė and Skirmantė Sakalauskaitė for their valueable contribution to the project with thorough work on interview transcriptions.

3. Overall reflections

Statistics on the measures imposed during the pre-trial investigation in the period 2004-2016, provided by the Department of Ministry of Interior, show a huge decline of detained suspects. Absolute numbers of detainees, held in custody at the end of the year decreased more than by half (51,8%) from 1248 in 2004 to 602 in 2016. Due to the massive emigration, the population of Lithuania also decreased remarkably in this period, so the decrease of the detainees ratio per 100 000 population was lesser, but still very significant - from 38,2 to 21,1 (44,8%). The decline by no doubt was affected by the decrease of numbers of registered criminal offences during this period by 21%. However we can still observe that decrease of the number of detainees outpaced the decrease of registered offences and therefore we can confirm significant changes in PTD application practices.

The absolute majority of respondents also noted downward trend of PTD application practices, except some respondents from smaller districts, who did not observe any changes in PTD practices. They also noted that numbers of PTD requests are very low in the province [judge 13, prosecutor 15]. We admit that with little numbers of PTD requests it is objectively difficult to observe if any substantial changes take place in practice.

Judges from bigger towns, especially from capital, noted that prosecutors make fewer requests for PTD and if they do, their requests are of good quality and are very rarely rejected.

"*I'd say, I can feel the decrease of requests for detention. Not a huge drop, but I receive less of doubtful, arguable requests. Of course, in the absolute majority of cases requests are approvable*" [judge 5].

"*In nowadays there are fewer decisions to detain suspects, the prosecutors request for PTD rarer, the grounds for PTD they provide are more substantial. Doubtful cases still appear sometimes, probably as the result of the pressure of police investigators. That's kind of stairs – police need PTD the most, prosecutors less, judges the least. Prosecutors filter the flow of PTD requests strongly, more carefully in recent years. I receive much less groundless requests for PTD*" [judge 1].

As a sign of improvement of the quality of the prosecution practices, some prosecutors noted that former practices to use PTD as a measure to force a suspect to confess are no longer employed [prosecutors 8 and 9].

Changes in attitudes of judges and improvement of their work quality may be also observed. One judge shared his impression that "*feels like judges are less afraid to release the suspect from PTD*" [judge 6]. Prosecutors admitted that it became more difficult to get approval for PTD in recent years, judges examine the factual grounds, the reasonability and proportionality of the PTD and other measures with more scrutiny. A formal approach where a judge might be satisfied with the plain statement of the grounds for the PTD and where he or she would not require for sufficient facts proving substantial risks for the proceedings is no longer frequent in practice [prosecutors 12 and 13].

Respondents shared their opinions what were the possible reasons for the aforementioned changes. First, change of generation of the practitioners has been mentioned. Judicial and prosecution systems received the substantial influx of the new young judges and prosecutors who have good knowledge of recent European standards for the protection of human rights and principles of rule of law and have no experience and ties with former (more restrictive) practices [judge 2, prosecutor 5]. As a rule, the position of pre-trial judge is a starting point for newly appointed judges, where they usually serve for the first couple of years. Secondly, respondents mentioned gradual overall development of Lithuanian legal professional mentality, it's transition from (post-Soviet) deterrent and security-focused attitude to more liberal, more human rights-focused approach, which is stimulated by the precedents of European Court of Human Rights and of the highest courts of Lithuania, also by the recommendations of the Prosecutor General and public academic discussions [attorney 1, judges 1, 2, prosecutors 5, 12, 13].

- The significant downward trend in PTD application practices might be observed during the last 13 years.
- Rise of the scrutiny standards in the evaluation of the grounds of PTD both in the prosecution and judicial practices might be observed during the period.
- Change in professional attitudes, shift to more liberal, human rights-focused approach might be explained both by steady promotion of higher standards in the precedents of the ECHR and Lithuanian higher courts, in the inner communication of prosecution offices and also in the academic discussions on one hand and by the influx of young generation into the judicial and prosecution profession on the other.

4. Basis of decision making on PTD

4.1 Risk of absconding

Risk of absconding is most commonly used ground for detention in practice in Lithuania. It was most often mentioned as the most frequent amongst the interviewees. The file analysis of 63 court decisions on imposition of detention indicated that this ground was employed in 89% of the decisions to detain suspects (often in combination with another ground for detention – risk of re-offending, which has been referred to in 56% of court decisions)[2].

Judges and prosecutors almost with one accord agreed on main circumstances that support the ground of flight risk: (a1) social bonds outside the country; (a2) poor quality of social bonds within the country, (b) unemployment; (c) lack of permanent residency, (d) prior criminal records and (e) perspective of long-term imprisonment sentence. The interviewees emphasized that any of these circumstances could hardly have decisive role. The circumstances must always be evaluated altogether.

Present or former social ties abroad (working place, close relatives, friends residing abroad, records of travels, criminal records abroad) have been indicated by the interviewees as important factors of the risk of absconding. Emigration level is very high in Lithuania (especially in province, where social situation and perspectives are often poor) therefore these circumstances appear rather frequently. One prosecutor commented with some irony that if the suspect's bonds abroad had been established "*written obligation not to leave would not prevent the suspect from fleeing*" [prosecutor 15]. A defence lawyer [4] regretted that this line of argumentation is often accepted too easily by the courts.

The social situation of the suspect (his or her bonds with family, employment status, place of residence) also plays it's role in the assessment of the risk of absconding. A need for qualitative assessment of relationships instead of formal one was emphasized by interviewed practitioners. Even in the case of

[2] By using National data base of the courts' files (LITEKO) we collected court decisions on either imposition or extension of detention. All decisions were made in the stage of trial, not pre-trial. We have collected 63 decisions on PTD, in 55 of them detention has been imposed or extended. The timeframe of decisions we collected was year 2014-2015. From the said range of time we randomly picked decisions from three categories of the cases – 1) theft (large scale excluded), 2) drug trafficking and 3) minor violence (that appeared to be mostly domestic violence cases). We also picked some additional random cases (driving accidents, illegal possession and distribution of alcoholic beverages, trafficking of goods etc).

joint residence with his or her family a suspect may live rather separate life without taking care of others and maintaining close personal relationships.

Unemployment of the suspected individual was also considered in the context of the flight risk and sometimes received very strightforward comments:

"If the suspect is unemployed or works somewhere illegally in the construction sector, he/she will abscond on the first occasion" [prosecutor 12].

On the other hand, if the suspect is unemployed, it does not necessary show lack of his or her effort to establish his or her social connections and consequently does not necessary indicate increased risk of absconding.

"The suspect might be disabled or have any other reasons explaining his/her status of unemployment" [judge 13].

We assume the same applies to the illegal work of the suspect. However few practitioners expressed their view regarding an illegal work of the suspect which was considered as "*a negative feature of the suspected person*" [judge 5].

The close look at the job situation of the suspect is often required as suspects sometime provide formal and suspicious evidence of their employment status.

"The suspect signed his contract of employment a month ago, nevertheless, he could not even explain his functions at work. We also encountered the fact that his quality of life did not meet the size of the salary, which was two-three times lower" [prosecutor 8].

The practitioners viewed the importance of the suspect's permanent residency in different aspects. One judge considered the lack of permanent residency (including apartment rent or living with the relatives) as the evidence of incoherent lifestyle and therefore being in favour of detention [judge 8]. Some practitioners emphasized the importance of the possibility to contact the suspect. As long as the suspect was accessible, he/she might avoid being detained, even if he or she was homeless.

"*If they [homeless people] confess, registration to the police is a common measure. They can come to register from any place. Or even if they don't confess, registration to the police is also possible. If they do not come to register, then we consider stricter measures. But again, we evaluate entirety of the circumstances, not a particular one*" [judge 4].

Having bonds to foreign countries and commonly lacking of social bonds in Lithuania, foreign suspects face high risk of detention on the ground of risk of

absconding. With relatively low inflow of immigrants, foreigners make relatively small share of all suspects, no more than 2-3 percent. The main categories of suspects foreigners are 1) truck drivers from Belarus and Russia who transport illicit cigarettes, 2) foreigners from South and East Asia (Vietnam, India, Pakistan) also from Georgia, Chechnia (Russian Federation), who illegally cross State border with forged personal documents or without personal documents, usually with the intent to transit the country and aim to the Western Europe, 3) foreign students on students exchange programs, more often from African countries, 4) foreigners with permanent residence in Lithuania, 5) other visitors of the country.

The practitioners emphasized that permanent residence and established social bonds in Lithuania (family, business) play huge role in decision making regarding all suspects, including foreigners. If these circumstances may not be established, the likelihood of the foreign suspect's detention on the ground of the risk of absconding is very high. However, further scenario highly depends on the expected sanction. If the sanction is expected to be unrelated to imprisonment (most commonly it is a fine), the speedy proceedings are employed. If the facts of the case are clear, the investigation of the case might be completed within 48 hours of arrest of the suspect and detention might even not come into question. If the investigation takes more time, short term detention might be ordered (for a couple of weeks) and then foreign suspects apply for the financial bond and they are usually released as soon as they collect requested amount of money for the bail. It is common practice to demand that the person who offers the bail money (be it the suspect him/herself or other person) would also give written consent that the bail money would be used later to cover the expected fine. However, this highly effective practice (which has no explicit ground in the law), especially when *third person* is forced[3] to consent with giving up his or her money for the recovery of the expected fine, rises doubts of its legitimacy.

The prior criminal records of the suspect were also often mentioned as the circumstances that contribute to the establishment of the ground of the flight risk (unfortunately, often without any further explanations). Some prosecutors briefly grounded this assumption by their direct observations: "*suspects with prior criminal records abscond more often*" [prosecutor 3]. We may assume that on one hand it may be related to criminal bonds, skills and negative attitudes towards law enforcement which the experienced offenders might possess more often. On the other hand prior convictions and status of

[3] In case of refusal, the bail would be denied, and request for the detention of the suspect would be made and also longer proceedings would take place.

recidivist of the suspect give more realistic perspective of imprisonment sentence and thus higher motivation to abscond while first time offenders may expect non-custodial sanctions. But one prosecutor made very interesting point to the opposite direction, that (national) suspects with prior criminal records and absconding experience may be more reluctant to abscond repeatedly because they are aware of the costs of the abscondment:

"*Well, in the situations of borderline decisions whether apply detention or less severe measures, I usually recommend to the investigator to explain to the suspect the consequences of the absconding in very detail. Often suspects with prior records understand very well what is the EAO and what are the costs of bringing the fugitive back to Lithuania. The consequences of bringing back the suspect are not limited to his or her immanent detention but also the costs of transportation might be recovered from the suspect. It may amount from 2000 to 4000 EUR. Probably that's why abscondments happen rarely, in my practice only once or twice a year. Providing of this information to the suspects makes huge preventive effect*" [prosecutor 13].

The perspective of long-term imprisonment sentence was specified as important factor in PTD decision reasoning based on the ground of the flight risk, mostly relevant in cases of serious and grave crimes (e.g. homicide and drug-related crimes). At the same time, it was emphasized that the probable long-term sentence *per se* may not justify decision to detain the suspect on the ground of risk of absconding [judge 9].

A higher court judge provided the examples where the suspects in the cases of homicide, criminal association or drug trafficking related offences did not receive detention and attended the court hearings nevertheless: "*we have got proceedings against criminal association which is charged with drug trafficking, overall 30 suspects, but only four of them are in custody. Others enjoy liberty and all of them attend hearings. They received seizure of personal documents in conjunction with a written obligation not to leave*" [judge 5].

The attorney [1] recalled his or her talks with clients who were charged with very serious drug offences and faced the perspective of long term imprisonment and had no motivation to abscond. The clients told they did not see any sense to abscond because it was too costly to live in hiding. The terms of statutes of limitation are very long, they simply could not afford to spend so many years in hiding. While living under cover one needs to pay for his or her liberty and security and it costs a lot.

The prosecutor [5] also made estimations of the chances of the suspects to flee justice successfully, especially if the suspect was not experienced

and had no well-developed criminal bonds: *"It is difficult to flee to the third countries where he [the suspect] is basically alone and is in need of money and visas. Meanwhile here, in the EU [in the area of operation of EAW], law enforcement works well enough to find him/her. It could take a year but in the end, we would find him. I even see some advantages in absconding of the suspect because investigation gets no time pressure in such situation. Of course, we speak about the cases where the interests of the victims are not at stake"* [prosecutor 5].

We need to add that thorough assessment of the costs of the absconding and of the suspect's chances to abscond successfully may highly contribute to the more restrictive use of this ground for detention and thus contribute to more trust in less severe measures and to the fulfilment of the principle of detention as ultima ratio.

4.2. Risk of re-offending

The risk that a suspect would further commit certain crimes[4] (Article 122 of CCP) was considered as the second common ground by the majority of the interviewed practitioners. A few interviewees held the ground of re-offending even for the leading one, which is, however, being mostly established in combination with the flight risk. According to the file analysis, detention was motivated with the risk of re-offending in approximately 56% of the examined case-files and was the second most frequent ground after risk of absconding.

Practitioners distinguished the following arguments reasoning the risk of re-offending: (a) prior criminal records; (b) living from the illegal income, unemployment (in cases for offences committed for profit); (c) drug addiction (also in cases of offences committed for profit).

Prior criminal records were predominantly mentioned as the factors that indicate the risk of re-offending. Majority of judges and prosecutors emphasized that usually only systematic commitment of analogous (e.g. profit driven) offences allows establishing of serious risk of re-offending: "*If a person is*

[4] When a person is believed to re-offend, detention might be ordered on condition that a person is suspected or accused for having committed one or several serious or very serious crimes, or aggravated theft, robbery, extortion or aggravated damaging of property, and might, before rendering of the judgement, commit a new very serious crime or one of the crimes mentioned above (Code of Criminal Procedure (2002) No. IX-785, Article 122 section 4).
See further in S Bikelis and V Pajaujis (2016). *1st National Report on Lithuania*, chapter 2.2 "Legal Prerequisites". [26 September 2017]. Available from: <http://www.irks.at/detour/LT%201st%20National%20Report.pdf>.

suspected for the same crime, the risk of re-offending is obvious" [prosecutor 12], "*it would not be relevant if the suspect had committed unrelated offences before*" [judge 4]. A defence lawyer agreed that the prosecution were likely to highlight similar nature of previous offences when requesting detention due to the risk of re-offending [defence lawyer 3].

Also short time lapse between offences was commonly mentioned as direct indication of the imminent risk of re-offending. Typical examples were series of thefts committed by the suspects suffering from drug addiction, also drug trafficking, domestic violence, frauds via communications, typically committed by the prisoners via illegally obtained cell phones.

Unemployment and living from the legally unexplained income play significant role as the circumstances that prove the risk of re-offending in the cases for offences committed for profit.

Similarly drug addiction was claimed as an influencing aspect in pre-trial detention decision-making in the cases where need for money to acquire drugs was a motive to commit a crime, especially, a theft.

"If the person who is a drug addict breaches the public order, that's not relevant to re-offending. But if suspect commits a theft because he or she needs money for drugs that is totally different case" [judge 8].

Some practitioners related drug addiction to another ground for detention, namely, risk of flight. One prosecutor, who apparently thought of serious drug trafficking offences, claimed that drug addiction *per se* "*would not be a determinant factor [for detention] but would rather be combined with the potential long-term sentence*[5]" [prosecutor 5]. Other interviewee indicated very negative social picture of the drug addicts "*the drug addict suspect would be with no permanent residency or totally unreliable, i.e. difficult to reach in the sense of flight risk*" [prosecutor 3].

Though Lithuanian criminal procedure code does not provide for the measure of treatment of drug addiction, the determination of the suspect to undergo treatment was usually taken into consideration as the factor against detention. However sometimes it happens that judges lose their trust in suspect's willingness to undergo treatment:

"It is often the case when the suspect has been a drug addict for a long time, i.e. for the last decade. He/she persuades you of finally having found a rehabilitation place. Then you review his/her previous judgements and notice

[5] See further in chapter 4.1 "Risk of absconding", p. 8.

the same speeches in all the cases. I do not think I should believe such person for the tenth time" [judge 5].

4.3 Risk of impeding proceedings

The least common ground in practice was the risk that the accused would take action to prejudice the administration of justice (Article 122 of CCP, point b). The results of the file analysis confirmed it, as only 13% of the decisions to detain suspects had made reference to the risk of impeding proceedings. The absolute majority of these files were domestic violence cases (6 from 7 case files, accordingly). Also one of the practitioners confirmed that ground of the risk of impeding proceedings is mostly employed in this category of the cases [judge 5]. However even in this category of cases it was by far not the most frequent ground for detention. From 18 domestic violence cases where suspects have been detained, this ground has been used in 6 cases, as much as ground of risk og re-offending, and risk of absconding has been established in 14 cases.

The judicial practice has made a turn towards very restricted interpretation of this ground recently. According to the recent practice the risk of impeding proceedings might be established only when evidence of already committed actions or attempts to interfere with proceedings exist. Mere assumption of potential influence on associates, witnesses, victim or of risk of concealment or damaging the evidence may not justify this ground. Thou judges supported the new interpretation of this ground for detention, some prosecutors held different opinion and advocated for broader concept of risk of impeding the proceedings.

For example the judge [2] claimed that in order to establish the risk of impeding the proceedings the suspect should have had either a history of impeding proceedings or should have been caught *in flagrante delicto*, *"for instance, when the suspect is caught burning the documents during the search in the investigation of financial crimes" [judge 2].*

There were some prosecutors opposing judge's view as "*it is often unrealistic to find evidence for impeding proceedings on the very first day of investigation*" [prosecutor 12] or because "*interference, as it has been established in the CCP, was projected for the future actions*" [prosecutor 15]. One prosecutor recalled that once the court dismissed the risk of impeding proceedings even despite the evidence of previous interference with procedure [prosecutor 13].

Also one judge at some extent supported broader interpretation of this ground for detention in the context of involvement of another person into prostitution[6]. According to that judge, "at the very beginning after the crime has been committed, objectively there cannot be any evidence of already committed impeding of the proceedings but the risk may still exist" [judge 15]. The same judge continued that, however, "if a prosecutor indicates this ground later during pre-trial investigation with no prior records of impeding proceedings, we would dismiss this ground for detention" [judge 15].

Also a prosecutor confirmed that this interpretation already took place in practice:

"In one of the cases of involvement into prostitution the victims were from a vulnerable group of a society. Hence, we based our arguments of the risk that suspect may make influence on victims due to their vulnerability i.e. their disadvantages in education, livelihood, personalities, income and similar features. The court approved our request" [prosecutor 7].

Beside cases of involvement of another person into prostitution, practitioners also mentioned sexual offences (especially against minors) and domestic violence cases where broader concept of proof of the risk of impedement of the proceedings needs to be employed.

"Sexual crimes are very sensitive ones. Hence, we try to apply for a detention in such cases in order to prevent suspect's negative influence on the victim" [prosecutor 9].

Another turn in interpretation of this ground for detention is related with the interpretation of silence or non-confession of the suspect, his or her reluctance to give testimony about the location of the relevant items (e.g. stolen goods), accomplices etc. Some time ago non-cooperation of the suspect used to be commonly interpreted as impeding the proceedings and thus as the legitimate ground for the detention.

"*In nowadays prosecution and courts became modern – non-cooperation of the suspect and non-confession may not have any significance for the decision on detention of a suspect because a suspect has a right but not duty to testify*" [prosecutor 2]. This statement has been repeated by several respondents. However some of our respondents prosecutors and judges still interpret non-cooperation of a suspect as negative factor in favour of his or her deten-

[6] We could add, that similar situation accur in cases for human trafficking.

tion. This has been also reflected at some extent in the interpretations of the vignette situation[7].

Defence lawyer [2] also shared his observations that refusal to confess or make a statements for example about location of stolen goods or accomplices sometimes might be interpreted as circumstances supporting need for detention in order to secure the undetected stolen goods (to prevent their concealment or destruction) or prevent the communication with unestablished accomplices.

"Probably, the suspect would not be detained in case of a confession and sincere cooperation with the police. It is a decisive factor in practice" [defence lawyer 1].

The judge 4 shared his or her opinion that suspect's confession may play a role in the decision making on detention, however not in the context of impeding the proceedings, which would mean infringement of the right to remain silent, but in the context of risk of absconding. If the suspect confessesed, the judge explained, in return he or she would receive various legal privileges (reduction of sentence, possibility to be released from criminal liability etc.), which, in turn, would diminish suspect's motivation to abscond.

4.4 Other factors

Apart from circumstances that may prove the risks that are legally described as the grounds of detention, some other factors also play their role in the decision making. On one hand, these factors may indirectly support (or oppose to) judge's or prosecutor's assumptions that legitimate risks are serious enough (or in contrary – not serious enough) to reasonably justify the decision to apply for or to order detention. But on another hand, a risk exists that reference to the factors that are not listed in the law (of course, informal reference), may result in subjective decisions, it may open the gates for prejudices or punitive attitudes which are not compatible with the aims of the provisional measures.

We have found out that some practitioners admitted that suspect's general social (or anti-social) attitudes and his or her personal impression on a judge play significant role in the decision making.

[7] See further in chapter 10 "Vignette", p. 44.

One interviewed judge claimed he or she dedicates his/her time in the court proceedings to understand the suspect's philosophy of life, motives and personal attitudes towards the crime [judge 15]. Another judge, similarly, noted that he or she asks questions to reveal suspect's world-view, priorities in his or her life, motivation driving his behavior and added that he or she takes it as very important information [judge 12]. Another judge admitted very honestly that social bonds, employment or unemployment play only secondary role in the whole puzzle of factors of decision making, "*you simply see the person, how he or she speaks, what is his or her characteristics, what kind of offence he or she has committed. You get subjective impression and then you can "pull" the objective arguments to the relevant direction*" [judge 1]. One prosecutor admitted that suspect's arrogant stance may support decision to detain him or her [prosecutor 12].

A defence lawyer shared his impression that investigation agencies in "white-collar crime" cases even deliberately use the tactics aiming to demonstrate the suspect being "ugly", being of lower class (being criminal), with the aim to alienate him or her from a judge and thus to eliminate moral barriers that a judge may face when making decision to detain socially well adapted person (e. g. businessman). Having been detained very unexpectedly, the suspect would be presented before a judge after 40 hours in custody, after long stressful and sleepless hours, being untidy and chaotic (i. e. unshaved, uncombed and with no good-looking clothes) [defence lawyer 1].

Some practitioners expressed prejudices regarding the nature of the offence. One prosecutor mentioned that some colleagues regard thefts as the offence where the suspect deserves pre-trial detention and they put much effort to justify the grounds of detention, especially practitioners who were the victims of such crimes themselves in the past [prosecutor 5]. One judge noted that in the vignette situation the nature of the offence (burglary) speaks by itself in favour of detention [judge 4]. A prosecutor referred to suspects in violent, sexual offences, crimes against minors as more liable to detention [prosecutor 16].

But we also have got the opposite opinions, where practitioners denied the role of the nature of an offence as a factor in decision making. The prosecutor who works with murder cases admitted that he or she carefully examines how realistic are the risks described in the law and denied that the nature of the offence (murder) could lead to automatic imposition of detention (also providing examples where suspects in murder have been released on conditions) [prosecutor 4]. A judge also expressed the same attitude and gave an example where many of suspects in drug trafficking related criminal organization have been released on conditions [judge 15].

Practitioners were also inquired regarding the ethnicity and origin of the suspect. This role of this factor in decision making has been generally denied, the emphasis on social ties and permanent place of residence has been put[8]. Yet one practitioner distinguished the Roma people as being problematic in respect of social adaptation and noted their ignorance of public norms [prosecutor 11].

- Overall, the risk of absconding is the most frequently cited ground for PTD. It is common that more than one justification for PTD is established.
- The risk of impeding the proceeding is the rarest justification for PTD in practise. This justification is interpreted in a very restrictive way; usually, an actual attempt to obscure evidence must be established. Our respondents differed in reports of whether the silence of a suspect, e.g. his or her failure to reveal the location of the stolen goods, can be used to prove an act that impedes the proceedings. Among judicial respondents, this was generally considered an invalid justification for PTD.
- The judge's personal impression of the suspect's motives and general social attitudes expressed during the hearing, appear to play an important role for the decision to implement PTD.

[8] See further in section 4.1 "Risk of absconding", p. 8.

5. Less severe measures than PTD

5.1 Context

Lithuanian criminal procedure law provides for a rather long but exhaustive list of less severe measures (LSM): 1) intense supervision (electronic monitoring), 2) house arrest, 3) obligation to live separately from or stay away from the victim, 4) financial bail, 5) obligation to report to the police, 6) commitment not to leave, 7) seizure of personal documents, 8) for a soldier - observation/supervision by the command of the unit where he or she is s doing his or her service, and 9) for a minor – committal to the supervision of parents, guardians or foster parents or the administration of a children's institution.

The latter two can be applied to the specific groups of suspects only and thus fall out of the scope of our research. Application of obligation to live separately from or stay away from the victim in practice is mostly limited to the specific category of cases – to the domestic violence cases.

During the pre-trial investigation, the prosecutor has predominant role in the imposition of LSMs. He or she has authority to decide to impose the bail and more lenient measures. Intense supervision, house arrest and obligation to live separately might be imposed by the court upon the request of the prosecutor. The court has authority to impose any less severe measure instead of a measure requested by the prosecutor. However, in practice, it almost never happens. If the judge disapproves the request of the prosecutor, in most cases he or she leaves it for the prosecutor to impose less severe measures if they were deemed necessary.

During the trial phase, a judge is fully responsible for the imposition of measures on a suspect.

The generally applied LSMs might be divided into three groups by their practical relevance:

a) intense supervision and house arrest,

b) financial bail and

c) the "trinity" of the least severe measures (obligation to report to the police, commitment not to leave, seizure of personal documents).

During the interviews, we focused mainly on the potential of the measures to satisfy the variety of practical needs and thus eliminate the need for imposing more severe measures, especially PTD. On the other hand, we also tried to

detect the indicators of possible net-widening effects – if some measures were applied quasi-automatically, without proper considerations of their necessity.

5.2 Net-widening effects

Some practitioners indicated the tradition of very wide, quasi-automatic use of the least severe measures ("trinity"). Often substantial motives why it would be necessary to impose or continue a measure are not given. As the result, excessive application of the "trinity" measures, especially the least severe measure commitment not to leave, occur in the cases where very low risk that suspect might abscond exists.

Judge 1, prosecutor 8 and also attorney 1 shared their opinions that overuse of the measures, possible quasi-automatism in ordering the measures without proper consideration of their necessity in securing the proceedings does indeed exist.

The prosecutor [8] gave the example where the police investigator ordered a measure commitment not to leave to a suspect who agreed to participate in the proceedings of mediation with expected release from criminal liability. The circumstances of the case showed that the suspect had no reason to flee justice: the facts of the case were clear and he or she demonstrated goodwill by active collaboration with the victim and the authorities to settle the negative effects of the offence.

On the other hand, the attorney [1] admitted that imposed measures are applied in a flexible way. Usually, prosecutors agree to give permission for a suspect to leave if some reason exists (business travel etc.) even for a prolonged period (e. g. even for a month) on condition that suspect's leave would not affect the proceedings. The flexible attitude at some extent "compensates" excessive restrictions of suspects' rights.

Some respondents (attorney [1], prosecutor [5]) shared their opinion that the strictest of the "trinity" measures - obligation to report to the police, which is applied rarer than commitment not to leave[9], sometimes is also imposed without reasonable procedural purpose and necessity, especially in later stages of proceedings.

[9] According to statistics provided by the Ministry of Interior, in the period of 2004-2016, the number of suspects who received measure of reporting to the police varied from 1009 (in 2016) to 3310 (in 2009). Range of the number of the suspects who received commitment not to leave was between 7526 (in 2016) and 18126 (in 2014) in the same period.

On the other hand, excessive use of this measure may provoke weaker control and tolerance of the breaches of its conditions. The attorney [1] shared his experiences that routine (especially prolonged) application of the measure sometimes is negligently controlled by the police, as the police might regard it as kind of a waste of their time. He told us about some occasions where after a prolonged time of application of the measure the police even agreed to register his clients by phone or for some scheduled reports in advance. Prosecutor [8] also shared some doubts about proper control of this measure.

Reported breaches of the duty to report to the police (especially if the infringements of duty were occasional) might be tolerated and ignored by the courts or prosecutors as far as suspects appear in the proceedings. The judge [3] gave as an example where during the trial stage the suspect did not appear for a single registration at the police but properly attended court hearings. The judge ignored the fact of infringement of the imposed measure until he or she decided to terminate the measure.

Prosecutor [5] commented that routine, quasi-automatic application of the least severe measures for suspects in low-risk situations is the issue of professional mentality. Many practitioners take it as self-evident that nearly every suspect must receive some measure. On the other hand, we assume that legal regulation also facilitates this situation. The art. 121 CCP authorizes the police and other officers of pre-trial investigation to impose "trinity" measures with later notice to the prosecutor. No authorization of the court or of the prosecutor is required. The pro-restrictive mentality of the investigators (that has been noticed by our respondents) together with tolerance of this practice by the subjects who have authority to terminate unnecessary measures (prosecutors during the pre-trial investigation and judges in the trial phase) contributes to the net-widening effect.

As a result, the situation where the suspect does not receive any measure was described as "very rear" [attorney 2], "very unusual" [prosecutor 8], "appeared in only very few cases" [attorney 1]. The prosecutor [5] and the former prosecutor, present judge [1] also indicated that cases, where suspect received no measure, could make only approx. 10-20 percent of all their cases.

5.3 LSM' potential to eliminate the need for more severe measures, including PTD

5.3.1 Financial bail

Practitioners assessed the financial bail mostly very positively. They described financial bail as "the most promising measure", "most effective alternative to PTD", especially comparing to others relatively severe measures (house arrest and electronic monitoring). On the other hand, serious limitations were indicated, which prevent the extended application of the bail.

Available statistics on measures show that financial bail is second rarest measure (after house arrest). In the period 2004-2016 was applied from only to from the min. 74 to the max. 162 times in the pre-trial investigation stage (the range of cases where PTD had been applied varied from 1202 in 2015 to 2708 in 2004). Some prosecutors, working in other locations than the capital, told us that they have never ever applied financial bail (prosecutor [17] has never applied it in his or her 24-year career), others told us they have applied it 1-2 times in their career, some apply it maybe once a year. The prosecutors working in the capital also rarely apply financial bail unless they work with specific categories of cases: "white collar" crimes and smuggling of cigarettes.

During interviews, a common explanation of rare application or even no application of financial bail was poor **financial situation of suspects** and of people in Lithuania in general. "*Suspects of the crimes we deal with, like thefts, domestic violence etc. do not have money*" [prosecutor 6], "*people here in the province do not have money, probably it is different in the capital, maybe there it might be applied*" [prosecutor 17]. Only a few categories of cases have been indicated where financial bail is applicable in practice: "white collar" crime (economic and financial offences, corruption cases) and cigarettes smuggling committed by foreign truck drivers.

One might assume that taking the financial situation of the suspect into serious consideration could contribute for application of bail for a broader range of suspects. However, in practice, other criteria for the establishment of the amount of the bail come into first place. Crime nature and harmfulness and (or) expected amount of sanction (fine) have been mentioned as prime criteria during interviews. We need to note that as far as the practice of application of bail is very rare, it is difficult to speak of any common standards for

setting the amount of bail. Our respondents mostly admitted that either common standards do not exist or they are unfamiliar with them. Prosecutors rather referred to the guidelines, developed by themselves and colleagues they work with.

In some of the interviews the respondents emphasized that financial bail must be **substantial**. The recommendations of the Prosecutor General (2015) provide that minimum amount of financial bail should be 30 standard units of fines (SUF)[10]. Currently the SUF is 38 EUR and it will increase to 50 EUR from the 1st of January 2018[11]. Subsequently minimum recommended bail is 1140 EUR, and shall increase to 1500 EUR. Some prosecutors apply even higher minimum sums for the financial bail. The prosecutor [13] stated that he would never consider financial bail of less than 3000 EUR. It must be a rather high threshold, which indeed might be unaffordable for suspects in many cases. The prosecutor [3] working with smuggling cases indicated standard amount of bail 3000-5000 EUR or more. He or she also indicated the specific criterion – approximate sum of the expected fine. This criterion goes in line with common practice in this specific category of cases where the bail money are being used for assure future payment of imposed fine. It is a recent practical solution for the problematic recovery of the fines imposed to suspects – foreigners truck drivers, who reside in Russia or Belarus. The specific feature of smuggling cases is that bail is often payed not by the suspect himself (suspect probably could not afford it) but by some "patron" (the owner of the truck, the owner of transport firm, who hired the suspect, or (and) even secret owner of the smuggled cigarettes), so the problem of affordability of the money required for the bail often does not occur.

The substantial sums of bail money contribute to the reluctance of the suspects to agree on bail even if they had sufficient financial means. Bail (when the sum is substantial) is rather a strict measure which might place the financial burden on a suspect or other people who provide bail. Providing money for bail results in freezing the substantial amount of assets for a prolonged time with a relatively high risk of losing it. Moreover, once agreed, the law does not provide for possibility for a person who paid the money to revoke bail (however some prosecutors sometimes agree to return bail if bail provider faces hardship situation [prosecutor 3]). Attorney [1] told us of a case were relations between the suspect and the person who provided the bail money have failed, but the bail provider could not revoke the bail. In the end, the suspect absconded and the bail was forfeited.

[10] Prosecutor General, Recommendations on application and supervision of the measures, except detention, in the pre-trial proceedings (2015) No. I-306.
[11] The Government of the Republic of Lithuania, Order No. 707 (2017).

Due to its severity, imposition of a bail usually comes into question only where the sufficient grounds for PTD are present. Prosecutor [3] expressed his or her conviction that no suspect would ever agree on bail if the perspective of PTD would not be very realistic.

Only in very exceptional cases a bail appears to be an alternative for measures other than PTD (i.e. there were cases where traveling businessman requested to replace commitment not to leave with a bail). In practice, prosecutors do not even offer the bail. The request for a bail usually comes from the defense side as the response to the prosecutor's intent to request for PTD.

Procedural complications for a judge to express his opinion about the right amount of the bail sometimes become an obstacle for application of a bail. This problem was noted by both judges and attorneys. During the pre-trial investigation, the defense is free to contact the prosecutor and discuss the proper amount of the bail. If they reach the agreement, prosecutor imposes the agreed bail. If the agreement is not reached or defense wants to skip the discussion with the prosecutor and shift decision to the court (prosecutors described it as "irritating" practice which is not uncommon [prosecutors 2 and 3]), or the proceedings are already in the trial phase, then the judge decides whether impose bail or not. In all these cases defense has no opportunity to contact the judge and figure out the satisfactory amount of money for the bail. Therefore suspect and defense makes a nearly blind guess for the right amount of money for the bail. If the court is satisfied with the sum, it refuses to impose or extend PTD and grants the bail. If not – it refuses the bail and imposes or extends another measure (e.g. PTD). In fact, it is not possible for a judge to indicate satisfactory sum for a bail and request to pay it later. Unwritten practice rules require the defense to secure the possible bail by paying money in advance before the court hearing, otherwise, the bail would not be granted. The judge [9] suggested that a judge might postpone hearing for a half an hour or for an hour until satisfactory sum for the bail would be collected and deposited. We may assume that in most cases it would be difficult to collect money within that short period of time. Judge [5] suggested that the problem could be solved by the law amendment which would allow imposing measures conditionally. If the suggested amount of the bail money would not satisfy the judge, the bail would be denied and other measures (usually PTD) would be applied until the suspect or defense pay the right amount of money for the bail. Once the right amount of money is paid, the decision to impose the bail would come into force. However, present law does not provide for this option.

5.3.2 House arrest

House arrest and electronic monitoring (EM) are listed in the top of the statutory list of provisional measures, just below the PTD. They are deemed to be most restrictive measures after the PTD and therefore one could assume they might serve as primary measures for decreasing use of PTD. But the picture in the law appears to be very different from the situation in practice. House arrest is the rarest measure in practice. Statistics show that numbers of applications of house arrest during pre-trial investigation dropped from 357 in 2004, to nearly nothing, to 25-44 per year in last 7 years. Statistics on electronic monitoring are still unavailable due to the recent introduction of this measure.

These statistics go in line with the unanimously very skeptical assessment of house arrest among the prosecutors and attorneys we interviewed. Opinions were more diverse among judges but we must note that pre-trial judges do not follow the cases and thus they can not evaluate the effectiveness of the measures they impose. Procedural and other practical issues are not relevant for them as well. Thus their assessments are rather theoretical. Moreover, pre-trial judges mostly admitted that they never or very rarely imposed different measure than that requested by the prosecutor. If a judge disagrees with the request, he or she usually dismisses the request without imposing other measures thus leaving for the prosecutor to make the decision on a proper alternative. Thus almost without exceptions, a pre-trial judge granting house arrest or EM relies on the prosecutor's opinion that the requested measure might be effectively executable.

Where are the roots of skepticism of the respondents about the house arrest?

In the law and in the books a house arrest is deemed to be "transitional" measure between PTD and measures of lower severity. However, in fact, it is by far less effective than the PTD and does not bring more effectiveness than the complex of less severe measures (LSM) could. In addition, it is more complicated for a prosecutor or judge to organize it and it is more restrictive to a suspect comparing to the LSM.

Can house arrest effectively replace PTD in the cases, where the high risk of absconding, impeding the proceedings (e.g. via communication with witnesses, accomplices) or re-offending exists? Can it effectively prevent these risks? The answer of respondents was "no". As prosecutor [16] told us, the title of the measure "house arrest" sounds nice and promising, like it is capable to secure the proceedings, but that's not the case.

Besides the noted general lack of house arrest's potential to prevent the risks, respondents doubted in the effectiveness of the police capacity to control this measure. They shared the view that it would be not very difficult to avoid imposed restrictions [attorney 1]. Police do not perform checks at night. The respondents also doubted if police are capable of performing checks regularly as the police reform is underway, a lot of officers leave police system and thus police is lacking human resources and capacities [prosecutor 6]. Also, respondents mentioned troubles in dealing with routine suspects' defenses against the measure breach reports. Reported suspects give variety of excuses (e.g. they did not the police at the door as they were asleep etc.), which are difficult to disprove. This also diminishes the effectiveness of the control of the execution of this measure.

Prosecutors noted that keeping suspect restricted at home does not help for investigation in any way [prosecutor 4].

In fact, the effectiveness of house arrest is very similar to the effectiveness of the complex of less severe measures. Risk of absconding might be limited by the seizure of documents and more frequent regular reports to the police, also by the commitment not to leave. The latter measure may include an injunction to communicate to certain people and appear in certain places, which might lower risk of impeding proceedings and reoffending.

An obvious limitation of the application of house arrest (also EM) is the situation were homeless or foreign suspect has no residence in Lithuania. Our respondents told us that registration to the police works well with homeless people [judge 4]. Prosecutor [3] told us of rare practice where law firm offers temporary residence (cheap hotel room) for their foreign clients to enable them to seek EM or house arrest and avoid PTD. However, this solution has never been approved by the courts so far.

Minors were the only category of suspects to whom a house arrest was deemed to be an effective measure. House arrest may help to prevent minor (at least temporary) from joining circles of people which may make him negative influence and it may even force parents to pay more attention to their child and to make more effort to control him or her [prosecutors 7, 9, 13]."

Considering little or even absent added value of the house arrest in comparison to LSM, application of this relatively strict measure might be seen as unjustifiable from the perspective of the principle of proportionality.

Respondents emphasized that if compared to less severe measures the house arrest adds more burden on the management of the proceedings [prosecutor 2, 6 and 7]. In contrast to the less severe measures, which might be imposed

by a prosecutor or even a police investigator, a house arrest requires authorization by the court. In addition, the length of house arrest is limited and (repeated) extensions might be needed. Going to the court and following the deadlines of house arrest consume time and energy of the prosecution. In addition, house arrest is usually followed by multiple requests of the suspect and defense for a leave (for a work and/or for other reasons) [judge 6]. Also established breaches of conditions of house arrest require time to be dealt with. Dealing with the breaches might appear pointless if strong grounds and necessity for application of PTD do not exist [prosecutor 3]. Altogether it may place unwanted additional administrative workload on a prosecutor or a judge.

All in all the verdict of the respondents (prosecutors – unanimously), was that in most of the cases (except some cases of minors) as far as PTD is not needed, costs/effect balance and principle of proportionality favors implementation of less severe measures other than house arrest [judge 1, prosecutors 2, 6, 7, 16].

5.3.3 Intense surveillance (electronic monitoring)

Electronic monitoring became technically available from April 2016. Statistics are still unavailable. Our respondents indicated that EM was applied rarely. Only one of 18 interviewed prosecutors and 5 of 13 judges had experience of application of EM at least once during the last year.

The attitudes towards electronic monitoring among respondents were just a little bit more positive than to the house arrest (there were few prosecutors who, at least theoretically (without having experience in application) shared positive expectations), but still, skepticism or uncertainty prevailed.

First, not a small part of prosecutors were uncertain about the EM technology (if it were radius or GPS). Some were uncertain if it could work in distant (rural) locations. Naturally, prosecutors are not ready to apply complicated measure if they were not familiar with it and consequently could not trust it.

Judges expressed little interest in technological aspects of EM. Some of them explained that they would never apply EM on their own initiative, but if the prosecutor requested for EM, that should mean prosecutor was sure it would be possible to execute EM in the case [judge 9].

Prosecutor [3] assessed the procedure of EM implementation as very complicated. Before presenting request for EM at the court, the prosecutor needs to receive affirmation from the police that EM is technically available at the residence of the suspect. Check of the suspect's residence and affirmation takes time and the risk that EM availability may not be confirmed exists. As far as at the beginning of the investigation (within the 48 hours of arrest) prosecutor works under huge time pressure, it is more convenient and safer for him or her to request for detention than for EM.

It goes without saying that EM offers advanced control of the suspect. If the suspect violates the conditions and absconds, the period of detection of violation is the shortest compared to the house arrest or report to the police. However, respondents noted that EM still does not prevent suspect from absconding. Also, it does not prevent suspect from contacting other suspects or witnesses and thus impeding of proceedings. Neither it has the capacity to prevent re-offending if the suspect was determined to commit a new offence. Therefore EM was not regarded as alternative to PTD in the first stages of the proceedings. However, some respondents saw it as acceptable option for gradual transition from PTD (especially from long-term PTD) to less severe measures in the cases where relatively high risk of absconding still exists.

However, one more limitation on EM has been noted during the interviews. This measure requires some discipline and organized routine from the suspect. Some socially underdeveloped people do not have skills of self-discipline and self-organization and it would be very likely that they would be unable to comply to the conditions required by the EM.

"*The suspect should have kind of interest in receiving this measure so he or she could comply with it. The suspect must execute some necessary diligence. Some advanced mentality is needed. My "clients" often do not possess it. Some cases might be unpredictable. Maybe they would not abscond, but it is likely that equipment might be damaged, they would fail to charge it on time, would act irresponsibly, would cause lots of problems*" [prosecutor 13].

- The professional mentality that 'every suspect should receive a measure' is still prevalent. We may assume that it stems from a couple of considerations: the belief that 'every suspect naturally deserves a measure', and the excessive hedging of the risks and from the possibility of reproach for failing to prevent those risks from occurring. These considerations result in very widespread and quasi-automatic application of the least severe measures, often without giving substantial justifications for why these measures are necessary. In addition, the

overuse of the least severe measures (LSM) is facilitated by providing police investigators the authority to apply LSM.

- **We recommend restricting the authority to impose the LSM (except seizure of documents) to only prosecutors and the courts and promoting the importance of diligence in reviewing the necessity of the LSM.**
- The application for bail is mostly limited to suspects of 'white collar crime' and smuggling cases. Other suspects usually have no financial means or refuse to pay the substantial sums requested for the bail. Recommendations of the Prosecutor General provide that minimum standard bail should start at 1140 EUR. However, some prosecutors demand substantially higher minimum bail sums.
- In smuggling cases, where the suspects are foreign truck drivers, bail is a common alternative for PTD. The bail money is often used to guarantee the recovery of imposed fines. This relatively recent, but already common, practise allows the State to recover otherwise unrecoverable fines. However, prosecution practice to force the provider of the bail to sign up an agreement to give up the bail money for the recovery of a fine is deemed to be illegitimate.
- Some procedural complications (lack of pre-hearing communication between bail providers and the judge and also lack of a set timeframe to collect the requested sum for the bail) may hinder more frequent applications of bail. **Therefore, it is recommended that the law be amended to allow conditional PTD, i.e. a rule which would allow the automatic release of the suspect from detention as soon as the ordered sum of financial bail was paid.**
- Most respondents were sceptical about the use of house arrest. It is by far less effective than the PTD and is no more effective than the combination of LSM's. In addition, it is more complicated for a prosecutor to arrange house arrest and it is more restrictive to a suspect when compared to other LSMs. Some practitioners believe that house arrest provides no added value to the proceedings, but is instead punitive. **Therefore, it is recommended that the prosecution and judiciary critically reconsider the reasonability of use of house arrest.**
- Starting in April 2016, electronic monitoring (EM) became available. It might be executed using either radius or GPS technology. The respondents' attitudes towards electronic monitoring were just slightly more positive than towards house arrest, but they remained sceptical about effectiveness and complicated implementation. Additionally, the

respondents lacked knowledge about the technical details of the measure.

While EM is impractical to apply in the initial stages of the proceedings, it might serve as attractive alternative for PTD for serious offences where PTD has already been applied for prolonged period of time. However, due to the severity, complexity and limited effectiveness of EM, other less severe measures, i.e. financial bail, should be considered as prima facie alternatives for PTD.

6. Role of players in the decision making

In the pre-trial investigation phase **prosecutors** are the key decision makers. A prosecutor has authority to apply any measure without authorization of pre-trial judge except detention, EM, house arrest and obligation to live separately. A prosecutor has also authority and duty to terminate any measure as soon as a measure is deemed to be not necessary any longer (incl. those measures, that were authorized by a pre-trial judge and those imposed by the police investigators). The rate of prosecutors' requests for PTD, approved by pre-trial judges is very high (over 90%)[12]. During interviews, we did not receive any information that would allow us to relate that high rate of approved requests with the alleged dominant position of the prosecutors over the pre-trial judges. Judges emphasized their independence from any external influences. The respondents shared their opinions that high approval rate rather reflects high quality of the requests.

Police investigators have authority to impose the most lenient measures (obligation not to leave, seizure of documents and obligation to report to the police). They also collect most of the material which might become background for the decision on PTD. The police investigators also play some informal role in decision making. Several respondents noted prevailing "punitive" attitudes among police investigators and their pressure on prosecutors to impose PTD (it was more common some years ago).

"*Police have no authority to request for PTD but the invisible side is that "half of the police office" might come to assure you that PTD is really necessary and to tell you, that they can get evidence to prove grounds for PTD, that they know how to do it*" [prosecutors 9,10].

"*Police investigators and I have very different views in what circumstances PTD is really necessary, we follow very different principles. For police PTD looks like "deserved" measure for a suspect for (allegedly) committed offence, they take it as some "message" of power and authority to a suspect*" [prosecutor 5].

[12] This number comes from estimations of Fair-trial project research (2015) and also from estimations of our respondents, i.e. pre-trial judges [judges 9 and 10].
See further in Human Rights Monitoring Institute (2015). *The practice of pre-trial detention in Lithuania*. [Online] Vilnius: Eugrimas. [28 September 2017]. Available from: <https://www.hrmi.lt/uploaded/TYRIMAI/Pre-Trial%20Detention%20in%20Lithuania%20-%202015.pdf.>

"Classics" are the phone calls from police where they tell you that the suspect is really bad person and they indeed need a request for detention. And they also tell that prosecutor should cooperate and not obstruct the work of the police. In fact, there is less of that "classics" in nowadays, but ten years ago it was frequent" [prosecutor 7].

"*The police desires PTD the most, prosecutors less, judges the least. Prosecutors work as strong filter for ill-grounded detentions*" [judge 1].

The presence of the **defense lawyer** is mandatory in the hearings of PTD (a suspect has the right to meet a defense lawyer before the first hearing of PTD) and throughout all the proceedings where the suspect is detained. The respondents shared their views that from the procedural point of view there are no obstacles for the defense lawyers to participate in the proceedings properly [attorneys 1-4]. They are informed about the proceedings properly and have full access to the files that are presented to the judge who decides on PTD. Before 2004 the practice existed that some of the case materials that were available for the the judge deciding on PTD were unavailable for the defense and the suspect. In 2004 the Supreme Court of Lithuania ruled that these practices infringe the principle of adversary proceedings. In 2015 CCP was complemented with the relevant provision that all the files, presented by the prosecutor to the court, must be accessible to the suspect and defense. This legal provision reconfirmed the pattern which has already been followed in practice since the ruling of the Supreme Court of 2004.

Defense attorneys admitted that they were provided with enough time to read the case files [attorney 1-4]. However, exceptions may occur in rare situations. Attorney [1] shared his experience when the "supplementary" attorney had been involved after present attorney demanded more time to read the materials of large case than the time was left until the deadline of detention (by the negligence of prosecution it was a "last minute" request for extension of detention). The "supplementary" attorney was not very demanding and he was satisfied with the time limits and agreed to represent suspect after reading the case within given timeframe [attorney 1].

"*An attorney gets access to the files in the court before the hearing when all the parties are already present. The judge asks if attorney is willing to read the files or the attorney asks for it his/herself. Then judge leaves for a time needed for file reading. It might take 10 min., or an hour, it depends on the case. If the arrest and hearing take place soon after the alleged offence had been committed, the files usually contain very little material (5 pages or so). If the case is based on criminal intelligence data, then there would be even fewer pages in the file. If the suspect is arrested after lengthy investigation*

(which took a year or two) then reading the files might take a while. In fact, complaints regarding the access of the files occur sometimes in complicated cases with multi-volume files, but it happens very rarely" [prosecutor 5].

However, both judges, prosecutors, and attorneys themselves were rather skeptical about the chances of the defense to play an important role in the hearings on PTD. The respondents shared their views that in the very beginning of the proceedings and during the first PTD hearing there are very few options for the defense to make significant contribution to the decision making. The role of defence becomes more important later when termination or extension of PTD comes into question. Attorney [1] shared his view that bail is, in fact, the only measure where the defense may effectively show initiative and "*receive any attention and response from the court*". In practice, this measure is "saved" for the defense. The prosecution never offers the bail [prosecutor 3]. However, bail is very rarely available in practice (see chapter 5.3.1).

Prosecutor [3] shared his or her rare experience where defense has showed substantial initiative to make EM or house arrest available for foreign suspect. The law firm offered to rent a cheap hotel room as the temporary residence for the suspect. The prosecutor him/herself assessed this initiative very positively, but it has never been approved by the courts.

Many respondents noted problem of the quality of legal representation of the suspects, namely widespread apathy of defense in the PTD hearings, mostly among State paid attorneys. State paid attorneys often represent their clients without any preparation, make very abstract objections to the PTD requests and leave it to the court to choose any other measure to apply instead of PTD. They do not suggest concrete measure and do not provide motives and supporting material which could convince the court to impose that alternative. On the other hand, there are very few options available for the defense that could have substantial potential to impress the judge and influence his decision in favor of alternatives rather than PTD.

Social services play no role in the PTD decision making. It is not provided by the law. The CCP provides that social report might be requested and issued for the purposes of sentencing and probation only. On the other hand, police and prosecution have access to the databases of State social security fund, State labor exchange, tax inspectorate, therefore relevant data about the employment situation and income of the suspect is usually already in the files of the case. Other data about the social environment of the suspect is usually provided by the suspect him- or herself (during his/her testimony) or/and his/her defense lawyer, if the latter is prepared and active in the case.

- In the pre-trial investigation phase, prosecutors are the key decision makers. A prosecutor has the authority to apply any provisional measure, except detention, EM, house arrest and obligation to live separately without the authorisation of a pre-trial judge. A prosecutor also has the authority and duty to terminate any measure as soon it is no longer necessary.
- In the past, it was common for police investigators to pressure prosecutors to apply PTD. Now, these practices have largely been abandoned; however, pro-detention attitudes still prevail among police investigators.
- Police investigators have the power to impose the least severe measures without the authorisation of a prosecutor or a judge. It might be considered the catalyst for net-widening effect and increased rates of application.
- The presence of a defence attorney is mandatory in PTD hearings and throughout all the proceedings in which the suspect is detained. However, defence attorneys have very few options for playing significant role in the decision making in the initial phases of the proceedings. One of the only effective options for the defence attorney is offering bail.
- The low quality of public defence services is a challenge.
- Social services play no role in the process of decision-making for the imposition of provisional measures. Their role is not provided for under the law. On the other hand, basic information about the social circumstances of the suspect might be accessed by the police and prosecutors from the social security, labour exchange and tax inspectorate databases.

7. Procedural issues of decision making

Interviewed judges and prosecutors admitted that their profession requires "strong backbone" to resist attempts to make influences on decision making.
As we have already noted in the previous chapter, prosecutors experience pressure from police investigators to request for PTD. Though most of the prosecutors told us they dealed with the pressure, a prosecutor from a small town admitted, that prosecutors sometimes give up to the pressure: "*maybe prosecutor is supposed to be independent, but sometimes it happens that police push you to request for PTD and sometimes you simply give up, just in case you would not be the one to blame, it is like an act of self-protection*" [prosecutor 18].
Though prosecutors stated their independence from the higher ranking prosecutors, prosecutor who deals with serious offences admitted s/he sometimes feels the pressure from his or her chiefs not to risk and avoid releasing of suspects in the cases which might attract public's and media's attention [prosecutor 4].
Pressure from media was also mentioned by some respondents, which might be both pro-detention and pro-release, and sometimes very aggressive (it depends on the quality of the media). A judge shared his or her experience in the case where, after the release of the suspect from detention, the investigation institution cooperated with media for publishing biased publication, depicting the court decision as wrong [judge 4].
On the other hand, defense and or suspect might retaliate to judge for detention decision with very negative publication about the judge, e. g. by questioning his or her professional ethics. That happened to the interviewed judge [4] not long before our interview.
Respondents dismissed allegations that any informal communication between the judge and other parties before the hearing on PTD may exist, except for clearly technical questions on scheduling the hearings. In the beginning of 2016 electronic info system of criminal proceedings "IBPS" was launched which, among other advantages, minimized contacts between judges and prosecution outside the hearings room. The requests for PTD and also all the case files may be delivered through IBPS. However some respondents in small districts (also some in big cities) were rather skeptical about IBPS as they did not see any added value of uploading the files into the electronic system. They said they were comfortable with direct communication and delivering paper requests and files from the police to prosecution and from prosecution to the court [prosecutor 15, judge 1].

The remains of practices of some informal communication before PTD hearings were recorded in only one small district where both the prosecutor and the judge admitted that sometimes the prosecutor calls or directly communicates to the judge before the hearings to "*give some broader context of the case or to clarify if it is worth to request PTD or not*" [prosecutor 18], "*sometimes prosecutors provide some more explanations before the hearings than it could be found in the case files*" [judge 12].
Workload and time pressure was noted by the prosecutors as important factor for choosing the measures, particularly deciding if it worth to apply for measures that need to be authorized and later extended by the court. Following the deadlines of measures and attending the court hearings are time and energy consuming, so cost and effect balance is important factor in deciding on measures for a suspect, as a rule resulting in decision against house arrest [prosecutor 3].
Some prosecutors from bigger district praised new electronic system IBPS for speeding up the delivery of the files from investigators to prosecutor. "It used to happen sometimes before IBPS that after late delivery of the files by the police you had only 10 minutes to decide to go to the court with the request for the PTD or not. Now you can see via IBPS immediately that a suspect is under arrest" [prosecutor 9].
The first decision on PTD must be passed within 48 hours after arrest of a suspect. That puts some time pressure on judges. "*There might be three PTD hearings in one afternoon, a hearing every hour. An hour for chairing the hearing and writing down the decision*" [judge 10]. "*Of course, we use templates for decisions and adjust them if necessary, there is no time to write "original masterpieces of literature*" [judge 6]. CCP provides that request for the extension of PTD must be delivered no later than 10 days before PTD term expires or no later than 5 days if the term of PTD was less than one month. Therefore the time pressure for making decisions on PTD extension is lower.

- There are no significant obstacles that prevent defence attorneys from executing their duties in proceedings on provisional measures.
- According to the respondents, the practise of informal communication between the prosecution and the court before court hearings has been mostly abandoned, at least in bigger districts.
- The electronic information system of criminal proceedings (IBPS), which enables electronic communication of the proceeding documents between investigators, prosecutors and judges, contributes to the elimination of the 'out of hearing' contact between prosecutors and judges.

- Respondents were mixed in their assessments of the value added by the IBPS. On one hand, some practitioners praised the increased speed of communication (delivery of the process documents) from an investigator to a prosecutor and from a prosecutor to a judge via this system. On the other hand, some were sceptical about IBPS, including practitioners from smaller districts where the speed of communication has never been a problem and judges that had seen IBPS as an additional instrument, which required extra work to upload the documents into the electronic system.
- The level of police investigators' pressure on the prosecution to impose the severest measures on the suspect has decreased in recent years, but still, a major difference in the police and prosecutors' attitudes exists.
- Coping with media pressure is an inevitable part of a judge's work.

8. Procedural safeguards and control

Lack of the effective judicial control over the long term (e. g. 3 months) detention has been noted by our respondent attorney [1]. This problem has been also discussed by Raimondas Jurka and Marina Gušauskienė in the academic publication "Controversial Issues Of Detention Corresponding To Ultimum Remedium principle" (2009)[13]. Attorney [1] noted that from the moment the appeal against the decision to impose or extend PTD is rejected (usually in the beginning of the detention term), there is no possibility to challenge the PTD in the court until the PTD term expires. Thus, after rejection of the appeal there might be no judicial control of PTD for all the rest period of PTD, i.e. for a month, two months or even longer. However important circumstances against PTD may emerge during that lengthy period. The only legal remedy in this case is making request to the prosecutor who has authority to terminate PTD as soon as it becomes unnecessary. But the attorney [1] did not assume it could be a sufficiently effective remedy and could effectively substitute judicial control. Though prosecutors assured us, that they obey the law and always terminate measures immediately as soon as they become unnecessary (prosecutor [5] noted that s/he releases every second detainee earlier before the detention term expires), we tend to agree with attorney and academic writers that judicial review of the grounds for detention (repeated appeal) should be available within shorter period than three months, at least when the new facts emerge.

The respondents confirmed the fact which has been established by the researchers of Lithuanian chapter of the Fair-Trial project, that pre-trial judges approve absolute majority of prosecutors' requests for PTD. Fair-trial researchers provided estimations that 95% of requests are approved. The judge [8] provided us with his estimations that approved requests might make around 98%. Judge [15] provided us with statistics of his own decisions that he rejected one of 50 requests for PTD which makes 90% of approvals. On the other hand, these numbers alone do not allow to make any assumptions about lack of effective judicial control and quasi-automatism in PTD decision making. Most of the judges noted decrease in numbers of applications for PTD on one hand and increase in the quality of the requests in recent years on the other (see chapter 3 Overall reflections) which might naturally make rejection rate very low.

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[13] Jurka, R and Gušauskienė, M. 2009. Suėmimo atitikties ultimum remedium principui diskusiniai klausimai (in Lithuanian). *Teisės problemos*. [Online]. 2(64). [14 September 2017]. Available from: <http://teise.org/wp-content/uploads/2016/10/2009-2-jurka-gusauskiene.pdf>.

However, in 2015 an attempt to improve the procedure of appeals against decisions on PTD was made. The Parliament passed an amendment of the CCP which established that the appeals must be heard by the collegium of three judges and not by one judge alone. Our respondents attorney [1] and judge [6] expressed some skepticism of the necessity and reasonableness of this amendment. In addition judge [6] noted that the higher court could not afford to hear appeals for PTD in collegiums of three judges from criminal chamber because the members of collegium would not be allowed to hear the same case in the later stages of the proceedings and thus there would be a risk that the court would face shortage of the judges eligible for hearing the cases. Therefore mixed collegiums of judges from criminal and civil chambers hear the appeals for PTD decisions. Involvement of judges from civil chamber had some probably unexpected consequences on the decisions. According to the judge [6] and also attorney [1], the civil law judges usually take more lenient attitudes and more frequently decide against PTD.

- The rule that provides only one appeal of the decision to detain the suspect or extend his or her detention poses a risk that lengthy detentions (up to 3 months) might be left without judicial control after the appeal is dismissed. **Judicial review of detention (repeated appeal) should be available within a shorter period than three months, if the new facts are present in the case.**
- Judicial approval rates (over 90 percent) of requests for detention alone do not indicate that the judicial control of detention lacks scrutiny and is quasi-automatic. The respondents suggested that the increased quality and the decreased number of the requests for the PTD are the main reasons for the high rates of the approval.

9. European aspects

9.1 The impact of the rulings of the ECtHR

Attorney [1] and prosecutor [5] both reported that the case law of the ECtHR[14] and the following ruling of the Supreme Court of Lithuania (2004)[15] triggered the change in practices, namely reassured the right of the defence to access the case files presented to the judge by the prosecution during the hearing on detention. The relevant rule was explicitly established in the law by the amendments to the Art. 121 CCP on the 25 June 2015[16]. Both practitioners noted that this rule was followed in practice long before the enactment of the amendments of the law[17].

9.2 European Arrest Warrant

Almost half of the interviewed prosecutors were familiar with the European Arrest Warrant (EAW) procedure in their practice. As for the judges, a smaller number had any experience in implementation of the EAW procedures.

Practitioners reported the EAW as an effective and reliable tool in the criminal procedure which significantly lowers the risk that absconding could damage the interests of justice.

"In regard to the risk of absconding - where can a suspect go and hide? The EAW is executable all across the EU and the law enforcement do their job nicely. In the end, the suspect would be found. Absconding to the third countries (without having good connections there) is very complicated – visas are needed, hiding is costly, a person will be lonely there, a lot of problems. Absconding may cause the delay of the investigation (maybe even for one additional year) but it is not a problem unless the case is very sensitive in regard to the victims. Anyway, in the end, the suspect would not avoid the liability. I even see some advantages of absconding. It removes time pres-

[14] Garcia Alva v Germany App no 23541/94 (ECtHR, 13 February 2001).
[15] Supreme Court of Lithuania Report No. 50 on the case law on application detention and house arrest and extension of the detention (2004).
[16] 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.
Human Rights Monitoring Institute (2015). *The practice of pre-trial detention in Lithuania.* [Online] Vilnius: Eugrimas. [28 September 2017]. Available from: <https://www.hrmi.lt/uploaded/TYRIMAI/Pre-Trial%20Detention%20in%20Lithuania%20-%202015.pdf.>, p. 20.
[17] See further in chapter 6 "Role of players in the decision making".

sure from the investigation, we have more time to investigate the case properly without any pressure from the attorneys. Also, I take absconding as the indirect self-incrimination. But for sure, absconding might have advantages only under the condition that the delay would not put at risk the interests of victims" [prosecutor 5].

"The destination countries of fugitives are usually England and Spain. It is not a problem to bring the suspects back from there with the EAW" [judge 5].

"The repeated offenders perfectly understand what the EAW brings. For the first time offenders, it is important to explain in a very detailed way about the EAW and possible recovery of the costs of the execution of the EAW from the suspect. The suspects abscond rarely (it happens once or couple times per year) and I think the effort to inform the suspects about the EAW largely contribute to the prevention of the abscondment.

And even in the case a suspect absconds to the foreign country, we usually try to contact him or his relatives, explain possible consequences and persuade him or her to return voluntarily. If the suspect shows goodwill and returns I do not request for PTD. And usually, no problems occur" [prosecutor 13].

However, some limitations of the EAW have been also reported.

Although aforementioned prosecutor [5] was not too concerned about the investigation delays in case of absconding, the other prosecutor complained about the lengthy EAW proceedings in England, where "*decisions to transfer the suspect receive plenty of appeals and hearing of the appeals takes a lot of time*" [prosecutor 12].

Also, there are a number of suspects (even though statistically low numbers) who are nationals of the third countries (Russia, Belarus, Georgia) or have good connections in said countries. The EAW is not an option for bringing them back in case of abscondment.

In some countries, the EAW is not executable for the convicted persons who abscond the execution of the judgement. For example, prosecutor [14] reported that in England and Sweden hiding from the execution of the sanction is not criminalized and therefore execution of the EAW is not possible.

9.3 European Supervision Order

The majority of the practitioners were not acquainted with the mechanism of the European Supervision Order (ESO) and no one had ever applied it in practice. A few respondents attended training on the topic of the ESO. Also, some reported that the national law on the implementation of the ESO has been enacted[18].

The prosecutor from the Prosecutor General office reported that to his knowledge there was one case of application of the ESO in the year 2016. The Czech Republic has been requested to execute some provisional measures other than PTD.

Interviewees shared mostly sceptical views towards the ESO mechanism. Some presumed that application of the ESO would be a very time-consuming and therefore unwanted process in the context of the already high level of the workload [judges 6, 10, prosecutor 6].

"Additional translations would consume more time" [prosecutor 6].

"I am sceptical when it comes to inter-institutional cooperation as it delays the whole proceedings" [judge 6].

The respondents shared their views that in the cases where the foreign nationals are involved they would prefer the financial bail and also they would make effort to complete the proceedings in a speedy form instead of involving into the trans-national cooperation for application of some provisional measures [prosecutors 3, 15].

The respondents also shared some considerations which alternatives might work in a foreign country. A prosecutor pointed out an issue if the suspect was a long distance truck driver [prosecutor 6]. Apparently, for that kind of suspects no other measure than the bail might work. A defence lawyer believed that in many cases registration at the police could work out under the ESO, while other alternatives might be too complicated to execute [defence lawyer 1]. We assume that obligation to stay in the place of residence might be also executable. The prosecutor [15] shared his or her experience where the obligation for the Latvian national suspect not to leave the place of residence in Latvia was issued by Lithuanian prosecutor without any involvement of Latvian authorities. However, the prosecutor admitted that in that case the measure was rather voluntary as control of execution of this measure

[18] The law on mutual recognition and enforcement of the decisions of the EU Member States in criminal cases (2014) No. XII-1322.

was not possible. We assume this effort to impose a measure, even though no control was possible, was another example of the still vital mentality "every suspect must receive a measure".

- Practitioners believe that the European Arrest Warrant system is a trustworthy and effective tool. Some respondents believed that, with the EAW system, abscondment does not pose high risk for the interests of justice (if time is not a sensitive issue in the particular case) because the chances of the suspect successful hiding in the EU are very low. Moreover, hiding is often complicated and costly for the suspect. Thus, the likelihood of a suspect absconding should not be overestimated.
- The practitioners surveyed had no experience regarding the implementation of the European Supervision Order. They shared a sceptical view that the ESO mechanism is time-consuming and complicated due to the need for translations and inter-institutional communication and that little value is added by the international execution of alternatives. The priority for speeding up the proceedings and for the use of financial surety has been given.

10. Vignette

10.1 Vignette and summary of answers

A 23 year old male is suspected of burglary in a house at 3 o'clock at night, while the house-owners and their 4 years old daughter were sleeping upstairs. He went into the house by cutting the glass of the entrance door and opened the door. Next morning the owners discovered that precious jewelry, a lap top and money all together worth 3000 euro was stolen. The police identified the suspect from cctv recordings. The suspect is currently unemployed and was sentenced before to a cso/conditional sentence (depending on the national situations) two years ago. Apparently he is living with his parents.

The person is arrested at Monday-afternoon and brought before you at a Tuesday-morning. You have to decide if you keep him in custody or not.

The offence shall be prosecuted under Art. 178 section 2 of Lithuanian CC, which provides sanction of fine or restrictions of liberty, or custody up to 90 days, or imprisonment up to 6 years.

Table 1. Responses of Lithuanian respondents

	PTD is more unlikely, than likely		PTD is more likely, than unlikely		Too difficult to answer, depends	
Prosecutors	11	64,7 %	2	11,8 %	4	23,5 %
Judges	11	73,3 %	1	6,7 %	3	20,0 %
Attorneys	2	50,0 %	2	50,0 %	-	0,0 %
Total	24	66,7 %	5	13,9 %	7	19,4 %

Pro-release attitude clearly prevailed among respondents. The judges and prosecutors demonstrated liberal attitudes. The attorneys' predictions of decision were more pessimistic than the opinions of the decision makers (judges and prosecutors) themselves. One fifth of the respondents did not give their judgement in this particular case and rather provided general comments or assumptions if circumstances would turn out in one or another way. But rather big proportion of respondents shared their impression of the most likely, ordinary decision in this case on the ground of the facts presented in the vignette.

Respondents emphasized that their decision would be based on the whole set of the circumstances of the case, on the balance of pros and contras. It also

appeared that judges consider some contextual circumstances which might seem to have only indirect relevance to the grounds for detention.

10.2 Risk of absconding

One of the main factors assessed and mentioned by the respondents was **the expected sanction**. Considering that the offense was not classified as serious and the suspect was not a recidivist, the custody or imprisonment sanction was not likely. This fact did not give strong motive for a suspect to abscond.

In addition, practitioners mentioned absence of the data giving grounds to believe the suspect had any **connections with foreign countries** (recent travels, work experience, family abroad) and no data that he would have any plans to leave the country.

"If he [the suspect] was a "world citizen" [the one who constantly migrates from country to country], I would ask for PTD as it were a risk he could leave the country" [prosecutor 3].

Prosecutors' shared different opinions if the **unemployment** of the suspect could be considered as the indicator of increased risk of absconding. One prosecutor claimed he or she would request for additional data regarding the efforts in job search and the objective reasons of the joblessness [prosecutor 2], while another interviewee directly related the unemployment of the suspect with the risk of absconding: "*the unemployed suspect has a higher risk of absconding, whereas an employee would fear to lose his job*" [prosecutor 17].

The fact that the suspect **resided with his parents** was assessed as debatable. One of the prosecutors emphasized that suspect's residency with his parents does not automatically prove their close relationship and therefore it might not be taken as the evident circumstance against detention [prosecutor 13]. In contrary to this view, another respondent considered living with parents as a social bond with a family decreasing the possibility of detention [prosecutor 2].

A few respondents emphasized the characteristics of the **suspect's decent life experience** that would speak against the realistic risk of flight in the vignette situation. The prosecutor [5] and the judge [6] drew attention to the suspect's decent life experience and his dependant way of life with no big life decisions made, no responsibilities taken so far. Together with the fact that

he had no relatives or other relationships abroad, these circumstances gave little chance that the suspect could be capable in successful hiding and that he could decide to face the high pressure (stress) that would be related with the absconding in these circumstances [prosecutor 5, judge 6].

10.3 Risk of impeding proceedings

Prosecutors were more likely to refer to the ground of impeding proceedings in the vignette situation than judges did. In fact practitioners focused on two sets of circumstances – if the stolen items had been found and if the accomplices had been present. However, they shared different opinions about the significance of these circumstances for the decision on PTD.

Some practitioners saw the reluctance of the suspect to cooperate and disclose the location of the stolen goods as impediment of the proceedings and thus reasonable ground for detention.

"It is important to take into the account the risk of stolen items being sold or hidden" [prosecutor 14].

Also one of the attorneys suggested that in practice, in case the goods were undiscovered, this would be used as a "concealed reason" to request for detention [defence lawyer 1].

However, some prosecutors and the majority of judges strongly disagreed with the employment of the said ground in the case at hand. In their opinion, if the fact that the suspect refused to disclose the location of the stolen goods would be regarded as the impediment to the proceedings, the suspect's right to remain silent would be infringed.

Some of the respondents emphasized the need to prevent communication between the suspect and his alleged accomplices. The judge [3] commented that PTD was the only measure that effectively prevented suspect's communication with other accomplices.

"If the crime is committed by the accomplices, you have to take into account potential alignment of testimonials, flight risk of undiscovered person or possible dissemination of information" [prosecutor 13].

"If they [the accomplices] provide with different testimonials, it could be considered as a threat to investigation" [defence lawyer 1].

But some respondents shared the opposite opinions.

"I don't think that the fact that accomplices are undetected in the case may justify the assumption that the high risk of impeding proceedings exists, I don't know how prosecutors relate said risk to this fact. I think that this suspect makes an impression of infantile personality, who sits at his parents' home, also he has no criminal records, most probably he would not have necessary energy and creativity to temper the evidence" [judge 6].

10.4 Risk of re-offending

Considering the risk of reoffending the criminal records of the suspect was on the focus. Some interviewees emphasized that previous conviction took place long time (two years) ago, which, in their opinion, in fact denied any ground to believe that suspect is about to offend repeatedly even regardless of the nature of his previous offence.

"Thefts are usually committed in series. If I could see in the files repeated thefts within a short period, then it would be a strong ground to believe that there is a high risk of re-offending" [judge 13].

However, some respondents distanced themselves from the time factor. The most radical opinion was that the suspect, who [whenever] re-offends after he had been sentenced to non-custodial sanction, "*breaches the trust showed to him by the court*" and "*demonstrates inability to reintegrate into society*" and thus carries higher risk of re-offending [judge 15].

Some respondents focused mostly on the type of the previous offence – if it was of the same nature (i.e. property crime), which would weight towards detention, or a crime of different type, which would make the previous record of little significance.

"Neither the prosecutor nor the judge would be convinced if the crimes were unrelated, for instance, forgery of a document or crime against traffic safety" [prosecutor 2].

One of the defence lawyers projected that re-offending might be considered as a livelihood having evaluated previous conviction, unemployment and the nature of the crime [defence lawyer 1].

Some practitioners also mentioned that records of previously committed administrative offences, especially minor thefts, could demonstrate the tendency of the suspect to re-offend [prosecutors 9, 15].

10.5 Other (contextual) factors

In addition to the facts relevant to the legal grounds of PTD, some judges reported they considered some contextual circumstances which might seem to have only indirect relevance to the grounds for detention.

General effort to keep people away from imprisonment as long as possible has been mentioned. This consideration reflects the principle that PTD (and any kind of incarceration) should be always employed as a measure of the last resort.

"It is important, that the suspect in this vignette previously received only liberty restriction, not imprisonment. Me and other judges are very reluctant to incarcerate people with no previous incarceration experience. There is nothing positive they could learn in the prison." [judge 5].

Some judges reported they consider nature of the offence.

"Burglary in the night time into the living house is more dangerous that other burglaries. Though the law provides the same range of sanctions for all burglaries, this circumstance would speak in favor of detention." [judge 4].

The consideration of the nature and dangerousness of the offence when deciding on provisional measures is not uncommon. The Prosecutor General even recommends considering it when deciding on provisional measures[19]. However, we assume that nature and dangerousness of the offence are rather criterions for measures of punitive character than for the preventive ones.

10.6 Alternatives

Having inquired about the less severe measures applicable in the vignette situation, interviewees noted obligation to report to the police; seizure of personal documents; written obligation not to leave and house arrest.

Reporting to the police was mentioned more frequently than any other alternative measure. According to one prosecutor, it provides opportunity to

[19] Prosecutor General, Recommendations on application and supervision of the measures, except detention, in the pre-trial proceedings (2015) No. I-306.

schedule the contacts with the suspect and allows a relatively prompt response in case of infringement of the measure [prosecutor 11]. A defence lawyer reported that two alternative measures might be expected to be combined, e.g. reporting to the police and written obligation not to leave [defence lawyer 4].

Confiscation of personal documents would be mostly implemented in order to prevent the suspect from absconding. One of the respondents noted that this alternative, even thou regarded as the most lenient one, "*significantly limits the social life of the suspected individual*" [prosecutor 11].

Two of the prosecutors considered house arrest to be an appropriate measure for the suspect in the vignette situation. However, the other interviewee held a different opinion that "*house arrest is only applicable in cases of more serious offences*" [prosecutor 10].

- In the vignette, a majority of both judges and prosecutors decided in favour of alternatives for PTD. They generally found no evidence of a substantial risk of abscondment (due to the suspect's rather undeveloped social skills, dependent lifestyle and lack of connections abroad), re-offending (due to the long time lapse since the previous, not serious offence), or obscuring the evidence. Also, the anticipated non-custodial sanction as well as the lack of prior imprisonment was important in the determinations.
- The respondents reported that strong justifications in favour of PTD include: the current offence's similarity to previous offences, drug addiction in connection with multiple property offences and a record of absconding in previous proceedings. On the other hand, unemployment has not been deemed as a significant factor.

Conclusions and recommendations

Overall reflections on recent developments

- A significant downward trend in the application for PTD was observed during the period between 2004 and 2016.
- These changes are not related to any legal reforms as no significant changes in relevant legislation have been made. The option to impose electronic monitoring was only introduced in April 2016.
- Lower rates of PTD may be due to a shift in professional (both prosecution and judicial) attitudes, towards a more liberal, human rights-based approach. As a result, the level of scrutiny imposed in the imposition of PTD may have increased in practise. Also, respondents have noted an abandonment (at least to some extent) of formerly common improper practices, including the use of detention for other than legal aims (e.g. to force suspect to confess or to punish him or her), the informal contacts between a prosecutor and a judge and the limitation of the right of the defence to receive all relevant case files.
- The shift in judicial and prosecutorial attitude might be explained by: (1) the steady promotion of high standards in the precedents of the ECHR and Lithuanian higher courts, the internal communication within prosecutoral organization and academic discourse and (2) the influx of the younger generation (educated in the light of contemporary human-rights-focussed standards) into the judicial and prosecution profession. The effective implementation of the European arrest warrant (EAW) system might also be a factor in facilitating more limited use of PTD because the EAW system lowers the risk that a suspect's absconding could damage the interests of justice.
- **Therefore, further institutional and academic promotion of PTD as ultima ratio, combined with the promotion of effective international cooperation, might further limit the imposition of PTD.**

Basis of decision making

- The predominant justification for PTD depends on the category of the offence at issue. It is common that more than one justification for PTD

is established. Overall, the risk of absconding is the most frequently cited ground for PTD.

- The risk of impeding the proceeding is the rarest justification for PTD in practise. This justification is interpreted in a very restrictive way; usually, an actual attempt to obscure evidence must be established. Our respondents differed in reports of whether the silence of a suspect, e.g. his or her failure to reveal the location of the stolen goods, can be used to prove an act that impedes the proceedings. Among judicial respondents, this was generally considered an invalid justification for PTD.
- The respondents reported that strong justifications in favour of PTD include: the current offence's similarity to previous offences, drug addiction in connection with multiple property offences and a record of absconding in previous proceedings. On the other hand, unemployment has not been deemed as a significant factor.
- Justifications for elimination of substantial risk of abscondment may include the suspect's rather undeveloped social skills, dependent lifestyle and lack of connections abroad. Also, the anticipated non-custodial sanction as well as the lack of prior imprisonment are important determinators. The long time lapse since the previous, not serious offence may indicate low risk of re-offending.
- The judge's personal impression of the suspect's motives and general social attitudes expressed during the hearing, appear to play an important role in the decision to implement PTD.

Less severe measures substituting PTD

- The professional mentality that 'every suspect should receive a measure' is still prevalent. We may assume that it stems from a couple of considerations: the belief that 'every suspect naturally deserves a measure', and the excessive hedging of the risks and from the possibility of reproach for failing to prevent those risks from occurring. These considerations result in very widespread and quasi-automatic application of the least severe measures, often without giving substantial justifications for why these measures are necessary. In addition, the overuse of the least severe measures (LSM) is facilitated by providing police investigators the authority to apply LSM.
- **We recommend restricting the authority to impose the LSM (except seizure of documents) to only prosecutors and the**

courts and promoting the importance of diligence in reviewing the necessity of the LSM.

- The application for bail is mostly limited to suspects of 'white collar crime' and smuggling cases. Other suspects usually have no financial means or refuse to pay the substantial sums requested for the bail. Recommendations of the Prosecutor General provide that minimum standard bail should start at 1140 EUR. However, some prosecutors demand substantially higher minimum bail sums.
- In smuggling cases, where the suspects are foreign truck drivers, bail is a common alternative for PTD. The bail money is often used to guarantee the recovery of imposed fines. This relatively recent, but already common, practise allows the State to recover otherwise unrecoverable fines. However, prosecution practice to force the provider of the bail to sign up an agreement to give up the bail money for the recovery of a fine is deemed to be unfair. **Therefore, it is recommended to reconsider these practices in the light of the principle of fair proceedings.**
- Some procedural complications (lack of pre-hearing communication between bail providers and the judge and also lack of a set timeframe to collect the requested sum for the bail) may hinder more frequent applications of bail. **Therefore, it is recommended that the law be amended to allow conditional PTD, i.e. a rule which would allow the automatic release of the suspect from detention as soon as the ordered sum of financial bail was paid.**
- Most respondents were sceptical about the use of house arrest. It is by far less effective than the PTD and is no more effective than the combination of LSM's. In addition, it is more complicated for a prosecutor to arrange house arrest and it is more restrictive to a suspect when compared to other LSMs. Some practitioners believe that house arrest provides no added value to the proceedings, but is instead punitive. **Therefore, it is recommended that the prosecution and judiciary critically reconsider the reasonability of use of house arrest.**
- Starting in April 2016, electronic monitoring (EM) became available. It might be executed using either radius or GPS technology. The respondents' attitudes towards electronic monitoring were just slightly more positive than towards house arrest, but they remained sceptical about effectiveness and complicated implementation. Additionally, the

respondents lacked knowledge about the technical details of the measure.

While EM is impractical to apply in the initial stages of the proceedings, it might serve as attractive alternative for PTD for serious offences where PTD has already been applied for prolonged period of time. However, due to the severity, complexity and limited effectiveness of EM, other less severe measures, i.e. financial bail, should be considered as prima facie alternatives for PTD.

Role of players in the decision making

- In the pre-trial investigation phase, prosecutors are the key decision makers. A prosecutor has the authority to apply any provisional measure, except detention, EM, house arrest and obligation to live separately without the authorisation of a pre-trial judge. A prosecutor also has the authority and duty to terminate any measure as soon it is no longer necessary.
- In the past, it was common for police investigators to pressure prosecutors to apply PTD. Now, these practices have largely been abandoned; however, pro-detention attitudes still prevail among police investigators.
- Police investigators have the power to impose the least severe measures without the authorisation of a prosecutor or a judge. It might be considered the catalyst for net-widening effect and increased rates of application.
- The presence of a defence attorney is mandatory in PTD hearings and throughout all the proceedings in which the suspect is detained. However, defence attorneys have very few options for playing significant role in the decision making in the initial phases of the proceedings. One of the only effective options for the defence attorney is offering bail.
- The low quality of public defence services is a challenge.
- Social services play no role in the process of decision-making for the imposition of provisional measures. Their role is not provided for under the law. On the other hand, basic information about the social circumstances of the suspect might be accessed by the police and prosecutors from the social security, labour exchange and tax inspectorate databases.

Procedural aspects

- There are no significant obstacles that prevent defence attorneys from executing their duties in proceedings on provisional measures.
- According to the respondents, the practise of informal communication between the prosecution and the court before court hearings has been mostly abandoned, at least in bigger districts.
- The electronic information system of criminal proceedings (IBPS), which enables electronic communication of the proceeding documents between investigators, prosecutors and judges, contributes to the elimination of the 'out of hearing' contact between prosecutors and judges.
- Respondents were mixed in their assessments of the value added by the IBPS. On one hand, some practitioners praised the increased speed of communication (delivery of the process documents) from an investigator to a prosecutor and from a prosecutor to a judge via this system. On the other hand, some were sceptical about IBPS, including practitioners from smaller districts where the speed of communication has never been a problem and judges that had seen IBPS as an additional instrument, which required extra work to upload the documents into the electronic system.
- The level of police investigators' pressure on the prosecution to impose the severest measures on the suspect has decreased in recent years, but still, a major difference in the police and prosecutors' attitudes exists.
- Coping with media pressure is an inevitable part of a judge's work.

Procedural safeguards and control

- The rule that provides only one appeal of the decision to detain the suspect or extend his or her detention poses a risk that lengthy detentions (up to 3 months) might be left without judicial oversight after the appeal is dismissed. **Judicial review of detention (repeated appeal) should be available within a shorter period than three months, if the new facts are present in the case.**
- Judicial approval rates (over 90 percent) of requests for detention alone do not indicate that the judicial control of detention lacks scrutiny and is quasi-automatic. The respondents suggested that the in-

creased quality and the decreased number of the requests for the PTD are the main reasons for the high rates of the approval.

European aspects

- Practitioners believe that the European Arrest Warrant system is trustworthy and effective tool. Some respondents believed that, with the EAW system, abscondment does not pose high risk for the interests of justice (if time is not sensitive issue in the particular case) because the chances of the suspect successful hiding in the EU are very low. Moreover, hiding is often complicated and costly for the suspect. Thus, the likelihood of a suspect absconding should not be overestimated.
- The practitioners surveyed had no experience regarding the implementation of the European Supervision Order. They shared a sceptical view that the ESO mechanism is time consuming and complicated due to the need for translations and inter-institutional communication and that little value is added by the international execution of alternatives. The priority for speeding up the proceedings and for the use of financial surety has been given.

Literature

S. Bikelis and V. Pajaujis (2016). *1st National Report on Lithuania*. Available from: <http://www.irks.at/detour/LT%201st%20National%20Report.pdf>.

Human Rights Monitoring Institute (2015). *The practice of pre-trial detention in Lithuania*. [Online] Vilnius: Eugrimas. Available from: <https://www.hrmi.lt/uploaded/TYRIMAI/Pre-Trial%20Detention%20in%20Lithuania%20-%202015.pdf.>.

R. Jurka and M. Gušauskienė (2009). Suėmimo atitikties ultimum remedium principui diskusiniai klausimai (in Lithuanian). *Teisės problemos*. 2(64). Available from: <http://teise.org/wp-content/uploads/2016/10/2009-2-jurka-gusauskiene.pdf>.

Supreme Court of Lithuania Report No. 50 on the case law on application detention and house arrest and extension of the detention (2004).

Legislation and jurisprudence

Code of Criminal Procedure of the Republic of Lithuania (2002) No. IX-785.

The law on mutual recognition and enforcement of the decisions of the EU Member States in criminal cases (2014) No. XII-1322.

The Government of the Republic of Lithuania, Order No. 707 (2017).

Prosecutor General, Recommendations on application and supervision of the measures, except detention, in the pre-trial proceedings (2015) No. I-306.

Garcia Alva v Germany App no 23541/94 (ECtHR, 13 February 2001).