DETOUR
TOWARDS PRE-TRIAL DETENTION AS ULTIMA RATIO

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Towards Pre-trial Detention as Ultimo Ratio

WORKING PAPER

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1. Introduction: PTD "in context"

The Dutch criminal justice system can be characterized as a civil law system with a moderate inquisitorial character. The prosecutor is dominus litus of the procedure and decides if a criminal case will be prosecuted or not. A case can be dismissed because evidence is lacking or a case has insufficient opportunity (priority). The rights of the defendant increase in the course of the procedure. For example, h/she can be legally restricted in his right to access the file during the phase of criminal investigation. After the criminal investigation is closed and the defendant is informed that h/she will be further prosecuted, he will have full access to the file. The prosecutor is a very important player in the Dutch criminal justice procedure. He is the leader of the investigation and has broad discretionary powers to deal with cases himself. He can offer a defendant an out of court settlement or compromise (transaction) for not prosecuting a suspect. If the offender accepts this condition, he waives his right to a public trial before an independent judge. Since 2009 the prosecutor also has the power to impose punishment orders (*strafbeschikking*). The difference with an out of court settlement is that punishment orders can be imposed against the will of the defendant, consent is not a legal requirement, but the defendant can appeal against the punishment order at the court within fourteen days.

Pre-trial detention (*voorlopige hechtenis*) entails the forms of deprivation of liberty by the judge that precedes the execution of the sentence. It infringes upon the right to personal liberty as safeguarded in Article 15 of the Dutch Constitution. Article 15 of the Dutch Constitution only allows restrictions on the basis of an Act of Parliament. With regard to the deprivation of liberty in the scope of criminal proceedings this statutory basis can be found in Title 4 of Book 1 of the Code of Criminal Procedure (hereafter: CCP).

After a strong increase of the prison population between 1990 and 2005, the prison population has been declining since that time (see below). Still, the number of prisoners on remand is relatively high compared to other countries. Only quite recently the number of prisoners in pre-trial detention has been decreasing faster than the general prison population. It is important to realize that the conditions in remand prisons are worse compared to the conditions in prisons for convicted offenders. The regime is much more sober, the work facilities are less developed and the possibilities for leave or unattended visits are absent or very restricted. The difference between the two regimes has been one of the reasons why convicted persons are transferred from a remand prison to a regular prison after the conviction in first instance, even in case they appeal. This legislation is debated from the scope of the principle of innocence.

This working paper reflects the current knowledge regarding pre-trial detention in the Netherlands. It is a starting point for an EU-funded empirical study on the use of pre-trial detention and alternatives for it. In the next paragraph we will describe the legal framework on pre-trial detention in the Netherlands. In paragraph 3 we will discuss statistics on prison numbers in general

and pre-trial prison numbers in particular and the extent to which these are related. In the fourth paragraph the most important research in the field of pre-trial detention will be summarized and discussed. Subsequently, we will map the most important 'alternatives' for pre-trial detention and what is known about their use. Finally, the influence of European regulation and jurisprudence, called the "European element", will be discussed.

2. Legal framework

As stated in paragraph 1, with regard to the deprivation of liberty in the scope of criminal proceedings this statutory basis can be found in Title 4 of Book 1 of the CCP.

As stated above, the term pre-trial detention as used in this chapter entails the forms of deprivation of liberty by the judge that precede the execution of the sentence.[1] Accordingly, it also covers the category of prisoners who have appealed to their sentence or are within the statutory time limit for doing so.

Before the pre-trial detention phase, a suspect can be deprived of his liberty by means of police arrest for questioning (*ophouden voor onderzoek,* Article 61 CCP) and by means of arrest by a police officer (*inverzekeringstelling*) on the basis of Article 57 CCP. The competence to issue arrest by a police officer is vested in the public prosecutor or a assistant public prosecutor in the case seeking the permission of the prosecutor would cause undue delay.

2.1 Different stages of pre-trial detention

Pre-trial detention can be divided in three stages: remand in custody (*inbewaringstelling*) on the basis of Article 63 CCP, detention in custody (*gevangenhouding*) and arrest (*gevangenneming*) on the basis of Article 65 CCP.

1. Remand in custody (*inbewaringstelling)*
   On the basis of Article 63 CCP, the Public Prosecutor can request for a person suspected of having committed a criminal offense to be remanded in custody. The examining judge (*rechter-commissaris*) decides on this request and can grant the order for a maximum period of 14 days (Article 64, first paragraph, CCP).
2. Detention in custody (*gevangenhouding*)
   After the period of remand in custody the Public Prosecutor may request the detention in custody (Article 65 CCP). This request is decided upon by the court in chambers (*raadkamer*), which consists of three members (Article 21, fifth paragraph, CCP). Detention in custody can be granted for a maximum period of 90 days (Article 66, first paragraph, CCP). The suspect is heard during this procedure.
3. Arrest (*gevangenneming*)
   Arrest on the basis of Article 65 CCP can be ordered if the suspect is at liberty and has to be taken into custody to appear before the judge.

[1] G.J.M. Corstens (edited by M.J. Borgers), *Het Nederlands strafprocesrecht*, Deventer: Kluwer 2014, p. 442.

2.2 Statutory requirements

The application of pre-trial detention is governed by four statutory requirements: 1) there must be a grave suspicion (*ernstige bezwaren*, Article 67, third paragraph, CCP); 2) it must concern one of the cases that is mentioned in Article 67 CCP; 3) there must be a ground that is mentioned in Article 67a CCP; and 4) the anticipation-requirement has to be fulfilled by the judge (Article 67a, third paragraph, CCP).[2]

Ad 1 Grave suspicion

A grave suspicion implies a high degree of suspicion that the suspect has committed the offence of which he is suspected. When the suspect is suspected of a terrorist crime such grave suspicion is not required for the application of pre-trial detention (Article 67, fourth paragraph, CCP).

Ad 2 Cases

Pre-trial detention can only be applied if it concerns one of the cases that is mentioned in Article 67 CCP. As a general rule, it can only be applied in case of a suspicion of a criminal offence which, according to its legal definition, carries a sentence of imprisonment of four years or more, or when it concerns one of the criminal offences that is specifically mentioned in the article itself. According to paragraph 2 of the article the order can further be issued if no permanent address or place of residence of the suspect in the Netherlands can be established and he is suspected of an offence which carries a statutory prison sentence.

Ad 3 Grounds for pre-trial detention

The grounds for pre-trial detention mentioned in Article 67a CCP concern the (serious) risk of absconding of the suspect or the existence of a serious reason of public safety requiring the immediate deprivation of liberty.

What situations qualify as the latter category is determined in the second paragraph of the article. According to this paragraph, the following can be considered as a serious reason of public safety:

- If it concerns suspicion of commission of an act which, according to its legal definition, carries a sentence of imprisonment of twelve years or more and that act has caused serious upset to the legal order;

[2] G.J.M. Corstens (edited by M.J. Borgers), *Het Nederlands strafprocesrecht*, Deventer: Kluwer 2014, p. 450.

- If there is a serious risk the suspect will commit an offence which, according to the law, carries a prison sentence of six years or more or whereby the security of the State or the health or safety of persons may be endangered, or give rise to a general danger to goods;
- If it concerns suspicion of one of the offences defined in Articles 285, 300, 310, 311, 321, 322, 323a, 326, 326a, 350, 416, 417bis, 420bis or 420quater CCP, whereas less than five years have passed since the day on which, on account of one of these offences, the suspect has been irrevocably sentenced to a punishment or measure entailing deprivation of liberty, a measure entailing restriction of liberty or community service, and there is in addition a serious likelihood that the suspect will again commit one of those offences;
- If detention on remand is necessary in reason for discovering the truth otherwise than through statements of the suspect.[3]

On January 1, 2015 a new ground for pre-trial detention was added to Article 67a CPP. This ground is dedicated to suspicion of one of the offences defined in Articles 141, 157, 285, 300-303 or 350 CCP, committed in a public area or against persons with a public task that has caused social unrest and the adjudication of the criminal offence will commence within 17 days and 15 hours after the arrest of the suspect. On the basis of this ground pre-trial detention with a view to accelerated proceedings against suspects of crimes in public areas or against public officials, such as policemen, firemen, and ambulance staff is facilitated.

The grounds mentioned in Article 67a CCP resemble the four categories as distinguished by the ECtHR: danger of absconding, obstruction of the proceedings, repetition of offences and preservation of public order.

Ad 4 Anticipation requirement

On the basis of Article 67a, third paragraph, CCP the judge deciding on the application of pre-trial is required to anticipate on the expected sentence in the case. According to the article, an order for pre-trial detention shall not be issued if there are serious prospects that, in case of a conviction, no irrevocable custodial sentence or a measure entailing deprivation of liberty will be imposed on the suspect, or that he, by the enforcement of the order, would be deprived of his liberty for a longer period than the duration of the custodial sentence or measure. The general starting point, as expressed by the European Court of Human Rights (ECtHR) and deriving from the presumption of innocence, is

[3] The translation of Article 67a CCP derives from the translation provided in ECtHR 9 December 2014, *Geisterfer v the Netherlands*, app.no. 15911/08, par. 23.

that the pre-trial detention should be used restrictively and that the suspect should be released whilst awaiting his trial.[4]

Article 66 CCP determines that once a defendant has been remanded in custody the trial must commence within 104 days. If the case is not ready for trial yet, but the suspect is already in pre-trial detention for 104 days, a *pro forma* session must be held to assess the progress of the case and to assess whether the suspect should stay in custody.

The time the suspect has spent in pre-trial detention is adduced from the prison sentence that is imposed. When a suspect is finally acquitted, he may ask for compensation for the time he spent in pre-trial detention. No legislation exists regarding the way time spent under electronic monitoring at the pre-trial stage is compensated when defining the overall duration of any final sanction or measure to be served.[5]

Despite of the criticism on the current practice of pre-trial detention as will be described in paragraph 4, the legal framework governing pre-trial detention, will not be subject to revision in the proposed modernization of the CCP.[6]

2.3 The use of alternatives within the legal framework

In the Netherlands, no alternatives for pre-trial detention can be found in the law. The only possibilities for applying an alternative to pre-trial detention is the possibility mentioned in Articles 80-86 CCP to suspend (*schorsen*) or postpone (*opschorten*) pre-trial detention. The alternatives that are possible within this framework will be discussed in paragraph 5.

[4] L. Stevens, ‘Voorlopige hechtenis en vrijheidsstraf. De strafrechter voor voldongen feiten?’, *Nederlands Juristenblad* 2010, p.1520.

[5] M. Boone, M. van der Kooij & S. Rap, *Current uses of Electronic Monitoring in the Netherlands*, Utrecht University 2016, p. 14.

[6] G.P.M.F. Mols, ‘Modernisering van het voorarrest: op weg naar vrijheidsbeneming als ultieme maatregel’, *Strafblad* 2015, p. 86-92.

Schematic summary

What?	Pre-trial detention?	Which cases?	Grounds	Who decides?	Degree of suspicion	How long?
Police arrest for questioning (*ophouden voor onderzoek*) Article 61 CCP	No	All cases	The interest of the investigation (*belang onderzoek*) Article 61, third paragraph, CCP	Public prosecutor or an assistant public prosecutor	"Normal" degree of suspicion	6 hours, not including the hours between midnight and 9 a.m.
Arrest by a police officer (*inverzekering-stelling*) Article 57 CCP	No	Cases in which pre-trial detention is allowed (Article 58, first paragraph, CCP jo. Article 67 CCP)	The interest of the investigation (*belang onderzoek*) Article 57, first paragraph, CCP	Public prosecutor or an assistant public prosecutor	"Normal" degree of suspicion	3 days, can be prolonged with another 3 days
Remand in custody (*inbewaringstel-ling)* Article 63 CCP	Yes	Cases in which pre-trial detention is allowed (Article 67 CCP)	Grounds mentioned in Article 67a, first paragraph, under a and b CCP: risk of absconding or the existence of a serious reason of public safety requiring the immediate deprivation of liberty (as defined in the second paragraph).	Examining judge (*rechter-commissaris*)	Grave suspicion (*ernstige bezwaren*)	14 days (NB anticipation requirement)
Detention in custody (*gevangenhou-ding*) Article 65 CCP/ Arrest (*gevangenne-ming*) Article 65 CCP	Yes	Cases in which pre-trial detention is allowed (Article 67 CCP)		Court in chambers (*raadkamer*)	Grave suspicion (*ernstige bezwaren*)	90 days (NB anticipation requirement)

3. Statistics

3.1 Prison population

The highest number of prisoners in 25 years was measured in 2005, with a total number of 15.206 prisoners.[7] By that time, the numbers had quadrupled since 1985. Boone and Moerings researched what the main reasons for this growth were in the period between 1985 and 2005 for six different categories of prisoners. They came to the conclusion that while the category of convicted offenders in prison had already started to stabilize, or even fall, from 1996 there had been an impressive increase of the other categories of prisoners: prisoners on remand, mentally ill offenders in penal-psychiatric TBS-clinics, irregular immigrants awaiting deportation (i.e. not for any offence) and youngsters detained for private law reasons (i.e. not for any offence either). The doubling of prisoners in remand detention could be explained in particular by the increased detention of small drug smugglers ('body packers'), 'repeat' offenders (mainly drug addicts) and foreigners without valid papers. They explained the 'cell explosion' by the increasing intolerance and indifference to the problems of these vulnerable groups.[8] This conclusion fits nicely to the main conclusions of Downes and Van Swaaningen who focused more on the macro-sociological explanations for the growing prison rates in the Netherlands in that period. They point for example at the severe budget cuts in welfare-provisions in the 1980s which resulted in a situation in which social problems were no longer solved by social policy, but were referred to the police and the criminal justice system.[9]

According to numbers provided by the Custodial Institutions Agency (*Dienst Justitiële Inrichtingen, DJI*) of the Ministry of Safety and Justice the total amount of prisoners has dropped significantly in the period 2005-2014. Between 2005 and 2009 the number of prisoners dropped drastically. After 2009, the number stabilized, but in 2012, 2013 and 2014 numbers dropped again. Compared to 2005 the population has dropped in 2014 with 35% to 9.909 prisoners.[10] Figure 1 shows the development in the population of prisoners in the period 2010-2014.

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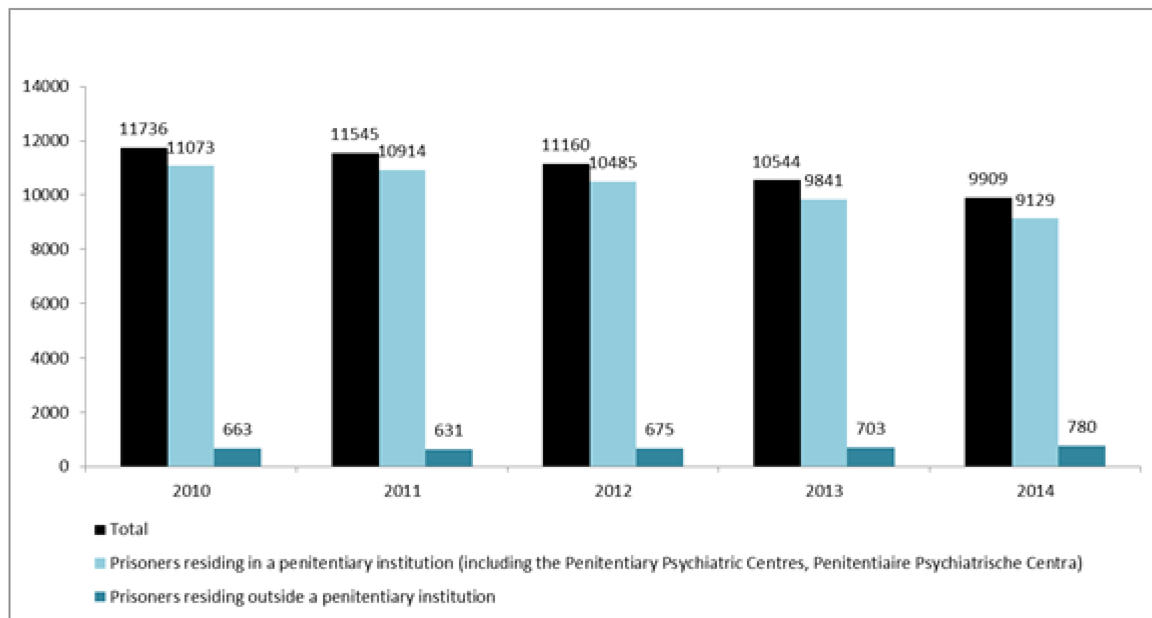
[7] *Gevangeniswezen in getal 2010-2014*, Dienst Justitiële Inrichtingen, May 2015, p. 29.

[8] M. Boone & M. Moerings, 'Growing prison rates' in: M. Boone & M. Moerings, *Dutch Prisons*, The Hague: BJu Legal publishers 2007, p. 51-76.

[9] D. Downes & R. van Swaaningen, 'The Road to Dystopia? Changes in the Penal Climate of the Netherlands', in: M. Tondry and C. Bijleveld (eds), *Crime and Justice in the Netherlands (Volume 35)*, Chicago: University of Chicago Press 2007, p. 31-71.

[10] This number includes prisoners who are detained within a penitentiary institution, but also prisoners who are placed in special health care institutions that are used for those who are particularly vulnerable and persons who follow a penitentiary program outside prison. Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 29.

Figure 1: Prison population, 2010-2014

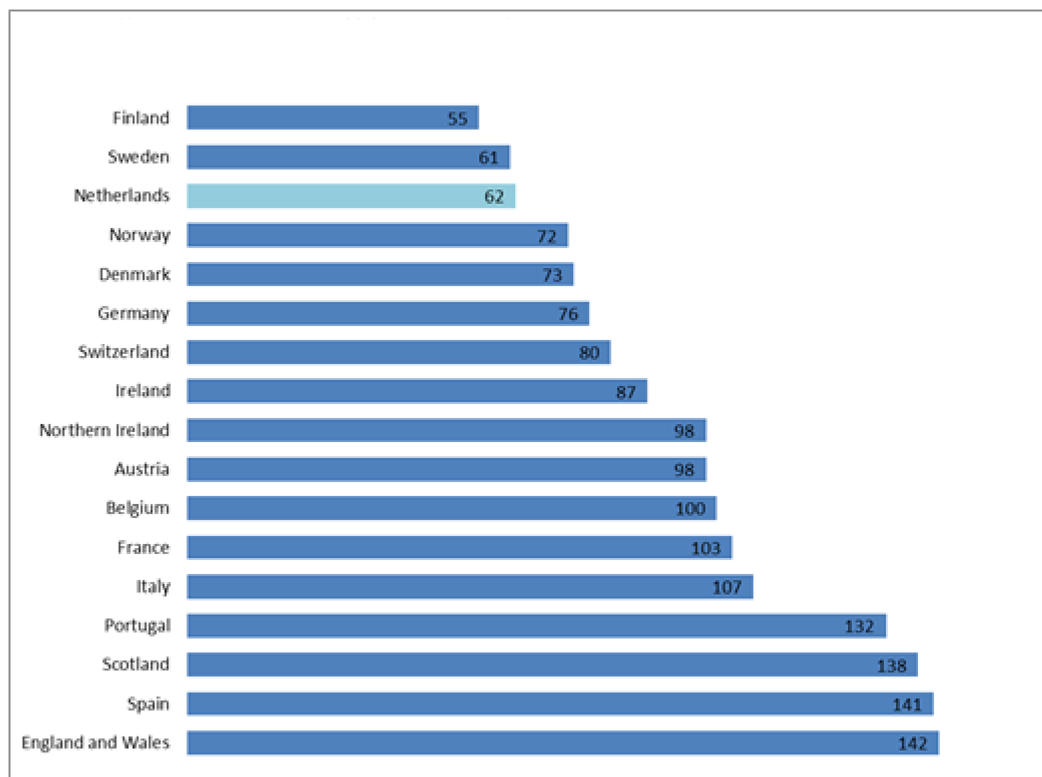


Source: Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 29.

The Council of Europe publishes its Annual Penal Statistics (SPACE) statistics on the prison population in the Council of Europe Member States every year. The most recent reports were published on 15 December 2014 (survey 2013) and 23 December 2015 (survey 2014). In the SPACE data persons detained under a hospital order are excluded from the calculation of the prison population. On the basis of the SPACE survey 2013, the Custodial Institutions Agency has compared the Dutch prison population ratio to those in other European countries. In this respect, it has noted that it is difficult to compare prison numbers in the different countries, especially since in some countries persons who are not or diminished criminally responsible by reason of mental disorder form part of the regular prison population, while in the Netherlands a hospital order can be imposed on adults who have committed a serious offence and have been declared entirely or partially unaccountable for that offence.[11] For the purpose of comparison, it has corrected the number of prisoners, by including the number of persons who are placed under a hospital order (see figure 2).

[11] Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 41.

Figure 2: Number of detainees per 100.000 inhabitants in the Netherlands and other European countries, September 2013.



Source: Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 42.

Comparing the Netherlands to other European countries reveals that the Netherlands belongs to the countries with the lowest prison rates, with a prison population ratio of 63 per 100.000 inhabitants.[12] Van Swaaningen[13] and Boone and Van Swaaningen[14] together try to answer the question if the fall of the prison population can be explained by a reversed punitive turn. They come to the conclusion that the developments within the categories that explained the growth between 1985 and 2005,[15] are also most influential in explaining the fall of imprisonment rates, but do not really relate to a (reverse of a) punitive turn. To give just two examples. The number of irregular immigrants awaiting deportation in detention halved, partly as a result of the stricter immigration policy that led to a spectacular decrease of the number of asylum seekers from 45.000 in 1998 to 10.000 in 2007 - rising again to 18.000 in 2013. The general pardon of 2007, involving about 27.000 people, also influenced

[12] In this figure the Netherlands is compared to other European countries with more than 1 million inhabitants. Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 41.

[13] R. van Swaaningen, 'Reversing the Punitive Turn: The Case of the Netherlands', in: T. Daems, D. van Zyl Smit & S. Snacken, *European Penology,* Hart Publishing Oxford 2013, p. 339-361.

[14] M. Boone & R. van Swaaningen, 'Regression to the Mean: Punishment in the Netherlands', in: V. Ruggiero & M. Ryan, *Punishment in Europe. A Critical Anatomy of Penal Systems*, Palgrave Macmillan 2013. P. 9-33.

[15] M. Boone & M. Moerings, 'Growing prison rates' in: M. Boone & M. Moerings, *Dutch Prisons*, The Hague: BJu Legal publishers 2007

the number of irregular migrants in prison, as did the acceptance of the European Union's guideline on Forced Return. According to this guideline, the maximum term of administrative detention awaiting deportation is six months. Because the Netherlands used to detain deportees for much longer, this EU-guideline has resulted in a large number of releases. Also the separation of juveniles detained for private law reasons from the juveniles detained because they have committed an offence has influenced the general detention rate. Before 2008, these two categories of juveniles were detained in the same penal institutions. Since their separated detention, the total number of juveniles in *prison* more than halved. In criminology, the phenomenon that former prisoners are detained in another type of (more or less) closed institution is called transcarceration. It is debatable whether this can be interpreted as a sign of a decreasing punitiveness.

One of the most direct causes for the decrease of the prison rate can be found in sentencing practices. Both the absolute number and relative share of unconditional prison sentences have been decreasing since 2003.[16] This phenomenon is (partly) explained by the 'production agreements' and 'output financing' of the police in 2003. Police officers are encouraged to focus on (large numbers of) minor cases instead of (fewer) more serious and complicated ones. As a consequence, less severe sentences were imposed by the courts, resulting in a reduction of the prison population. Criminal law scholar Buruma already warned in 2004 for a 'miniaturisation' of criminal law as a result of these developments.[17] This argument seems to be underlined by the analysis of Berghuis. He has noted that the diminished demand for prison capacity has diverse reasons. Decisive developments have been identified in a number of serious offences. Berghuis notes that the diminished need for prison capacity is mainly driven by the criminal response to a limited number of serious offences. Important has been the reduced result of criminal prosecution of those who are involved in the hard drug business, especially of those who play a leading role. Also clear-up rates and crime numbers of other serious crimes also have decreased. These two developments have significantly contributed to a diminished demand for prison capacity.[18] The low prison rate has led in recent years to the closing of many penitentiary facilities and the leasing of prison capacity to Belgium (the Willem II prison in Tilburg) and Norway (the Norgerhaven prison in Veenhuizen).

[16] S.N. Kalidien, N.E. de Heer-de Lange & M.M. van Rosmalen, *Criminaliteit en Rechtshandhaving 2010: Ontwikkelingen en Samenhangen*, Wetenschappelijk onderzoek- en documentatiecentrum 2011, table 6,7.

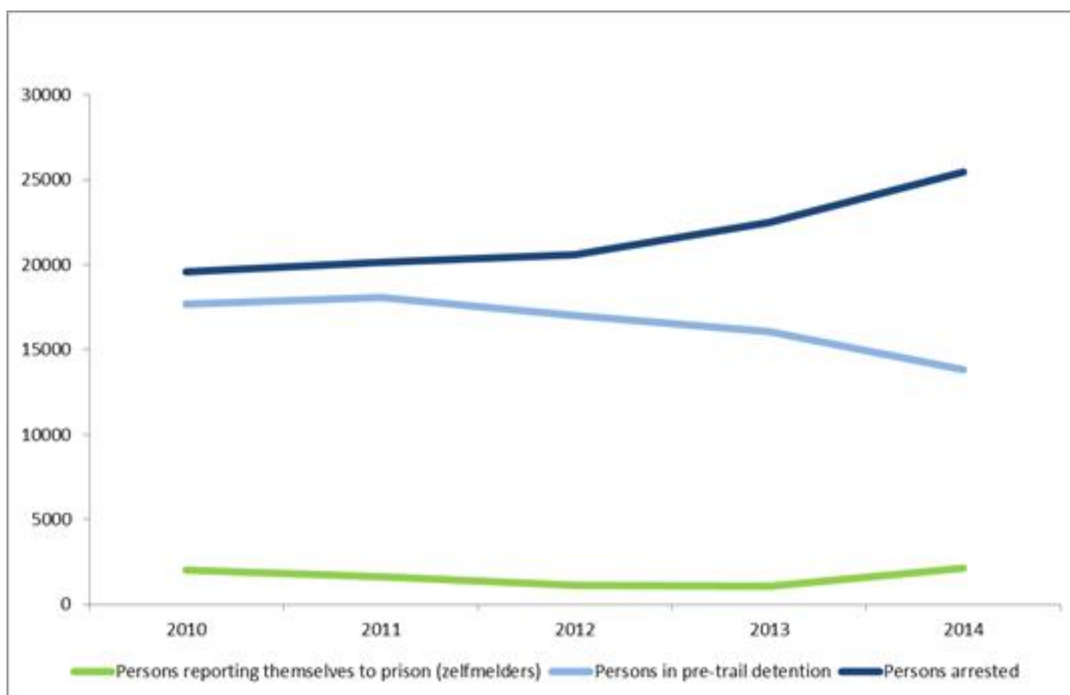
[17] Y. Buruma, 'Onoprechte handhaving', in: B. van Stokkom & L.G. Moor (eds.), *Onoprechte handhaving? Prestatiecontracten, Beleidsvrijheid en politie-ethiek,* Stichting Maatschappij Veiligheid en Politie 2004…

[18] A.C. Berghuis, 'Hoe komt het dat al die cellen leeg staan?, *Sancties* 2015/12, p. 65-73.

3.2 Pre-trial detainees

According to the Custodial Institutions Agency the influx of prisoners entering into the prison system has increased in the period 2012-2014 after a slight decrease in the period 2010-2012. This increase is mainly due to a strong increase of persons who are committed to prison for non-payment of a fine (*gijzeling*). Because of their average short period of detention, their effect on the total prison population is only limited.[19] The number of pre-trial detainees entering the prison system has decreased in the period 2010-2014 from 17.694 in 2010 until about 13.803 in 2014, which is a decrease of 22%.[20] According to the WODC this decrease had already taken place since 2007, coming from 19.800 pre-trial detainees in that year, with the strongest decrease between 2012 and 2014.[21]

Figure 3: Influx per category (the Netherlands)



Source: Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 22.

The decrease in pre-trial detainees as demonstrated in figure 3 is remarkable, since it is relatively stronger than the decrease in registered criminal offences and the decrease of suspects who are taken into police custody.[22] While the number of pre-trial detainees has decreased from 2010, the amount of damages paid to pre-trial detainees that were acquitted has largely increased. In 2010, 3 773

[19] Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 21.

[20] Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 22-23.

[21] WODC, *Criminaliteit en rechtshandhaving 2014*, Den Haag: p. 46.

[22] Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 9.

persons were compensated for in total 8.3 million euros. In 2014, this has increased to 6 112 persons who were compensated for in total 11.3 million euros. In 2015, the number of persons who were awarded compensation again increased to 7 068, but the total amount of damages awarded dropped to 10.3 million euros.[23] This means that in 2015 more people were awarded damages for relatively shorter periods of detention.[24]

The Custodial Institutions Agency has noted that the reasons for the decrease in the number of pre-trial detainees are not yet clear. Since multiple explanations are possible, this decrease will be investigated further in 2015 by academics and experts from the criminal justice system.[25] Berghuis, Linckens and Aanstoot have investigated possible explanations for the decrease in the number of pre-trial detainees, also in relation to the increased amount of damages paid, in their 2016 article in *Trema*.[26] According to them, the reduced number of pre-trial detainees follows to a large extent from the development in crime and the investigation of criminal offences. The amount of cases that is suspended immediately after the remand in custody (*inbewaringstelling*) is suspended has increased from 33.8% in 2011 and 2012 to 35% in 2013 and 36.4% in 2014. In addition, pre-trial detention is applied for a shorter period. Where in 2012, 36% of the pre-trial detention was suspended or postponed within a month, this was increased to 40% in 2014. Also, the average length of the pre-trial detention has decreased from 93 days in 2012 to 87 days in 2014. Berghuis, Linckens and Aanstoot conclude that judges seem to have adopted a more reluctant approach towards the application of pre-trial detention.[27] A possible explanation for the increased willingness of judges to suspend or postpone pre-trial detention can be the criticism on the extensive pre-trial detention practice (as described in figure 4) as expressed by, including many others, several judges in a critical article on the current pre-trial practices.[28] Berghuis, Linckens and Aanstaat explain the increase in the amount of damages paid by the explosive application of police custody of suspects as a result of imposing on the spot-penalties.[29]

Figure 4: Number of pre-trial detainees and persons sentenced to imprisonment

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[23] Centraal Bureau voor de Statistiek StatLine d.d. 18 april 2016.

[24] With a daily rate of €80 this means an average of 23 days per person in 2014 and 18 days in 2015.

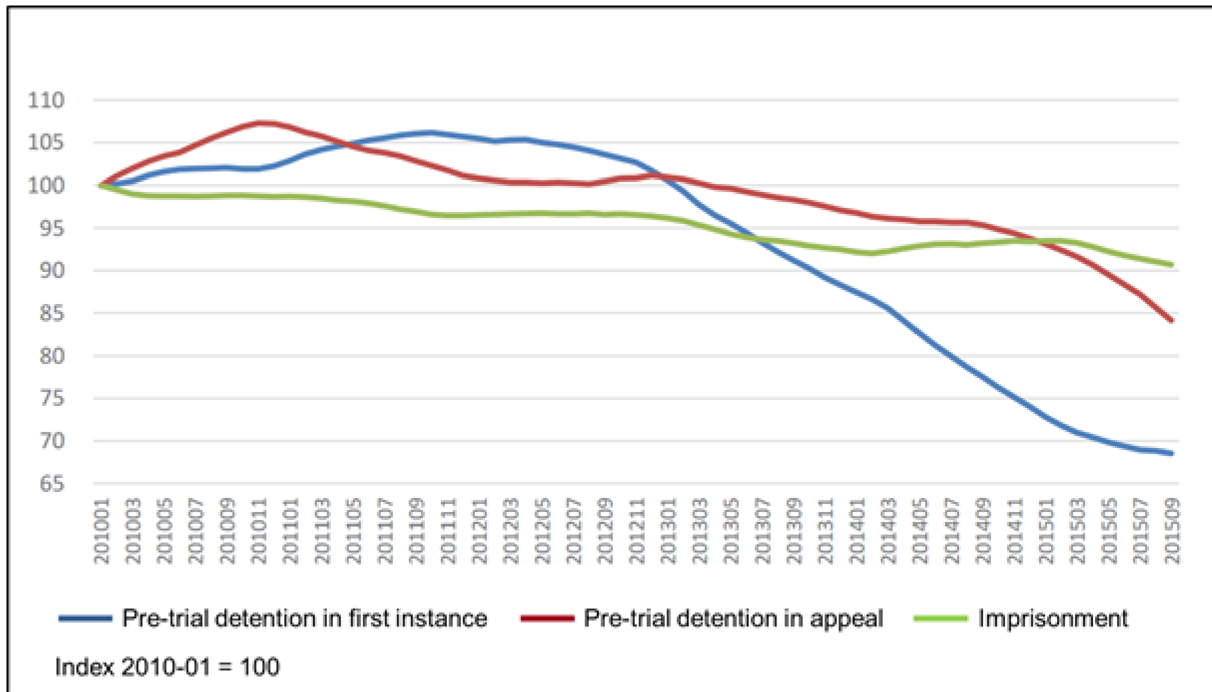
[25] Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 9.

[26] B. Berghuis, P. Linckens & A. Aanstoot, 'De voorlopige hechtenis een halt toegeroepen?', *Trema* 2016/3, p. 76-81.

[27] B. Berghuis, P. Linckens & A. Aanstoot, 'De voorlopige hechtenis een halt toegeroepen?', *Trema* 2016/3.

[28] B. Berghuis, P. Linckens & A. Aanstoot, 'De voorlopige hechtenis een halt toegeroepen?', *Trema* 2016/3, referring to J.H. Janssen, F.W.H. van den Emster & T.B. Trotman, 'Strafrechters over de praktijk van de voorlopige hechtenis. Een oordeel van de werkvloer!', *Strafblad* 2013, p. 430-444.

[29] B. Berghuis, P. Linckens & A. Aanstoot, 'De voorlopige hechtenis een halt toegeroepen?', *Trema* 2016/3, p. 76-81.



Source: B. Berghuis, P. Linckens and A. Aanstoot, 'De voorlopige hechtenis een halt toegeroepen?' (2016), *Trema* 3, p. 77.

Comparing the influx of pre-trial detainees with the number of persons held suspect of a crime yields indeed that although the influx of pre-trial detainees shows the above mentioned remarkable decline in absolute terms, the decline in relation to the number of persons held suspect of a crime shows a less significant decrease. It must be noted though that pre-trial detention is not possible for all crimes (see paragraph 2).

Figure 5: Proportion of pre-trial detainees on total number of crime-suspects

Year	Total number of crime- suspects	Influx pre-trial detainees	%
2010	207.719	17.694	9,85
2011	227.295	18.056	8,97
2012	222.225	16.991	8,53
2013	205.658	16.081	8,63
2014	207.639	13.803	7,24
2015	185.738	13.778	8,10

Source: CBS/WODC, Criminaliteit en rechtshandhaving 2015, tables corresponding to chapters 5 and 7.

Over the past years, there hasn't been a significant shift in the percentage of pre-trial detainees related to the total population of prisoners, although numbers have declined a little to 43% in 2015.

Figure 6: Proportion of pre-trial detainees on the total prison population

Year	Total number of inmates (including pre-trial detainees)	Total number of inmates in pre-trial detention	% of pre-trial detainees in total number of inmates
2010	11.736	5.632	48
2011	11.545	5.643	49
2012	11.160	5.453	49
2013	10.544	4.911	47
2014	9.909	4.251	43
2015	8.976	3.874	43

Source: Gevangeniswezen in getal 2010-2014, Dienst Justitiële Inrichtingen, May 2015, p. 31; DJI in getal 2011-2015, Dienst Justitiële Inrichtingen, April 2016, p. 25.

About half of the prisoners is born in the Netherlands.[30]According to the Council of Europe foreign prisoners are those with a foreign state citizenship, but not those who are stateless or whose nationality is unknown. Numbers for detainees whose nationalities are unknown have been incorporated in the surveys from 2012 onward. As for the share of foreigners in pre-trial detention in the Netherlands, the figure below shows a slight decrease over the past couple of years. However, when the numbers are adjusted to include persons with an unknown nationality, it shows a tendency to stabilize over the last three years.

Figure 7: Foreigners in detention

Year	1	2	3	4	5	6	7	8	9	10	11
	$T^{inmates}$	$T^{foreign}$	$T^{adjusted}$	%	$\%^{adj}$	$T^{pre\text{-}trial}$	%	EU-cit	%		%
2010	11.737	2.517	2.830	21,4	24,1	1.340	53,2	833	33,1	313	2,7
2011	11.579	2.410	2.636	20,8	22,8	1.265	52,2	910	37,8	226	2,0
2012	11.324	2.208	2.380	19,5	21	1.243	56,3	903	40,9	172	1,5

[30] DJI in getal, 2011-2015, Dienst Justitiële Inrichtingen, April 2016, table 2.10, p 28.

2013	10.547	2.140	2.321	20,3	22	1.150	53,7	951	44,4	181	1,7
2014	9.857	1.820	2.081	18,5	21,1	917	50,4	781	42,9	261	2,6

Source: Council of Europe Annual Penal Statistics (SPACE I) surveys over 2010, 2011, 2012, 2013 and 2014.[31]

1: Total number of inmates (including pre-trial detainees)

2: Total number of foreign inmates

3: Adjusted total of foreigners (including unknown)

4: % of foreigners in the total number of inmates

5: Adjusted % of foreigners (inc. unknown) in the total number of inmates

6: Number of foreign pre-trial detainees

7: % of foreign pre-trial detainees in the number of foreign inmates

8: Number of inmates citizens of Member States of the EU

9: % of the EU citizens in the number of foreign inmates

10: Number of detainees for which the nationality is unknown

11: % of detainees for which the nationality is unknown

No official numbers are available about the number or irregular migrants detained in remand prisons in the Netherlands. Based on personal information of the Dutch Prison Service (DJI), Boone & Kox mention a total number of 1150 persons without a residence status detained in Dutch penitentiary institutions on a criminal ground, but these numbers will be long obsolete if they were ever reliable.[32]

[31] Please note that these figures may differ slightly from those of the Dutch Custodial Institutions Agency (DJI), due to the fact that the Council of Europe uses September 1st as reference date, while DJI uses September 30th as a reference date. ..

[32] M. Boone & M. Kox, What works for irregular migrants in the Netherlands, *European Journal of Probation* 2012, (4), 3, p. 60.

4. Literature review

The Dutch pre-trial procedure has been the topic of much debate and discussion in academic literature. Academic legal research on pre-trial detention is abundant, especially on the question how the Dutch practice of pre-trial detention relates to the *ultima ratio* principle, as codified in Article 5 ECHR. Defense lawyers, academics but also judges have criticized the extensive use of pre-trial detention in the Netherlands.[33] Below, a selection of the most relevant legal and empirical studies on the theory and practice of pre-trial detention and the use of alternatives is provided.

In 2008, Stevens concluded that the Dutch pre-trial procedure in the light of Article 5 ECHR is not problematic, as the Dutch legal procedure concerning pre-trial detention requires grounds that are acknowledged by the ECtHR and these grounds are tested periodically.[34] In 2010, she has tested whether the practice of pre-trial detention is in accordance with the general principle that pre-trial detention should be used restrictively and as a last resort by judges in an empirical study.[35] To this purpose, she has interviewed 28 judges, including 14 examining judges from 7 different courts. Besides this, these judges were presented with five different cases to investigate their decision-making process. Stevens found that especially the ground of a serious reason of public safety requiring the immediate deprivation of liberty is interpreted extensively, serving as a legitimatization to demonstrate that dangerous behavior shall not go unpunished. By applying pre-trial detention, judges try to safeguard a feeling of safety amongst the victim(s) and others affected by the criminal act. These arguments are to a large extent also used to substantiate the ground of reoffending.[36] Stevens concludes that pre-trial detention is applied rather extensively by judges, not for restricted reasons but as a means to achieve quick punishment and to protect society against the suspect.[37]

In 2009, an analysis of the legal framework of pre-trial detention in the Netherlands was provided by van Kalmthout in the comparative study on Pre-trial Detention in the European Union.[38] A national

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[33] See, among many others, defence lawyers such as N. van der Laan, 'De voorlopige hechtenis lotto. Een pleidooi voor motiveren en publiceren', *NJB* 2009, p. 4215-2420, academics such as Y. Buruma, 'Onschuldig gedetineerd', *Nederlands Juristenblad* 2013, p. 2129, A.H. Klip, 'Voorlopige hechtenis', *Delikt en Delinkwent* 2012, p. 83-93 and judges J.H. Janssen, F.W.H. van den Emster & T.B. Trotman, 'Strafrechters over de praktijk van de voorlopige hechtenis. Een oordeel van de werkvloer!', *Strafblad* 2013, p. 430-444.

[34] L. Stevens, 'De praktijk van de Nederlandse voorlopige hechtenis vanuit Straatsburgs perspectief: "klaag niet te snel"', *Delikt en Delinkwent* 2008, afl. 5/35, p. 499-514.

[35] L. Stevens, 'Voorlopige hechtenis en vrijheidsstraf. De strafrechter voor voldongen feiten?',*Nederlands Juristenblad* 2010, p.1520-1525.

[36] L. Stevens, 'Voorlopige hechtenis in tijden van risicomanagement. Lijdende of leidende beginselen?', *Delikt en Delinkwent* 2012/36, p. 384-387.

[37] L. Stevens, 'Voorlopige hechtenis en vrijheidsstraf. De strafrechter voor voldongen feiten?', *Nederlands Juristenblad* 2010, p.1520-1525. See also L. Stevens, 'The Meaning of the Presumption of Innocence for Pre-trial Detention. An Empirical Approach', *Netherlands Journal of Legal Philosophy* 2013 (42)3, p. 246.

[38] A.M. van Kalmthout, 'The Netherlands', in: A.M. van Kalmthout, M.M. Knapen & C. Morgenstern (eds.), *Pre-trial Detention in the European Union*, Nijmegen: Wolf Legal Publishers 2009, p. 689-716.

report on pre-trial detention in the Netherlands as a part of a comparative study on pre-trial detention is also provided by Tak in 2012.[39]

Although academic legal research on pre-trial detention is abundant, especially on the question how the Dutch practice of pre-trial detention relates to the *ultima ratio* principle, as codified in Article 5 ECHR. Less, however, has been published on the alternatives for pre-trial detention.

In 2011, the Council for the Administration of Criminal Justice and Youth Protection (*Raad voor Strafrechtstoepassing en Jeugdbescherming*, RSJ) published an advice in which it explored and proposed alternatives for the practice of the use of alternatives for pre-trial detention.[40] The Council in this advice notes that statistics show that in 2003 in only 14% of the cases of remand in custody and 12% of the cases of detention in custody were immediately suspended. In the interviews that the Council has held for its advice, interviewees noted that 20 to 60% of the pre-trial detention cases was immediately suspended. The Council found that alternatives as electronic monitoring, and a duty to report are underused because of organisational problems, the lack of standard procedures and a common practice. In its 2011 advice, the Council recommended to take the practice in youth matters as an example, adhering to the basic principle that the pre-trial detention is suspended, unless there are reasons to not do this.[41]

In 2016, Crijns, Leeuw and Wermink of Leiden University have published the national report on the Netherlands for the research that is coordinated by the British NGO Fair Trials.[42] The goal of the report was to provide an overview of the use of pre-trial detention in practice in the Netherlands. In the research project 109 hearings on pre-trial detention were observed, 56 case files were reviewed and 6 judges and 3 prosecutors were interviewed. Also, a survey was completed by 35 defense lawyers. The central question in this report was if the criticism of the extensive use of pre-trial detention in Dutch criminal procedures is justified, and if so, what steps need to be taken to alleviate the concerns that exist regarding pre-trial detention. Main finding is that the Dutch legislation on pre-trial detention meets the relevant standards of the European Court of Human Rights, but that the way in which the legal rules on pre-trial detention are applied in practice is rightly criticized.[43] Researchers conclude

[39] P.J.P. Tak, 'Pre-trial detention in the Netherlands: improvements are still mandatory', in: P.H.P.H.M.C. van Kempen (ed.), *Pre-trial detention. Human Rights, criminal procedural law and penitentiary law, comparative law*, Intersentia 2012, p. 533-557.

[40] Council for the Administration of Criminal Justice and Youth Protection (Raad voor de strafrechtstoepassing en jeugdbescherming, RSJ), 'Voorlopige hechtenis – maar dan anders. Verkenning van alternatieven in het kader van schorsing en tenuitvoerlegging', advice July 4, 2011.

[41] Council for the Administration of Criminal Justice and Youth Protection (Raad voor de strafrechtstoepassing en jeugdbescherming, RSJ), 'Voorlopige hechtenis – maar dan anders. Verkenning van alternatieven in het kader van schorsing en tenuitvoerlegging', advice July 4, 2011, p. 21-30.

[42] J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, research report March 2016.

[43] J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, research report March 2016, p. 6.

that they feel that alternatives to pre-trial detention are underused, especially in the first phase of pre-trial detention and state that "[m]ore research and discussion is necessary to fully develop alternatives in terms of new legislation and better use of existing alternatives such as bail and electronic monitoring."[44]

[44] J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, research report March 2016, p. 7-8.

5. Alternatives/ non-custodial supervision

First it should be noted that strictly speaking in the Dutch system there are no alternatives to pre-trial detention. The judge can decide whether to order pre-trial detention or not. After deciding to order pre-trial detention, however, he can, immediately or during the execution of the pre-trial detention decide to suspend the execution (Article 80 paragraph 1 CCP). This means that the suspect is released, but has to abide by the conditions that the judge has set, usually until the moment that the trial will take place, although the judge can decide on any timeline that he sees fit. A more fundamental consequence is that the alternatives stay within the framework of the pre-trial detention itself. This means that the use is restricted to cases in which a ground for pre-trial detention exists and the alternative is sufficient to meet one of its objectives. With regard to the conditions attached to the suspension of the pre-trial detention, the CCP distinguishes between general and specific conditions. If the judge decides to suspend the pre-trial detention, this will always be under the general conditions; that the suspect will comply to possible future court orders regarding the pre-trial detention and that he will cooperate with the execution of a possible future sentence to imprisonment (Article 80 paragraph 2 CCP). Furthermore, the judge may apply specific requirements to the suspension. An overview of the requirements/alternatives that are most common in the countries of the European Union, is given by Van Kalmthout e.a. (2009). The law does not mention a (limited) list of requirements that can be added to a suspension (contrary to for example the conditional prison sentence and conditional release) which allows creativity for the judge to tailor the alternatives that can be used. .

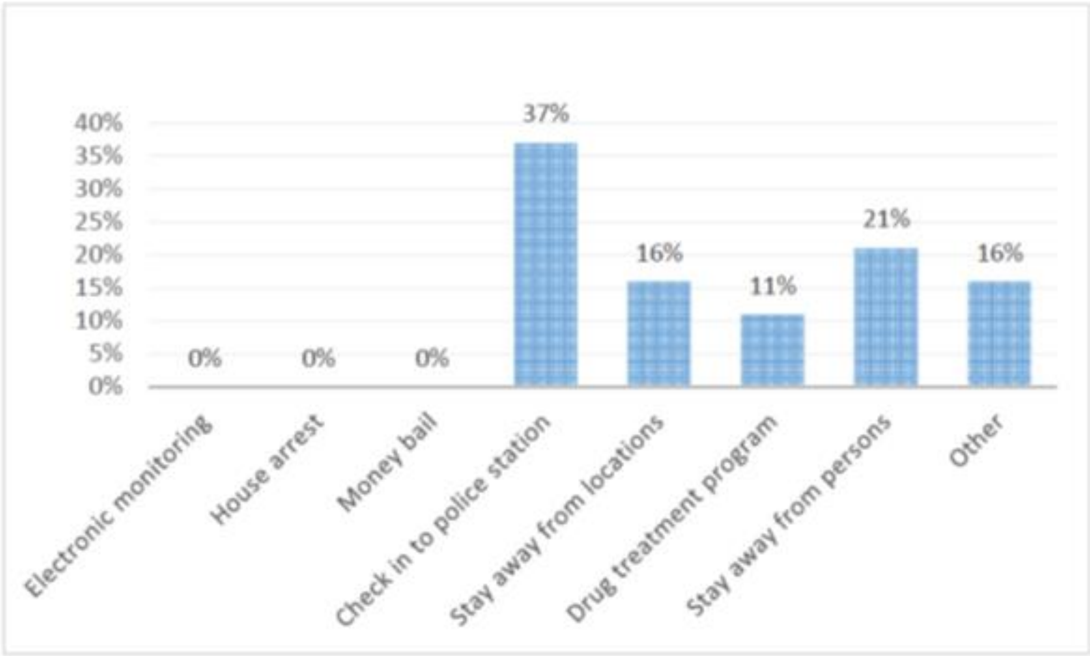
The most common used alternatives accordingto the recent study of Crijns, Leeuw and Wermink are more or less comparable:

- Electronic monitoring;
- House arrest;
- Money bail;
- Check in to the police station;
- Location bans;
- Drug treatment programs;
- Stay away from persons;
- Other.

In their research, Crijns, Leeuw and Wermink observed that at the initial review pre-trial detention was suspended in 16% of the cases. At the court in chambers pre-trial detention was suspended in 13% of the cases in which pre-trial detention was ordered. These figures are comparable to those mentioned in the report of the 2011 Council for the Administration of Criminal Justice and Youth Protection stemming from the year 2003. According to figures of the prosecution service, in that year 14% of the

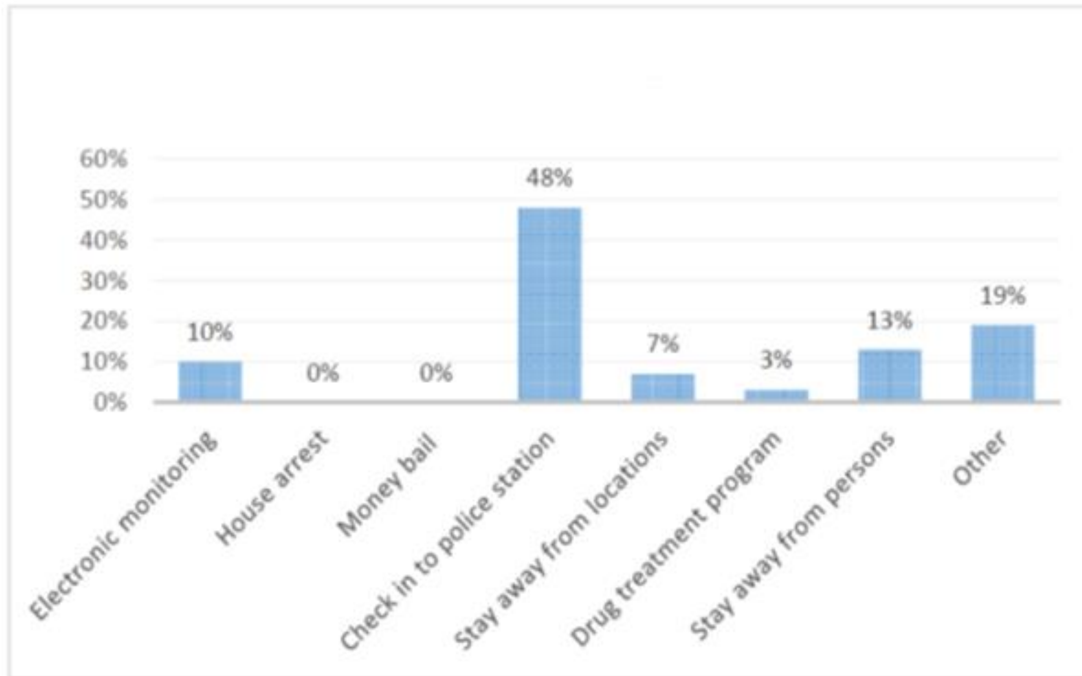
pre-detentions were suspended at the initial hearing and 12% at the court in chambers. It can be concluded that within a time frame of 10 years, progress has been very limited. Crijns, Leeuw and Wermink also give an overview of the types of alternatives applied in the cases they observed. Since we cannot exactly derive from the report what the relative significance of the numbers is, we just copy their figures without too much further comments. What we can conclude is that in the 13-16% of the cases that were suspended, special conditions were attached to the suspension in at most 48% of the cases. Check in to police station was by far the most common used requirement.

Figure 8: Alternative measures at *initial* hearings



Source: J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality,* research report March 2016, p. 36.

Figure 9: Alternative measures at *raadkamer* hearings



Source: J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality,* research report March 2016, p. 37.

Common to the 2011 report of the Council for the Administration of Criminal Justice and Youth Protection, the authors of the recent report on pre-trial detention come to the conclusion that although bail can be applied as an alternative for pre-trial detention, judges are generally quite reluctant to do this.[45] The arguments are also still the same. Judges are unfamiliar with the alternative and the way it could be applied or are afraid it will result in class justice. The researchers did not observe one case in which bail was applied. [46]

5.1 Electronic monitoring

Recently a research was conducted on the use of Electronic Monitoring (EM) in the Netherlands. EM can be used as a condition of the suspension of pre-trial, never as a stand alone measure, however, but only as a conditon to monitor a location order or a location ban. This restriction can be explained by the fact that EM has never been accepted in the Netherlands as an autonomous replacement of imprisonment.[47] The possibility of EM is not explicitly stated in the law. It is, however, mentioned in

45 Council for the Administration of Criminal Justice and Youth Protection (Raad voor de strafrechtstoepassing en jeugdbescherming, RSJ), 'Voorlopige hechtenis – maar dan anders. Verkenning van alternatieven in het kader van schorsing en tenuitvoerlegging', advice July 4, 2011.

46 J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, research report March 2016, p. 37.

47 M. Boone, M. van der Kooij & S. Rap, *Current uses of Electronic Monitoring in the Netherlands*, Utrecht University 2016.

the instruction of the Public Prosecution Service. According to this instruction, EM may be attached to a movement restriction condition, more specifically a location order or location ban. The probation service needs to investigate whether the use of EM to control a movement restriction condition is feasible. The instruction states that the prosecutor needs to consider the proportionality of EM because its use seriously impairs the privacy of those under EM. A restraining order can be imposed as a special condition for the purpose of protecting a specific victim. In order to enhance the enforcement of such an order, a location ban may be added as a special condition. This means that the living address of the victim may be appointed as an exclusion zone, which can be monitored with EM. The instruction states that the enforcement of movement restriction conditions is a joint task of the police and the probation service. The examining magistrate, the court or the public prosecutor can propose the use of EM. The suspect's consent is required.

Although the figures are hardly comparable, a result of the comparative research of which the Dutch study was part of seemed to indicate that EM is less used as an alternative for pre-trial detention compared to countries in which it can be applied as an autonomous sanction, e.g. Belgium and England & Wales.[48] In 2013, 12% of the cases of EM were imposed as a condition of the suspension of pre-trial detention. The absolute numbers are still relatively small. Interviews with judges and prosecutors give several suggestions as to how this can be explained. It seems that EM has no priority at the Public Prosecution Service because there are many other issues that require prosecutors' attention. Also the image prosecutors and judges have of EM is not very positive. The prosecutors interviewed in our research indicate that the technical problems and limitations associated with EM decrease their willingness to request EM. Examining judges and sentencing judges indicate that they are rarely advised to impose EM. Since the judiciary relies on the advice of the probation service with respect to special conditions, when there is no advice for EM, they will not impose EM either.

Several respondents in the EM-research stated that the use of EM at the pre-trial stage is increasing. This observation can be supported by figures. In 2012, the number of started supervisions with EM at the pre-trial stage was 153),[49] whereas in the first 10 months of 2015, 373 of such supervisions started (according to unpublished figures provided by the Dutch Probation Service). Some respondents indicated that the possibility of EM increases the chance that the Council Chamber will decide to suspend the pre-trial detention.

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[48] Hucklesby, A., K. Beyens, M. Boone, F. Dünkel, G. McIvor and H. Graham, Creativity and Effectiveness in the use of electronic monitoring: a case study of five jurisdictions, http://emeu.leeds.ac.uk/reports/, 2016.

[49] Reclassering Nederland,*Eenmalige uitgave over elektronische controle. Voor professionals in de strafrechtketen*, Utrecht: Libertas 2013, .

6. The "European Element"

The Dutch pre-trial detention procedure has been assessed in the light of Article 5 ECHR by the ECtHR only a couple of times. Despite this, the case law of the ECtHR has shown to be relevant for the Netherlands. The Brogan v. UK case, for example, was the reason for major amendments in the rules concerning the length of the pre-trial procedure and the involvement of the judge in the Dutch pre-trial detention phase.[50]

In the 2007 case of Kanzi and Hendriks against the Netherlands the ground of the shocked legal order as codified in Article 67a of the CCP was assessed.[51] The applicant, a suspect of rape, did not challenge the existence of serious indications (*ernstige bezwaren*) but argued that, given the context in which the facts had occurred, his release would not give rise to any social unrest which would justify keeping him in pre-trial detention. The ECtHR noted that the ground of disturbance to public order as codified in Article 67a of the CCP includes in that concept the likely public disorder if such an accused were released and accepts that this factor may legitimately be taken into account in deciding whether it is necessary and justified to place or retain a suspect in pre-trial detention. Still, the ECtHR noted that the extent to which the commission of such an offence has attracted or been given publicity cannot be decisive in the domestic determination of the possible 'disturbance to public order', but the passage of time will generally weaken the justification of pre-trial detention based on such considerations.[52]

The ECtHR adopted a more critical approach in the case of Geisterfer against the Netherlands to the notion of shocked legal order.[53] Geisterfer was arrested early 2006 because of membership of an alleged membership in a crime ring and placed in pre-trial detention. His detention was adjourned because of a surgery of one of his co-defendants. When the trial was resumed in late September 2007, Geisterfer was again placed in pre-trial detention on the ground of prevention of recidivism and the ground of prevention of collusion. His request for release, arguing that his temporary release had not caused a disruption of the public order during the months in which the applicant had been released did not make the court change its mind about the continued existence of the twelve-year ground. Geisterfer was released in December 2007, as the judge anticipated that the to be expected sentence was not likely to be longer than the time he had spent in pre-trial detention. In this case, the ECtHR repeated that social disturbance, caused by offenses of a particular gravity, can justify pre-trial detention in exceptional circumstances. These grounds, however, can only be deployed on the basis of

[50] ECtHR 29 November 1988, *Brogan and others v. UK*, appl.nos. 11209/84; 11234/84; 11266/84 and 11386/85.

[51] ECtHR 5 July 2007, *Kanzi v. the Netherland,* appl.no. 28831/04 and ECtHR 5 July 2007, *Hendriks v. the Netherlands*, appl.no, 43701/04.

[52] ECtHR 5 July 2007, appl.no. 28831/04, *Kanzi v. the Netherlands* and ECtHR 5 July 2007, appl.no.

43701/04, *Hendriks v. the Netherlands.*

[53] ECtHR 9 December 2014*, Geisterfer v. The Netherlands*, appl.no. 15911/08.

facts capable of showing that release of the accused would actually disturb social order. In addition the continuation of pre-trial detention is only legitimate if public order remains actually threatened, which was not demonstrated by the district court. For this reason, the ECtHR concluded that Article 5 ECHR was violated. Although this case shows that the ECtHR has adopted a critical approach towards the ground of a shocked legal order, the 2016 research of Crijns, Leeuw and Wermink showed that this ground is still frequently used by judges as a ground for pre-trial detention.[54]

The European Arrest Warrant has been construed as a measure implementing the European Union Treaty. The execution of European Arrest Warrants is assigned to the District Court of Amsterdam, which serves as '*unus jude*x'. On 1 November 2013, the European Supervision Order has been implemented in the Netherlands legislation.[55] The new law was laid down in title 3 of book 5 of the CCP.

[54] J. Crijns, B. Leeuw & H. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, research report March 2016, p. 28 and 33-40.

[55] Wet van 5 juni 2013 tot implementatie van kaderbesluit 2009/829/JBZ van de Raad van de Europese Unie van 23 oktober 2009 inzake de toepassing tussen de lidstaten van de Europese Unie, van het beginsel van wederzijdse erkenning op beslissingen inzake toezichtmaatregelen als alternatief voor voorlopige hechtenis (PbEU L 294), *Staatsblad* 2013, 250.

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