



1st Belgian National Report

# DETOUR – Towards Pre-trial Detention as Ultima Ratio

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Brussels, October 2016



Justice 2014  
with the financial support of the European Commission



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## 1. Introduction: Pre-trial Detention in Context

Belgium is a federal state, composed of three communities divided mainly according to language (the Flemish Community, the French Community and the German-speaking Community) and three regions that aspired to economic autonomy (the Flemish Region, the Brussels Capital Region and the Walloon Region). While issues such as foreign affairs, national defence, finance, social security, etc. are the competence of the federal state, issues such as education, culture, employment and environment are at the discretion of each community or region. For a long time justice fell under the exclusive competence of the federal state but since 1 January 2015 the probation services (“*maisons de justice*” in French or “*justitiehuisen*” in Dutch) in charge of executing sentences in the community have been under the responsibility of the communities (Law of 6 January 2014)<sup>1</sup>. In this way the implementation of custodial measures that can be applied in the pre-trial stage (arrest, detention on remand or pre-trial detention) fall within the federal state whereas the execution of alternative measures belongs to the competence of the communities. The courts are divided into five judicial areas: Antwerp, Ghent, Brussels, Mons and Liege. These areas are in turn divided into 12 judicial districts (27 before 1 April 2014).

On 1 January 2016, Belgium’s population was 11,267,910. The population density is 363 people per km<sup>2</sup> (2015), although the north of the country (Flanders) is much more densely populated than the south (Wallonia). 1,057,666 inhabitants are of a different nationality (i.e. not Belgian) (2010). In 2015, French nationals were the largest group with non-Belgian citizenship numbering 159,352, followed by Italians and Dutch nationals, who numbered 156,977 and 149,199 respectively. Moroccans were in fourth position (82,009), followed by Poles (68,403)<sup>2</sup>.

Criminal proceedings are laid out in the Code of Criminal Procedure (“*code d’instruction criminelle*” or “*Wetboek van Strafvordering*”). Since 1990, pre-trial detention has been subject to separate legislation, contained in the Pre-Trial Detention Act. This Act does not include the proceedings for juvenile detention which will not be discussed in this report.

In principle, and in most cases, a criminal case is opened for any offence known to the public prosecutor. After receiving the initial police report of the offence, this prosecutor

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<sup>1</sup> Alexia Jonckheere, ‘L’informatique Dans La Tourmente de La 6ème Réforme de l’Etat’ (2016) 2013/2 & 2014/1 Pyramides 87.

<sup>2</sup> Belgian Federal Government, ‘Belgium.be’ (2016).

may decide to conduct the investigations with the assistance of police, a process called *information* (“*information*” or “*opsporingsonderzoek*”). He may also decide to refer the case to an investigating judge (“*juge d’instruction*” or “*onderzoeksrechter*”)<sup>3</sup>. In this case, an *instruction* (“*instruction judiciaire*” or “*gerechtelijk onderzoek*”) is opened and the investigations take place under the responsibility of the investigating judge and the judicial council, a special chamber of the district court in first instance (“*chambre du conseil*” or “*raadkamer*”). If the prosecutor requests special measures such as an arrest warrant (“*mandat d’arrêt*” or “*aanhoudingsbevel*”), he must ask to open an *instruction*<sup>4</sup>. In addition to the police arrest (allowed for a maximum period of 24 hours, renewable once by a judge since the Law of 13 August 2011) there are two main kinds of coercive measures that the investigating judge can apply: pre-trial detention under arrest warrant (detention in prison or, since the Law of 27 December 2012, at home under electronic monitoring) and alternative measures (release on bail or under probation conditions; for these measures, see 6. Alternatives to Pre-Trial Detention).

Under Belgian law (Pre-trial Detention Act of 20 July 1990), coercive measures are only possible when it is absolutely necessary for public security, when the criminal offence is punishable with a prison sentence of one year or more and when serious indications of guilt are present. Furthermore, if the maximum sentence for the criminal offence does not exceed 15 years of imprisonment, remand in custody or alternatives have to be based on additional grounds, that is, a risk of recidivism, absconding, collusion or destroying evidence. Before the arrest warrant can be issued, the suspect must be heard by the investigating judge and has the right to be assisted by a lawyer. There is no absolute maximum length of remand custody but a judicial review of the order for pre-trial detention takes place regularly: the first within five days of the arrest warrant, then within one month following this first revision, then once within one month and finally, every two months<sup>5</sup>. The (alternative) measure of release under conditions has a maximum length of three months, renewable every three months.

New legislation is being discussed, with the Minister of Justice wishing to reduce the duration of pre-trial detention and additionally to extend the period of 24/48 hours during which a suspect can be detained by police. Other reforms are under discussion,

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<sup>3</sup> Criminal procedure is described here succinctly; for more information, see 2. Legal Background.

<sup>4</sup> The legislature has recently expanded the prosecutor’s prerogatives in the preliminary stage of a criminal trial. Since the Law of 5 February 2016, the public prosecutor can also validly request a search warrant in the context of a ‘*mini-instruction*’, i.e. with no involvement of the investigating judge. See Adrien Masset and Pierre Monville, ‘La Réforme de L’enquête Préliminaire: Peau de Chagrin ou Requiem pour L’instruction?’ in *La loi ‘pot-pourri II’: un recul de civilisation?* (Anthemis, 2016).

<sup>5</sup> Previously the law provided a monthly revision. This is no longer the case since 1 July 2016 (Law of 5 February 2016).

primarily aiming to increase the possibilities for home detention under electronic monitoring.

Discussions about new legislative proposals are influenced by the relatively new problem of terrorism but also by the decades-old problem of prison overcrowding. The prison population has seen an explosive growth especially since the early 1990s (see 3. Statistics). This increase does not only concern convicted offenders; the population in remand custody has risen, and this by more than 150 %. Although alternatives for remand custody seem to be applied quite often (in 2015 a record number of 5,296 new supervision orders handled by the Probation Service was reached), they did not (substantively) reduce the number of detainees in remand custody. The situation for foreigners is particularly of concern due their high proportion among the prison population. In particular with respect to pre-trial detention and its alternatives, this issue seems to be a major challenge for the future. As recent research (see 4. Literature Review) has shown, alternatives are much less frequently ‘granted’ to ‘non-nationals’<sup>6</sup>, since foreign origin or nationality is a stable predictor of pre-trial detention (remand in custody). Another challenge is the large number of drug-related offenses leading to an arrest warrant, probably due to border traffic.

Belgium ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1955 and in 1998 Protocol No. 6, abolishing the death penalty. Belgium is also party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). On 21 June 2016, Representatives of the Council of Europe's Committee for the Prevention of Torture held high-level talks with Koen Geens, the Belgian Federal Minister of Justice about the implementation of recommendations made by the Committee with a view to introducing a guaranteed minimum service in prisons during strikes (penitentiary establishments in Belgium were affected by strikes in May 2016 – see 5. Pre-trial Detention in the Media). The next visit in Belgium of the Council of Europe anti-torture committee is announced for 2017.

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<sup>6</sup> Alexia Jonckheere and Eric Maes, ‘Opgesloten of vrij onder voorwaarden in het kader van het vooronderzoek in strafzaken? Analyse van het profiel van verdachten onder aanhoudingsmandaat en vrij onder voorwaarden (VOV) op basis van justitiële databanken (jaar 2008)’ in Lieven Pauwels and others (eds), *Criminografische ontwikkelingen: van (victim)-survey tot penitentiaire statistiek* (Maklu 2010).

<sup>7</sup> More information about the European context in section 7. The ‘European Element’.

## 2. Legal Background

### 2.1. Principles and competent authorities

Pre-trial detention in a broad sense refers to three categories of deprivation of liberty:

- judicial arrest (“*arrestation judiciaire*” or “*gerechtelijke aanhouding*”) by police for a maximum of 24 hours, exceptionally extendable to 48 hours<sup>8</sup>. Belgian law makes a distinction between the arrest of someone caught in *flagrante delicto* and the arrest of a person not caught in the act. In the first case, the suspect can be arrested by the police but the police have to inform the public prosecutor immediately and by the most rapid means of communication. In the second case, the public prosecutor makes the decision to deprive a person of liberty only if there are serious indications of guilt (Art. 1 & 2 of the Pre-trial Detention Act);
- order to appear (“*mandat d’amener*” or “*bevel tot medebrenging*”) issued by an investigating judge, to bring a suspect in for questioning. The judge has to question the accused within 24 hours after notifying the order to appear (Art. 5) and;
- pre-trial detention under an arrest warrant (*mandat d’arrêt*” or “*aanhoudingsbevel*”) ordered by an investigating judge.

In practice, however, the term “pre-trial detention” (“*détention préventive*”<sup>9</sup> or “*voorlopige hechtenis*”) often is only used to refer to the latter form of liberty deprivation.

Although Article 12 of the Belgian Constitution recognises the right to personal liberty (“Individual freedom is guaranteed”), it allows these deprivations of liberty under certain strict conditions, according to the main principle of the presumption of innocence and the principle that “No one can be prosecuted except in the cases provided by law, and in the form prescribed by law”<sup>10</sup>.

As regards the competent authorities, the police have to inform the public prosecutor of any criminal case. The public prosecutor may decide to prosecute or to drop the case at

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<sup>8</sup> Parliament is currently discussing a government proposal to extend the period of 24/48 hours to 72 hours for some offenses, particularly for acts of terrorism. This discussion is taking place in the context of the special commission for the fight against terrorism.

<sup>9</sup> In French law, the term “*détention provisoire*” is used.

<sup>10</sup> For the various possibilities of depriving people of their liberty with a preventive purpose in Belgium, see AM Van Kalmthout, MM Knapen and Christine Morgenstern (eds), *Pre-Trial Detention in the European Union* (Wolf Legal Publishers 2009). These opportunities relate, e.g. to administrative detention (for a maximum of 12 hours) by police in case of disrupting public order or safety, the deprivation of liberty of mentally ill persons, the arrest of a foreigner with the intention to deport, etc.



any stage of the proceedings. If an *instruction* is opened, it is the investigating judge who is competent to conduct the case. The judge leads the preliminary judicial investigation and may perform judicial duties, such as issuing the warrant of arrest. Two special courts also have specific competences: the judicial council and the chamber of indictment (“*chambre des mises en accusation*” or “*kamer van inbeschuldigingstelling*”) (see below).

## 2.2. Procedural rights, defence counselling and detention hearing

At the time a suspect is deprived of freedom of movement, the person must be informed of the reasons for arrest.

Article 2bis of the Pre-trial Detention Act guarantees anyone deprived of freedom of movement access to a lawyer of choice from the moment of arrest and prior to the first questioning by the police or, failing that, by the public prosecutor or the investigating judge (Art. 2bis of the Pre-trial Detention Act).

If the suspect has not chosen a lawyer or this lawyer is not available, the Bar Council’s pro bono unit is contacted. A suspect who does not have adequate resources can benefit from full or partial free legal aid. From the moment the lawyer is chosen or appointed, a consultation with a lawyer must take place within two hours. This consultation is confidential and takes place for a maximum of 30 minutes (Art. 2bis).

Although the lawyer may attend the suspect’s hearing, the presence of the lawyer is exclusively designed to enable control of:

- respect for the right of the respondent not to incriminate himself and freedom to choose to make a statement, to answer questions asked or remain silent;
- the treatment of the suspect during the hearing, in particular the obvious exercise of unlawful pressure or stress;
- the notification of the rights of defence (for instance, that all questions and answers are written down word for word) and regularity of hearing.

The hearing can be suspended for 15 minutes maximum for an additional confidential consultation, either at the request of the respondent himself or his lawyer, or else in case of revelation of new offenses not related to the facts that have been previously brought to attention (Art. 2bis).

In proceedings before the investigating judge, the suspect’s lawyer must be informed in time of the place and time of the interrogation, to enable the lawyer to attend. The interrogation can begin on time, even if the lawyer is not yet present. On arrival, the

lawyer joins the hearing. The investigating judge has also to inform the suspect of the possibility that an arrest warrant may be issued against him, and hear his comments on that and, if applicable, those of his lawyer (Art. 16, paragraph 2).

When the investigating judge refuses to issue an arrest warrant requested by the prosecutor, the latter makes a reasoned order that is communicated immediately. This order is not appealable. If an arrest warrant is issued, it must contain the statement of the act committed, the mention of the legislative provision that makes it a felony crime (“*crime*” or “*misdaad*”) or misdemeanour (“*délit*” or “*wanbedrijf*”) and the existence of serious indications of guilt (Art. 16).

The decision to place the suspect under arrest is communicated orally, in the language of the proceedings and this signification is accompanied by the delivery of a complete copy of the arrest warrant (Art. 18). The arrest warrant is executed immediately. It is not subject to appeal or cassation (Art. 19).

### 2.3. Grounds for pre-trial detention

A first condition concerns the seriousness of the offense: the pre-trial detention may be ordered only in case of an offense punishable by a prison sentence of at least one year. The investigating judge needs to have serious indications of guilt. And the warrant is only possible when it is absolutely necessary for public security.

Furthermore, if the maximum sentence for the criminal offence does not exceed 15 years of imprisonment, remand in custody or alternatives have to be based on additional grounds, that is, a risk of recidivism, absconding, collusion or destroying evidence.

### 2.4. Duration and end of pre-trial detention

Pre-trial detention is always a temporary measure. Although Belgian law does not stipulate a maximum duration, an accused person has to be taken to court within a reasonable time. This reasonable time is stipulated in the Article 5, paragraph 3 of the European Convention on Human Rights (ECHR) and is considered in the light of the jurisprudence of the European Court of Human Rights (ECtHR).

The investigating judge’s first decision on pre-trial detention is valid for five days, from the moment of execution. Within that period a special chamber of the district court, the judicial council, has to decide if the pre-trial detention is to be maintained. If the judicial council does not meet within five days, the suspect must be released. Before taking its decision the judicial council must take note of the investigating judge’s report as well as

the prosecutor's requests. It should also hear arguments of defence from the accused party and, if relevant, the lawyer. The judicial council checks the legal conditions for detention and assesses whether the pre-trial detention should be continued. If there is an irreparable nullity, such a detention based on an irregular warrant of arrest, the judicial council cannot repair the act and has to order the release of the accused (see 5. Pre-Trial Detention in the Media).

As long as the pre-trial detention is still ongoing and the investigation is not closed, the judicial council will review the detention, twice on a monthly basis and then bi-monthly<sup>11</sup>. Before the hearing, the case file is placed for two days at the disposal of the accused and his counsel (Art. 22). The judicial council checks if the pre-trial detention is still necessary in light of the circumstances, that is, if serious indications of guilt and other reasons that existed at the moment of arrest remain valid. Before any decision, the court must hear the detainee and/or the lawyer. In the future, however, there will be a possibility to be heard by video conference so that the detainee will not need to appear physically before the council or be represented physically by the lawyer. This is provided by a Law of 29 January 2016 which should enter into force no later than 1 September 2017. Several reservations have been expressed about this law, for by introducing a physical distance between the accused and the judicial parties there is a risk of compromising the contradictory nature of the debates. It also raises logistical questions. Furthermore, the lawyer's role needs to be adjusted to this new way of appearing. It is presently up to the government to determine the concrete details regarding the law's implementation<sup>12</sup>.

Both the suspect and the prosecutors have the right to appeal against the decisions of the judicial council before the chamber of indictment (Art. 30) and a further appeal against the decision of the chamber of indictment can be made to the Court of Cassation (Art. 31). The possibilities to appeal in cassation, however, have been limited by a new Law of 5 February 2016. Under the new law, the decision on appeal of the chamber of indictment to maintain the pre-trial detention can no longer be contested in cassation, unless the decision of the judicial council (i.e. the decision appealed against) was taken at the moment of the first control of the arrest warrant (i.e. within the first five days of its issue)<sup>13</sup>. This change in the law has been strongly criticised, especially because of the determining role hitherto played by the Court of Cassation in interpreting the rules

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<sup>11</sup> New Law since 1 July 2016 (Law of 5 February 2016).

<sup>12</sup> Ivo Mennes, 'Potpourri II-Wet: Gerichte Verbeteringen Aan de Wet Voorlopige Hechtenis' (2016) 11 *Nullum Crimen* 204.

<sup>13</sup> Olivier Michiels and Ludivine Kerzmann, 'Nouveautés En Matière de Détention Préventive Ou Les Droits de La Défense À Prix Bradés: Une Fausse Bonne Affaire?', *La loi 'pot-pourri II': un recul de civilisation ?* (Anthemis, 2016).

governing pre-trial detention and in controlling the motivation of decisions by the chambers of indictment<sup>14</sup>. The lawmakers justified their position by invoking bottlenecks at the high court due to a multiplication of appeals against judicial decisions in the criminal investigation stage and the extension of the procedures regarding pre-trial detention and reasonable delay in criminal proceedings. However there is a high risk that irregularities will be found in the future as they had not been subject to censor by the Court of Cassation<sup>15</sup>.

Previously, in addition to the possibility to appeal against decisions of the judicial council to the chamber of indictment, this body conducted an automatic review of the *instruction* after six months of pre-trial detention. This chamber had to decide on the necessity of pre-trial detention and on the proper conduct of the investigation. Such control, introduced in 2005, was abolished by the Act of 5 February 2016. Although the review by the chamber of indictment had little impact on the duration of pre-trial detention, the six-month deadline represented a symbolic milestone after which this detention could be seen as lasting too long<sup>16</sup>.

At the end of the *instruction*, the investigating judge hands the case file over to the public prosecutor. If there is no demand for any further investigation, the judicial council examines the file and then decides whether or not to refer the case to court. Additionally, the court decides whether the pre-trial detention should continue or if the individual is eligible for release under conditions. After this decision the judicial council no longer conducts an automatic review for the pre-trial detainee, who can still, from month to month, introduce a request for release. For a suspect released under conditions, the sentencing court may decide to deliver an arrest warrant if the suspect does not respond to a summons or in the case of new and serious circumstances.

## 2.5. Pre-trial detention at home under electronic monitoring<sup>17</sup>

With the Law of 27 December 2012 (in operation since 1 January 2014), electronic monitoring was introduced as a new alternative measure to pre-trial detention. More specifically, electronic monitoring is considered as a ‘modality of execution’ of an arrest warrant, which means that the investigating judge (or investigating courts) will first

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<sup>14</sup> Damien Vandermeersch, ‘Les Modifications En Matière D’instruction et de Détention Préventive’ (2016) 25 *Journal des tribunaux* 424.

<sup>15</sup> Masset and Monville (n 4).

<sup>16</sup> Vandermeersch (n 14).

<sup>17</sup> For observations and reflections on Electronic Monitoring in Belgium, see Eric Maes, ‘Observations and Reflections on Electronic Monitoring: The Case of Belgium’ in C Joldersma (ed), *Prisons of the Future. Final report Prisons of the Future* (Dutch Custodial Institutions Agency 2016).

decide whether an arrest warrant has to be issued (or prolonged) and then, in a second step, will decide where the arrest warrant will be executed: in prison or at the suspect's home (or at another assigned residence). At this stage of the criminal justice process, suspects are monitored using GPS-technology, without limitation in time. In case of non-compliance, electronic monitoring can be converted into pre-trial detention in prison.

The continuation of electronic monitoring will be reviewed on a regular basis, just as would have been the case were the suspect detained in prison.

A suspect under electronic monitoring is not allowed to leave the assigned place of residence except for a limited number of movements allowed for medical reasons, in case of force majeure, or in relation to the criminal investigation process (e.g., hearings by judicial authorities and police interrogations). Electronic monitoring in the pre-trial stage thus appears to be a form of '24-hour home detention'.

Furthermore, similar to 'classic' pre-trial detention, the electronic monitoring system can also be 'individually modulated', i.e., a prolonged term of 'prohibition of free movements' is possible, in terms of contacts with the outside world by way of correspondence, visits and telephone contacts.

## 2.6. Pre-trial detention consecutive to the issuing of a European arrest warrant

Specific legislation has been adopted to enforce an arrest warrant issued by another EU Member State<sup>18</sup>. Under this law, someone can be arrested in Belgium in virtue of a European arrest warrant, that is, a judicial decision issued by the competent judicial authority of another member state and pertaining to criminal proceedings, the execution of a sentence or a security measure depriving liberty (Art. 2). Two types of conditions must be met: the first condition regards the scale of penalty: the offence(s) in question must be punishable in the country issuing the warrant by a sentence or security measure depriving liberty of at least 12 months. The other condition refers to the principle of (double or) dual criminality: the offences occasioning the arrest warrant, barring exceptions, are also offences under Belgian law.

An arrest based on a European warrant proceeds in the same conditions as those stipulated by the Law on Pre-trial Detention. Within 24 hours following arrest and

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<sup>18</sup> Law of 19 December 2003 concerning the European arrest warrant. This law is briefly described in this report.

before the hearing by an investigating judge, a written document must be delivered to the suspect informing him of his rights and of the procedure concerned (Art. 10).

The suspect must appear before an investigating judge within 24 hours after arrest. Following the hearing the magistrate can order liberty deprivation based on the European arrest warrant; in this case the warrant cannot be executed in the form of home detention with electronic monitoring, but the magistrate can also release the person subject to respect for one or several conditions until a final decision is taken on execution of the European warrant. If these conditions are not respected an arrest warrant can then be considered under the conditions of the Law of 20 July 1990 (Art. 11). The investigating judge also has the option to impose bail.

Under the European arrest warrant, if the investigating judge decides to detain, the validity of this order is not limited to five days but remains in effect until the final decision on execution of the warrant (Art. 20). This decision can nevertheless be reconsidered at any time. Within 15 days after arrest, it is the judicial council's responsibility to decide on execution of the arrest warrant (Art. 16). The judicial council's decision may be opposed. Once it is definitive, however, the offender will be surrendered to the authorities of the issuing State within ten days (Art. 22). However, this execution deadline may be postponed for serious humanitarian reasons (Art. 23).

A simplified procedure also exists for cases where the person arrested specifically consents to be surrendered to the State issuing the arrest warrant. However, the person so consenting thus renounces the benefit of the specialty principle whereby a person under a European arrest warrant cannot be pursued, found guilty or deprived of liberty for an offence committed before his surrender if the offence is different from the one that motivated the warrant (article 5.1.3.1. of the Ministerial Circular of 8 August 2005 concerning the European arrest warrant and 5.3.1 of this same Circular). The consent must be certified by the public prosecutor, and this only after a first hearing by the investigating judge. At this time the prosecutor can decide whether or not to execute the European arrest warrant through a simplified procedure that does not involve appearing in the judicial council. If the prosecutor decides on execution of the arrest warrant, this decision represents a detention order until the person is actually surrendered to the issuing State (Art. 13).

## 2.7. Deduction of the time spent in pre-trial detention from the definitive prison sentence

The Belgian Penal Code stipulates that the time spent in pre-trial detention is deducted from the definitive prison sentence, both for detention in prison and for home detention under electronic monitoring.

In case of inappropriate detention (because the person is innocent or because the time spent in pre-trial detention exceeds the length of the prison term to which he was sentenced; “*détention inopérante*” or “*onwerkdadige hechtenis*”), the suspect can receive compensation under certain conditions (Act of 13 March 1973). According to Article 28 of the Act of 1973, one of these conditions is that the person has been held in pre-trial detention for more than eight days without this detention being attributable to personal behaviour. The amount of the compensation is determined in equity. In practice however it appears that sentencing judges occasionally match the duration of pre-trial detention, pronouncing sentences that are at least equal to the time spent in pre-trial detention.

Since 2012 the federal government has paid € 763,000 in compensation to individuals for inappropriate detention. In 2012, the Ministry of Justice approved 54 of the 99 requests submitted by persons after such pre-trial detention for a total of € 271,284.93. In 2013, 39 applications out of a total of 88 were approved representing a total amount of € 314,336.05. In 2014, 33 out of 97 applications were approved, resulting in the payment of compensation of € 177,901.11<sup>19</sup>.

## 2.8. Alternatives to pre-trial detention: release under bail and release under conditions

In the case where pre-trial detention can be ordered or maintained the investigating judge can, ex officio or at the request of the public prosecutor or the suspect, determine an amount for bail; the detainee can then be released following prior and complete payment. The judge can also decide to release the suspect and impose respect for one or several conditions for a determined period and in any case no longer than three months (see 6. Alternatives to Pre-trial Detention).

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<sup>19</sup> BELGA, ‘Depuis 2012, 763.000 euros d’indemnités pour “détention préventive inopérante”’ *La Libre Belgique* (15 April 2015) <<http://www.lalibre.be/actu/belgique/depuis-2012-763-000-euros-d-indemnites-pour-detention-preventive-inoperante-552e7a573570fde9b2b62601>>.

### 3. Statistics

#### 3.1. The overall prison population rate from a European perspective

For several decades now, Belgium has faced serious problems of prison overcrowding, due to an almost constantly rising prison population. The start of this century has been especially marked by record highs in prison population, each year beating the previous record. In 2003, the number rose to 9,000 inmates (not counting those under electronic monitoring), a level long considered as unattainable, and this for the first time since the end of the Second World War<sup>20</sup>. Since then, new population records have been reached: more than 10,000 inmates on a daily basis in 2007, more than 11,000 in 2011 and up to more than 12,000 at certain moments in the year 2013.

**Table 1. Overview of total prison population, prison capacity, prison population rate and prison density, according to available SPACE I statistics (survey 2014)**

	Population	Capacity	pop/cap	Tables SPACE I
<b>Population in Belgium (on January 1, 2014)</b>	11.203.992			SPACE I, Table 1. - Table 1.3.
<b>Total prison population SPACE I (on September 1, 2014)</b> <i>(i.e. incl. EM - incl. minors in closed federal facilities - incl. Paifve)</i>	13.212	10.240		SPACE I, Table 1. - Table 1.3. (population) - Table 1.2. (capacity)
<i>of which</i>				
Electronic monitoring	1.904			SPACE I, Table 1.1. (population)
Minors (in closed federal facilities)	91	124		SPACE I, Table 1.1. (population) - Table 1.2. (capacity)
Others (Institution for Social Defense Paifve)	204	205		SPACE I, Table 1.1. (population) - Table 1.2. (capacity)
Total excl. EM - incl. minors - incl. ISD Paifve	11.308	10.240		SPACE I, Table 1.2. (capacity)
Total excl. EM - excl. minors - incl. ISD Paifve	11.217	10.116		
Total excl. EM - excl. minors - excl. ISD Paifve	11.013	9.911		SPACE I, Table 1.3. (population)
<b>Rate per 100,000 inhabitants</b>				
incl. EM - incl. minors - incl. ISD Paifve (= <u>NON-ADJUSTED</u> )	117,9			SPACE I, Table 1. - Table 1.3.
excl. EM - incl. minors - incl. ISD Paifve	100,9			
excl. EM - excl. minors - incl. ISD Paifve	100,1			
excl. EM - excl. minors - excl. ISD Paifve (= <u>ADJUSTED</u> )	98,3			SPACE I, Table 1.3.
<b>Prison density</b>				
incl. EM (only in population) - incl. minors - incl. Paifve		129,0		SPACE I, Table 1.
excl. EM - incl. minors - incl. Paifve		110,4		
excl. EM - excl. minors - incl. Paifve		110,9		
excl. EM - excl. minors - excl. Paifve		111,1		

<sup>20</sup> The previous record high was due to the massive use of imprisonment as part of the so-called 'repression policy' after the Second World War towards those who collaborated with the enemy.



The Belgian average daily prison population was 11,645 in 2013<sup>21</sup> (i.e. a prison population rate of 104.3 per 100,000 inhabitants)<sup>22</sup>. This number dropped slightly to 11,578 in 2014, for a rate of 103.3 inmates per 100,000 inhabitants (with a general population of 11,203,992)<sup>23</sup> and decreased to 11,041 in 2015<sup>24</sup>. According to the most recent SPACE-statistics (SPACE I; *Statistiques pénales annuelles du Conseil de l'Europe*), on 1 September 2014, Belgium had 117.9 prisoners per 100,000 inhabitants (prison population rate)<sup>25</sup> or - when adjusting for differences in calculation methods of the prisoner population between countries – 98.3 detainees per 100,000 inhabitants, after correction. For Belgium, the latter figure does not include electronically monitored prisoners nor other specific categories of inmates.<sup>26</sup>

While some countries, mainly those from the former Eastern Bloc, exhibit particularly high (adjusted) prison population rates (see e.g. the Russian Federation and Lithuania with a rate of 465.8 and 299.6 respectively), Belgium is found in the middle bracket of the Council of Europe countries. The (adjusted) prison population rate in Belgium is below the European average (131.2) and median (119.1), and lower than that observed in some other Northern and South-western European countries, such as the United Kingdom (England & Wales: 148.4), Spain (144.2), Portugal (129.4) and France (101.6). On the other hand, Belgium's prisoner rate is not only higher than that of the Scandinavian countries – countries which traditionally show one of the lowest imprisonment rates (prisoner rates varying between 53.9 in Finland and 72.8 in Norway on 1 September 2014) – but even outnumbers that of two neighbouring countries, namely the Netherlands (56.9) and Germany (75.1)<sup>27</sup>.

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<sup>21</sup> Directoraat-generaal Penitentiare Inrichtingen, 'Jaarverslag 2013' (FOD Justitie 2014) 66.

<sup>22</sup> *ibid.*

<sup>23</sup> Directoraat-generaal Penitentiare Inrichtingen, 'Jaarverslag 2014' (FOD Justitie 2015).

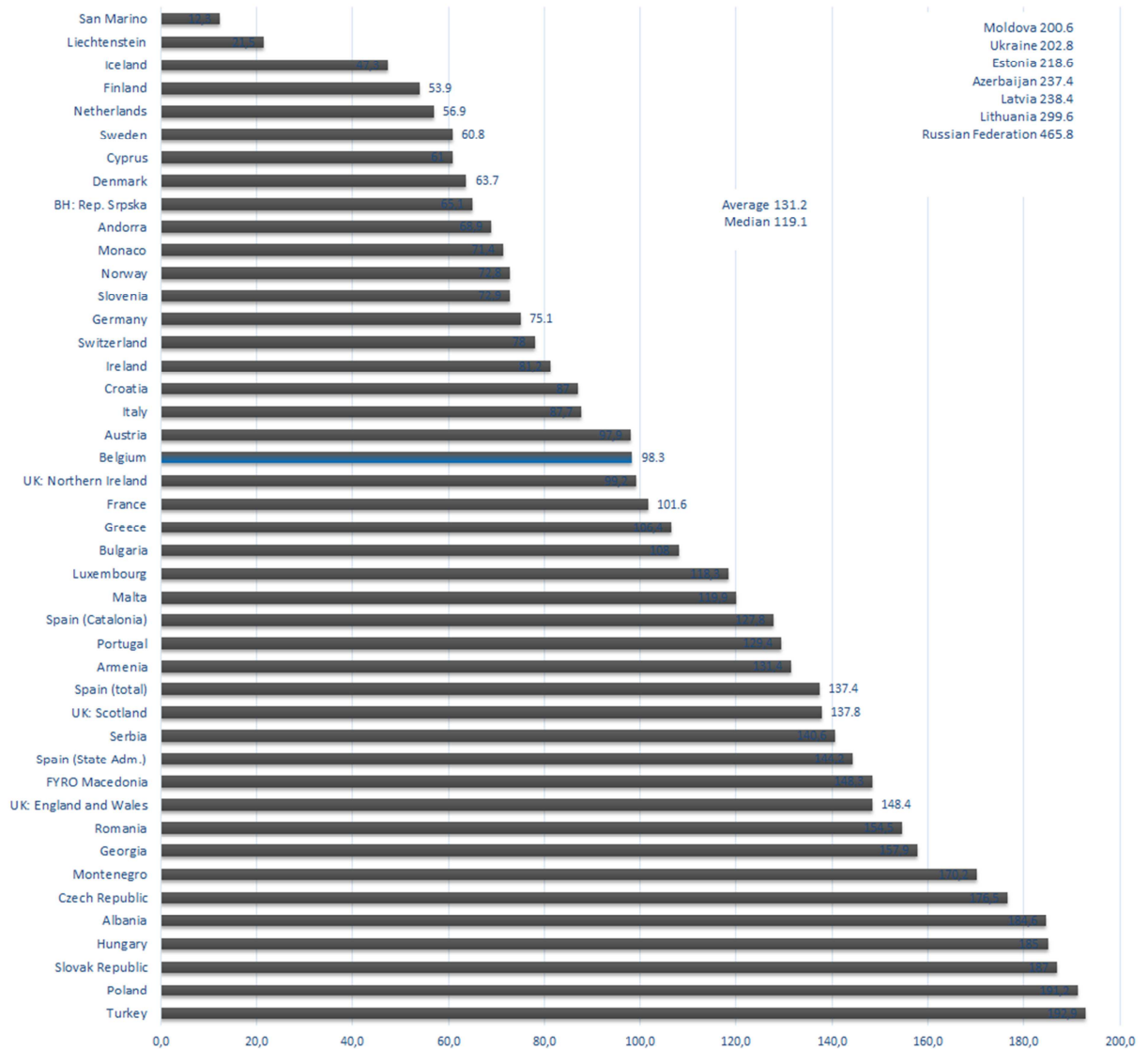
<sup>24</sup> Directoraat-generaal Penitentiare Inrichtingen, 'Jaarverslag 2015' (FOD Justitie 2016) 37.

<sup>25</sup> Marcelo F Aebi, Mélanie M Tiago and Christine Burkhardt, 'SPACE I - Council of Europe Annual Penal Statistics: Prison Populations. Survey 2014.' (Council of Europe 2015) Table 1.1.

<sup>26</sup> *ibid* Table 1.3 for adjusted figures ; Table 1.1 and following comments for an enumeration of the categories not included in the calculation.

<sup>27</sup> *ibid* Table 1.3.

**Figure 1. Prison population rate (per 100,000 inhabitants) on 1 September 2014 (SPACE I, adjusted figures, excl. > 200.0<sup>28</sup>)**



### 3.2. The remand prisoner population rate from a European perspective

When looking more specifically to the situation of prisoners in remand custody, another image is depicted. With a score, on 1 September 2014, of 29.6 ‘detainees not serving a

<sup>28</sup> Countries with a (extreme) prison population rate exceeding 200 are not visualised in figure 1 (see the text box in the upper right corner).

final sentence' per 100,000 inhabitants (excluding 'other cases'), Belgium comes much closer to, and even scores higher than the European average (28.9) and median (24.9)<sup>29</sup>.

Other international data sources such as the (second edition of the) World Pre-Trial/Remand Imprisonment List of the International Centre of Prison Studies<sup>30</sup>, Eurostat and the European Sourcebook also mention some figures for Belgium with respect to pre-trial detention. Walmsley<sup>31</sup> reports a remand population of 3,600 on average for the year 2012, resulting in a pre-trial/remand population rate of 32 per 100,000 out of an estimated 11.14 million national population (31.8 % of the total prison population); a higher figure than in 2000 (30), although lower than 2005 and 2010 (34). This rate corresponds with EUROSTAT-data<sup>32</sup>, updated last on 25 May 2016. According to EUROSTAT, Belgium had 3,535 remand prisoners in 2012 or 31.86 per 100,000 population, a number that rose in 2013 to 3,746 (or 33.56 per 100,000). The fifth edition of the European Sourcebook of Crime and Criminal Justice Statistics<sup>33</sup> reports, for Belgium, a 30 % remand prison population as a percentage of total stock in the years 2007-2008, 28 % in the years 2009, 2010 and 2011<sup>34</sup>.

Based on the SPACE I-figures published for the year 2013 (at that time, remand prisoners were not yet eligible for electronic monitoring in Belgium), it can be observed that 29.1 % of the total prison population was held in remand custody (in a closed prison setting): out of a total prison population of 11,455 on 1 September 2013 (i.e., excluding those serving their sentence under electronic monitoring)<sup>35</sup>, 2,645 prisoners were untried detainees [no court decision being reached yet] and 685 were sentenced prisoners who had appealed or who were within the statutory limit for doing so<sup>36</sup>, i.e. a total of 3,330 prisoners not serving a final sentence. SPACE I reports for Belgium on 1 September 2014, 2,705 untried prisoners and 609 not-definitively sentenced prisoners,

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<sup>29</sup> Aebi, Tiago and Burkhardt (n 25).

<sup>30</sup> Roy Walmsley, 'World Pre-Trial/Remand Imprisonment List (Second Edition)' (International Centre for Prison Studies 2014).

<sup>31</sup> *ibid* 5.

<sup>32</sup> Eurostat, 'Prisoners by Legal Status of the Trial Process' <[http://ec.europa.eu/eurostat/web/products-datasets/-/crim\\_pris\\_tri](http://ec.europa.eu/eurostat/web/products-datasets/-/crim_pris_tri)> accessed 31 August 2016.

<sup>33</sup> Marcelo F Aebi and others, 'European Sourcebook of Crime and Criminal Justice Statistics 2014' (European Institute for Crime Prevention and Control 2014).

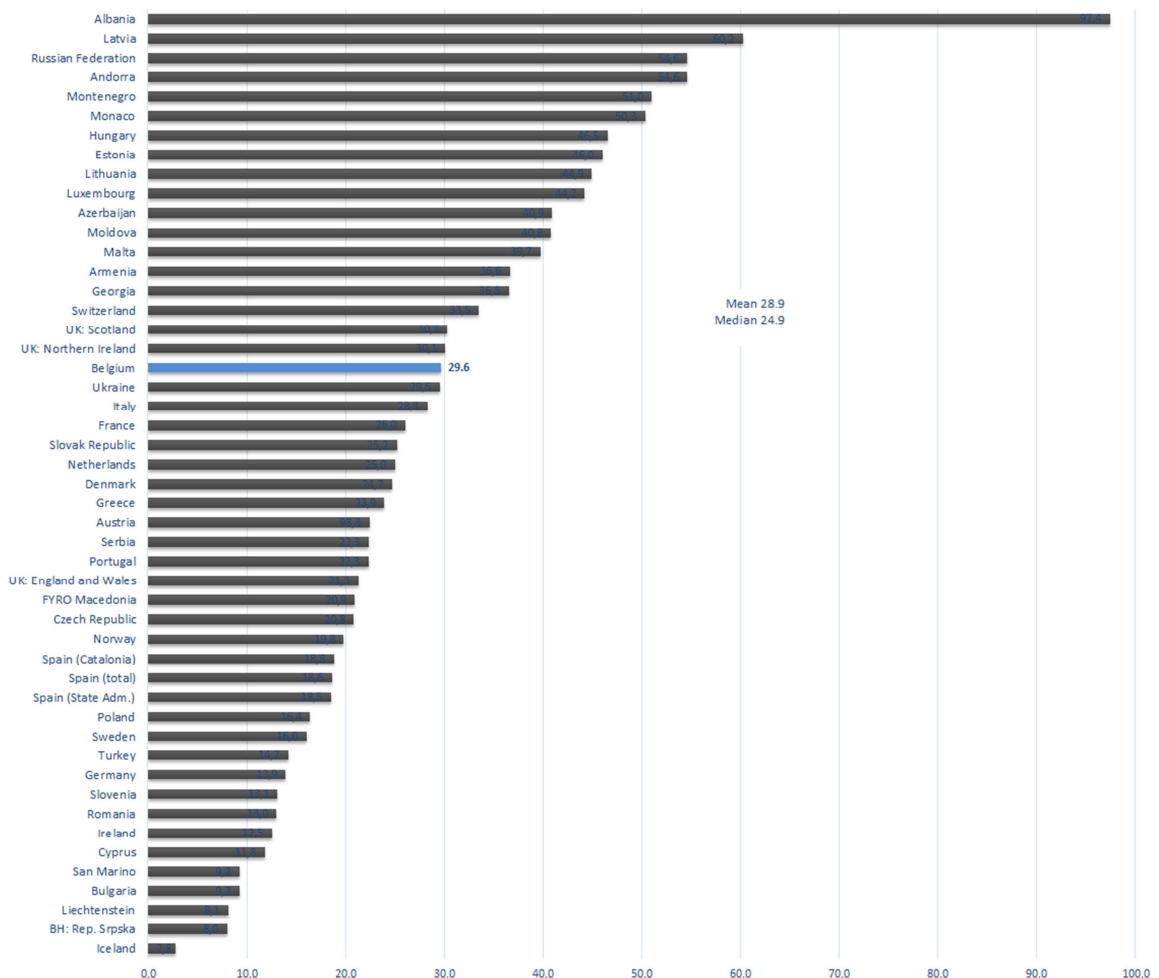
<sup>34</sup> *ibid* Table 4.2.1.2.

<sup>35</sup> Marcelo F Aebi and Natalia Delgrande, 'SPACE I - Council of Europe Annual Penal Statistics: Prison Populations. Survey 2013.' (Council of Europe 2015) Table 1; Table 1.1. This figure includes remand prisoners, definitively sentenced prisoners and mentally ill offenders incarcerated in adult prison facilities or in the institution for social defence of Paifve, as well as minors held in specific federal institutions.

<sup>36</sup> *ibid* Table 5.

i.e. a total of 3,314 people in remand custody (in prison or under electronic monitoring; see below) out of a total prison population of 13,212 (i.e. including electronically monitored prisoners)<sup>37</sup>.

**Figure 2. Prison population rate of ‘detainees not serving a final sentence’ (excl. ‘other cases’) per 100,000 inhabitants, on 1 September 2014**



Although the Belgian prison situation seems at first sight to be better than in many other European countries, a few observations can be addressed in order to place these figures in a broader perspective.

First, in Belgium, the number of people who are deprived of their liberty before being definitively convicted is undoubtedly one of the highest compared to many other Western European countries. Except for Luxembourg, with an even higher number of remand prisoners (44.2 per 100,000 inhabitants), Belgium (29.6) makes more use of

<sup>37</sup> Aebi, Tiago and Burkhardt (n 25).

pre-trial detention (remand custody) than, for example, Germany (13.9), the Netherlands (25.0) and France (26.0)<sup>38</sup>.

Furthermore, the degree of prison overcrowding in Belgium is one the highest in all of Europe. And from a longitudinal perspective, over the last decades Belgium experienced a remarkable and alarming growth in its incarceration numbers, including for prisoners in remand custody. This evolution raises the question as to whether ‘alternatives’ to pre-trial detention – especially those introduced by the new Pre-trial Detention Act of 1990 and later reforms – have been able to alter this situation. These so-called alternatives are certainly very popular, but do they really attain the goals they are meant to pursue?

### 3.3. Prison density from a European perspective and varying degrees of overcrowding according to individual prison

In terms of prison overpopulation the available SPACE I-statistics indicate, with regard to Belgium, an overall prison density (number of detainees per 100 places) on 1 September 2014<sup>39</sup> of 129.0 (134.2 on 1 September 2013). However, this figure is somewhat misleading, as electronically monitored prisoners are counted in the prison population figures, while, for obvious reasons, they are not included in the figures relating to prison capacity. Nevertheless, even after correction, the prison density in Belgian prisons in general remains very high: if electronically monitored prisoners and other specific categories of inmates are excluded from the calculations, the overall prison density amounts to 111.1 (11,013 prisoners for 9,911 available places)<sup>40</sup> and this, compared to 122.1 on 1 September 2013, with 11,153 prisoners for 9,133 places<sup>41</sup>.

The degree of prison overcrowding however has receded in the last years. While the Belgian Prison Service reported a 24.1 % of overpopulation in 2013<sup>42</sup> and 16.6 % for the first 9 months of 2014 (on average 11,578 prisoners for 9,931 available places)<sup>43</sup>, it dropped to 7 % on 1 September 2015 (10,823 prisoners for 10,108 places)<sup>44</sup>. This is a

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<sup>38</sup> *ibid* Table 5.1.

<sup>39</sup> *ibid* Table 1.

<sup>40</sup> *ibid* Table 1.1; Table 1.2; Table 1.3.

<sup>41</sup> Aebi and Delgrande (n 35) 45 and 51.

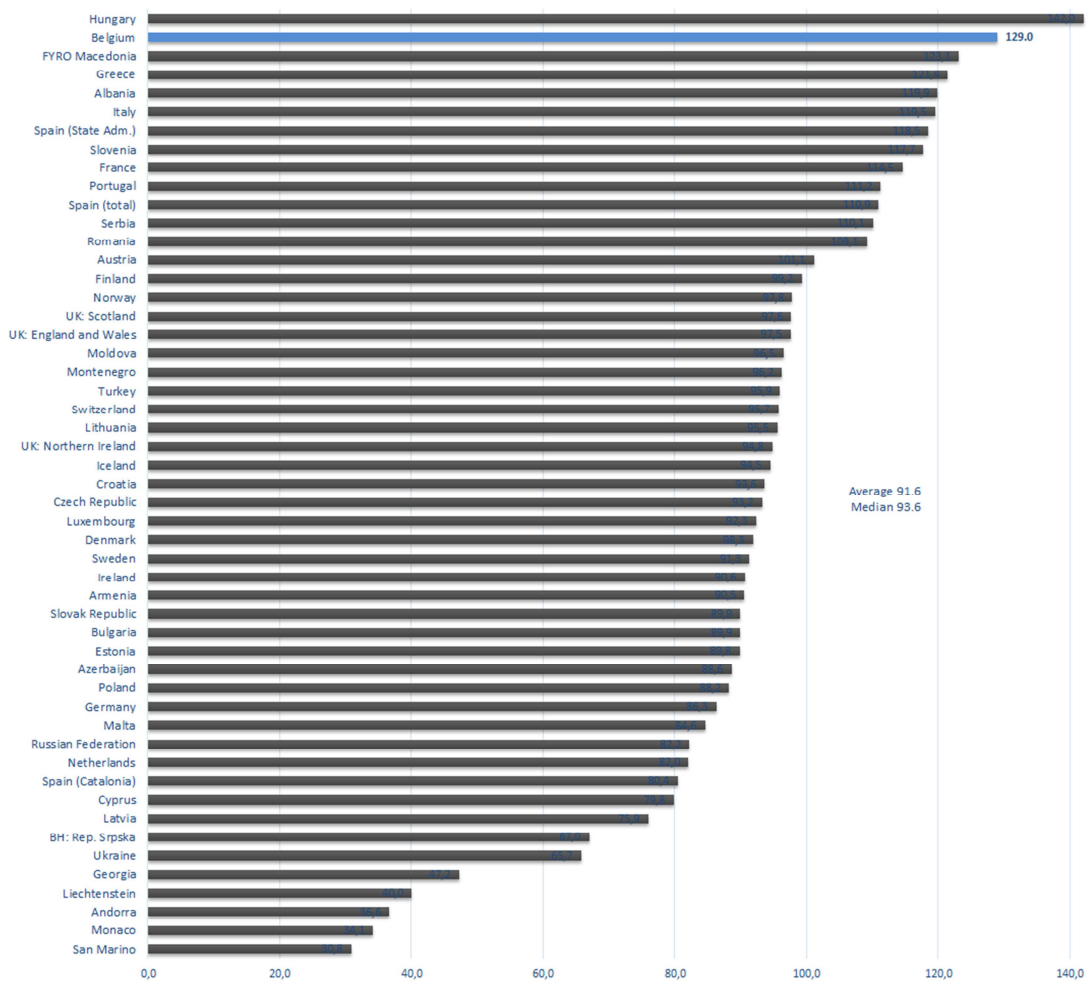
<sup>42</sup> Directoraat-generaal Penitentiaire Inrichtingen, ‘Jaarverslag 2013’ (n 21).

<sup>43</sup> Directoraat-generaal Penitentiaire Inrichtingen, ‘Jaarverslag 2014’ (n 23). In these calculations made by the central prison administration, minors who are incarcerated in specific federal detention centres (Everberg, Tongeren, Saint-Hubert) are not included in the population and capacity numbers (nor do electronically monitored ‘prisoners’).

<sup>44</sup> KST, ‘Overbevolking Gevangenen Historisch Laag’ *De Morgen* (2 September 2015) <<http://www.demorgen.be/plus/overbevolking-gevangenen-historisch-laag-b-1441151165660/>>.

consequence both of a reduction in the incarcerated prison population and of a quite significant expansion of prison capacity over the last years (capacity in 2013: 9,384 places). Temporary loss of capacity and a new (slight) rise in the prison population (back up to more than 11,000 prisoners) resulted in an overpopulation of about 10 % in November 2015<sup>45</sup>. The latest annual report of the central prison administration indicates an average 10.1 % overall degree of overpopulation for the last 9 months of 2015.<sup>46</sup>

**Figure 3. Prison density (population per 100 places) on 1 September 2014 (SPACE I)**



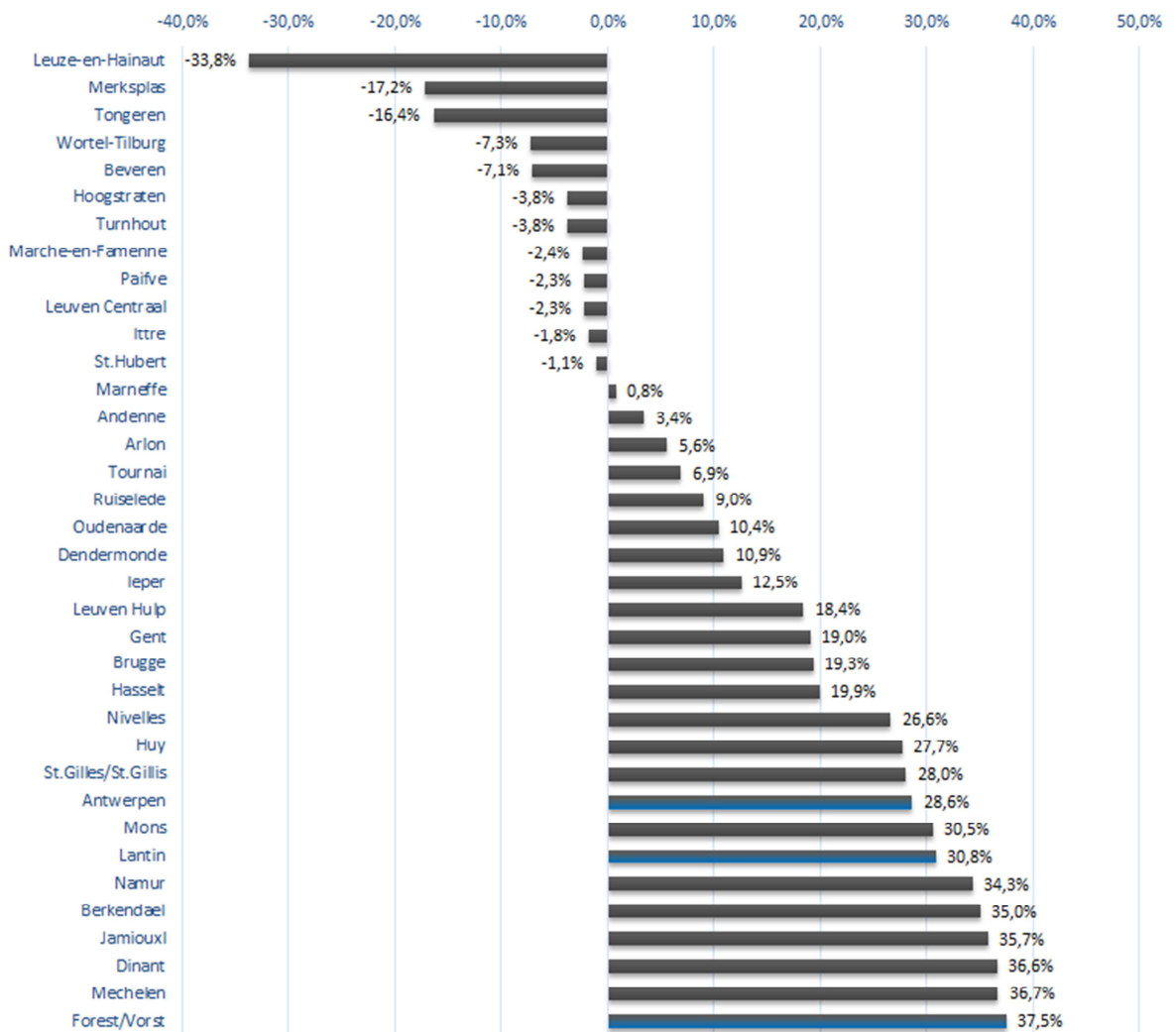
This global figure however hides significant variations between different prison facilities. While certain prison facilities do not encounter problems of over-occupancy – some of them follow a *‘numerus clausus’* policy (and the ‘one cell, one prisoner’ principle) because of their specific destination (e.g. Hoogstraten, as an open prison; the central prison of Leuven, as a facility for offenders convicted to very long prison sentences),

<sup>45</sup> BELGA, ‘Ruim 11.000 Gedetineerden in Belgische Cel’ *De Redactie* (7 December 2015) <<http://deredactie.be/cm/vrtnieuws/binnenland/1.2517615>>.

<sup>46</sup> Directoraat-generaal Penitentiaire Inrichtingen, ‘Jaarverslag 2015’ (n 24).

others are confronted with problems of huge overcrowding, with inmates sharing a single cell with two or even more fellow detainees. This is especially the case for large, and often very old, remand prisons, such as Antwerp, Lantin (Liège) and Forest (Brussels), which have over-occupancy rates of 28.6, 30.8 and 37.5 % respectively (in 2015)<sup>47</sup>. In 2014, the situation was even worse, with overcrowding rates of 50.6, 38.6, and 48.3%<sup>48</sup>.

**Figure 4. Average rate of over-occupancy, according to prison facility (excl. electronic monitoring) – year 2015 (31 March 2015 – 31 December 2015)**



Such a situation is a cause for concern, as the detention conditions, which are not uncommonly described as ‘inhuman’, hamper the practical application of the provisions

<sup>47</sup> *ibid* 37.

<sup>48</sup> Directoraat-generaal Penitentiaire Inrichtingen, ‘Jaarverslag 2014’ (n 23).

of the 2005 Prison Act<sup>49</sup>. A lack of prison infrastructure that is sufficiently adapted to current needs<sup>50</sup> and problems of overcrowding have many negative effects: a degrading moral climate within the institution and difficulties with respect to order and security, classification, hygiene and comfort, as well as the supply of enough prison labour and food and organization of family visits, etc.<sup>51</sup> In this respect there is a serious risk of violation of Article 13, § 2 of the 2005 Prison Act which – similar to past prison regime regulations<sup>52</sup> – clearly states that as far as possible remand prisoners should be granted all regime facilities that are compatible with imperatives of good order and security within prison. With regard to remand prisoners it is, in particular, the principle of the ‘presumption of innocence’ that often has been used as a justification for maximum efforts to prevent the potentially detrimental effects of imprisonment (to a larger extent, i.e. not limited to pre-trial detainees, see also the current concept of ‘normalization’, as established in the European Prison Rules and the Belgian 2005 Prison Act)<sup>53</sup>. It therefore seems paradoxical that, in daily practice, remand prisoners sometimes endure detention conditions that are more unfavourable than those of sentenced prisoners.

### 3.4. Long term evolution of the Belgian prison population and the use of alternatives to (pre-trial) detention

During the last decades the Belgian parliament and government developed several ideas and implemented multiple initiatives to reduce the (over-)use of pre-trial detention/remand custody, of which the important reform of the Pre-trial Detention Act in 1990 is just one example. The ambitions expressed on the occasion of this legislative reform, however, seem not have been reached.

Available statistics indicate an almost constant growth of the prison population. Over the last 35 years this population has almost doubled (+ 94.5 %): from ‘merely’ 5,667

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<sup>49</sup> Law on principles/Prison Act of 12 January 2005 concerning the administration of the prison system and the legal position of detainees [1 February 2005] Official Journal (*Moniteur belge/Belgisch Staatsblad*).

<sup>50</sup> Eric Maes, ‘Les prisons craquent de toutes leurs jointures’ (2015) 70 *La Revue Nouvelle* 25, 27.

<sup>51</sup> Kristel Beyens, Sonja Snacken and Christian Eliaerts, *Barstende muren. Overbevolkte gevangenis: omvang, oorzaken en mogelijke oplossingen* (Kluwer 1993).

<sup>52</sup> Article 165 of the Règlement général des maisons de sûreté et d’arrêt (General regulations on remand prisons) of 6 November 1855 for example already stated that all communication and other mitigations of prison regime that are compatible with good order and security in prison, are granted to suspects and accused prisoners within the limits of the prison rules, “[t]outes les communications et les autres adoucissements compatibles avec le bon ordre et la sécurité de la prison, sont accordés aux prévenus et aux accusés dans les limites du règlement”; Recueil des circulaires, instructions et autres actes émanés du Ministère de la Justice ou relatifs à ce département [1855-57] 177ff.)

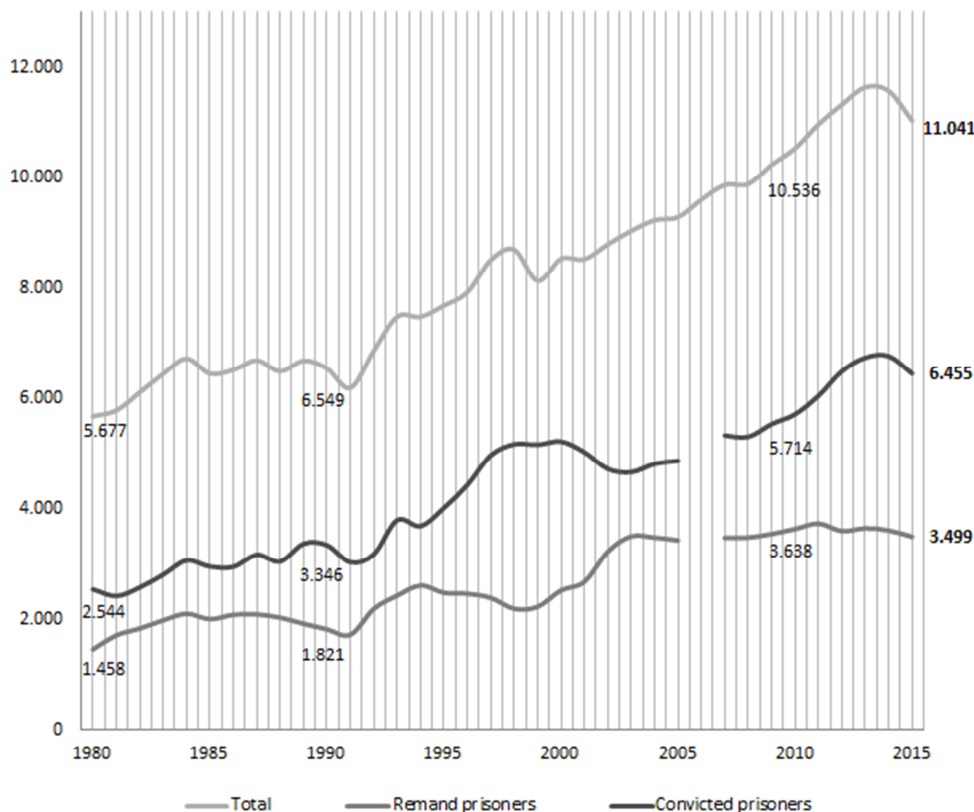
<sup>53</sup> On this subject, see more in general: Eric Maes, *Van gevangenisstraf naar vrijheidsstraf. 200 jaar Belgisch gevangeniswezen* (Maklu 2009) 993ff 996 1031-32.



prisoners in 1980<sup>54</sup> to over 11,000 in 2015 (N=11.041), and this, even without accounting for almost 2,000 offenders who are presently serving their sentence or under arrest warrant in the community and monitored by electronic devices (ankle bracelet, voice recognition, GPS). In particular since the early 1990s, just after the introduction of the new Pre-trial Detention Act of 1990, the prison population began to rise exponentially; and, this evolution applies to both sentenced and non-sentenced prisoners.

In 2015, 903 interned offenders with mental disorders were behind bars, in federal penitentiary facilities, i.e. excluding those supervised in the community or placed in private psychiatric hospitals (or in the forensic psychiatric care institution of Ghent, a public-private cooperation). The number of definitively convicted offenders rose from around 2,500 in 1980 to more than 6,400 in 2015 (+ 153.7 %); or, formulated otherwise, it has been multiplied by a factor of more than 2.5 (N=2,544 in 1980 and 6,455 in 2015).

**Figure 5. Evolution of the prison population (daily average) - total number (1951-2015) and according to legal status (remand and convicted prisoners, 1980-2015)**



A similar trend, less pronounced but nevertheless significant, in terms of growth of the prison population over the long run is observable for those in remand custody (average

<sup>54</sup> Eric Maes, 'Evoluties in punitiviteit: lessen uit de justitiële statistieken' in Ivo Aertsen and others (eds), *Hoe punitief is België?* (Maklu 2010) 49.

daily population). The number of pre-trial detainees evolved from nearly 1,500 in 1980 to almost 3,500 in 2015<sup>55</sup>, an increase of 140 % (N = 1,458 in 1980 and 3,499 in 2015). Compared to the year 1990 (N = 1,821), there is an increase of 92.1 %, or, in other words, a population in pre-trial detention almost twice higher in 2015.

The rise of this (sub)population is especially observable in the first half of the 1990s and from the late 1990s into the new century. It is remarkable to note that the population in remand custody declined in the years just before the introduction of the new Pre-trial Detention Act of 1990, but started to grow again immediately thereafter – although its main objective was to produce the opposite effect (figure 5).

**Figure 6. Evolution of prison committals (flow, incl. EM 2014-2015) and average daily population (stock) in remand custody (1980-2015)**



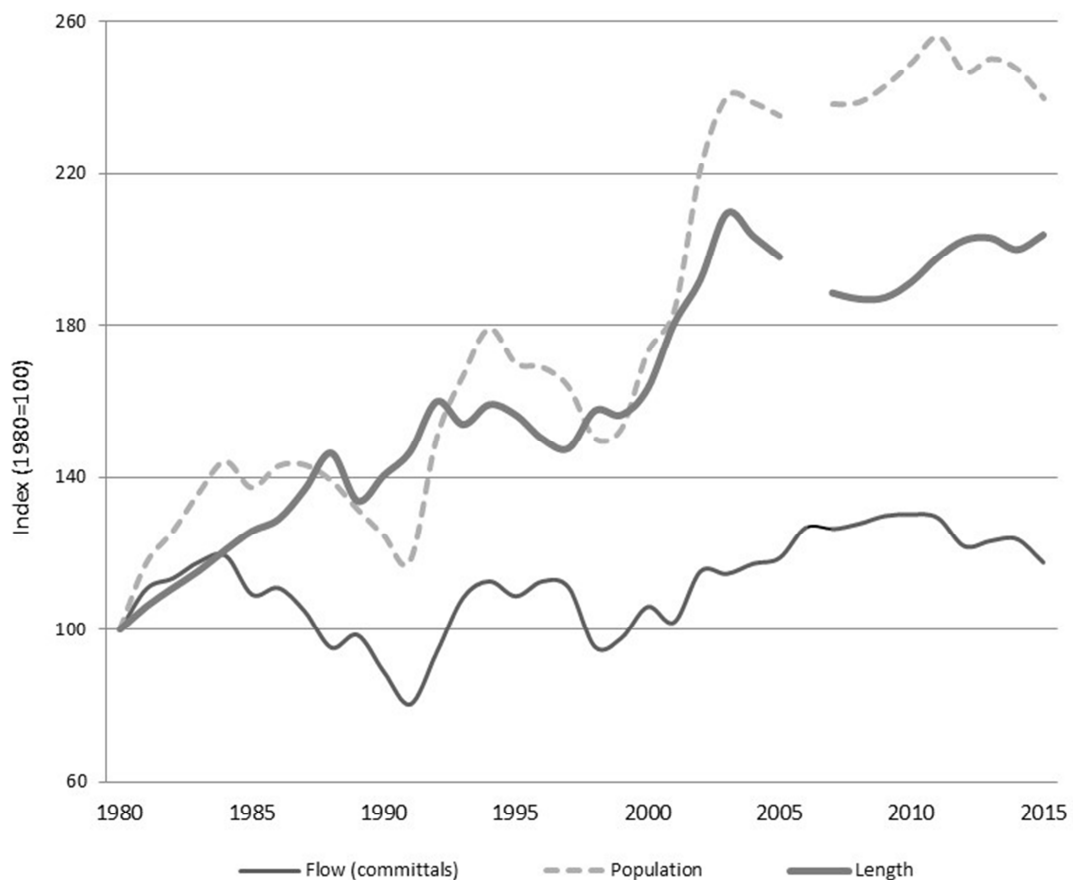
The decrease in the pre-trial prison population (stock) prior to the year 1990 is clearly related to a significant drop in the number of prison committals of pre-trial detainees during the last half of the 1980s (see figure 6)<sup>56</sup>, whereas the rise in pre-trial detainees

<sup>55</sup> *ibid*; Directoraat-generaal Penitentiare Inrichtingen, 'Jaarverslag 2015' (n 24).

<sup>56</sup> The figures concerning prison flow (number of committals) are taken from Beyens, Snacken & Eliaerts (1993) for the years 1980-1991, produced by the NICC based on raw data available from the prison database SIDIS (see Deltenre & Maes, 2004) for the years 1992-1995. From the year 1996 onwards, figures are being used as published in the official publication *Justice en cijfers/Justitie in cijfers* and in annual reports of the national prison administration. Data with respect to the prison population (daily average) are based, for the years 1980-1994, on figures cited by Beyens, Snacken &

after 1990 goes hand in hand with a renewed strong increase in prison committals. By the end of the 1990s and the start of this century the increase of the population in remand custody is even more significant than that observed in the early 1990s. The last ten years (from 2003 onwards), however, are marked by a relatively stable remand prison population, although it continues to fluctuate highly, with around 3,500 to 3,600 pre-trial detainees on a daily basis. And despite an increase of the number of prison committals the population remained stable between 2003 and 2008.

**Figure 7. Evolution of the number of committals (flow), daily average population and length of pre-trial detention (indices, 1980-2015)**



As prison stock is determined by flow (number of committals) and length of stay (see the formula used in SPACE I:  $Stock = \frac{flow * duration}{12}$ , if length is expressed in number of

Eliaerts (1993) and Beyens & Tubex (2002: 145). For the years 1995-2005 we made use of unofficial data from the prison administration. Figures for the years 2007-2014 were available from the annual reports of the prison administration. These figures include mentally ill offenders who are not definitely interned, but exclude minors detained in federal detention centres for minors.

Beyens, Snacken and Eliaerts (n 51); Samuel Deltenre and Eric Maes, 'Simulation de L'impact de Quelques Changements Législatifs En Matière de Détention Avant Jugement' [2004] *Revue de droit pénal et de criminologie* 83, 86-89 116; Kristel Beyens and Hilde Tubex, 'Gedetineerden geteld' in Sonja Snacken (ed), *Strafrechtelijk beleid in beweging* (VUBPress 2002) 145.

months), it can be deduced that the observed stabilization of the pre-trial prison population is linked to a shorter duration of pre-trial detention in the years concerned (from the above formula, the duration – expressed in number of months – can be derived:  $\text{duration} = [\text{stock}/\text{flow}] * 12$ ). Figure 7 - in which these various indicators are expressed in indices, with data for the year 1980 being assimilated to index 100<sup>57</sup> – shows that the length of pre-trial detention is a very important factor to explain the evolution of the pre-trial prison population, and even more substantial than the number of prison committals (flow), proportionally in terms of growth and decline<sup>58</sup>.

In 2010, for example, there were 30 % more prison committals than in 1980 (index = 130), whereas the length was almost twice as long (+ 92 %, index = 192). It remains to be seen however whether the shortened length of stay in remand custody (from 2003 onwards) can be explained by a growing number of ‘pure and simple’ releases from custody (i.e., without conditions) and/or an acceleration of criminal proceedings leading more rapidly to a final conviction or acquittal; or whether less longer terms of imprisonment have actually been influenced by the increase in the use of alternatives to pre-trial detention, in particular the ‘freedom/release under conditions’ (see below, figure 8)<sup>59</sup>. From the available criminal justice databases it is not possible to determine to what extent persons subjected to an alternative measure to pre-trial detention were incarcerated before (i.e. were granted an alternative measure immediately, at the first hearing by the investigating judge, or only after an initial period of pre-trial detention)<sup>60</sup>. However, a survey among the French-speaking Probation Service indicates that in five out of six observed districts, most of the alternatives (freedom/release under conditions) were preceded by a period of pre-trial detention, ranging from 61.1 % (Mons), 81.9 % (Namur); the district of Charleroi (29.5 %) is thus an exception to this ‘general rule’<sup>61</sup>.

Even though it is reasonable to assume that the alternative measure of ‘freedom/release under conditions’ had a positive effect on the population in remand custody at certain

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<sup>57</sup> Absolute figures for the year 1980 are set at index 100, and the values of consequent years are recalculated in relation to this index. This allows to describe and to obtain a better visualization of proportional in- and decreases over time, in particular when it concerns indicators which, in absolute terms, differ considerably by order of magnitude.

<sup>58</sup> For the years 2014-2015 the length of pre-trial detention is somewhat underestimated, as the official statistics include placement under electronic monitoring in the pre-trial stage as prison committals (in that, the flow is overestimated if EM is granted immediately at the first hearing), whereas electronically monitored suspects are not counted as prison population in these statistics.

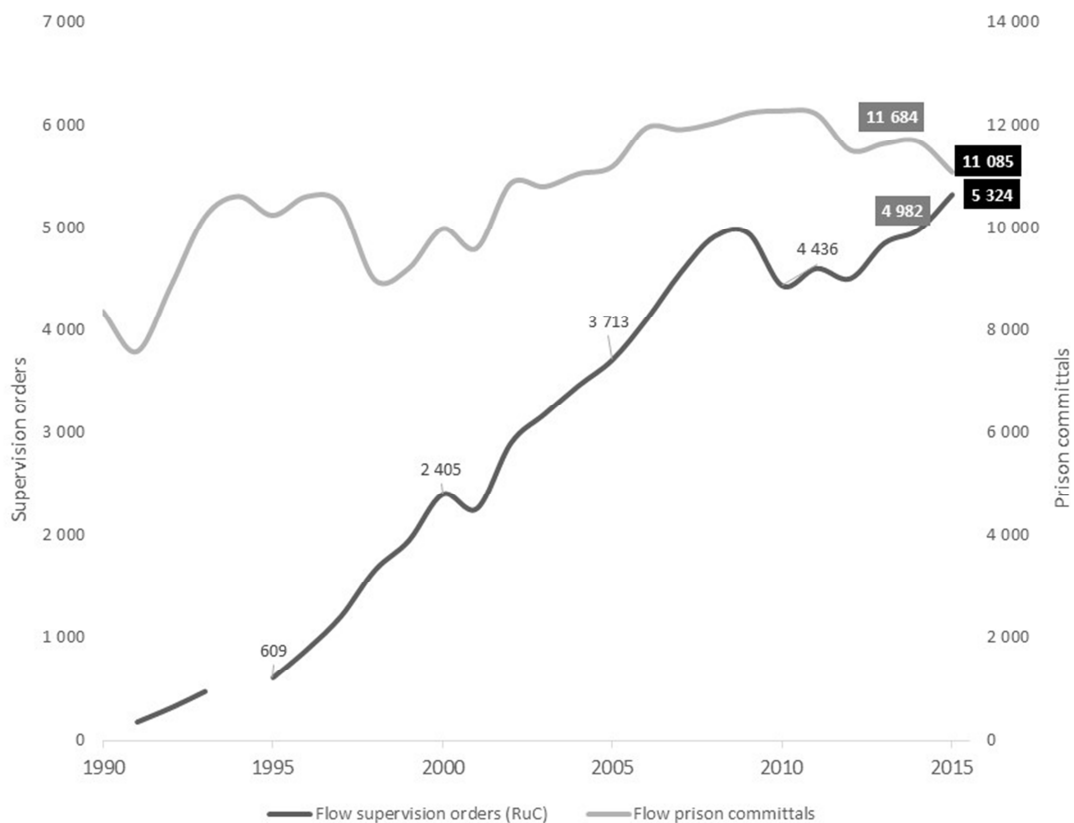
<sup>59</sup> Maes, ‘Evoluties in punitiviteit: lessen uit de justitiële statistieken’ (n 54).

<sup>60</sup> Alexia Jonckheere and Eric Maes, ‘Caractéristiques Des Personnes Placées Sous Mandat D’arrêt Et/Ou En Liberté Sous Conditions’ in Alexia Jonckheere and Eric Maes (eds), *La détention préventive et ses alternatives. Chercheurs et acteurs en débat* (Academia Press 2011).

<sup>61</sup> Alexia Jonckheere, ‘Structure de concertation locale des maisons de justice : « Détention préventive et liberté sous conditions »’ 2.

times, in the long run its impact seems to remain quite marginal. In any case, there is no question of a very significant decrease of the population in remand custody, nor of the number of prison committals (under an arrest warrant or as a non-definitely convicted offender).

**Figure 8. Evolution of the annual number of new supervision orders within the framework of pre-trial detention (release under conditions) and the number of prison committals (flow) (1990-2015)**



As figure 8 shows, these alternatives to pre-trial detention are certainly popular, there is even a real ‘explosion’ in their use. As such, in the year 2015, more than 5,000 new supervision orders (flow) within the framework of alternatives to pre-trial detention (freedom/release under conditions) were admitted to the Belgian probation services. The number of prison committals as well is nevertheless constantly increasing over time, with 11,640 committals of remand prisoners in 2013, thereby including a few committals in federal centres for minors. The number of prison committals in remand custody amounted to 11,684 in 2014; this figure however also contains some ‘prison’ committals of remand prisoners placed under electronic monitoring). A significant decrease of prison committals is observable in 2015 (N=11,085, including electronic monitoring).

This number nevertheless remains higher than in many previous years, e.g. compared to 9427 committals in 1980 and 8378 in 1990<sup>62</sup>.

In addition, electronic monitoring within the framework of pre-trial detention (recently introduced by a legislative Act of 2012<sup>63</sup>, and operational since 1 January 2014) as a ‘modality of execution’ of an arrest warrant, is – contrary to the expectations of several policy makers at the time of parliamentary discussion – used rather sparsely. In 2014, over 400 people were placed under EM in the pre-trial stage (N = 461, or 7.3 % of all EM placements<sup>64</sup>), resulting by the end of December 2014 in a stock of over a hundred remand prisoners under electronic monitoring (N = 105, or 5.7 % of the total EM-stock<sup>65</sup>); this rather small number of electronically monitored suspects ‘at home’ contrasts highly with the number of pre-trial detainees deprived of freedom ‘in prison’. By the end of June 2016, over 200 suspects were placed under electronic monitoring<sup>66</sup>, an increase that seems to have been stimulated by strikes of prison guards in Belgian prisons that lasted nearly a month; deteriorating living conditions in prison led some judges to release suspects from prison under electronic monitoring or under conditions<sup>67</sup>.

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<sup>62</sup> Figures concerning the annual number of prison committals in remand custody were available from the sources mentioned above. Data with respect to the supervision orders as an alternative to pre-trial detention come from reports of the former *Service social d'exécution des décisions judiciaires* (years 1991-1993, 1995-1998), from the official publication *Justice en chiffres/Justitie in cijfers* (years 1999-2010), from annual reports of the *Service Maisons de Justice* (years 2011-2014), and from the data warehouse of the Probation Service (for the year 2015; consulted on 22 February 2016).

<sup>63</sup> Law of 27 December 2012 including various provisions in justice matters [31 January 2013] Official Journal (*Moniteur belge/Belgisch Staatsblad*).

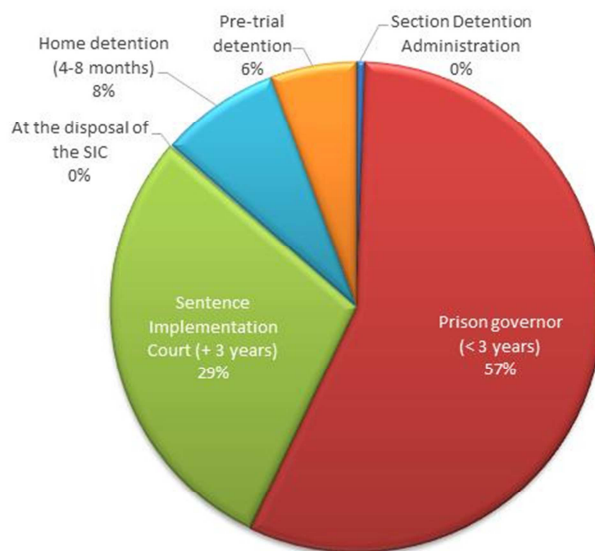
<sup>64</sup> Dienst Justitiehuisen, ‘Jaarverslag 2014’ (Vlaamse Gemeenschap Departement Volksgezondheid, Welzijn en Gezin 2015) 96.

<sup>65</sup> See figure 9 ; *ibid* 96.

<sup>66</sup> Personal communication Prison Administration 30 June 2016.

<sup>67</sup> Laurence Wauters, ‘Grève dans les prisons: un détenu préventif sur six a pu quitter Lantin’ *Le Soir* (25 May 2016) <<http://plus.lesoir.be/archive/d-20160524-G7XZCW?referer=%2Farchives%2Fcherche%3Fdatefilter%3Dlastyear%26sort%3Ddate%2Bdesc%26start%3D10%26word%3Dd%25C3%25A9tention%2Bpr%25C3%25A9ventive>>.

**Figure 9. Distribution of electronically monitored supervision orders, according to legal framework/procedure (National Centre for Electronic Monitoring), on 31 December 2014 (percentages)**



As the average daily population in pre-trial detention has not decreased significantly even though alternatives introduced much earlier have become quite popular, it seems that these alternatives supplement, rather than completely replace, ‘classic pre-trial detention’<sup>68</sup> (cf. net-widening effect). Counting together all the numbers of people placed under one or another form of control in the pre-trial stage at a certain point of time of the year, gives a clear image of the impressive growth over time in the use of coercive, custodial or non-custodial measures before final conviction. In this way, 6,209 people were under some form of judicial control in 2014 (figure 10)<sup>69</sup>: 3,625 were incarcerated in prison or in federal centres for minors (on an average daily basis)<sup>70</sup>, 2,479 were free or

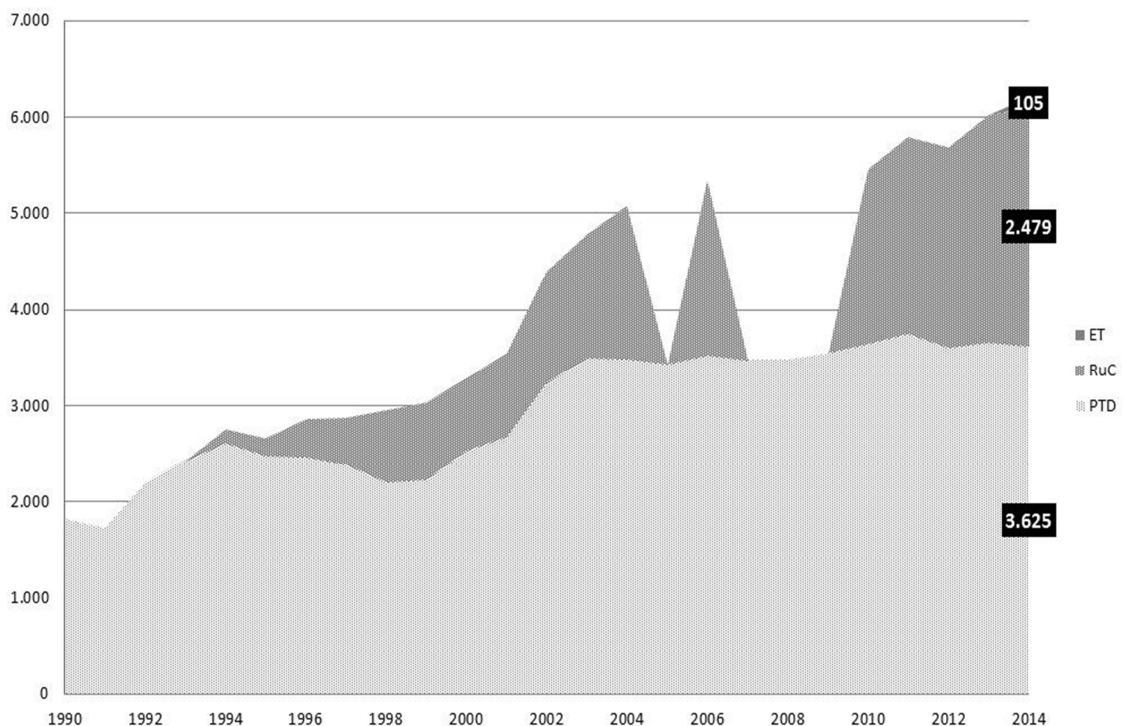
<sup>68</sup> It was also clearly demonstrated in a recent NICC research (Bursens, Tange & Maes, 2015) that alternatives to pre-trial detention do not seem to replace incarcerations under remand custody (imprisonment). When a suspect is presented before the investigating judge (first hearing), alternatives are mainly applied in place of a release (maintain in liberty) without any imposed conditions. Not only is there more frequent use of pre-trial detention (remand custody) in cases where a suspect is presented before the investigating judge, but there are also fewer cases of simple releases without conditions among applied modalities of non-detention. A similar tendency is observable when it comes to terminating a period of remand custody: although the alternative of release under conditions has a certain success, its main objective does not seem to have been reached (Dieter Bursens, Carrol Tange and Eric Maes, ‘Op Zoek Naar Determinanten van de Toepassing En de Duur van de Voorlopige Hechtenis / A La Recherche de Déterminants Du Recours À La Détention Préventive et de Sa Durée’ (NICC, Operationele Directie Criminologie 2015).

<sup>69</sup> Similar figures are not yet available for 2015.

<sup>70</sup> As recent official statistics on alternative measures to pre-trial detention (release under conditions) and electronic monitoring at the pre-sentencing stage do not distinguish between adults and minors, we also included suspects held in remand custody within federal centres for juveniles (N=14 in 2014) when presenting data on the incarcerated remand prison population.

released under conditions (persons with a supervision order controlled by the Probation Service on 31 December 2014) and 105 were placed under electronic monitoring (on 31 December 2014). Over time, a growing number of individuals are being subjected to one or another, more or less restrictive (pre-trial) measure: while this number reached more than 6,200 in 2014, it was hardly 2,700 in 1995.

**Figure 10. Evolution of the daily population ‘under judicial control’ within the framework of pre-trial detention (remand custody in prison, release under conditions, electronic monitoring, 1990-2014)**



#### 4. Literature Review

In recent decades, growing prison population numbers, sustained criticism of the use of imprisonment and increasing attention paid to the efficiency of criminal justice proceedings have led to several proposals for reform and new legislation in the domain of (criminal) justice, and especially in the area of criminal justice proceedings and pre-trial detention. Major legislative reforms concerning pre-trial detention were enacted in 1990 (the new Pre-trial Detention Act), 2005, 2010 (so-called ‘Salduz’ legislation), 2012 (electronic monitoring at the pre-sentencing stage) and 2016. Consequently, quite a lot of literature has been produced on pre-trial detention (and alternatives) in recent



decades, both by stakeholders working in the criminal justice system (judges, prosecutors, lawyers) and by scholars at universities and public research institutions.

Apart from juridical contributions (*doctrine*) published in specialised journals and important ‘reference works’ in which proposals for legislative reform, newly introduced legislation and/or highly relevant jurisprudence are commented on and discussed, as well as national overviews in legal-comparative studies<sup>71</sup>, a significant amount of empirical scientific research has been conducted on pre-trial detention and alternatives in Belgium since the late 1980s. Results of these research projects have been reported in (unpublished) research reports, (national and international) journal articles (in Dutch, French and/or English), (published) books and book chapters in topical readers<sup>72</sup>. Within this research literature, three major types of research can be distinguished:

- Contributions that describe and comment on (quantitative) developments in the use of imprisonment and alternative measures or sanctions, and/or that describe profiles (specific characteristics) of the populations concerned. Information on these topics with respect to pre-trial detention/alternatives is provided as part of more general descriptions of the prison population or alternatively sanctioned offenders, or is specifically devoted to the pre-trial detainees or suspects subjected to an alternative pre-trial measure.
- Research into factors that influence the decision to remand suspects in custody and the length of pre-trial detention, using quantitative multivariate analyses of data gathered through analyses of judicial files and research on underlying decision-making processes, using qualitative research methods like interviews and observations.
- Research that evaluates the effects of already introduced legislative or practical reforms or that assesses the desirability and/or possible impact of proposed legislative or practical reforms (e.g. increasing the eligibility threshold for the application of pre-trial detention, developing ‘positive’ or ‘negative’ lists of offences, limiting the length of pre-trial detention and introducing electronic monitoring as an additional alternative/execution modality).

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<sup>71</sup> See some publications with chapters on Belgium: Van Kalmthout, Knapen and Morgenstern (n 10); Piet Hein Van Kempen (ed), *Pre-Trial Detention. Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law. Détention Avant Jugement. Droits de L’homme, Droit de La Procédure Pénale et Droit Pénitentiaire, Droit Comparé* (Intersentia, 2012).

<sup>72</sup> For an overview, see also: Dieter Burssens, ‘De Voorlopige Hechtenis in België. Synthese van Bestaand Empirisch Onderzoek’ [2012] *Fatik* 17.

#### 4.1. Descriptions of the use of pre-trial detention and suspect's profiles

With regard to the first type of research results, descriptions of the remand population in custody can be found in separate chapters of NICC research reports, the first of which depicts the profile of pre-trial detainees committed to prison during 2003 and the second of which describes all arrest warrants issued in 2008. Other contributions compare characteristics of the remand population with the pre-trial population released under conditions and supervised by the Probation Service<sup>73</sup>. Separate studies are fully focused on the application of alternatives to pre-trial detention (release under conditions)<sup>74</sup>. General descriptions of the long-term evolution of the prison population and the application of alternatives are available, with the theme of pre-trial detention and alternatives part of a broader study<sup>75</sup> or focused on exclusively<sup>76</sup>.

#### 4.2. Predictors of pre-trial detention and decision-making processes

Regarding the second line of research, an important initial study was conducted by scholars at the *Vrije Universiteit Brussel* (VUB) in 1989, i.e. one year before the promulgation of the new Pre-trial Detention Act of 1990<sup>77</sup>. In order to evaluate the extent to which the Law of 13 March 1973 had been able to counter long-lasting criticism of the exaggerated use of pre-trial detention, they studied 244 judicial cases (files) of serious theft (“*vol qualifié*” or “*zware diefstal*”) opened in May and November 1972,

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<sup>73</sup> Eric Maes and Alexia Jonckheere, ‘Kenmerken van Personen Geplaatst Onder Aanhoudingsmandaat En/Of Vrij Onder Voorwaarden’ in Eric Maes and Alexia Jonckheere (eds), *De voorlopige hechtenis en haar alternatieven. Onderzoekers en actoren in debat* (Academia Press 2011); Jonckheere and Maes, ‘Opgesloten of vrij onder voorwaarden in het kader van het vooronderzoek in strafzaken? Analyse van het profiel van verdachten onder aanhoudingsmandaat en vrij onder voorwaarden (VOV) op basis van justitiële databanken (jaar 2008)’ (n 6); Jonckheere and Maes, ‘Caractéristiques Des Personnes Placées Sous Mandat D’arrêt Et/Ou En Liberté Sous Conditions’ (n 60).

<sup>74</sup> Alexia Jonckheere, ‘Vrijheid Onder Voorwaarden Als Alternatief Voor de Voorlopige Hechtenis: Gebruik En Duur van de Maatregel’ (2012) 33 *Panopticon* 85; Alexia Jonckheere, ‘La (mise en) liberté sous conditions : usages et durée d’une mesure alternative à la détention préventive (2005-2009). Note de recherche dans le cadre de l’exploitation scientifique de SIPAR, la base de données des maisons de Justice’ (INCC 2012).

<sup>75</sup> Beyens, Snacken and Eliaerts (n 51); Beyens and Tubex (n 56); Hilde Tubex and Julie Strypstein, ‘Veel Gedetineerden, Weinig Cijfers’ [2004] *Panopticon* 112; Eric Maes and Veerle Scheirs, ‘De Belgische gevangenispopulatie in cijfers’ in Tom Daems and others (eds), *Achter tralies in België* (Academia Press 2009); Maes, ‘Evoluties in punitiviteit: lessen uit de justitiële statistieken’ (n 54); Kristel Beyens and Eric Maes, ‘Gevangenisbevolking, Gevangenis capaciteit En Gevangenis personeel: Een Kwantitatief Overzicht’ in Kristel Beyens and Sonja Snacken (eds), *Handboek Penologie* (Maklu 2017).

<sup>76</sup> Eric Maes, ‘Quelques données chiffrées sur l’application de la détention préventive et de ses alternatives’ in Laura Aubert (ed), *Détention préventive: comment sans sortir? (Collection ‘Galets rouges’)* (Bruylant 2016).

<sup>77</sup> S de Coninck van Noyen and Alain De Nauw, ‘De toepassing van de voorlopige hechtenis’ (Vrije Universiteit Brussel 1989).

1974 and 1982 in the judicial districts of Ghent, Antwerp, Charleroi and Brussels. This research focused on elements that influence the decision to remand in custody, practical implementation of the procedure, the length of pre-trial detention and the impact of related decisions on outcomes in the sentencing stage. Similar research focusing on another type of offence and including decision-making regarding alternatives to pre-trial detention was conducted by a research team at the *Vrije Universiteit Brussel* and the National Institute of Criminalistics and Criminology (NICC) several years after the enactment of the new Pre-trial Detention Act<sup>78</sup>. This study examined 403 judicial files of suspects convicted of drug-related offences in May and November 1996 in the judicial district of Brussels, as well as in May, September and November 1996 and in January and February 1997 in the judicial district of Antwerp. This study described the use of pre-trial detention and alternatives (remand under conditions), particularly with respect to the length of the measure imposed, the suspect profile, decisions made by the competent judicial authorities and so on. Another study undertaken by a VUB researcher did not focus exclusively on pre-trial detention, but still contained much valuable information in this regard<sup>79</sup>. This study analysed no less than 21,000 conviction records (rulings) for drug offences by Brussels courts in 1976, 1979 and 1981 and from 1988 until 2003, with specific attention paid to the impact of (Moroccan) nationality on judicial decisions. A more recent study with this second type of research orientation (quantitative analysis, based on data from judicial files, and focused on factors influencing decisions) was undertaken by a research team at the NICC<sup>80</sup>. Here, the researchers analysed judicial cases (files) that were oriented towards criminal investigation procedures under the lead of an investigating judge when the case was announced to the prosecution office in the judicial districts of Brussels, Antwerp and Liège in May and November in 1988, 1993, 1998, 2003 and 2008. Unlike most of the aforementioned studies, this one includes all types of (possible) offences, selects cases from a starting point of view (thus, cases that are definitively settled before they reach the sentencing stage are also included) and spans a time frame well beyond 10 years. This latest NICC study describes personal and case characteristics of 1,490 individual suspects (of a total of 915 criminal cases), identifying factors influencing the decision to remand them in custody and the length of their pre-trial detention using quantitative multivariate data analysis methods.

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<sup>78</sup> Katelijne De Buck, Koen D'Haenens and Paul Verhaeghe, 'Onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden' (NICC / VUB 1997).

<sup>79</sup> Walter De Pauw, *Justitie onder invloed: Belgen en vreemdelingen voor de correctionele rechtbank in Brussel: 28 jaar straftoemeting in drugszaken* (VUB Press 2009).

<sup>80</sup> Burssens, Tange and Maes (n 68).

The results of these quantitative studies have been complemented by other research using qualitative data gathering and analysis methods. In addition to their earlier study in the mid-1990s, in 1998 a VUB-NICC research team designed a qualitative study based on interviews and (participant) observations in order to provide a more detailed interpretation of the quantitative research results obtained<sup>81</sup>. The study examined 247 (individual) cases presented before 16 different investigating judges in the judicial districts of Brussels and Antwerp and questioned 56 persons involved in implementing alternatives to pre-trial detention (release under conditions) via open interviews or focus group interviews. Respondents included staff of the MAM service (*Mesures Alternatives/Alternatieve Maatregelen*) of the public prosecution office in Brussels, probation officers and members of social and forensic health care services. More recently, results were published from another qualitative study in which in-depth interviews were conducted with 12 investigating judges from seven different judicial districts.<sup>82</sup> This research focused on how investigating judges use legally provided criteria when deciding upon pre-trial detention and on the extra-legal criteria that influence their decision-making.

#### 4.3. Evaluations of effects and assessments of possible impact

Evaluative research and ‘simulation’ studies are another important source of available Belgian research on pre-trial detention and alternatives. Especially since the early 21st century, much attention has been paid to this type of research, with many of these studies supported by the subsequent competent ministers of Justice (with different political orientations). However, a notable and meticulous early study was conducted in 1991 by researchers at *Katholieke Universiteit Leuven*<sup>83</sup>. Although this study analysed many different aspects of the criminal investigation process in general (*information and instruction*) and was therefore undertaken from a much broader point of view, a separate chapter of the research report included interesting findings on perceptions about pre-trial detention held by interviewed public prosecution officers and investigating judges (interviews with 41 prosecution officers and 14 investigating judges). More specifically oriented towards pre-trial detention (and alternatives) was the qualitative study of *Vrije Universiteit Brussel* that used semi-structured interviews to ask 23 investigating judges for their opinion about different initiatives that could

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<sup>81</sup> Samuel Deltenre and others, ‘Recherche qualitative sur l’application de la détention préventive et de la liberté sous conditions. Kwalitatief onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden’ (INCC 1999).

<sup>82</sup> Sofie Van Roeyen and Tom Vander Beken, ‘Een wet om aan te houden’ (2014) 35 *Panopticon* 502.

<sup>83</sup> S Christiaensen and P Claes, ‘Het strafrechtelijk vooronderzoek en de voorlopige hechtenis : een verkennend onderzoek’ (KUL 1991).

mitigate the use of pre-trial detention and support and stimulate the application of alternatives (release under conditions)<sup>84</sup>. These measures include e.g. the ‘court authorisation’ (“*autorisation judiciaire*” or “*rechterlijke machtiging*”)<sup>85</sup>, legal provisions such as a review of the criteria for pre-trial detention, instructions with regard to available prison capacity and the use of regional quotas (maximum capacity)<sup>86</sup> and measures to support the use of alternatives, such as electronic monitoring, permanent 24-hour assistance for decision-makers by probation officers and prolongation of the 24-hour maximum time of police arrest without a judicial decision. In a series of subsequent research projects ordered by different ministers of Justice, NICC teams analysed the desirability of several particular measures that could potentially help to reduce the remand population and/or quantitatively assesses the potential impact of these measures on the number of prison committals and the average daily pre-trial prison population (‘simulation’ studies, sometimes using different scenarios). An initial study conducted in 2001 focused on the possible effects of a) an increase in the eligibility threshold for pre-trial detention (from a threshold of one year’s imprisonment to three years) and b) a limitation of the length of remand custody.<sup>87</sup> The possible effects of the second measure (the maximum length of pre-trial detention) were further elaborated upon in a new study in 2005. In addition to a comprehensive literature review and legal-comparative analysis, this study also included assessments of possible mitigating effects (based on data from 2003) according to different scenarios, namely by in/excluding specific types of offences (i.e., by limiting the length of pre-trial detention for all offences vs. only for some specific offences or by fully in/excluding particular offences from the scope of application of pre-trial detention).<sup>88</sup> Another more recent study focuses entirely

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<sup>84</sup> Sonja Snacken and An Raes, ‘Onderzoek naar de toepassing van de voorlopige hechtenis en de vrijheid onder voorwaarden, 1999-2000’ (VUB 2001).

<sup>85</sup> This means that the competence to issue an arrest warrant lies with the investigating judge, but that other authorities (public prosecutor’s office or prison authority) may determine whether the arrest warrant is being carried out or not.

<sup>86</sup> In this scenario, a certain capacity of prison cells is reserved per district to be used for pre-trial detention by public prosecution officers or judges. When all cells are occupied, no person may be remanded in custody any longer, unless another inmate is released (see the former Dutch experience of ‘*heenzending*’).

<sup>87</sup> Samuel Deltenre and Eric Maes, ‘Effectmeting van enkele mogelijke wetswijzigingen op het vlak van de voorlopige hechtenis. Simulations de l’impact de quelques modifications législatives en matière de détention préventive’ (INCC 2001); Samuel Deltenre and Eric Maes, ‘Effectmeting van enkele mogelijke wetswijzigingen op het vlak van de voorlopige hechtenis’ [2002] *Panopticon* 196; Samuel Deltenre and Eric Maes, ‘Pre-Trial Detention and the Overcrowding of Prisons in Belgium. Results from a Simulation Study into the Possible Effects of Limiting the Length of Pre-Trial Detention’ [2004] *European Journal of Crime, Criminal Law and Criminal Justice* 348; Deltenre and Maes, ‘Simulation de L’impact de Quelques Changements Législatifs En Matière de Détention Avant Jugement’ (n 56).

<sup>88</sup> Philip Daeninck and others, ‘Analyse des moyens juridiques susceptibles de réduire la détention préventive / Analyse van de juridische mogelijkheden om de toepassing van de voorlopige hechtenis te verminderen’ (INCC 2005) *Rapport final de recherche*; Alexia Jonckheere and others, ‘Garantir L’usage Exceptionnel de La Détention Préventive: Du Seuil de Peine À Une Liste D’infractions Comme Critère

on the introduction of electronic monitoring as a possible alternative to (or modality of execution of pre-trial detention). Through an extensive literature review describing relevant developments and effects of electronic monitoring in different countries around the world, as well as round table discussions with judicial and other stakeholders (prosecution office, investigating judges and jurisdictions, defence attorneys), the researchers evaluated the desirability (added value) of electronic monitoring and its preferential means of legal implementation, assessing its possible applications and effects in terms of reducing the prison population in remand custody.<sup>89</sup> These NICC research results were presented to a small and select audience of judicial and other stakeholders (public prosecution officers, investigating judges, defence attorneys, police services, ministerial representatives and probation and prison authorities) and discussed in two separate round table discussion sessions. The main findings of these research results and the outcomes of the discussions<sup>90</sup> were summarised in a book available in Dutch<sup>91</sup> and in French<sup>92</sup>.

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de Gravité?’ [2007] *Revue de droit pénal et de criminologie* 50; Eric Maes and others, ‘“Oplossing(en) Gezocht Om de Toepassing van de Voorlopige Hechtenis Terug Te Dringen’ [2007] *Panopticon* 19.

<sup>89</sup> Caroline De Man and others, ‘Toepassingsmogelijkheden van het elektronisch toezicht in het kader van de voorlopige hechtenis. Possibilités d’application de la surveillance électronique dans le cadre de la détention préventive’ (NICC 2009) Eindrapport; Eric Maes and others, ‘Thinking about Electronic Monitoring in the Context of Pre-Trial Detention in Belgium: A Solution to Prison Overcrowding?’ [2012] *European Journal of Probation* 3; Eric Maes and Benjamin Mine, ‘Some Reflections on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-Trial Detention in Belgium’ [2013] *The Howard Journal of Criminal Justice* 144; Eric Maes, ‘Elektronisch Toezicht in Het Kader van de Voorlopige Hechtenis. Enkele Beschouwingen over Een Aantal Juridisch-Technische En Praktisch-Organisatorische Aspecten’ (2012) 2 *Panopticon* 110; Benjamin Mine and others, ‘Exercice de mise en perspective des possibilités d’application de la surveillance électronique dans le cadre de la détention préventive’, *La détention préventive et ses alternatives. Chercheurs et acteurs en débat* (Academia Press); Eric Maes and others, ‘Een Belichting van de Mogelijkheden Om Het Elektronisch Toezicht Toe Te Passen in Het Kader van de Voorlopige Hechtenis’ in Eric Maes and Alexia Jonckheere (eds), *De voorlopige hechtenis en haar alternatieven. Onderzoekers en actoren in debat* (Academia Press 2011); Eric Maes and others, ‘Naar elektronisch toezicht in het kader van de voorlopige hechtenis. Waarom de invoering ervan, vanuit het oogpunt van een vermindering van de gevangenispopulatie, misschien toch niet meteen de meest aangewezen strategie is’ [2011] *Fatik* 6.

<sup>90</sup> Dieter Burssens, ‘La Détention Préventive Sous (sans) Conditions. Débat Entre Les Acteurs de L’instruction Judiciaire’ in Alexia Jonckheere and Eric Maes (eds), *La détention préventive et ses alternatives. Chercheurs et acteurs en débat* (Academia Press 2011); Carrol Tange, ‘La Détention Préventive: Pis-Aller Du Système Pénal?’ in Alexia Jonckheere and Eric Maes (eds), *La détention préventive et ses alternatives. Chercheurs et acteurs en débat* (Academia Press 2011); Dieter Burssens, ‘Voorlopige Hechtenis (Z)onder Voorwaarden’ in Alexia Jonckheere and Eric Maes (eds), *De voorlopige hechtenis en haar alternatieven. Onderzoekers en actoren in debat* (Academia Press 2011); Carrol Tange, ‘De Voorlopige Hechtenis: “minst Slechte” Oplossing Binnen Het Kader van Het Strafrechtssysteem?’ in Alexia Jonckheere and Eric Maes (eds), *De voorlopige hechtenis en haar alternatieven. Onderzoekers en actoren in debat* (Academia Press 2011).

<sup>91</sup> Eric Maes and Alexia Jonckheere (eds), *De Voorlopige Hechtenis En Haar Alternatieven. Onderzoekers En Actoren in Debat*. (Academia Press 2011).

<sup>92</sup> Alexia Jonckheere and Eric Maes (eds), *La détention préventive et ses alternatives. Chercheurs et acteurs en débat* (Academia Press 2011).

The Department of Criminal Policy of Belgium's FPS Justice conducted research specifically related to the implementation of new legislation with respect to consultation and assistance by defence attorneys during police interrogations and during hearings with an investigating judge.<sup>93</sup>

## 5. Pre-Trial Detention in the Media

The issue of pre-trial detention and alternatives is regularly covered by the media. A thematic analysis, based on all articles on pre-trial detention and alternative measures published between 1 January 2015 and 31 May 2016 in two national daily newspapers (*Le Soir* in French and *De Standaard* in Flemish) shows that, overall, the tone of the newspaper articles addressing issues related to pre-trial detention is particularly negative.

### 5.1. Poor detention conditions

Detention conditions were regularly addressed, both in the north and the south of the country, especially after various complaints about Belgium's poor detention conditions.

While prison overcrowding is regularly cited as one of the causes of the degradation of the detention conditions, the dilapidation of the buildings is equally so in a context of budgetary restrictions that do not allow prison administrations to adhere to the legal provisions: the security standards set by the firefighting services are not systematically respected (with faulty electricity, for example<sup>94</sup>), several kitchens do not meet standards of hygiene and defects affect the monitoring of the buildings with surveillance cameras, etc.<sup>95</sup> In 2016, the detainees' situation worsened again due to strikes that hit the prisons.

The media echoed complaints against the Belgian government in 2016, which had to pay penalties to convicts who did not benefit from a minimum service in prison<sup>96</sup>. The situation was explosive: the prison officials' strike blocked the detainees' access to visits,

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<sup>93</sup> Saaske De Keulenaer and others, 'Evaluation de la loi Salduz' (Service de la Politique criminelle 2013) Rapport final.

<sup>94</sup> *Le Soir*, « Forest, où l'homme rencontre l'indigne », published online on 1 May 2016.

<sup>95</sup> Christophe Dubois, 'L'étau et Le Réseau. Recompositions Des Contextes de Travail Des Équipes de Direction Pénitentiaire' [2016] *Justice & sécurité Justitie & Veiligheid* 15.

<sup>96</sup> *De Standaard*, « Een minimum dienstverlening voor gevangenen », 4 May 2016; *De Standaard*, "Staat veroordeeld tot betalen van 300 euro per dag aan 21 gedetineerden", 5 May 2016; *Le Soir*, "Les condamnations s'accumulent pour l'Etat", published online on 6 May 2016.

preventing them from enjoying walks, taking showers, eating hot meals, meeting with their lawyers or even receiving medical attention. Following this particularly worrying situation, some inmates in pre-trial custody were simply released<sup>97</sup>, while others were placed under house arrest with electronic monitoring<sup>98</sup> and soldiers were sent to prisons to ensure that the detainees received their minimum rights<sup>99</sup>.

Prison overcrowding and its consequences for inmates were also regularly discussed in the media during the period considered, with Belgium holding the distinction of one of the highest overcrowding rates in Europe (see 3. Statistics). Belgium is also one of the few countries to lease prison space in a neighbouring country (in this case, the Netherlands)<sup>100</sup>. By 27 January 2016, there were still 500 detainees there<sup>101</sup>.

## 5.2. Procedural errors

Different articles have reported procedural errors that have led to the release of inmates, including illegal (house) searches<sup>102</sup>, the judicial council's failure to confirm the detention<sup>103</sup>, a psychiatrist's report that was not delivered within a reasonable time due to fees unpaid by the Belgian government<sup>104</sup>, etc.

One case that received special media attention concerned a member of a regional parliament who was released because the investigating judge had not signed the arrest warrant issued against him<sup>105</sup>. This case highlighted the lack of judicial staff, because the investigating judge did not benefit from the mandatory assistance of a court clerk. Due to the staff shortage, the clerk's position was filled by a former court chauffeur who only had a primary education diploma<sup>106</sup>.

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<sup>97</sup> Le Soir, "Des détenus libérés en raison de la grève", published online on 7 May 2016.

<sup>98</sup> Le Soir, "Grève dans les prisons: un détenu préventif sur six a pu quitter Lantin », published online on 25 May 2016.

<sup>99</sup> Le Soir, « La réponse à la crise pénitentiaire? L'armée bien sûr ! », published online on 12 May 2016.

<sup>100</sup> Le Soir, "Dernier bail pour la prison de Tilburg", published online on 6 July 2015.

<sup>101</sup> Réponse du ministre de la Justice du 27 janvier 2016 à une question parlementaire, Chambre des représentants, *Compte-rendu intégral de la commission Justice*, CRIV 54 COM 324, p.2.

<sup>102</sup> De Standaard, "Gentenaar vrijgesproken voor kinderporno door procedurefout", De Standaard, 15 April 2015.

<sup>103</sup> De Standaard, "Procedurefout: man die echtgenote en dochtertje vermoordde, komt vrij", 7 May 2015.

<sup>104</sup> De Standaard, "Verdachte vrijgelaten omdat psychiater niet werd betaald", 11 January 2016.

<sup>105</sup> De Standaard, "Parket vraagt vrijlating Van Eyken wegens procedurefout", 28 January 2016.

<sup>106</sup> Le Soir, "Arrestation de Van Eyken: Luc Hennart tire la sonnette d'alarme", published online on 28 January 2016.



The compensation that Belgium owes for inappropriate pre-trial detention has also been emphasised by the media after a Court of Assize (“*cour d’assises*” or “*Hof van Assisen*”) acquitted a defendant who was incarcerated for four years before his trial. This case helped to reveal the amounts currently granted to individuals judged innocent: while they have risen to € 100 per day spent in prison in the past, they currently vary between € 40 and € 75<sup>107</sup> (see 2. Legal Background).

Finally, the media has denounced a legal vacuum that, for some time, has surrounded pre-trial detention with electronic monitoring. This concerned the situation of electronically monitored suspects after the judicial council intervened to decide to refer the accused to a trial court (i.e. the time period between the committal ruling by the judicial council and the first court trial). In fact, several defendants should have been released at the end of the *instruction*, because they were not allowed to be held in pre-trial detention under electronic monitoring on any legal basis. This legal vacuum has since been filled by an amending law<sup>108</sup>.

### 5.3. Legislative reforms

Various modifications to the Law on Pre-trial Detention are currently being discussed or have recently been adopted by the federal Parliament. The media did not fail to note the different projects supported by the federal Minister of Justice, particularly in the context of the attacks that have shaken Belgium and other European countries. The lengthening of the time authorised for the police to hold someone in custody, from 24 to 72 hours, has been addressed many times<sup>109</sup>. The minister’s desire to place more defendants in preventive house arrest with electronic monitoring has also been the subject of several articles in the press<sup>110</sup>. Altogether, these projects have prompted various criticisms, reported by the media, which have emanated from political opposition parties, investigating judges, prosecutors, bar councils, etc.

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<sup>107</sup> De Standaard, “Onschuldig in de cel? 68 euro per dag”, 4 June 2015.

<sup>108</sup> De Standaard, « Enkelbanddraggers op vrije voeten door fout in de wet? », 13 February 2015.

<sup>109</sup> De Standaard, “Alleen omweg kan aanhouding tot 72 uur nog redden”, 9 February 2016.

<sup>110</sup> De Standaard, « Geens schaft celstraffen van één jaar of korter af », 18 March 2015.

## 6. Alternatives to Pre-Trial Detention

In cases where pre-trial detention may be ordered or maintained, the same judicial authorities (investigating judge, judicial council or chamber of indictment) may decide on an alternative measure: release on bail or under conditions.

### 6.1. Release on bail

The Pre-Trial Detention Act of 20 July 1990 provides for release on the (sole) condition that bail is paid (Art. 35, paragraph 4). The judge freely determines the size of the amount, since there are no legal criteria for it. The investigating judge is not even required to give a reason for the decision on the amount of bail if the parties have not filed submissions on this point<sup>111</sup>. The amount must be paid in advance and in full; it is indeed a prerequisite to release. If the suspect was present at all the proceedings and has presented himself in order to serve his sentence, the bail is returned to him.

There is no updated data that can inform us about the use of the measure, but we know that it is scarcely used in practice. According to the judges, it threatens the equality of citizens, since those who can afford to pay bail could be released while others are sent to or remain in prison. Nonetheless, this argument had been debated during the parliamentary work that preceded the adoption of the Pre-Trial Detention Act of 20 July 1990; the members of parliament thought that there is no discrimination between those with no or little income and others who can afford to pay bail, to the extent that investigating judges can always impose other conditions on release<sup>112</sup>.

The reason why bail is not often used as an alternative to pre-trial detention seems to be mainly related to the culture of the country, which is viewed as similar in both the north and the south, as seen in two round table discussions that brought together Flemish-speaking<sup>113</sup> and French-speaking investigating judges and other stakeholders in June 2010<sup>114</sup>.

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<sup>111</sup> Chambre des Représentants, *Réponse écrite du 4 novembre 1996 du ministre de la Justice*, Bulletin des questions et des réponses écrites, n°44, 1996-1997, p. 7, 532.

<sup>112</sup> Sénat de Belgique, *Projet de loi relatif à la détention préventive, Rapport fait au nom de la commission Justice*, 658-2 (1988-1989), 5 June 1990, p.111.

<sup>113</sup> Burssens, 'Voorlopige Hechtenis (Z)onder Voorwaarden' (n 90).

<sup>114</sup> Tange, 'La Détention Préventive: Pis-Aller Du Système Pénal?' (n 90).

Some judges also regret that in Belgium, bail must be paid in full in order to be released, while in other countries, a promise to pay by third parties is enough for release<sup>115</sup>. The situation could potentially change: in January 2016, the Minister of Justice announced in Parliament that he would support a change of the law in this regard<sup>116</sup>.

## 6.2. Release under conditions

The most common alternative is to release the suspect on one or several conditions.

Release under conditions can occur either without a prior arrest warrant or after time is spent in detention. There is currently no statistical information about the number of releases under conditions preceded by pre-trial detention, even though such information would be relevant for shedding light on the hypothesis that these releases are less capable of preventing incarceration than they are of reducing its duration; one survey conducted among the country's French-speaking Probation Service has shown that most releases under conditions follow pre-trial detention (see 3. Statistics).

When deciding on release under conditions, the judge must determine how long it will last, though it cannot exceed three months (Art. 35, paragraph 1). Before the termination of the first period established, the judge may decide to extend the conditions for a new period and determine the duration, which once again cannot exceed three months. This possibility continues to be available to the judge throughout the *instruction* (Art. 36).

Acting *ex officio* or at the request of the public prosecutor, the investigating judge may also impose one or several new conditions, as well as withdraw, modify or extend the conditions already laid down in whole or in part. At the end of the *instruction*, the judicial council may decide to maintain or withdraw the conditions. Finally, after the *instruction* is completed, it is up to the trial court handling the case to decide whether to extend the existing conditions, always for a maximum period of three months and until the ruling at the latest. It may also withdraw or dispense with compliance with some of them, but it may never impose new ones (Art. 36).

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<sup>115</sup> Damien Vandermeersch, 'La Détention Préventive de La Personne Présumée Innocente et La Privation de Liberté de L'étranger' (2015) 6 *Revue de droit pénal et de criminologie* 602.

<sup>116</sup> Commission Justice de la Chambre des Représentants, *Compte-rendu intégral*, 27 January 2016, CRIV 54 COM 324, p.6.

### *6.2.1. Conditions*

The choice of conditions is left to the judges' discretion: the Pre-Trial Detention Act of 20 July 1990 does not provide for an exhaustive list of conditions that can be imposed. The judge may choose which conditions are imposed, such as to not leave the country, to remain at a specified place and to inform the police or another authority of any change of residence, to remain under the supervision of a probation officer, to follow therapeutic treatment, to not meet the victim or other people involved in the case, to find a job or an occupation, to stay at home between e.g. 10 pm and 6 am, etc. Some conditions are systematically imposed in specific cases. Thus, in cases of domestic violence, we often find the following conditions: to not contact the victim, to recover one's personal belongings through a third-party intermediary or the police and to solve problems related to the custody and visitation of children through an attorney or legal service. In the case of drug use, the following conditions are regularly imposed: to stay away from drug-using environments, to follow therapeutic treatment (more provisions are sometimes included regarding the nature of the therapy, the frequency of contact, means for furnishing proof, etc.) and to hold a regular job.

If a condition related to a form of treatment is imposed (such as medical, psychological, etc.), the investigating judge or the investigating court or trial court invites the accused to choose a competent person or service. This choice is subject to the agreement of the judge or the court. The service or person that agrees to administer the treatment must submit a follow-up report to the judge and the probation officer in the month following the ruling and once every two months thereafter. Furthermore, if the service or person deems it necessary, it may also send a report more promptly to the judge. The service or person must also respond to any request made to that effect. The report must address the following: the actual presence of the person concerned at the scheduled sessions, any unjustified absences, unilateral cessation of the treatment by the person concerned, the problems encountered in carrying out the treatment and situations posing a serious risk to third parties (Article 35, paragraph 6). These judicial requirements explain why defendants sometimes have trouble finding a therapist.

The number of conditions to be met can be high. In some cases, 15 conditions may be imposed. The Probation Service has noticed a trend towards increasing the weight of conditional measures, particularly for offences related to membership in terrorist networks.<sup>117</sup>

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<sup>117</sup> Administration générale des maisons de justice, 'Rapport Annuel 2015'.

As a reminder, electronic monitoring is considered a modality of execution of pre-trial detention and not a form of release under conditions. Therefore, time spent in pre-trial detention under electronic monitoring is deducted from the prison sentence that would be imposed. This does not apply for the time spent on release under conditions.

### *6.2.2. Verifying the conditions*

The Probation Service may be called on to verify that the conditions are being met. Although it is an option and not an obligation, it seems that the Probation Service does indeed verify most of the conditions. However, occasionally an investigating judge is satisfied with police verification, as we have seen during observations made with an investigating judge in July 2016.

Adherence to conditions of prohibition (the prohibition to visit cafés, former inmates, certain neighbourhoods, etc.) must be verified by the police (Art. 38). In practice, we have noticed that this verification is organised quite differently from one place to another<sup>118</sup>; in some cases, police verification that the conditions are met is solely reactive, while in other cases verification is pro-active.

Reporting of the imposed conditions in the police database is sometimes problematic, particularly when imprecise information is reported. Therefore, for example, when a defendant harasses a victim, the absence of the victim's identification by name makes it impossible to verify whether the condition is met. Removal of conditions at the end of the measure and modification of the conditions does not always seem assured. For example, one individual who had been unable to leave the country was stopped at the airport because the condition that had once been imposed on him had not been erased from the database.

To overcome these organisational problems that hinder effective police control of people on release under conditions, a circular was adopted on 7 June 2013 to organise the exchange of information related to the monitoring of released individuals subject to compliance with conditions<sup>119</sup>. This circular gives the prosecutor the role of coordinating the flows of information and charges the police and the Probation Service with ensuring complementary verification of compliance with the conditions. From the first feedback received from practitioners, it seems that while this circular has raised awareness among those working in the field regarding the monitoring of individuals who have been

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<sup>118</sup> Jonckheere, 'Structure de concertation locale des maisons de justice: «Détenue préventive et liberté sous conditions»' (n 61).

<sup>119</sup> Collège des procureurs généraux, Circulaire commune du 7 juin 2013 n°COL 11/2013 du ministre de la Justice, du ministre de l'Intérieur et du Collège des procureurs généraux près les cours d'appel.

released, but placed under judicial control, it does not preclude the fact that locally, various kinds of practices are still preferred. An evaluation of the circular is in progress.

If the conditions are verified by the Probation Service, it is also responsible for providing social assistance to the individual. The probation officer regularly writes and sends a report to the judicial authority that ordered the release under conditions. This report must be issued in the case of non-compliance with the conditions or if a problem arises in connection with adhering to them. In any case, such a report must be written no more than 15 days before the period of release under conditions ends (Art. 38, paragraph 1).

In Belgium, non-compliance with the conditions does not constitute an offence. In the event of a breach of conditions, depending on the stage of the proceedings, the investigating judge, the judicial council or the chamber of indictment may deliver an arrest warrant. In fact, it is observed that this option is rarely used: releases under conditions are revoked in only 3 % of the cases<sup>120</sup>. However, this percentage may be underestimated, as probation officers are not always informed of the delivery of an arrest warrant. In some instances, judges prefer to impose new conditions or adapt the conditions to the situation of the individual concerned.

### *6.2.3. Alleged offences committed by individuals on release under conditions*

One may wonder what kind of case allows a defendant to be given release under conditions. A study was conducted in Belgium based on data reported in the Probation Service in 2008. In that year, 33.7 % of the supervision orders on individuals on release under conditions reported at least one offence against the person, while 32.3 % of the orders mentioned at least one offence against property. However, the survey showed considerable variations from one Court of Appeal jurisdiction to another. Thus, for example, offences against drug legislation are represented significantly more in the jurisdiction of the Court of Appeal of Ghent (40.7 % of the supervision orders report this type of offence, whereas only 24.3 % of all the orders in Belgium do so). To take another example, offences against the person are more common in the jurisdiction of the Court of Appeal of Mons (43.8 % of the orders)<sup>121</sup>.

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<sup>120</sup> Administration générale des maisons de justice (n 117).

<sup>121</sup> Jonckheere and Maes, 'Caractéristiques Des Personnes Placées Sous Mandat D'arrêt Et/Ou En Liberté Sous Conditions' (n 60); Alexia Jonckheere, 'La Liberté Sous Conditions Des Présumés Innocents: Enjeux et Usages D'une Mesure Alternative' (2011) 71 Annales de Droit de Louvain 15.

#### *6.2.4. Length of the release under conditions verified by the Probation Service*

The length of releases under conditions is extremely variable. In some cases, it only lasts three months; in other cases, it may be extended to 18 months<sup>122</sup>. However, the duration does not only depend on the type of records. A previous study<sup>123</sup> showed that in some judicial districts, releases under conditions are automatically prolonged, while this never happens in others. In addition, releases under conditions are on average longer than pre-trial detention. Is this because a lower priority is reserved for cases in which there are no detainees? It is indeed surprising to note that the alternative measure lasts longer than the measure it is intended to replace, while the time spent on release under conditions is not deducted from the time of the sentence that may be imposed at the end of the case investigation. This may be an effect of the three-month period provided by law: while it is a maximum (renewable) period of time, it seems that judges systematically make it last that long. We have no knowledge of a case of release under conditions given for a shorter period of time, like for two months, for example.

#### *6.2.5. Preliminary social inquiry*

Before deciding on the measure to take concerning a suspect, the investigating judge may ask a probation officer to conduct a specific inquiry into the need for pre-trial detention or the suitability of release under conditions (Art. 35, paragraph 1). He may also request this social report about somebody who is already in prison and whom he hesitates to release. This investigation option is used less frequently, however.

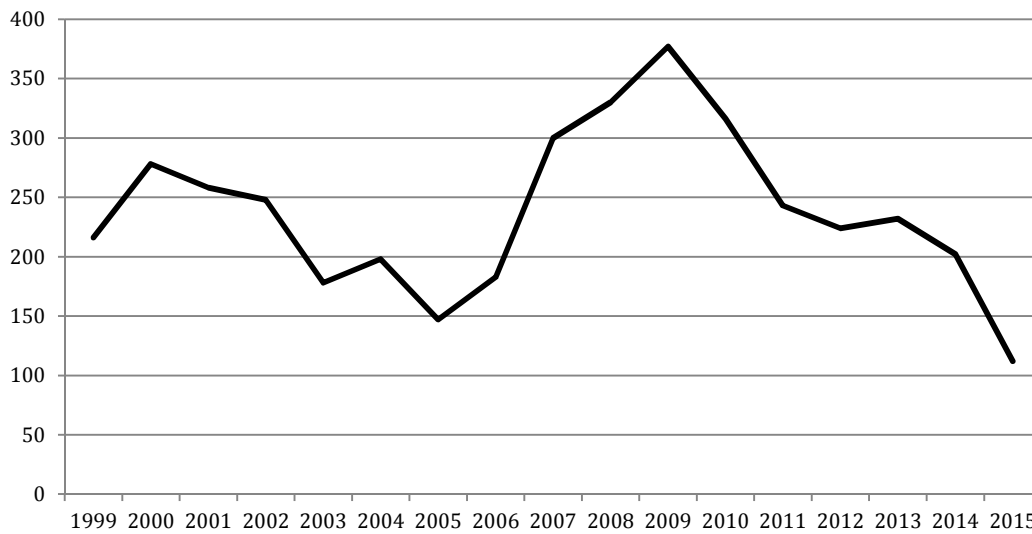
Figure 11 shows the use of social inquiry (by the Probation Service) over recent years. The number of social inquiries dropped to its lowest level in 2015, when only 112 social inquiry requests were reported, while 5,324 new releases under conditions were ordered and monitored by a probation officer. The maximum period of 24 hours within which the judge must decide to deprive a suspect of his freedom seems to explain the lack of social inquiry requests, as they usually take a few days to complete. Unfortunately, there are no specific data on requests for which the suspect is already in prison: in this case, a little more time may be given to the probation officers. If granted, release under conditions may reduce the length of detention.

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<sup>122</sup> Administration générale des maisons de justice (n 117).

<sup>123</sup> Jonckheere, 'La (mise en) liberté sous conditions : usages et durée d'une mesure alternative à la détention préventive (2005-2009). Note de recherche dans le cadre de l'exploitation scientifique de SIPAR, la base de données des maisons de Justice' (n 74).

**Figure 11. Evolution of the number of requests for social inquiry (1999-2015)<sup>124</sup>**



## 7. The ‘European Element’

With respect to European developments and its impact on domestic legislation and jurisprudence, first, it must be stated that Belgium has always been supportive of the idea of European social and economic integration. Belgium was one of the founding members of the Council of Europe (CoE) in 1949 and of the European Economic Community (EEC) in 1957, which integrated into the European Union (EU).

Belgium ratified the European Convention on Human Rights (ECHR) on 14 June 1955 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) on 23 July 1991. The new Pre-trial Detention Act of 20 July 1990 and other legislation on the deprivation of liberty before trial were significantly influenced by the case law established by the European Court of Human Rights (ECtHR), especially the decisions in the cases of *Lamy vs. Belgium* (30 March 1989; access to file information and ‘equality of arms’), *Bouamar vs. Belgium* (29 February 1988; detention of minors in remand centres) and *Pauwels vs. Belgium* (26 May 1988; deprivation of liberty of military soldiers)<sup>125</sup>. More recently, the cases of *Salduz vs. Turkey* (27 November 2008) and *Bouglame vs. Belgium* (2 March 2010) impacted on Belgian legislation and led to important modifications of the Pre-trial

<sup>124</sup> Data source: Annual reports of the Probation Service (years 1999-2000), Official publication ‘*Justice en chiffres 2008*’ (years 2001-2004), Data warehouse of the Probation Service (2005-2015).

<sup>125</sup> Chris Van den Wyngaert, Bart De Smet and Steven Van Dromme, *Strafrecht En Strafprocesrecht in Hoofdlijnen* (7th edn, Maklu 2009).



Detention Act of 1990, where it concerns access of lawyers to police interrogations and the hearing by the investigating judge (Law of 13 August 2011).

In a recent contribution, Beernaert assesses whether the current Belgian legislation on pre-trial detention conforms to the standards set by the European Convention of Human Rights and the European Court's case-law. Although she concludes that Belgian law (on pre-trial detention) is in conformity with the main principles of the European Convention (and this, even if recent legislative reforms reduce the possibilities of a regular judicial review and appeal before the Court of Cassation), the question arises as to whether the practice of pre-trial detention infringes important requisites of the convention. E.g., when the placement in pre-trial detention or its continuation is motivated in a too summary, abstract and stereotyped way, or when this is done without taking into account the evolution of the situation and the progress of the proceedings; when alternatives to deprivation of liberty have not been seriously considered or have been refused without a convincing and detailed motivation; or when the proceedings are not conducted with all diligence that is desired.<sup>126</sup>

In any case, in recent years the Belgian State was convicted (again) by the ECtHR, because of unreasonable length of pre-trial detention (*Lelièvre vs. Belgium*, 8 November 2007; remand in custody of seven years and ten months – violation of Art. 5, § 3 ECHR), and because of inhuman or degrading detention conditions due to prison overcrowding in Belgian prisons (*Vasilescu vs. Belgium*, 25 November 2014 – violation of Art. 3 ECHR).

In addition, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (CPT) repeatedly criticized the situation in detention facilities, and especially the detention conditions in remand prisons. After having visited the remand centre of Vorst/Forest in Brussels in 2012, the CPT concluded that the detention conditions as mentioned in his report, and more specifically those in certain wings of the Forest prison, could be considered as resembling an inhuman and degrading treatment to inmates who experience this situation, a conclusion that was even not contested by the Belgian authorities that were interviewed during the visit<sup>127</sup>. Recent strikes of prison guards attracted the attention of the CPT and, following a visit in order to “*examine on the spot the impact of this industrial action, (...), on the*

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<sup>126</sup> Marie-Aude Beernaert, ‘La détention préventive sous le regard de la Cour européenne des droits de l’homme’ in Laura Aubert (ed), *Détention préventive: comment sans sortir?* (Bruylant 2016).

<sup>127</sup> CPT, ‘Rapport Au Gouvernement de La Belgique Relatif à La Visite Effectuée En Belgique Par Le Comité Européen Pour La Prévention de La Torture et Des Peines Ou Traitements Inhumains Ou Déggradants (CPT) Du 23 Au 27 Avril 2012’ (2012) § 19.  
[http://www.cpt.coe.int/documents/bel/2012-36-inf-fra.htm#\\_Toc331489883](http://www.cpt.coe.int/documents/bel/2012-36-inf-fra.htm#_Toc331489883)

*situation of inmates*<sup>128</sup>, the CPT held ‘high-level talks’ with the Minister of Justice and a member of the Private Office of the Belgian Prime Minister<sup>129</sup>.

With regard to EU legal instruments, Belgium adopted legislation in order to implement the European Arrest Warrant (EAW)<sup>130</sup>. However, Belgium is one of the last EU member states that still have to transpose another important EU-instrument into national legislation, the so-called European Supervision Order (ESO; EU Framework Decision 829). Legislative action in this respect has been announced for soon ...

## 8. Conclusions

In this paper we briefly presented and discussed Belgian legislation on pre-trial detention and alternatives and the use that is made of these measures. As has been shown in section 3, alternatives to pre-trial detention, such as introduced by the new Law on Pre-trial Detention of 1990, did not result in a significant decrease of the population in remand custody (nor in a reduction of the number of annual prison committals). Both pre-trial detention and alternatives are being used to a high degree. It seems that the (legal) availability of alternatives even ‘prompts’ some practitioners, in particular lawyers, to apply for these measures in order to avoid imprisonment, instead of requesting for a simple release without conditions. Probably, alternatives are considered as a ‘compromise’ that is more easily ‘negotiable’. As a result, over the last 25 years there is an impressive growth in the use of coercive, custodial or non-custodial measures before final conviction; more than 6,000 people were under some form of judicial control (before trial) in 2014, with more than half of them being incarcerated in prison. Making better use of alternatives therefore remains a big challenge for the near future.

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<sup>128</sup> <http://www.cpt.coe.int/documents/bel/2016-05-09-eng.htm>

<sup>129</sup> <http://www.cpt.coe.int/documents/bel/2016-06-22-eng.htm>

<sup>130</sup> Law of 19 December 2003 concerning the European arrest warrant [22 December 2003] Official Journal (*Moniteur belge/Belgisch Staatsblad*),

## Glossary

Détention préventive / Voorlopige hechtenis	<b>Pre-trial detention</b> – Pre-trial detention refers to the detention of a suspect in a criminal case before the trial has taken place. This decision must be ordered by an investigating judge. The suspect remains innocent as long as no sentence is given.
Ministère public / Openbaar ministerie	<b>Public prosecutor</b> – Represents society in court. His main work consists of detecting and prosecuting criminal offences.
Juge d’instruction / Onderzoeksrechter	<b>Investigating judge</b> – The investigating judge is appointed to lead the <i>instruction</i> (see below). If there are indications of a crime, the judge may begin an <i>instruction</i> , though only at the request of the public prosecutor or the civil party.
Chambre du conseil / Raadkamer	<b>Judicial council</b> – A special chamber of the district court. The judicial council only intervenes in the <i>instruction</i> . After reviewing the investigating judge’s report, one judge will decide if the suspect remains in pre-trial detention in prison or at home under electronic monitoring or is released, whether or not under conditions.
Chambre des mises en accusation / Kamer van Inbeschuldigingstelling	<b>Chamber of indictment</b> – Part of the chamber of the Court of Appeal. This chamber decides on appeals against rulings by the judicial council. It deals with criminal and correctional cases in the investigative stage.
Information / Opsporingsonderzoek	<b>Information</b> – Led and coordinated by the public prosecutor and mainly executed by the police, <i>information</i> is a preliminary stage to investigation that consists of all acts intended to gather useful elements for a criminal investigation, such as by seeking evidence, hearing witnesses and arresting suspects.
Instruction judiciaire / Gerechtelijk onderzoek	<b>Instruction</b> – Led by the investigating judge, an <i>instruction</i> consists of all investigative duties performed to detect perpetrators, gather evidence and take action to possibly bring the case to court.
Assistant de justice / Justitieassistent	<b>Probation officer</b> – Officer (social worker) who prepares a social inquiry report at the request of the judicial authorities and supervises the implementation of sentences and measures in the community.

Surveillance électronique (DP) / Elektronisch toezicht (VH)	<b>Electronic monitoring</b> (PTD) – A way to implement pre-trial detention outside prison. The suspect does not stay in prison, but must remain in an assigned place (24 hours per day, except for a limited number of movements) where he is monitored via GPS tracking.
Libération sous caution – Invrijheidstelling onder borg	<b>Release under bail</b> – Financial bail. Release of a suspect on the condition of a financial settlement.
Libération sous conditions / Invrijheidstelling onder voorwaarden	<b>Release under (probationary) conditions</b> – Release of a suspect under conditions as an alternative to pre-trial detention. There is no (legal) exhaustive list of conditions that can be imposed by the investigating judge or courts. The breach of any condition may lead to revocation of the release order.
Arrestation judiciaire / Gerechtelijke aanhouding	<b>Judicial arrest</b> – Coercive measure to deprive someone of freedom, carried out by the police, for a maximum time limit of 24 hours (exceptionally extendable to 48 hours).
Mandat d’amener / Bevel tot medebrenging	<b>Order to appear</b> – Order issued by an investigating judge to bring a suspect in for questioning.
Mandat d’arrêt / Aanhoudingsbevel	<b>Arrest warrant</b> – A written order issued by an investigating judge that authorises the arrest of a suspect.
Enquête sociale / Maatschappelijke enquête	<b>Social inquiry report</b> – Report on an individual’s living conditions and surroundings to assist the judge in his decision to establish a personalised measure and/or order or to keep a suspect in pre-trial detention.
Administration pénitentiaire / Gevangenisadministratie	<b>Prison Service</b> – The Belgian Prison Service is an entity attached to the Federal Public Service Justice. In addition to a central administration and two training centres for prison staff, it consists of 35 correctional facilities, of which 17 are located in the Dutch-speaking part of Belgium, 16 in the French-speaking part and two in Brussels.

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