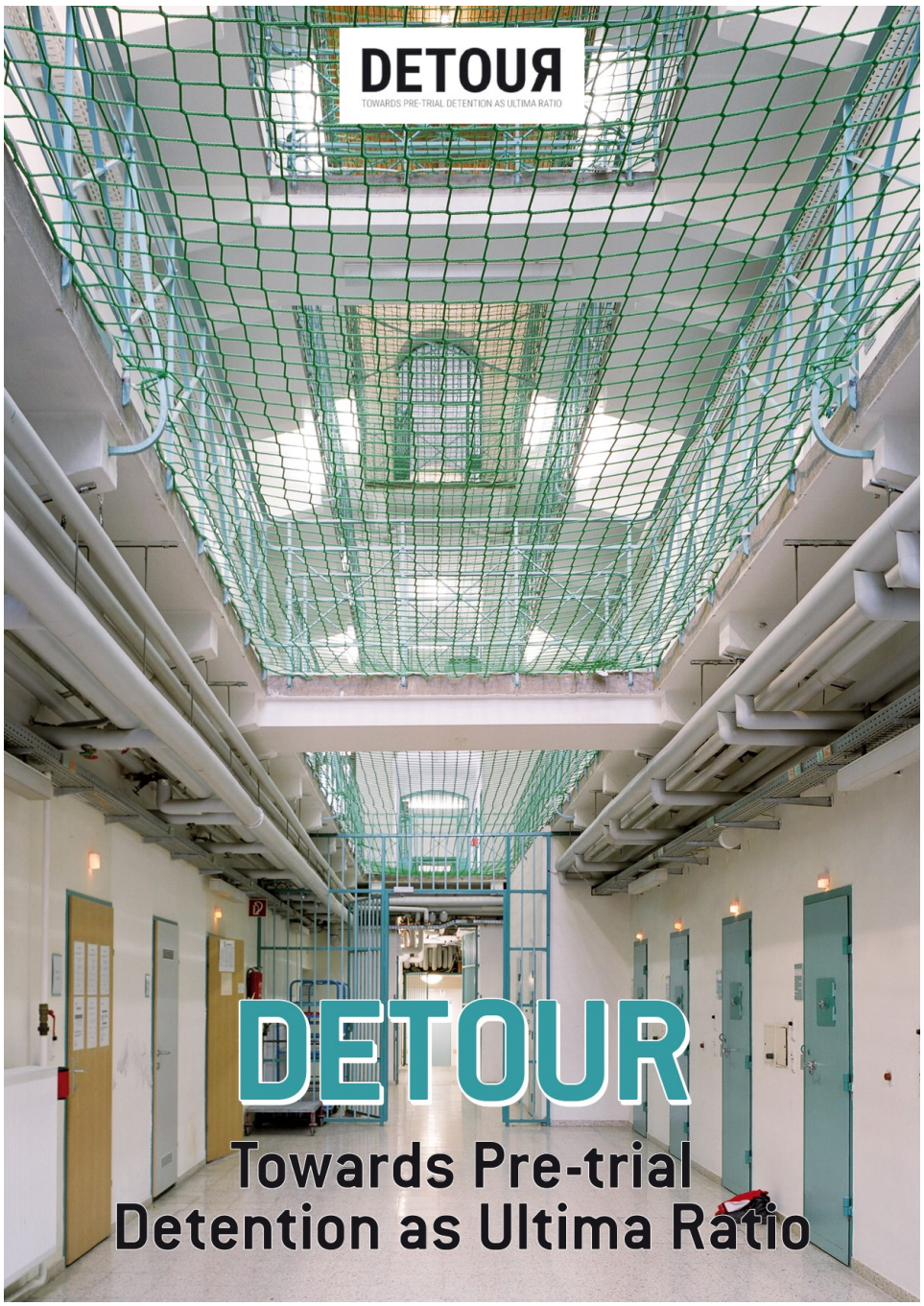
Universiteit Utrecht

MONTAIGNE CENTRUM
ONDERZOEKSCENTRUM VOOR RECHTSPLEGING EN CONFLICTOPLOSSING



2nd *Dutch* National Report on Expert Interviews

Miranda Boone, Pauline Jacobs & Joep Lindeman.

Utrecht, December 2017

Funded by the Justice Programme of the European Union

Table of contents

1 Introduction

1.1 Dutch participation in the DETOUR project

This national report is created within a European research project, commissioned by the European Commission, with the title 'DETOUR – Towards Pre-trial Detention as *Ultima Ratio'* that was conducted in 2016-2017. The research project aimed at exploring and analysing pre-trial detention practice, especially different ways of reducing the use of pre-trial detention in seven European jurisdictions (Austria, Germany, Romania, Belgium, Lithuania, Ireland and the Netherlands). Within the project we investigated whether pre-trial detention is used as *ultima ratio* (i.e. as a last resort) in these jurisdictions. In this context, both the availability (legally and practically) and the use of alternatives for pre-trial detention were investigated. A focus also lies on the European Union (EU) mutual recognition instruments laid down in the framework decisions on the European Arrest Warrant (EAW)[1] and the European Supervision Order (ESO).[2] Both instruments have an impact on pre-trial detention practice, especially the ESO, which specifically aims at reducing the need for pre-trial detention by enhancing the possibilities to apply alternative measures. Relevant questions in this respect are whether these instruments are used at the national level, and if there are challenges or hindrances in their use. More information on the DETOUR project can be found on the project's website at <http://irks.at/detour/>.

In this national report, the Dutch theory and practice concerning pre-trial detention is explored, with a specific focus on the use of alternatives for pre-trial detention. This national report builds upon the working paper on the Netherlands that was published in October 2016, available on the DETOUR project's website.

1.2 Statutory requirements for pre-trial detention in the Netherlands

After having arrested a suspect, the police can *hold* him/her for *questioning* for a maximum of 18 hours,[3] after which the deputy-prosecutor[4] can order *police custody* for three days. Pre-trial detention (*voorlopige hechteni*s) starts after police custody[5] and entails the order of deprivation of liberty by a judge that precedes the trial in criminal procedures. Article 15 of the Dutch Constitution demands a legal basis[6] for deprivation of liberty. 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 Dutch Code of Criminal Procedure (CCP).[7] As we will show in this report, both the public prosecutor and the judiciary have a wide margin of appreciation regarding the request for pre-trial detention and the consecutive decision on that request.

A translation of the relevant legislation can be found in appendix 2. The application of pre-trial detention is governed by four statutory requirements: (1) there must be 'serious indications' (*ernstige bezwaren*, art. 67, third section, CCP); (2) it must concern one of the cases

[1] Framework Decision 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
[2] Framework Decision 2009/829 of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.
[3] Nine hours for questioning, but not counting the time between midnight and 9:00 AM.
[4] A police-officer with a higher ranking and additional training.
[5] It is important to be aware of the fact that, due to this distinction between police custody and pre-trial detention, our research does not address police custody: the focus lies on pre-trial detention (*voorlopige hechtenis*).
[6] In this regard the legal basis must be statute law, as in an Act of Parliament.
[7] The Dutch legal framework on pre-trial detention is described more in detail in our first country report: M. Boone, P. Jacobs and J. Lindeman, October 2016, published at <http://www.irks.at/detour/publications.html>, p. 5-9.

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 (art. 67a, third section, CCP).[8]

Ad 1 Grave suspicion
A grave suspicion implies a high degree of suspicion that the suspect has committed the offence of which he/she is suspected. Neither legislation nor case-law provide much clarity as to when this threshold is met, though. 'Just' a reasonable suspicion is not enough. The burden of proof for this suspicion lies with the public prosecutor.

Ad 2 Cases
As a general rule, pre-trial detention 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. The code mentions some exceptions to this 'four years or more-requirement', though. The order can also be issued if no permanent address or place of residence of the suspect in the Netherlands can be established and he/she is suspected of an offence which carries a sentence of imprisonment.

Ad 3 Grounds for pre-trial detention
The two main grounds for pre-trial detention mentioned in the CCP concern (a) the (serious) risk of absconding of the suspect or (b) the existence of a serious reason of public safety requiring the immediate deprivation of liberty. Such a serious reason can be considered present in situations described in the code which can be summarised as follows: (b-i) fear for serious upset to the legal order due to the very serious nature of the crime, (b-ii) fear for recidivism, (b-iii) fear for obstruction of justice, or (b-iv) the need to facilitate expedited proceedings against suspects of unsettling crimes in public areas or against public officials (policemen, firemen, and ambulance staff). This last ground is relatively new: it was added in 2015.[9] We will elaborate more extensively on these grounds in the next chapter.

Except for (b-iv), all grounds resemble the four categories as distinguished by the European Court of Human Rights (ECtHR) in its established case law: danger of absconding, obstruction of the proceedings, repetition of offences and preservation of public order.

Ad 4 Anticipation requirement
The judge deciding on the application of pre-trial detention is required to anticipate the expected sentence in the case. An order for pre-trial detention should not be issued if it is expected that the pre-trial detention would exceed the custodial sentence or measure applied by the trial judge.

The basic principle, derived from the presumption of innocence, and also expressed by the ECtHR, is that the pre-trial detention should be used restrictively and that the suspect should be released whilst awaiting his/her trial.[10]

It follows from the CCP that remand in custody and the consecutive detention in custody cannot last longer than 104 days, after which the trial against the – by then – defendant will have to start. In reality, most complex investigations will not have been finished by then, which leads to so-called *pro forma* hearings, where the trial court will hear the case for no other reason than to decide on the continuation of the pre-trial detention, which it can then extend for 60 days on each occasion.

[8] Corstens & Borgers 2014, p. 450.
[9] This ground is often referred to as the 'expedited proceedings-ground', but this is misleading as the ground only applies to a limited amount of cases that are eligible for expedited proceedings.
[10] Stevens 2010, p. 1520.

The time the defendant has spent in pre-trial detention will be adduced from the imposed prison sentence. If the defendant gets acquitted, he/she may ask for financial compensation for the time he/she spent in pre-trial detention (art. 89 CCP). This provision only applies to time actually spent in prison. There is no similar legislation (and therefore no financial compensation) regarding alternatives for pre-trial detention, such as electronic monitoring or participation in rehabilitation programmes.[11]

1.3 Alternatives to pre-trial detention: conditional suspension of the execution

Strictly speaking there are no alternatives to pre-trial detention in the Dutch system: either the suspect awaits his/her trial in freedom or his/her pre-trial detention is ordered. The only possibility to replace pre-trial detention in a non-custodial setting is the possibility mentioned in articles 80-86 CCP to suspend (*schorsen*) the pre-trial detention.[12] The judge or court ordering pre-trial detention can, straight after the order or at a later time during the execution of the pre-trial detention, decide to suspend the execution (art. 80, section 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 the trial will take place, although the judge can set any timeframe that he/she sees fit. As long as the suspect meets the conditions, the execution of the pre-trial detention remains suspended. As such, a fundamental feature of the Dutch system is that the alternatives are created within the framework of the pre-trial detention itself. This means that, in theory, the use is restricted to cases in which one or more grounds for pre-trial detention exist and that the alternative is a sufficient means to prevent the risk(s) that, given the ground(s) used, the pre-trial detention aims to prevent.

The CCP distinguishes between general and specific conditions. The general conditions attached to a suspension of the pre-trial detention are that the suspect will comply with possible future court orders regarding the pre-trial detention and that he/she will cooperate with the execution of a possible future prison sentence (art. 80, section 2, CCP). The only special requirement mentioned in the law is financial bail to guarantee the fulfilment of the conditions of a suspension (art. 80, section 1, subsection 3, CCP). The law does not mention any other specific conditions, leaving room for any condition deemed suitable. In practice, a limited set of conditions is used regularly, as will be explained in chapter 7.

1.4 Prison population and numbers of pre-trial detainees

According to the SPACE statistics of the Council of Europe, the Netherlands, together with Finland, has the lowest prison rates, with a prison population ratio of 51 per 100,000 inhabitants.[13] After a strong increase of the prison population between 1990 and 2005, the prison population in the Netherlands has been declining. The highest number of prisoners in 25 years was measured in 2005, with a total number of 15,206.[14] According to numbers provided by the Custodial Institutions Agency (*Dienst Justitiële Inrichtingen, DJI*) of the Ministry of Justice and Security the total number of prisoners has since dropped by almost 58% to 8,806

---

[11] Boone, Van der Kooij & Rap 2016, p. 14.

[12] The CCP also mentions the option to postpone (*opschorten*) the pre-trial detention, but this is a provision meant to allow the suspect to leave the prison for a short time, for example in order to attend a funeral. We will not elaborate any further on this provision.

[13] Compared to most northern, western and southern European countries with more than one million inhabitants; Dienst Justitiële Inrichtingen 2017, p. 30. For an elaboration on the reasons for this low prison rate, we refer to the working paper by M. Boone, P. Jacobs and J. Lindeman on the Netherlands, October 2016, published at <http://www.irks.at/detour/publications.html>, p. 13.

[14] Dienst Justitiële Inrichtingen 2015, p. 29. This number is based on an annual count in September of each year. It includes prisoners who are detained within a penitentiary institution, but also prisoners who are placed in special health care institutions used for those who are particularly vulnerable and persons who follow a penitentiary programme outside prison.

prisoners in 2016.[15] The number of pre-trial detainees forms a large part of the total prison population. Over the past years, the percentage of pre-trial detainees related to the total population of prisoners has been rather stable, with a small decline from 49% in 2012 to 44% in 2016.[16]

Given the serious drop of the prison population in the Netherlands, it is not surprising that the absolute number of pre-trial detainees entering the prison system on an annual basis has also decreased.[17] According to the Research and Documentation Centre (*Wetenschappelijk Onderzoek- en Documentatiecentrum, WODC*) of the Ministry of Justice and Security this decrease already started in 2007, with the strongest decrease between 2012 and 2014.[18] This decrease in pre-trial detainees in absolute terms makes sense, because the number of people held suspect to a crime by the police has also decreased.[19] In relative terms, though, the ratio of new pre-trial detainees to people held suspect by the police has not changed much (a slight increase from 4.4% in 2010 to 5.0% in 2016).[20]

In short: absolute numbers of pre-trial detainees have come down significantly, but in relative terms, there does not seem to be a significant shift: only a slight decrease compared to the total prison population and a slight increase compared to the total number of people held suspect by the police (on an annual basis).

While the absolute number of pre-trial detainees has decreased from 2010, the number of people taken in police detention seems to have increased significantly over the past years.[21] Police detention is not seen as pre-trial detention and unfortunately, the Dutch statistics do not provide the exact numbers on police detention annually. In 2017 the Netherlands Court of Audit (*Algemene Rekenkamer*) released an analysis on, *inter alia*, the relation between police detention and pre-trial detention from 2010 to 2016.[22] That analysis shows that the number of suspects taken in police custody has been increasing from 16.6% in 2010 to 25.1% in 2016. However, from 2012-2014 (the only data available in the analysis at this point) there is a decrease in the number of suspects in police custody that are consecutively requested to be remanded in custody (from 47.8% to 38.8%).[23]

The Netherlands Court of Audit also found that the amount of damages paid to suspects on remand (police detention and pre-trial detention taken together) who were later acquitted has largely increased. In 2010, 3,773 persons were compensated a total of 8.3 million euros. In 2014, this has increased to 5,469 persons who were compensated a total of 10.9 million euros. In 2015, the number of persons who were awarded compensation again increased to 5,973, but the total amount of damages awarded dropped to 9.6 million euros. This trend shows an increase in the persons awarded with compensation but a decrease in the average amount paid is also visible in 2016 (6,222 persons received a total of 7.9 million euros).[24] This means that more people are awarded damages, but increasingly only for police deten-

[15] Dienst Justitiële Inrichtingen 2017, p. 22.
[16] Dienst Justitiële Inrichtingen 2017, p. 24.
[17] From 17.694 in 2010 to 13.350 in 2016, which is a decrease of 24,5%; Dienst Justitiële Inrichtingen 2017, p. 18.
[18] WODC 2014, p. 46.
[19] WODC 2017: from 406.510 in 2010 to 268.280 in 2016.
[20] WODC 2017 (C&H 2016). In this respect, it must be noted that pre-trial detention is not possible for a lot of criminal offences, so this percentage could never be 100%.
[21] Algemene Rekenkamer 2017, p. 24.
[22] See <https://english.rekenkamer.nl/publications/reports/2017/11/14/pre-trial-detention-suspects-in-the-cells> and <https://english.rekenkamer.nl/latest/news/2017/11/14/more-former-suspects-receiving-damages-after-short-stay-in-police-cells>.
[23] Algemene Rekenkamer 2017, p. 24.
[24] Centraal Bureau voor de Statistiek 2017.

tion.[25] This trend has been acknowledged by the Netherlands Court of Audit, which added that only 35% of the people eligible for compensation actually requested it.[26] In reaction, the Minister of Justice and Security has stated that he will study the causes of the relatively sharp increase in the number of people remanded in police custody. He also noted that more suspects have become familiar with the possibility to request compensation, which is a possible explanation for the increase in requests and awards.[27]

In 2016, Berghuis, Linckens and Aanstoot published results of their research on possible explanations for the decrease in the number of pre-trial detainees and also in relation to the increased amount of damages paid.[28] According to them, the reduced number of pre-trial detainees followed to a large extent from the development in crime and the investigation of criminal offences. The amount of cases suspended immediately after the remand in custody (*inbewaringstelling*) 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. While in 2012, 36% of pre-trial detention-orders got suspended or postponed within a month, this increased to 40% in 2014. Also, the average length of the pre-trial detention 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.[29] They suggest a relation between the increased amount of damages paid and the increase in application of police custody to suspects who have been subjected to the so-called ZSM-proceedings ('*zo snel mogelijk*': ZSM. More on that in chapter 4).[30]

As mentioned earlier in this paragraph, the percentage of pre-trial detainees related to the total population of prisoners has declined from 49% in 2012 to 44% in 2016.[31] Looking at the 2015 SPACE statistics, these percentages are relatively high in comparison with other countries in the EU, with only Albania, Andorra and San Marino having higher percentages of 'Detainees not serving a final sentence'.[32] The relatively short prison sentences in the Netherlands are an important factor contributing to this high percentage. Meaningful quantitative international comparison is quite hard though, as acknowledged very recently by the Netherlands Court of Audit, which held that there are too many differences and caveats between the different databases used:[33]

> "For a variety of reasons, it is not possible to make a meaningful quantitative international comparison based on the data currently available. The legal systems, definitions and data registration methods used in the various European countries often cannot be compared with each other."

1.5 Current discussion and debates

The Dutch pre-trial procedure has been the topic of much debate and discussion in academic literature. Defence lawyers, academics and judges have criticised the extensive use of pre-trial

[25] With a daily rate of €80 this means an average of 23 days per person in 2014 and 18 days in 2015.
[26] Algemene Rekenkamer 2017, p. 31.
[27] Algemene Rekenkamer 2017, p. 33-34.
[28] Berghuis, Linckens & Aanstoot 2016/3, p. 76-81.
[29] Berghuis, Linckens & Aanstoot 2016/3.
[30] Berghuis, Linckens & Aanstoot 2016/3, p. 76-81.
[31] Dienst Justitiële Inrichtingen 2017, p. 24.
[32] Council of Europe Annual Penal Statistics (SPACE I) Surveys over 2015, table 5.1 (p. 76). Mean: 24,7%, Median: 21,7%.
[33] Algemene Rekenkamer 2017, p. 17. Also see: <https://english.rekenkamer.nl/publications/reports/2017/11/14/pre-trial-detention-suspects-in-the-cells>.

detention in the Netherlands.[34] They argue that pre-trial detention is not applied as an *ultima ratio,* but as a standard and automatic measure for people awaiting trial. Often these critics refer to the high percentage of pre-trial detainees in the Netherlands compared to other European countries and the high amount of damages paid to pre-trial detainees that were acquitted, as described in the previous paragraph.

In 2010, Stevens tested whether the practice of pre-trial detention is in accordance with the general principle that it should be used restrictively and as a last resort by judges in an empirical study.[35] To this purpose, she interviewed 28 judges, including 14 examining judges from seven different courts. She found that 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 extensively rather than restrictively by judges and as a means to achieve swift punishment and to protect society against the suspect.[37] In 2013, three judges qualified Dutch judicial practice in decisions on pre-trial detention as an 'efficient cookie-factory', in which pre-trial detention is the rule rather than the exception.[38] In 2016, Crijns, Leeuw and Wermink concluded that the Dutch legislation on pre-trial detention meets the relevant standards of the ECtHR, but the way in which the legal rules on pre-trial detention are applied in practice is rightly criticised.[39] They conclude 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."[40]

In 2017, the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) commented on the way judges substantiate their decisions concerning pre-trial detention. The institute emphasised that on the basis of the international human rights standards, the motivation concerning pre-trial detention measures should not be general or abstract, but should refer to the specific circumstances of the case and the person involved. To assess if pre-trial decisions lived up to these requirements, more than 300 files of four different courts and two courts of appeal from the period July 2014 until December 2015 were investigated. On the basis of this research it was concluded that improvements are desired and necessary. It was found that the existence of a 'grave suspicion' was hardly ever substantiated. It was also found that in some of the files there was no motivation at all as to the grounds for pre-trial detention that were found applicable. Also, in three out of four courts the court in chambers merely referred back to the motivation as provided by the examining judge without any scrutiny. Moreover, in many decisions standard text blocks were used that were so general that they could have been applicable to numerous cases. Still, there were also good examples: one of the investigated courts showed that an adequate motivation of the grave suspicion is very well possible.[41] The outcomes of this research and the ongoing debate have led to parliamentary questions[42] while at the same time it became clear that steps had already been taken to ensure improvement of the motivation of pre-trial detention decisions, *inter alia* by the intro-

[34] See, among many others, defence lawyers such as Van der Laan 2009, p. 4215-2420, academics such as Buruma 2013, p. 2129, Klip 2012, p. 83-93 and judges Janssen, Van den Emster & Trotman 2013, p. 430-444.
[35] Stevens 2010, p.1520-1525. Also see, in English, Stevens 2012b.
[36] Stevens 2012a, p. 384-387.
[37] Stevens 2010, p.1520-1525. See also Stevens 2013 (42)3, p. 246.
[38] Janssen, Van den Emster & Trotman 2013, p. 430-444.
[39] Crijns, Leeuw & Wermink 2016, p. 6.
[40] Crijns, Leeuw & Wermink 2016, p. 7-8.
[41] College voor de Rechten van de Mens 2017.
[42] Answers to Parliamentary questions by the member Van Nispen (SP) to the Minister of Justice and Security, *Aanhangsel Handelingen II* 2016/17, 1848.

duction of professional standards,[43] developed by the judiciary, that underline the importance of sound motivation of decision: "The judge shall give reasoned, understandable decisions in a manner that is suited to the case" (standard no. 2.8). A slight tendency towards improvements has been reported since,[44] but it has also been argued that additional substantiation of pre-trial detention decisions might not change practice a lot, as the real issue is not a lack of substantiation but much more a fundamental disagreement on the extent to which pre-trial detention should be applicable.[45]

1.6 Potential new legislation

In 2015, the Department of Justice and Security announced a thorough modernisation of the CCP. In fact, the whole CCP is about to be rewritten and restructured. On the one hand, the department's aim is not for a significant shift in the criminal justice system, but on the other hand some developments in the past decades have shown that rethinking parts of the system is necessary. This report does not allow for an extensive elaboration on the plans that have been laid out, especially since the plans are still in a preliminary phase, but touching shortly on the subject is necessary, as these plans will most surely influence the debate on the system of pre-trial detention in coming years. In short, the plans that have been presented so far suggest that a procedure of 'provisional restriction of liberty' should take the place of the order of pre-trial detention followed by a conditional suspension of the execution. The envisioned provisional restrictions will be similar to the conditions for suspension used in the current system (see chapter 6).

However, the provisional restriction of liberty as proposed will be applicable for a wider range of cases than for pre-trial detention in the current system. Reactions, therefore, are mixed: on the one hand, there is a degree of satisfaction that the government is seeking a serious decrease in pre-trial detention orders. On the other hand, there is concern that the system could draw in more suspects, enabling some serious restrictions on people's liberty while the judicial framework lacks scrutiny and offers few safeguards.[46] Furthermore, the proposal does not address how, from whom and within which timeframe the public prosecutor and/or the examining judge get the necessary information to decide which restrictive measure would suit the suspect best. As our research will show, getting the right information on a short notice in the initial phase of the suspect's arrest is one of the big problems in the current practice of pre-trial detention. This proposed legislation will not necessarily solve this.

1.7 Conclusion

While over the past decade the absolute number of pre-trial detainees has reduced significantly in the Netherlands, in relative terms there has hardly been a decrease in the share of pre-trial detainees in the total detention population. The current percentage of 43% seems rather high in itself and also compared to other European countries, even when the numbers used for quantitative international comparison should be treated cautiously.

More recently, a substantial increase in the application of police detention has been observed, together with a rather high amount of cases in which financial compensation is awarded for wrongful police detention. While our research does not focus on police detention, it is still noteworthy that, apparently, this form of deprivation of liberty is being applied prematurely in quite some cases.

---

[43] <https://www.rechtspraak.nl/SiteCollectionDocuments/professionele-standaarden-strafrecht.pdf>.
[44] Docter & Baar 2017.
[45] Robroek 2017, p. 65.
[46] Van den Brink 2017. Also see, for example, the reaction of the Netherlands Bar: Advies Nederlandse Orde van Advocaten over de wetsvoorstellen tot herziening van Boek 1 en 2 Wetboek van Strafvordering, 30 juni 2017 (<https://www.advocatenorde.nl/juridische-databank/details/wetgevingsadviezen/426682>).

Turning back to the practice of pre-trial detention we have seen much debate in the Netherlands in the past years. Criticasters have focussed on a lack of scrutiny applied by the judiciary when deciding on pre-trial detention, on the high percentage of pre-trial detainees, on inadequate substantiation of decisions and on a seemingly limited use of alternatives for pre-trial detention. At the same time, the judiciary has acknowledged to a certain extent that, indeed, there has been a lack of substantiation.

Still, we find that this does not seem to be the whole story, as there have been a number of developments in the Dutch criminal justice system in the past years that also have had an impact on the practice of pre-trial detention. Apart from that, we wonder if more substantiation of decisions would really change the underlying decisions, because pre-trial detention seems to serve ulterior purposes, outside of the scope of the traditional grounds. There seems to be a fundamental disagreement between different players in the procedure (as well as between members of society) on the extent to which pre-trial detention should be applicable. The focus of the debate has mainly been on the role of the judiciary, which does not seem to do justice to the fact that it is the public prosecutor who ultimately has the power to put forward a case for pre-trial detention or not. Also, the important roles of the lawyers and the Probation Service have not got much attention in the debate so far. As such, the debate is still very relevant and worth more elaboration on the practice, the role of the players and the use of alternatives. In this report, we will elaborate on these topics.

2 Methodology

2.1 Introduction

This study is part of a comparative project on the use of pre-trial detention in seven jurisdictions. The researchers from the different countries tried to follow a common approach to have a good starting position for a comparison in the final stage of the project. The local differences between the criminal justice systems and the extent to which it was possible to get access to the different data made slight differences inevitable, however. Due to the fact that several recent studies on the topic have been published in the Netherlands recently (chapter 1), we could start our research from a very good position. The findings mainly derive from interviews with judges, public prosecutors, defence lawyers and probation officers. Preceding the interviews (during work stream 1 of the research project), we undertook some observations in court as well as case file research at some law firms, to get a better connection with the field.

2.2 File analysis

The files on pre-trial detention were collected and studied at four different law firms in four different cities (Amsterdam, Utrecht, Harderwijk and Tilburg). We asked the participating lawyers for cases in which alternatives for pre-trial detention had actively been proposed and eventually – often after multiple requests by the defence lawyer – had been granted by the judge. The aim of this file analysis was to investigate how judges and examining judges respond to requests for a suspension of the pre-trial detention. A specific goal was to investigate whether we could identify 'best practices' in this regard: successful strategies to reach a suspension of the pre-trial detention. Descriptions of the investigated cases were recorded in file analysis.

This file analysis resulted in preliminary findings.

- The role of the defence lawyer seems to be very important in proposing suspension of the pre-trial detention. During the execution of the pre-trial detention, the defence lawyer has an important task in identifying personal circumstances that may call for a suspension of pre-trial detention and the gathering of information concerning these circumstances in order to request a suspension. If suspects are suspended, this is usually only after several requests by the defence lawyer. This led us to subject the role of the different actors during the pre-trial detention process to further investigation during the interviews in work stream 2.
- The request for pre-trial detention by the public prosecutor is often substantiated by ticking boxes on a standard form, without any further argumentation. Argumentation for the decision to apply pre-trial detention is also only provided summarily by judges.[47] Furthermore, responses to (often very elaborate) requests for pre-trial detention by defence lawyers are only responded to by the judge without much argumentation on why the request is granted or refused. This was an important finding that merited further attention during the interviews with public prosecutors and judges in work stream 2.
- Reports by the Probation Service seem to play an important role in granting or refusing the request to suspend the pre-trial detention. Almost all successful requests for suspension of the pre-trial detention were preceded by a positive report on the proposed suspension by the Probation Service. Still, there is no preliminary probation report (a so-called *vroeghulprapportage*) in every case before the decision by the exam-

[47] This finding was recentlyhas been confirmed by the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*), see chapter 1.

ining judge. For this reason, during the interviews with employees of the Probation Service in work stream 2 it was explored in more depth in which cases, and during which phases of the pre-trial detention, there is an active involvement of the Probation Service in the procedure.

A limitation of the file analysis is that not all decisions on pre-trial detention are well documented. In several cases, for example, the case file did not include a report (*proces-verbaal*) of the hearing before the examining judge. Sometimes, the notes of the lawyer provided more information on the arguments that were brought forward by him/her orally during this hearing. When there was a report of the hearing, it only included a summary of the hearing and the most important decisions. Because of this lack of information, it was hard to get a firm hold on the decision-making process by the examining judge and his/her response to the arguments brought forward by the public prosecutor and the defence lawyer during the hearing.

2.3 Court observations

In order to perform observations of the hearings at the examining judge and the court in chambers, we sought permission and cooperation from the Council of the Judiciary (*Raad voor de Rechtspraak*), since these hearings are closed to the public. Requests for these observations were however rejected by the Council in September 2016 and February 2017. The rejection was mainly motivated by referring to several recent or pending studies on this topic, including the study of Crijns, Wermink and Leeuw that was carried out for a two-year project on pre-trial detention commissioned by the NGO Fair Trials.[48]

Due to this lack of permission by the Council of the Judiciary to observe hearings by the court in chambers, the researchers decided to make observations at the district court in Den Bosch on 30 August 2016. Here, one of the researchers witnessed five hearings by a trial court. These were all *pro forma* hearings. The observations were documented in observational protocols.

Monitoring these hearings provided an opportunity to gain insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and the response from the judge. During three out of the five hearings, the defence lawyer requested a suspension of the pre-trial detention. In two hearings, a suspension was requested because of personal interests of the suspects. In the other case, the suspect was the owner of a dancing school. The defence lawyer in this case also referred to the presumption of innocence and his client's willingness to comply with the conditions attached to the suspension.

2.4 Interviews

In total 31 interviews were conducted with judges, prosecutors, defence lawyers and probation officers. We tried to achieve sufficient spread between respondents working in densely populated, urban areas and more rural areas. Nevertheless, some concentration was necessary to speak to different types of respondents from similar areas. Most of our respondents were therefore based in Amsterdam (big city), Utrecht (middle sized city) and Den Bosch (smaller city in the southern part of the country), but we also spoke to some respondents in The Hague and two small cities in the Eastern part of the country. Since all the researchers have good connections in the field, we started with eight defence lawyers from our own network. We had very good gate keepers at the Prosecution Service and the Probation Service who helped us make a selection of respondents with different characteristics and experiences. Finding enough judges to speak to was problematic, because the Council of the Judiciary rejected our proposal twice based on the arguments mentioned above. They invited us to submit another

[48] Crijns, Leeuw & Wermink 2016.

request after the results of some pending studies were published, but that would have been too late to finish our report in time. Through our own network and by asking our respondents from the other professions whether they could provide us with names of judges who were probably interested in participating in the research, we succeeded to include seven judges from different courts and with different experiences. An overview of the respondents and their main characteristics can be found in appendix 1.

The interview schedule was divided into two parts: a more or less classical questionnaire and a discussion regarding a short case description (vignette). Together with our co-researchers from the other participating jurisdictions we prepared a pre-structured topic-list to which every jurisdiction added a few country-specific topics. The topic list was used as a basis for the interview that was, however, kept very open. The topic list was mainly scheduled along the lines of the procedure, constantly asking for the input of the different parties and their arguments. An example of a topic list can be found in appendix 2. After finishing the interview, we presented our respondents a small case description about a 23-year-old male, suspected of burglary in a house at 3 o'clock at night, while the house-owners and their four-year-old daughter were sleeping upstairs (see appendix 3 for the full description). Our main question was how our respondent would act in a case like this and what would be the main arguments for applying pre-trial detention or not. With small additions, the vignette was used in all the participating countries.[49] Although we had concerns in the first instance that doing both a classical interview and a vignette-study would be too time consuming and probably would also include too much repetition, the combination worked out very well. It brought new energy in the discussions and the vignette worked as a summary/test of the preceding part of the interview. With a few exceptions, all interviews were done in couples to guarantee that they were conducted more or less in the same way and that all items would be covered. The interviews took about 90 to 120 minutes,[50] which was reasonable according to our respondents, but gave us the opportunity to really discuss items in depth. A verbatim report was made of all interviews. These data were imported in NVIVO and analysed by a pre-defined coding scheme which was mainly constructed together with our international partners, but also included codes that typically applied to the Dutch situation. Quotes that are used throughout the report are selected carefully either as an illustration of a widely shared opinion or as a significant minority point of view.

[49] For the pros and cons of using vignette methodology in comparative research see Maguire, Beyens, Boone, Laurinavicius & Persson 2015 7(3): 241–259.

[50] The interviews with the probation-officers usually were shorter as we did not discuss the vignette with them.

3 General comments on the practice of pre-trial detention

3.1 Introduction

In chapter 1, we described the debate in the Netherlands on the perceived extensive application of pre-trial detention. This debate and the statistics on pre-trial detention in the Netherlands formed an important starting point for our research. We asked all the participants to reflect on the current state of affairs and the debate surrounding it. In this chapter, we will reflect on their responses and, where necessary, we will once more relate them to literature and case law.

3.2 Pre-trial detention as standard practice

As we described in chapter 1, compared to the other jurisdictions in this project, the Netherlands seems to have a relatively high proportion of pre-trial detainees on a relatively small absolute number of prisoners. On average, the proportion of pre-trial detainees in the total number of prisoners has been around 50% for a long period of time. Only recently this percentage started to decline to 43% in 2016, while at the same time the proportion of pre-trial detainees in the total number of people held suspected of a crime by the police increased from 4.4% in 2010 to 5% in 2016.[51] We started our interviews by asking respondents about their general picture of the application of pre-trial detention. Do they perceive this practice as extensive, proportional or restrictive? What differences do they observe with regard to different groups of suspects (or defendants)?[52] And do they notice any recent changes in the practice of pre-trial detention?

In general, respondents of all categories confirmed the tendencies observed in other studies that pre-trial detention is broadly applied in the Netherlands.[53] This practice means that from a certain degree of seriousness of the offence, the (informal) rule seems to be that pre-trial detention is applied, unless there are good reasons not to apply it ('yes, unless'). Variation exists on the answer to the question which cases are serious enough to apply pre-trial detention. Some of the prosecutors we spoke to mainly deal with serious cases such as human trafficking or other forms of organised crime. According to them no real discussion exists on the application of pre-trial detention in these types of cases. If the suspicion is serious enough and substantiated sufficiently, pre-trial detention is likely to be requested (by the public prosecutor) and, subsequently, ordered (by the examining judge). Also in other cases with a certain weight, violent cases in particular, a request for pre-trial detention is more or less standard practice.

> "Looking at commune cases – in particular in the somewhat heavier cases – the prosecutor will always request, although I won't say automatically, remand in custody." (PP6)

This seems to be especially true for the so-called high impact crimes (see § 3.3.2).

[51] See chapter 1 for an elaboration on these numbers.

[52] Dutch legislation does not distinguish between a suspect or a defendant, although art. 27 CCP establishes that the term 'verdachte' (which literally translates as 'suspect') means the person suspected of having committed a criminal offence, up until the prosecution starts. After prosecution has started, 'verdachte' means the person who is being prosecuted, a description to which the term 'defendant' would fit better. Unfortunately, the law doesn't define very clearly at which point 'prosecution' starts, but it generally accepted that this is the moment where a judge is involved in the proceedings. This means that from the first hearing by the examining judge, a 'suspect' could turn into a 'defendant'. However, we feel that we do more justice to the Dutch practice if we keep using the term 'suspect' until the moment that the actual trial court gets involved.

[53] Crijns, Leeuw & Wermink 2016.

According to earlier studies, when the public prosecutor brings a suspect before the examining judge and files a request for remand in custody, remand is almost never denied.[54] The respondents in our study confirm that the dismissal of a request of the prosecutor on the basis of insufficient substantiation of the grounds of pre-trial detention is an exception. If a request of the public prosecutor is dismissed, this is mostly due to insufficient substantiation of the grave suspicion. In general, the legal grounds for pre-trial detention are neither considered as a cause nor an obstacle for the broad application of pre-trial detention by our respondents.

> "In principle, every decision to apply pre-trial detention can be legally grounded or denied on similar legal grounds" (J6)

The wide use of pre-trial detention in the Netherlands is not so much considered a result of the legal framework of pre-trial detention, but much more described in terms of 'legal culture' or even 'legal policy'(politics). A broad conviction exists among practitioners that it has many advantages to use pre-trial detention as an advance on the final sentence. This conviction is supported by three important arguments.

The first argument is that you could not explain to the victim(s) of a serious offence or to society in general that somebody who had just committed a serious crime would be released within hours or days. 'Can you explain it to your neighbour (or aunt or grandmother)' is an often-heard criterion.

> "If you suspend someone and he absconds right away, it will be in the newspapers immediately. Would you suspend someone who is a clear suspect of murder? You can't explain that to the victims. And of course, the adagio also applies that suspects should be considered innocent until proven guilty, but try and explain that to the victims in this day and age." (J4)

The second line of reasoning is that it is assumed to be much better for the offender to serve his/her time directly after arrest instead of being released and detained again after months or – sometimes even – years. According to a defence lawyer:

> "Pre-trial detention is often used as an advance on the final sentence. The general idea is that the suspect committed the offence anyway. The suspect usually stays in jail for a while, because it will only lead to more difficulties if you release him at first and detain him again afterwards. I think that's wrong, though. In that stage, it's not the question whether someone committed the offence or not, but if the suspect has to be remanded in custody." (DL5)

The third argument can be considered as the reverse of the second one. Prosecutors and examining judges or court in chamber judges are convinced that the trial court will be hesitant to send someone who has been suspended from pre-trial detention back to jail. It is their perception that trial courts impose more lenient (unconditional) prison sentences, if any, when the suspect is not detained at the moment of the hearing. Therefore, the fear that a convicted offender will escape his/her deserved punishment is a third reason not to suspend.

[54] Crijns, Leeuw & Wermink 2016; Stevens 2010; Stevens 2012; Van den Brink 2018.

"If you suspend suspects in an early stage of the proceedings, judges in court tend to impose lighter penalties. This could prevent examining judges and judges in the court of chamber from suspending the detention." (J4)

3.3 Variation with regard to certain categories of suspects

3.3.1 Foreign nationals

An important aim of the DETOUR project is to determine and eventually explain the proportion of foreign nationals in the pre-trial population. A foreign national is, according to the English language, a person who is not a citizen of the host country in which he/she is residing or temporarily sojourning. The term is often blurred with other concepts like, for example, irregular migrants, though.[55] In Dutch, we do not often use this categorisation, but according to the SPACE statistics, in 2015, 22.2% of the detention population had a foreign or unknown nationality. 42.1% of the foreign detainees were citizens of member states of the European Union. 51.4% of all foreign detainees were in pre-trial detention. Altogether, 23% of the pre-trial detainees in the Netherlands in 2015 are foreign nationals.[56] Compared to the other countries involved in the DETOUR study, the Netherlands takes a middle position: 73% of the pre-trial detainees in Austria are foreign nationals, but only 3% in Romania and Lithuania.

Still, we can speak of a disproportionate number of foreigners in (pre-trial) detention since only 5.3% of people staying in the Netherlands are of a foreign nationality (as of 1 January 2016 according to the Dutch Department for Statistics). Of these 900,000 people, 563,000 (60%) have their origins in another European country.[57] In these numbers, irregular migrants, people without a residence status, are not included. It is of course unknown how many 'undocumented' people are staying in the Netherlands; however, recent estimations suggest that this number has decreased quite a bit over the past decade, from between 100,000 and 200,000 to ca. 35,000.[58]

The sociological explanation Melossi gives for the high proportion of migrants in European prisons in general, compared to the United States, is the different history of migration. The United States has always been a migration state and has in principle a positive attitude towards migration contrary to most European countries. This difference explains for example the different attitude towards work of (irregular) migrants. While work is stimulated in the United States and perceived as a protective factor, the opportunities to work for migrants are severely restricted in many European countries. He also points at the European obsession with discovering migrant crime versus the American's ease with it.[59]

It is easy to see his theory illustrated in Dutch criminal policy towards migrants. In 1998 the Linking Bill was introduced which made it possible to link a person's residence status to his/her right to access social services. This bill severely restricted the possibilities for migrants to study, work or make use of social services in the Netherlands. This is also true for the obligation to present an ID at work (introduced in 2005) and the penalisation of employers who offer work to irregular immigrants. Unauthorised residence as such is not a criminal offence in the Netherlands, but several other measures were introduced in recent years that penalise the (irregular) stay of migrants in the Netherlands: (1) breaching the entrance ban, introduced in the European Guideline of Forced Return 2008, is codified as a misdemeanour since December 2011; (2) the sliding scale that relates the length of the regular stay to the

[55] Canton & Hammon 2012.
[56] Council of Europe Annual Penal Statistics (SPACE I) Surveys over 2015.
[57] Centraal Bureau voor de Statistiek 2016, consulted on 21 July 2017.
[58] Van der Heijden, Cruyff & Van Gils 2015.
[59] Melossi 2013.

termination of a regular stay in the Netherlands due to committing a criminal offence, has been tightened several times in recent years.[60]

The relatively low proportion of foreign nationals in pre-trial detention in a comparative context can partly be explained by this strong relation between criminal policy and immigration policy. Respondents from all categories mention that suspects of relatively low crimes who do not have a residence status in the Netherlands are not put in pre-trial detention, but are immediately put in immigration detention.[61] One respondent explains that this can have grave consequences because in some cases the transfer to immigration detention could mean that the person is detained in situations where 'regular' suspects would have been released from pre-trial detention.

> "People are sometimes arrested for criminal reasons and subsequently put in immigration detention. The consequences can be grave in these cases. You're arrested for a minor offence, or it might even be a wrongful arrest. That is possible as well. But you are put in immigration detention just the same." (DL5)

> X: "And it isn't so that you, for example, call the immigration police and say: is this a person to be kept in immigration detention?"
> Y: "Yes, but they [the immigration police, eds.] are much earlier informed than we are. They immediately call us. 'Goes into immigration detention…'." (PP8)

> "I meet suspects like these [a suspect without a right of residence in the Netherlands, eds.] from time to time. Not very often. It is rather a counter-indication for pre-trial detention, because they immediately go into immigration detention. And of course, in case of more serious offences, I don't take notice of it. In that case I pretend as if he belongs here and I look at what is necessary. But in case of a shoplifter, it can easily happen that I don't order pre-trial detention, because I know he will go immediately into immigration detention. In that case it is not necessary at all that he stays in detention on a penal title." (J2)

In a study regarding sentencing decisions, Wermink et al. concluded that suspects who look Dutch and speak Dutch have a smaller chance of being sentenced to prison.[62] The design of this study did not allow us to determine if similar processes also play a role in the allocation of pre-trial detention. We did ask our respondents, however, what different factors played a role in the decision to apply pre-trial detention in case a suspect did not have the Dutch nationality. In § 5.3.1 we will elaborate further on this.

3.3.2 High impact crimes

A second category of offenders that we want to pay attention to in this chapter are the so-called suspects of high impact crimes (HIC). In 2010, a study was published which described patterns and developments of robbery in the Netherlands.[63] The study signalled that the recidivism rates among convicts of robbery were relatively high. In 2011, in response to this study,

---

[60] Kurtovic & Boone 2015, p. 408. Aliens that commit criminal offences can, as a consequence, lose their permit of resicdence. The Aliens Act 2000 (art. 67) and the accompanying Aliens Decree 2000 (art. 3.86) use a so called sliding scale: the longer an alien has had a right of residence, the more serious the conviction of a criminal offence needs to be before the right of residence can be withdrawn. This sliding scale has been altered repeatedly over the past years, so that – after having been convicted of a criminal offence – aliens can lose their right of residence more easily. See Bezem & Thelosen 2017.

[61] Immigration detention is administrative detention used *inter alia* to enable authorities to deport illegal aliens.

[62] Wermink, de Keijser & Schuyt 2012. They observed 365 criminal cases that came before the police court.

[63] Rovers et al. 2010.

the *Task force Overvallen,* a cooperation between public and private parties, advised the Ministry of Justice and Security on measures to be taken to reduce the number of robberies.[64] Initially, the focus of the policy was on suspects and convicts of robberies, but this later shifted to the so-called HIC or violent property crimes, which include not only robbery but also burglary, mugging and violent crimes. In response to figures indicating an increase in the number of burglaries in April 2013, the Minister of Justice and Security wrote a letter to the Parliament in which he described the pillars of the HIC-policy.[65] He stated that the fight against HIC had 'top priority' and emphasised that these crimes have a great impact on victims, their environment and the feeling of security in society as a whole. He wrote that the HIC-policy should be characterised by an individualised approach, quick detection of offenders, local preventive measures and special attention to victims of HIC. In January 2014, the minister again emphasised the importance of addressing these crimes and stated that they represent a majority of the crimes committed by repeat offenders.[66] From our research it becomes clear that the HIC-policy also has had a major influence on the practice of pre-trial detention. Asked for specific categories of suspects for which a special policy is being applied for pre-trial detention, several respondents mention suspects of high impact crimes as a category for which pre-trial detention is almost automatically applied.

> "High impact crimes. These are the ones for whom you promptly ask for pre-trial detention." (PP2)

> "For more severe violent crimes we always request pre-trial detention, that is standard practice." (PP6)

> "In case of high impact crimes, it is not very common to refuse a request." (J1)

As became clear in earlier research on the use of electronic monitoring in the Netherlands, the definition of what qualifies as a HIC is not very clear.[67] In our current study we also found that it is not always clear what is understood as HIC and what not, but that in general a broad definition is used, which of course also widens the scope for the application of pre-trial detention.

> "High impact crimes are more severe crimes, violence often plays a role. So, robberies, robberies of houses, but also street robbery is a high impact crime. A minor case of shoplifting is not a high impact crime. A simple insult neither. Violence has to be involved. Crimes that have a lot of impact on victims and society." (PO6)

> "If you try to find a hard cut, I assume it would be the offences where the physical integrity of a person or where protection of the house is disputed. Violent robberies, home burglaries, home robberies, robberies at company premises. For these kinds of offences pre-trial detention is usually requested, because of their serious nature." (PP7)

---

[64] Task Force Overvallen (2011). Actieprogramma ketenaanpak Overvalcriminaliteit. Retrieved from <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/02/09/actieprogramma-ketenaanpak-overvalcriminaliteit.html>.
[65] Opstelten 2013, retrieved from <https://hetccv.nl/fileadmin/Bestanden/Onderwerpen/Lokaal_geweldbeleid/Documenten/Aanpak_high_impact_crimes/aanpak-high-impact-crimes.pdf>.
[66] *Kamerstukken* II, 2013/14, 31110, nr. 15.
[67] Boone, van der Kooij & Rap 2016.

3.3.3 Repeat-offenders

As has become clear from the above-mentioned policy document on HIC, suspects of these type of offences are often regarded as repeat offenders. For the 600 highest prioritised repeat players in Amsterdam, a specific policy has been designed, the 'Top 600' policy.[68] Similar policies exist in other major cities of the Netherlands, for example Utrecht and Rotterdam. According to Prosecution Service policy on this topic, offenders can be classified for the top-600 if they were arrested for at least three HIC in the last five years.[69] As soon as they are classified as a top-600 case, they are also prosecuted more easily for smaller offences, and also our material suggests that application of pre-trial detention is more common. At the same time, this category is sometimes suspended almost directly so that there is a legal framework that allows work on their complicated social and behavioural problems. This topic will be described more extensively in chapter 6.

Persistent offenders should be distinguished from repeat offenders. Persistent offenders are defined in the Criminal Code as suspects who are suspected of an offence for which pre-trial detention is allowed and who have been convicted and served at least three irrevocable custodial sentences or measures or a community service order in the last five years (article 38m Criminal Code). A suspect that falls under the definition of a persistent offender can be convicted to a custodial measure of two years to both prevent further offending and (if possible) treat underlying problems. According to a guideline of the Prosecution Service,[70] pre-trial detention is preferred in these type of cases, in particular because of the preventive character of this measure. Many of our respondents confirm that for this category of offenders, pre-trial detention is more or less the standard practice.

> "The only category of offenders for whom the prosecution service has a formal policy are the persistent offenders, is my opinion. After so many offences they are put in pre-trial detention, standard for 60 days to make reports and prepare the measure for persistent offenders." (J1)

3.4 Recent changes

The broad conviction as described in § 3.2 is challenged by a critical article of three judges from the District Court of Rotterdam on the current practice of pre-trial detention in the Netherlands.[71] They describe the practice of pre-trial detention in 2013 as an 'efficient cookie factory'. Based on their own experiences they come to the conclusion that protecting society did become the overarching objective of pre-trial detention, while the judiciary turned from an independent reviewer into the final link of the safety chain. This article resulted in an ongoing debate on the use of pre-trial detention in the Netherlands, which is described extensively in chapter 1. In this chapter, we also described that the absolute number of pre-trial detainees entering the prison system declined with almost 30% since 2007, in line with the decline of the total number of prisoners. The relative number of pre-trial detainees only declined scarcely, however, to 44% of the prison population in 2016.[72]

Many of our respondents recognise the picture of an absolute decline of the pre-trial population. "Almost halved I think", one of the prosecutors estimates.

> "We used to have two very full sessions before the court in chambers in Utrecht and one in Lelystad, each week. Nowadays we probably have 10 persons in pre-trial deten-

[68] <https://www.om.nl/organisatie/landingspagina/amsterdam/aanpak-top600/>.
[69] <https://www.om.nl/organisatie/landingspagina/amsterdam/aanpak-top600/>.
[70] Richtlijn voor strafvordering bij meerderjarige veelplegers, Staatscourant 2009 nr. 10579 14 juli 2009.
[71] Janssen, Van den Emster & Trotman 2013.
[72] Dienst Justitiële Inrichtingen 2017, p. 24.

> tion in Lelystad, sometimes just one, and probably 15-20 persons in Utrecht on a weekly basis. Really, a spectacular decrease compared to how it used to be." (PP4)

However, when asked if pre-trial detention was also relatively less requested for certain categories of offences, respondents often were not so sure.

In the article of the Rotterdam judges and the debate that followed, the emphasis is on the wide application of the grounds for pre-trial detention and the scarce motivation of pre-trial decisions. As we have tried to make clear in § 3.2, these factors legitimise the current practice of pre-trial detention, but do not explain it. The main explanation for the current practice must be sought in the legal culture with regard to pre-trial detention. Also, many of the respondents we spoke to indicate that this culture has to change, before the application of pre-trial detention can fundamentally change.

3.5 Conclusion

Several studies on the practice of pre-trial detention in the Netherlands already indicate that the grounds for pre-trial detention are interpreted rather extensively. Our research seems to confirm this assumption. The wide use of pre-trial detention in the Netherlands is not so much considered as a result of the legal framework of pre-trial detention, but much more described in terms of 'legal culture' or even 'legal policy'(politics). A broad conviction exists among practitioners that there are many advantages to using pre-trial detention as an advance on the final sentence. This conviction is supported by three important arguments. The first argument is that you cannot explain to the victims of a serious offence or to society in general that somebody who just committed a serious crime gets released within hours or days. 'Can you explain it to your neighbour?' is often heard as a criterion. The second line of reasoning is that it is assumed to be much better for the offender to serve his/her time directly after arrest, instead of being released and detained again after months or – sometimes even – years. The third argument can be considered as the reverse of the second one. Prosecutors and examining judges or court in chamber judges are convinced that the trial court will be hesitant to send someone who has been suspended from pre-trial detention (or against whom an order for pre-trial detention has been refused) back to jail. It is their perception that trial courts impose more lenient (unconditional) prison sentences, if any, when the suspect is not detained at the moment of the hearing. Therefore, the fear that a convicted offender will escape a deserved punishment is a third reason not to suspend.
We observed that foreigners, suspects of high impact crimes and repeat offenders are overrepresented among the pre-trial detainees. By concentrating on the use of pre-trial detention for these specific groups, a considerable reduction of pre-trial detention could already be realised.

4 Selection: cases eligible for pre-trial detention

4.1 Introduction

In the Netherlands, the decision to apply for pre-trial detention lies exclusively with the public prosecutor. As there is no such thing as obligatory pre-trial detention and the Dutch prosecutor has a wide margin of appreciation in his/her decision-making, the phase of the investigation just before an eventual application for pre-trial detention and the role of the public prosecutor in that phase are pivotal. Also, the expediency principle plays an important role: if the public prosecutor finds that the public interest is not served by a prosecution, he/she can decide to dismiss the case. To understand this phase of the procedure and the role of the prosecutor, in this chapter we will elaborate on the various work streams within the public prosecutor's office and on the various prosecutorial decisions that the public prosecutor can take. We will also look into the role that the application for remand in custody – the first phase of pre-trial detention – plays in this decision-making process.

4.2 Statutory requirements

As discussed in chapter 1, the application of pre-trial detention is governed by statutory requirements, that can be summarised as follows: (1) there must be serious indications against the suspect (a grave suspicion); (2) the suspicion must concern a crime of a more serious nature; (3) there must be at least one ground for pre-trial detention; and (4) the so-called anticipation-requirement has to be fulfilled by the judge.

The grounds for pre-trial detention are (a) the (serious) risk of absconding of the suspect or (b) the existence of a serious reason of public safety requiring the immediate deprivation of liberty: (b-i) fear for serious upset to the legal order due to the very serious nature of the crime, (b-ii) fear for recidivism, (b-iii) fear for obstruction of justice, or (b-iv) the need to facilitate expedited proceedings against suspects of unsettling crimes in public areas or against public officials (policemen, firemen and ambulance staff).

The public prosecutor, a member of the judiciary who is expected to decide like a *magistrate,*[73] will keep these requirements in mind: a request for pre-trial detention that clearly does not meet the statutory requirements is a waste of resources and does not fit his/her quasi-judicial role. As the prosecutor is the one to initiate the proceedings leading to pre-trial detention, it makes sense to put a certain burden of proof on him/her.

4.3 The prosecution's decision-making process on pre-trial detention in Dutch criminal cases

4.3.1 Introduction

In this paragraph, we will elaborate on the decision-making process that leads to the actual request for remand in custody before the examining judge – the so-called *voorgeleiding*. The expediency principle plays a large role in the Dutch criminal procedure practice. The public prosecutor decides if prosecution will take place[74] and, if so, whether the procedure will involve an actual trial (judicial procedure) or that primarily an extra-judicial procedure will be followed.[75] Extra-judicial procedures can involve just a fine, but also a community punish-

[73] Dutch public prosecutors are members of the judiciary and are expected to act like a magistrate while performing their tasks: see Lindeman 2017, p. 295 et seq. See Lindeman 2017 and Van de Bunt & Van Gelder 2012 for (much) more elaboration on the role of the Public Prosecution Service and the prosecutors.

[74] He/she can also choose to dismiss the charges.

[75] The term 'prosecution' is not defined very clearly in Dutch law. Whereas the so-called transaction (art. 74 CCP) is seen as an extrajudicial procedure that actually avoids prosecution, the 'penalty order' (art. 257a CCP) is

ment order, eventually combined with extra conditions (regarding, amongst others, the behaviour of the suspect, the obligation to pay damages to the victim or a confiscation order).

The decision to file a request for pre-trial detention is also part of the prosecutorial discretion that defines the expediency principle. With the anticipation requirement in mind, if a prosecutor decides that he/she wants to request for remand in custody, this implicates that he/she expects the case to go to trial.

4.3.2 Different 'work streams'

The Dutch CCP will not give a clear picture as to what the practice of the application of the expediency principle looks like. This is especially true for decision-making on requests for pre-trial detention. Public prosecutors have a large margin of appreciation. Of course, not all cases that the prosecutor will take to trial will involve pre-trial detention. Sometimes because certain basic legal requirements have not been met (e.g. the maximum prison sentence is less than four years), but also because the prosecutor thinks there are insufficient grounds for pre-trial detention or because he/she doesn't feel that the case in question merits pre-trial detention. The decision-making can be influenced by the particular work stream in which the case reaches the public prosecutor: there are many varieties in which a criminal case comes to the attention of the police and, subsequently, to the public prosecutor's office. The same goes for the ways in which a suspect can fall into the hands of the authorities. There seem to be four ground-scenarios, though:[76]

1. Construed investigations where authorities have been able to prepare a lot before suspects are arrested. Based on intelligence gathered by the police, suspicion has risen towards one or more persons that commit or will commit serious crimes (a criminal organisation: often drugs-related and/or involving human trafficking). Suspects will be the subject of secret surveillance (wire-taps, secret observations and such). Once enough incriminating evidence has been gathered, the suspects will be arrested, preferably all at the same time so that remaining suspects cannot compromise the follow-up of the investigation. This follow-up will usually involve searches in houses and other premises, and more wire-tapping of other individuals suspected to be involved with the criminal organisation. In cases like these, that involve serious crimes, there often is a clear danger of collusion if the suspects were to be let loose straight after their apprehension. Also, the suspects will have to be present during interrogations and their declarations should remain isolated in this initial phase, again to prevent collusion.
2. Suspects that have been caught in the act. Often these are suspects of shop-lifting, burglary, vandalism and violence, pickpocketing etc. These suspects will be brought to the police station for questioning and perhaps police custody. Suspects in police custody can be brought to the attention of the public prosecutor: they will often be brought into the so-called ZSM-procedure (more on that further on).
3. Suspects have been arrested after they have been reported to the police by a victim or witness and the police have indeed found reason to acknowledge them as suspects. These are often suspects of domestic violence, sexual offences, other acts of violence and again shop-lifters etc. (as mentioned above under 2).

---

seen as an extrajudicial means of prosecution. In both cases, though, by meeting certain conditions (e.g. paying a fine) the suspect will avoid a trial. Procedural requirements are different though. As this report focusses on cases that eventually will end up before a trial court, we will not elaborate on the finesses of extrajudicial procedures here. Further reading: Jacobs & Van Kampen 2014 (4), p. 73-85.

[76] Lindeman 2017.

4. Suspects have come into the picture and have been arrested after initial police-investigations e.g. after a body has been found or burglaries, acts of violence etc. have been reported to the police without a suspect having been in the picture initially.

The suspects mentioned under (1) will mostly be dealt with by specialised police-forces and designated public prosecutors. These prosecutors will have given thought to the decisions regarding pre-trial detention before the suspects have been arrested. Due to the seriousness of the crimes involved and the mostly ongoing nature of these crimes, the legal criteria and the grounds for pre-trial detention will likely be met and authorities will most likely not spend months or, rather, years, preparing the case only to send the suspects home straight after their arrest. Pre-trial detention is requested in such cases more often than not.

The suspects mentioned under (2) to (4) will come to the attention of the police and the public prosecutor on a more ad-hoc basis. The public prosecutor's office has had difficulties with streamlining the decision-making process of these cases for a long time. Deciding whether to prosecute or not, whether to use extra-judicial procedures or not, whether to serve a summons straight-away or to expand the investigation further, whether to send the suspect away and leave the case with the police or to request pre-trial detention: in short, separating the wheat from the chaff has been proven a difficult task.[77] It was equally difficult for our research team to understand how this really works in relation to the pre-trial decisions.

4.3.3 Introduction to the ZSM-procedure

Around 2011, it became clear that lots of criminal cases weren't dealt with very efficiently and that the criminal justice system was malfunctioning. The role of the public prosecutor in the decision-making process had, in some cases, become non-existent: subordinates would have the mandate to decide in the name of the public prosecutor. Proceedings were too slow, cases would disappear altogether or the judge would have to postpone the hearing in order to get additional research done, because the preparation had lacked scrutiny. Prosecutors were aware of the fact that they were not involved in all cases and that this sometimes led to cases that were underprepared for the hearing.

On the other hand, all district-offices of the public prosecutor's service had round-the-clock availability for more serious crimes and those crimes would get more thorough attention. A misbalance between simple cases and more serious and/or more complicated cases became visible. It was then decided that all criminal offences should reach the public prosecutor's service through the same channel and that, through that channel, as soon as possible ('*zo snel mogelijk*': ZSM) a follow-up decision as to the further processing of the case should be taken. This decision would have to be taken by none other than a public prosecutor (so not by a subordinate), and this prosecutor would have to consult with a probation officer, a police officer and an employee of the victim-care organisation. So this prosecutorial decision should not only be taken as soon as possible, but it should also be as smart as possible ('*zo slim mogelijk*') and with a clear aim to society ('*zo samen mogelijk*') in a multidisciplinary setting. In short: a well-informed decision, in which the interests of the suspect, the victim and the society were taken into account as much as possible. The new method got called the ZSM-procedure and has been implemented in all districts, whom now each have a ZSM-desk. One of the main targets is to prevent cases becoming so-called 'wandering cases': cases with a suspect that is not in pre-trial detention, without a set trial date and that needs more investigation by the police before it can be sent to the public prosecutor. Experience shows that these cases end up at the bottom of the pile and too much time passes before an eventual prosecuto-

[77] Lindeman 2012/2017.

rial decision will be made. In order to achieve that, the aim is to take a decision straight-away. For that purpose (already in use before the ZSM-procedure was introduced) the practice was introduced to summon the suspect for his/her trial or to issue a penalty-order straightaway during the police detention. Also expedited procedures were introduced, where the suspect will be tried within the 14 days of his/her remand in custody.[78] In terms of efficiency, the advantages are clear: no risk of cases ending up at the bottom of the pile. Today, it is against this background that most of the decisions to request pre-trial detention (in the form of remand in custody) in the ground-scenarios (2) to (4) are taken.

Designated prosecutors take 'ZSM-shifts' and will deal with all the cases that come in. As a rule, the prosecutor will be informed by the police, by an employee of the Probation Service and by a representative of the victim-care organisation. Should he/she decide that a request for pre-trial detention is imminent, he/she either organises the necessary paperwork him/herself or he/she'll pass the file on to another prosecutor who'll take it from there.

Some cases will prove to be too serious/grave/complicated for the ZSM-desk and these will be sent to another department of the district-office (e.g. cases that appear to involve sexual offences, human trafficking, (attempted) homicides, major drug trafficking etc.). Another public prosecutor will then decide on an eventual request for remand in custody. An example:

> "Say there has been a knife-stabbing incident in a bar and the suspect is caught in the act. The police will take the case to the ZSM-desk. If the victim is in the hospital with grave injuries, the ZSM-desk will likely refer the case to a prosecutor in the so called 'investigations'-team, who will take the case from there and who will decide on the request for remand in custody. If there are only minor injuries, the prosecutor on the ZSM-desk will decide whether or not a request for remand in custody will be made." (PP1)

4.3.4 Summary

The foregoing can be summarised as follows:

- A case comes in either at the ZSM-desk or at a specialised department.
    - Only at the ZSM-desk: all participants at the desk gather information about the crime, the suspect and/or the victims.
        - Too complicated or serious? --> case will be referred to specialised department.
        - Otherwise: decision by public prosecutor (see below).
    - Cases dealt with otherwise (not by the ZSM-desk): the prosecutor will likely try to gather information as well, but is usually much more dependent on just police information and/or information from Probation Service after a specific request.
        - If prosecutor finds that he/she has enough information: decision (see below).
    - The public prosecutor decides:
        1. Dismissal of the case.
        2. Extrajudicial procedure.
        3. Case will go to trial:
            3.1. Summon the suspect straight away:
                3.1.1. Send him/her home.
                3.1.2. Request for remand in custody --> expedited procedure.

[78] Apart from this, there are also super-expedited procedures, where the suspect will go to trial within three days of the police custody.

3.2. No summon yet; more investigation is needed to get the case ready for trial:
    3.2.1. Send suspect home in attendance of ongoing investigation.
    3.2.2. Request for remand in custody in attendance of ongoing investigation.

In our research, we found that the decision-making process within the public prosecutor's office can vary not only internally (ZSM-desk or not?) but also locally: both the ZSM desks and the other departments of the district-offices are often organised differently in each district. There are ten district-offices (with each district office having a ZSM desk as well as specific prosecutors for e.g. human trafficking, sexual offences etc.) and a number of national offices as well (without a ZSM desk). All in all, there are more than 800 public prosecutors who, as said, have a wide margin of appreciation in their decision-making. So, it's hard to paint one clear picture as to the national decision-making process. Still we found a lot of common practices.

4.4 Policy on pre-trial detention

As said, prosecutors enjoy a wide margin of appreciation when deciding on requests for pre-trial detention. However, the public prosecution service does have some written policy rules regarding the pre-trial detention.[79] For example, if someone is suspected of violating a temporary domestic exclusion order,[80] the 'Instruction on domestic violence and child-abuse'[81] prescribes that the prosecutor is to request for remand in custody. The instruction still leaves a margin of appreciation for the public prosecutor, though, so there is no possibility for, say, a victim to force the prosecutor to request for remand in custody. Our research shows that most public prosecutors aren't always specifically aware that instructions like these exist and in general they don't feel that policy rules or other guidelines within their organisation impacts their decision-making process. On the other hand, as shown in § 3.3.2, prosecutors appear very aware that pre-trial detention should be seriously considered with regards to (e.g.) HIC suspects and repeat offenders. Still, they find that they are not fully bound by the policy.

> "It's more common sense, really. (…) I'm a magistrate, I'm independent. (…) There have been consultations where it's been discussed that we should be more reticent in our policy towards the requests for pre-trial detention." (PP8)

> "There is, for example, a guideline on how to deal with pre-trial detention in sexual crimes, but it's not that it's a strict prescription as to which cases do or do not qualify for pre-trial detention. It all very much depends on the specifics of the case. You'd be hard pressed to formulate specific rules." (PP1)

4.5 Deciding on pre-trial detention: the influence of the new ZSM procedure and expedited procedures

As discussed in chapter 3, practice shows that more often than not, requests for remand in custody are made in certain types of cases as soon as the legal requirements are met, while the legal description of the grounds for pre-trial detention allows for a broad interpretation. Sus-

[79] Lindeman 2017, p. 129.
[80] The Law on a temporary domestic exlusion order (*Wet tijdelijk huisverbod*) provides the mayor of a municipilaty with the power to issue such an order. This order should be distinguished from the behaviour order that we'll address in § 4.6.2.
[81] Aanwijzing huiselijk geweld en kindermishandeling, *Stcr.* 2016, 19416.

pects of crimes that involve (a threat of) violence towards other persons will more likely than not be taken into consideration for pre-trial detention, especially when one or more specific victims can be individualised. Breaking and entering, violent crimes, sexual crimes, human trafficking are examples, as are drug-related crimes. The less serious cases in these categories can be dealt with at the ZSM-desk. In our research, we have tried to determine whether the new ZSM procedure had any influence on the decision-making process in pre-trial detention cases. A general observation on that part is that, indeed, the ZSM procedure influences the decision-making process. This is because the ZSM procedure and the infrastructure around it are aimed at gathering as much relevant information as possible and at taking a final prosecutorial decision as soon as possible in as many cases as possible.

If, for example, the prosecutor at the ZSM-desk consults the representative of the probation office and finds that an extra-judicial procedure that also includes conditions regarding the behaviour of the suspect could work, he/she can decide on the spot to follow up on the case in that manner. Outside the ZSM-desk, with no direct access to a probation-officer, more time would be needed to come to that decision. This would increase the chance of the prosecutor opting for a request for remand in custody. Also, video-conferencing has become more common at the ZSM-desks. In that way, the public prosecutor and/or a probation officer can talk to a suspect face to face, even when the suspect is in a police station miles away. Up until recently, face to face contact between prosecutor and suspect was highly unusual. In general, respondents feel that the ZSM-procedure leads to more decisions without the need for pre-trial detention.

> "I think that for less serious crimes, the number of requests for pre-trial detention has seriously decreased. It's a different way of thinking. The aim is to complete the case within the given timeframe." (PP6)

> "Now with the ZSM-procedure, we only get the shoplifters that already have a criminal record. First offenders, also burglars, used to be brought before me concerning the request for remand in custody, I think it was just a matter of routine. But that doesn't happen anymore. The public prosecutors deal with these cases themselves now." (J4)

Still, not all respondents were convinced that the ZSM-procedure has led to a decrease in pre-trial detention cases. It proved quite hard though, to identify the specifics that would lead to the decrease or increase in pre-trial detention cases they attributed to the ZSM-procedure. An example may illustrate this. A specific reason given for a possible decrease or, on the contrary, an increase in requests for remand in custody is the expedited procedure. While not necessarily part of the ZSM-procedure (the expedited procedure already existed before the ZSM-procedure), it is felt that the infrastructure surrounding the ZSM-procedure can be seen as conducive to the use of the expedited procedure. Again, having all relevant actors and information in one place is a benefit to the decision-making process. On the one hand, there is the possibility to send the suspect away with a summons.[82] According to some respondents, some of these suspects could otherwise have been put in pre-trial detention. However, the expedited procedure is also seen as a reason for an increase in requests for remand in custody, the benefit being that the suspect is kept in jail until the hearing, so that the execution of a prison sentence can start straight away after the trial.

[82] It should be noted that one of the main benefits is that a summons served in person to the suspect allows the trial judge to presume that the suspect knows about the case, which allows the judge to decide to hear the case and pass the sentence in default of the suspect, should he/she not appear at the trial. A lot of trials need to be postponed because the suspect doesn't appear when the summons was not served in person.

> "I participated in a pilot where lawyers were also present at the ZSM-desk. I saw indeed that a lot of people were sent away with a summons for an expedited procedure, mostly in cases where a request for remand in custody would not have been made otherwise. However, I remember two cases where my clients got a summons for an expedited procedure and that a request for remand in custody was made. The request was granted by the examining judge, but he immediately suspended the execution. Both clients got convicted at the trial, but they didn't get a prison sentence. It made me wonder whether pre-trial detention would have been requested had there been no possibility for an expedited procedure. I actually don't think that a request would have been made then." (DL3)

This remark suggests that perhaps the expedited procedure could have an increasing effect on pre-trial detention. While we have no hard evidence for this, one of the judges (J6) stated that in some cases the expedited procedure can be a reason for pre-trial detention. At the same time, he added that it can also work the other way around: the knowledge that the case will be on trial very soon and that the judges in his district will not hesitate to impose an unconditional prison sentence, even when the suspect has not been in pre-trial detention, can sway the public prosecutor away from the beaten path of pre-trial detention.

As already mentioned in § 4.1, in some specific cases expedited proceedings can constitute an autonomous ground for pre-trial detention. We will elaborate on that in chapter 5.

To close off this section, we have a few last remarks on the 'super'-expedited procedure, which takes place within the time frame of the police-arrest. Not all regions have this procedure. The redundancy of pre-trial detention in these cases is obvious though: the case will have been tried before the request for remand in custody could possibly have been made. It's equally obvious that these super-expedited procedures can only be applied in very straightforward cases, as in general the trial will have to take place within a mere three days after the arrest of the suspect. Examples are repeat offenders for shoplifting or pickpocketing. Still, an increase in these super-expedited cases can be one of the explanations for the decrease in pre-trial detention cases that we've seen in recent years.[83]

4.6 Alternatives that could precede the decision on pre-trial detention

4.6.1 Introduction

In this report, we repeatedly state that there aren't any real alternatives for pre-trial detention, as most measures are taken as a part of the suspension of the execution of pre-trial detention. Yet there are some possibilities that can be seen as implicit alternatives. In this regard, specific attention should be given to the so-called behaviour order and programmes offered by the Probation Service.

4.6.2 Behaviour order (art. 509hh CCP)

Under this provision, the public prosecutor can hand out a behaviour order for a maximum of 90 days when there is a grave suspicion that the suspect has committed an offence:

- that caused excessive nuisance to the public order and in addition to which there is a great risk of recidivism;
- in connection to which there is a fear for seriously aggravating behaviour of the suspect towards certain person(s); and

[83] Berghuis, Linckens & Aanstoot 2016/3, p. 76-81.

– in connection to which there is a fear of behaviour from the suspect that causes repeated danger for property.

While this provision was mainly introduced as a preventive instrument against public disorder-crime (e.g. hooliganism), it also provides for behaviour orders in cases of domestic violence and such. Several respondents claimed that the behaviour order is increasingly used in domestic violence cases.[84] As such it has turned out to be an alternative for pre-trial detention. Rather than filing a request for remand in custody with the examining judge, the prosecutor can decide him/herself.

> "The behavioural order gives us more possibilities. The more serious crimes that we deal with at the ZSM-desk and in which we consider pre-trial detention, those are the cases where we now have a wider range of possibilities to deal with the danger of putting someone back on the street without any framework. The behavioural order is a very important means to substitute the need for a request for remand in custody combined with a conditional suspension of the execution." (PP8)

> "Our colleagues at the 'Interventions'-team[85] have already adopted this: the public prosecutor has possibilities to impose conditions on the suspect, outside of the conditional suspension of the pre-trial detention where the judge sets the conditions." (PP3)

4.6.3 The new ZSM-procedure and alternatives offered by the Probation Service

One of the significant aspects of the ZSM-procedure is the continuous presence of a representative of the Probation Service. Outside of the ZSM-procedure, the contact with the probation officers is not face to face. If the prosecutor wants information on a suspect before the hearing for the remand in custody, he/she would ask for pre-trial assistance which would lead to a short visit from the probation officer to the suspect which would result in a concise report. In the ZSM-procedure this still is a possibility. But the presence of the probation officer also means that there is easy access to already existing files on the suspect which in itself can be useful information regarding the decision on the necessity of pre-trial detention.

Meanwhile, the percentage of remand in custody-hearings where a report after pre-trial assistance by the probation officers is present differs between judicial regions. In some regions respondents claim a percentage of almost 100%, while other regions have substantially smaller percentages. It goes without saying that the information from the Probation Service is very important when it comes to deciding on the usefulness of behaviour orders or conditions regarding the suspension of the pre-trial detention. We will elaborate on that in chapter 6.

For now, it is important to mention that in some regions, the Probation Service have programmes in which suspects can enrol before a prosecutorial decision has been made. These programmes vary regionally, but in general they are aimed at keeping people on the straight track rather than let them get entwined in the machineries of the criminal procedure. The sooner the public prosecutor and the probation officer realise that a suspect is eligible for one of those programmes, the more chance there is that arrangements can be made before a decision on pre-trial detention becomes imminent because the time limit for police custody expires.

> "That's something that we do outside all other procedures. The decision-making process will be put on hold. It's a small probation-trajectory and depending on the results

[84] Domestic violence being one of the primary targets addressed by both the criminal justice system and the local authorities: based on administrative law, the mayor also has the competence to issue a behaviour order.
[85] This is the team that runs the ZSM-desk.

> a prosecutorial decision will be made, for example a conditional dismissal of the procedure (…). Some people just need help immediately and their offence is not serious enough for a regular probation trajectory. We're looking to solve the problems outside of the criminal procedure. (…) It shouldn't be someone with a huge criminal record. It started with thefts, but it has become available for all other kinds of offences." (PO1)

As said, our research shows that similar initiatives seem available in other regions as well, but there isn't enough coherence to reach general conclusions. Still, it shows that the ZSM-procedure, combined with other organisational developments in the chain of the criminal justice system, allows for a different mind-set in the proceedings that precede the decision of the prosecutor regarding the pre-trial detention: rather than aiming at the more traditional route of remand in custody combined with a conditional suspension of the execution, sometimes there is room for an approach that might reach similar goals without the pre-trial detention framework.

4.7 Concluding remarks

In this chapter, we have described that the decision-making process by Dutch public prosecutors in pre-trial detention cases has changed radically in recent years. The introduction of the ZSM-desk and its multidisciplinary approach, together with new extra-judicial possibilities as well as the further development of (super-) expedited procedures, have allowed for a broader framework for the decision-making process. In all groups of respondents there are those with the opinion that these developments have led to a decrease in suspects brought before the examining judge in connection to the request for remand in custody. Not everyone is equally convinced though, but no one suggests that the number of pre-trial detainees has increased due to the ZSM-procedure. We think that it is clear that the new ZSM-procedure has had quite an impact.

However, there have been so many other developments that have influenced the criminal justice system that it is not possible to absolutely state that the ZSM-procedure in itself has led to fewer requests for remand in custody. For many reasons, debate about the Dutch Public Prosecutor Service as a 'gatekeeper' for the judicial procedure is necessary: the inscrutable decision-making process regarding pre-trial detention is one of them.[86]

The foregoing has shown that most of the so-called high-frequency crimes are dealt with at the ZSM-desk (shoplifting, burglary, pickpocketing, street violence and other forms of violent crimes). More serious crimes, also referred to as HIC, (sexual assault, arson, homicide, serious violent offences, organised crime, human trafficking, drug trafficking, armed robbery etc.) are not dealt with in the ZSM-procedure. In § 3.3.2 we have elaborated on the fact that in these HIC, the decision to request for remand in custody is not uncommon.

[86] See Lindeman 2017, p. 268.

5 Grounds for pre-trial detention at the initial hearing

5.1 Introduction

In this chapter, we focus on the decision of the examining judge. Firstly, the procedure before the examining judge, i.e. the initial hearing, is described. Questions that are addressed in this part are: how does the hearing take place, who are the players involved in this decision-making process and what is their role? After this, the focus will shift to the actual substance of the decision-making process, focusing on the legal grounds for remand in custody as prescribed in article 67a CCP, their meaning in practice and their interpretation. We will then look at the assessment made and the reasoning provided by the examining judge when he decides to apply remand in custody in a specific case.

5.2 The procedure at the initial hearing

As a general principle, a suspect must be brought before the examining judge within three days and 18 hours after the arrest. The remand in custody can be ordered for 14 days by the examining judge upon a request by the public prosecutor (art. 63 CCP). The initial hearing is a closed session that is not open to the general public. During this hearing, not only the request by the public prosecutor for remand in custody is decided upon, but also the lawfulness of the arrest is checked (art. 59a CCP). The examining judge hears the suspect in person in the presence of his/her defence lawyer.[87] The hearing before the examining judge takes on average around 24 minutes.[88]

In most cases, the file discussed during the hearing before the examining judge will be composed of the information provided by the police, the statements of the suspect (if he/she decides to speak) and information on the criminal antecedents of the suspect. Also, previous reports by the Probation Service might be present in the file, as well as a current report by the Probation Service (although this will not always be available, as discussed in chapter 7). During the hearing, the examining judge hears the suspect in order to learn more about the available evidence in the case file and his/her involvement in the alleged crime. During the hearing, the defence lawyer gets the possibility to discuss the available evidence against his/her client, to make comments about the lawfulness of the arrest (if relevant) and to argue why the request of the public prosecutor for remand in custody should be denied. In most cases, with respect to the latter aspect, the defence lawyer will focus on contradicting the existence of the grave suspicion and the grounds for the remand in custody as brought forward by the public prosecutor. During the hearing, the defence lawyer can also request orally and/or in writing for the suspension of the pre-trial detention. Within the debate on this request, the personal circumstances of the suspect may form an important topic of conversation between the examining judge, the suspect and his/her defence lawyer. A defence lawyer describes the hearing before the examining judge as follows:

> "Often your client is given the opportunity to talk a bit more about the file or the arrest. First and foremost, it is a conversation between the suspect and the examining judge, insofar as a suspect wants to say something, of course. Then I get the opportunity to comment on the request by the public prosecutor and the information in the file. After this I have the opportunity to request for a suspension and then the examining judge makes his decision." (DL3)

[87] Research shows that in almost all cases both the suspect and the defence lawyer are present during the initial hearing before the examining judge. Crijns, Leeuw & Wermink 2016, p. 23.
[88] Crijns, Leeuw & Wermink 2016, p. 31-32.

The public prosecutor will have made his/her case for the pre-trial detention in his/her written request for remand in custody to the examining judge before the hearing. In this request, he/she can indicate whether he/she will resist a suspension when requested by the defence lawyer. He/she can also give his/her viewpoint on a suspension of the remand in custody during informal contacts with the examining judge, for example, per email. The public prosecutor does not take part in the conversation at the initial hearing, since, as a general principle, the public prosecutor is not present during the initial hearing (contrary to hearings concerning minors, where the public prosecutor is present).[89] Public prosecutors note in this respect that attending hearings before the examining judge is simply not possible because of their caseload and busy schedules (PP1, PP4, PP6, PP7, PP8).[90] They only decide to attend the hearing before the examining judge in exceptional cases. This is confirmed by a defence lawyer who notes that during 13.5 years he has actually seen a public prosecutor at the hearing before the examining judge only twice (DL1). Examples where the prosecutor would be present are (special) murder cases (PP1) and sensitive cases (PP3). One respondent notes that she once decided to attend a hearing because she wanted to make sure that somebody was not suspended because of the specific circumstances of the case. Although she notes that she added nothing during the hearing other than had already been in the written pieces, she still felt that is was important to repeat her story at the hearing to emphasise certain aspects and to be able to respond to the arguments by the defence lawyer brought forward in favour of suspension (PP6).

Although for some respondents the absence of the public prosecutor is not considered a missed opportunity, some respondents do in fact indicate that it would be better if the public prosecutor would be present during the hearing. Amongst judges there is no consensus on whether it makes a difference if the public prosecutor is present during the hearing or not. One judge notes in this respect that he has the possibility to call the public prosecutor if issues arise during the hearing and he wants to discuss matters further (J6). Although one judge says that the presence of the public prosecutor would not add anything to the hearing (J2), another judge notes that when a public prosecutor wants to successfully oppose to a suspension, his/her attendance at the hearing is crucial:

> "Sometimes the public prosecutor opposes to a suspension. But if this is the case, he needs to come here [to the initial hearing, eds.]. Then he needs to hear everything to be able to come to a balanced opinion. If he would say: 'I oppose to a suspension' on the outright, he would miss all the information and arguments brought forward by the defence lawyer during that hearing that I take into account when deciding on the request. This does not only concern new information, but it can also concern matters of the case on which different opinions are held that I want to discuss further with both the defence and the public prosecutor." (J5)

From our interviews, no clear-cut image arises about the availability of a report by the Probation Service at the hearing before the examining judge. On the one hand, some respondents note that in most cases a (preliminary) report by the Probation Service is available (DL5, PO5, PO7), although one respondent indicates that this differs per court (DL8). Other respondents note that in approximately 30/40% (PO1) or 50% of all cases (PO3, J6) a report is drawn up about the suspect in time for the hearing before the examining judge. One respondent notes an increase in the amount of cases in which there is involvement of the Probation Service before

[89] Uit Beijerse & Kunst 2000 (9), p. 418.
[90] For more information on the increased task, duties and responsibilities of public prosecutors and recent developments at the Public Prosecution Services in the Netherlands, see Lindeman 2017.

the hearing, resulting in a report (PO3). A judge notes in this respect that a report of the Probation Service is available in approximately 70% of the cases where he would like to have it, i.e. where he feels that it would add something to the case (J2). Although it is hard to provide general conclusions on the basis of these different observations, nevertheless it can be concluded that all these responses indicate a significant increase compared to the numbers presented by Uit Beijerse and Kunst in 2000, who noted that in 13 examining judges' offices, the input of the Probation Service with regard to requests for suspension was nil.[91]

When there is no time to provide a written report, the probation officer might decide, or he/she can be asked, to be present at the hearing to provide his/her viewpoints in oral form (PO6, J2). Some respondents consider the attendance of a probation service officer at the initial hearing an advantage, since the probation service officer can then be asked questions and can take active part in the discussion (J2, PO7). Members of the Probation Service attend hearings by the examining judge, however, only incidentally (J2, PO5, PO6).

The decision by the examining judge is announced immediately orally to the suspect and his/her defence lawyer, a written decision is provided afterwards. Crijns, Leeuw and Wermink noted during the observed hearings that the judge gave a detailed explanation on the reasons for granting or refusing the order, while the written decision is briefer.[92] Our file studies confirmed these findings: sometimes the notes taken by the defence lawyer during the hearing would contain more information on the judge's reasoning than the order for remand in custody itself.

5.3 Grounds for pre-trial detention at the initial hearing

As mentioned in chapter 1, the two main grounds for pre-trial detention mentioned in the CCP concern (a) the (serious) risk of absconding of the suspect or (b) the existence of a serious reason of public safety requiring the immediate deprivation of liberty. Such a serious reason can be considered present in situations described in the CCP which can be summarised as follows: (b-i) fear for serious upset to the legal order due to the very serious nature of the crime, (b-ii) fear for recidivism, (b-iii) fear for obstruction of justice, or (b-iv) the need to facilitate expedited proceedings against suspects of unsettling crimes in public areas or against public officials (policemen, firemen, and ambulance staff).[93] An important basic principle of the statutory regulation concerning pre-trial detention is that on the basis of articles 67 and 67a CCP, the judge has a discretionary power to apply pre-trial detention when the conditions to do so are met, but he/she can also decide to abstain from applying pre-trial detention if there are good reasons in a specific case to do so.[94] In 2013, three Rotterdam judges critically noted that judges do not use this discretionary power enough.[95] With regard to the grounds formulated in article 67a CCP they state that an inverse argumentation is used: after having determined that there is a case for pre-trial detention and that there is a grave suspicion, judges will first see if they want the suspect remanded in custody or not, after which they will try and find the right grounds on which to base their decision. According to the three judges, on the basis of this reasoning it can be concluded that there are ulterior goals that play a role in the decision-making process on the remand in custody. Similar to the findings of Stevens (see

[91] Uit Beijerse & Kunst 2000. Their research showed that although suspects stated to be visited by an employee of the Probation Service, this information was not available at the hearing before the examining judge. Some examining judges even indicated that they had neither seen a report by the Probation Service nor been approached by somebody by the Probation Service, p. 419.
[92] Crijns, Leeuw & Wermink 2016, p. 40.
[93] See chapter 1 as well as appendix 2.
[94] Corstens & Borgers 2014, p. 450 and Janssen, Van den Emster & Trotman 2013, p. 431-432.
[95] Janssen, Van den Emster & Trotman 2013, p. 432.

chapter 1) the judges conclude that material goals such as (special) prevention, considerations of security, retribution/punishment and anticipation on the expected sentence (in the sense that somebody already undergoes his expected sentence) also play a role in the decision-making process. The three judges refer to these goals as the 'material shadow-goals'.[96]

We will now elaborate on the different grounds, their interpretation and their meaning in practice. The grounds will be discussed in the order of appearance in article 67a CCP. Pre-trial detention can be ordered on the basis of at least one of these grounds. In practice, however, often more than one ground is used to substantiate the order for remand in custody. The Netherlands Institute for Human Rights conclude that in 41% of the files they investigated, two or more grounds were mentioned by the examining judge.[97] The judge is allowed to add new grounds or to remove grounds at subsequent decisions regarding the pre-trial detention.

5.3.1 The risk of flight

The first legal ground mentioned in article 67a CCP concerns the (serious) risk of absconding of the suspect, i.e. the risk of flight. The risk of flight entails a risk that the suspect will abscond to evade the criminal proceedings against him/her and the punishment imposed. This risk of flight must be substantiated by reference to the specific behaviour of the suspect or specific personal circumstances. It may not be deduced solely from the severity of the punishment of the alleged criminal offence or the fact that somebody is a foreigner (a European or a non-European national).[98] If guarantees are offered by the suspect, for example by putting up a bail, the remand in custody may not solely be based on the risk of flight.[99]

Compared to some of the other countries involved in the DETOUR project, flight risk is only used scarcely as a ground for pre-trial detention in the Netherlands, although the numbers we had at our disposal show a somewhat uneven spread.[100] The Netherlands Institute for Human Rights concluded in 2017 that the ground 'risk of flight' was not thoroughly motivated in the majority of the cases in which it was used.[101] An example of a standard motivation used by the court in Rotterdam is that: "No fixed residence by the defendant can be established, he has no permit of residence (*geldige verblijfstitel*) in the Netherlands, and he has the opportunity to avoid criminal proceedings in the Netherlands [by absconding, eds.] and it is reasonably to be expected that he will make use of this possibility". The Institute notes here that in this case many things remain unclear in the argumentation of the examining judge: e.g. whether the suspect has no fixed residence or he is declared an undesirable foreign national, why there are indications that he will avoid criminal proceedings in the Netherlands and why it is to be expected that he will make use of these possibilities.[102]

---

[96] Janssen, Van den Emster & Trotman 2013, p. 434.

[97] College voor de Rechten van de Mens, *Tekst en uitleg. Onderzoek naar de motivering van voorlopige hechtenis*, March 2017, p. 25.

[98] Corstens & Borgers 2014, p. 454, referring also to the case ECtHR 26 June 1991, appl. no. 12369/86, Letellier/France. See also Janssen, Van den Emster & Trotman 2013, p. 434.

[99] Corstens & Borgers 2014, p. 454, referring also to the case ECtHR 26 June 1991, appl. no. 12369/86, Letellier/France. See also Janssen, Van den Emster & Trotman 2013, p. 436.

[100] In the 109 cases observed by Crijns et al., flight risk was only mentioned as a ground for pre-trial detention in 4% of the cases observed at the initial hearings and 1% of the cases observed at the hearings in chamber (Crijns et al. 2016). The Netherlands Institute for Human Rights concluded that risk of flight is mentioned as a ground in 28 of the 222 cases in 2017 concerning remand in custody, which is 13% (*College voor de Rechten van de Mens* 2017). This difference in percentages can be explained by the fact that both studies did not work with a big enough sample.

[101] In three of the 28 'remand in custody'-decisions, the ground was mentioned but not motivated. In the other 25 decisions the ground was motivated, but in 15 cases with a standard motivation.

[102] College voor de Rechten van de Mens 2017, p. 25-26.

The low occurrence of the risk of flight is confirmed by some of our respondents (J1, PP4, PP5), however there does not seem to be much consensus as to the scrutiny applied by judges deciding on the ground. Judge J6, for example, puts forward the view that it's quite easy to substantiate the risk of flight:

> "We can reason in any which way we want. And then the issue particularly is that we do not really substantiate. A first offender with a kilogram of coke in this car? We can always think of a scenario. Where did you get the coke? That must be a criminal organisation! And working for a criminal organisation means: risk of absconding to another country!" (J6)

As mentioned in § 3.3.1, foreigners are overrepresented in the pre-trial population – even when, compared to other countries in this research, their number is relatively low. Asked for reasons to explain the higher proportion of foreigners in the Dutch pre-trial detention, risk of absconding is the first reason mentioned. Some of the respondents refer to the (tightened) regulation as described in § 3.3.1. False identity papers, refusal to identify oneself or mentioning a false name can be reasons to keep people in remand custody.

> "In case somebody without documents would steal a bicycle, you can be certain that he will be remanded in custody, the main idea being that it would be better if he serves his sentence immediately." (DL6)

> "In case of false identity papers, it was usual to keep people in pre-trial detention because of risk of absconding and then they were convicted to two months (of unconditional prison sentence, eds.), this was standard practice. But now we have ZSM,[103] which means that we can serve a summons in person to the suspect and then it doesn't matter if he'll attend the hearing or not [the judge can then convict the suspect *in absentia*, eds.]" (PP8)

Also suspects of all forms of organised crime who only fly to the Netherlands to commit criminal offences are mentioned as a category of offenders who can be detained on the risk of flight, such as suspects of terrorism who have concrete plans to go to Syria (DL6).

In 2013 the three Rotterdam judges, Janssen, Van den Emster and Trotman, put forward the view that the fact that somebody is a foreign national (European or non-European) and/or has no fixed place of residence are extremely important indicators in the acceptance of this risk of flight. According to them, only little seems to be needed from the specific behaviour from the suspect or his/her circumstances to accept the ground of risk of flight.[104] Equal to Janssen, Van den Emster and Trotman, in 2016, Crijns, Leeuw and Wermink found that the ground risk of flight is quickly accepted, also in the case of a lack of a fixed place of residence.[105]

This image is partly confirmed by our respondents. DL6 notes that the risk of flight is always accepted if people have no fixed place of residence and that it also easily accepted when people have an address outside of Europe. DL6 also stated that if the defence lawyer can show that in fact the suspect does have a place of residence, he/she can successfully oppose the existence of this ground. A public prosecutor critically notes, though, that in such cases the lawyer should be able to clearly demonstrate the existence of the address, for exam-

[103] See chapter 4.
[104] Janssen, Van den Emster & Trotman 2013, p. 435.
[105] Crijns, Leeuw & Wermink 2016, p. 31.

ple by showing an extract of the municipal personal records database (*gemeentelijke basisadministratie persoonsgegevens*) (PP2).

Especially when it comes to suspects from other countries *within* the EU, there seems to have been a change over the past years. According to some of our respondents, EU law led to a significant decrease in the use of the risk of flight as a ground for pre-trial detention. In 2013, the Amsterdam Court in Chambers held that, due to the non-discrimination principle laid down in article 18 of the Treaty on the Functioning of the EU (TFEU) and the Directive on the right of free movement in the EU,[106] EU citizens with a demonstrable address in another EU-Country cannot be remanded on the ground of flight risk.[107] Although this case-law has not led to a lot of publicity, some respondents seem to recognise that, also due to the principle of mutual recognition, it is not that obvious anymore to assume the risk of flight regarding EU-citizens from other EU-countries: the mere fact that the suspect has no fixed place of residence in the Netherlands constitutes an insufficient reason to accept a risk of flight.[108] In this respect, the judge should take into account whether there are possibilities to transfer the person back to the Netherlands (for example through the use of a European Arrest Warrant) once he/she has left the Netherlands. One public prosecutor notes a similar approach towards non-EU residents:

> "The risk of flight is less and less accepted. Because we have extradition treaties with many countries. Also with countries with no extradition treaty such as Turkey it is also not always accepted. There must be good reasons, much motivation that is provided to argue why in such cases there is in fact a risk of flight." (PP5)

That said, citizens from European countries who come to the Netherlands to commit crimes – mobile bandits in criminological terms – are still often put in pre-trial detention. This often happens with the purpose of so-called expedited proceedings.[109] These expedited proceedings are used to allow for a very swift trial, for which suspects like these mobile bandits can wait while in pre-trial detention. "The East-European route", one of our respondents cynically said (J7), referring to the overwhelming number of Polish, Bulgarian and Romanian citizens who come to the Netherlands to commit crimes. The ground for pre-trial detention can, in those cases, very well be the risk of reoffending.

> "What you do see, are Romanians, mobile bandits. They travel through all of Europe. They have lists in their pockets what events are happening in Europe. These are typical cases for fast proceedings. You keep them two weeks in remand detention and if possible they are convicted after these two weeks for a longer period. What you do need is the possibility to request for criminal record information abroad. So that we can see. If these Romanians travel from country to country they are everywhere considered as first offender, although they are not. But nowadays this is regulated rather well." (PP2)

Prosecutors and judges do have different opinions on the usefulness of keeping this category of offenders in pre-trial detention, however. Some of them assume it is much better to give them a summons and send them away to give them a reason to avoid the Netherlands for a

[106] Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Art. 24: " (…) all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State (…)".
[107] Rechtbank Amsterdam 10 December 2013, *NBSTRAF* 2014/25.
[108] Corstens & Borgers 2014, p. 454, with references.
[109] See also chapters 4 and 5.

while, although we also heard the suggestion these type of offenders will travel to another country and continue committing offences there (PP7).

One judge specifically indicates a lack of confidence in the possibilities of transferring mobile bandits back to the Netherlands (J2). He concedes that that might be contrary to the meaning of the EU-treaty, but finds that one shouldn't look at the risk of flight in terms of 'can I find them later on?', but in terms of 'will they serve their sentence?' and he is not convinced at all that these mobile bandits would serve their sentence if they were not put pre-trial detention, allowing them to flee the country and never return.

5.3.2 Public safety: serious upset to the legal order

Fear for serious upset to the legal order due to the very serious nature of the crime is the first 'serious reason of public safety requiring the immediate deprivation of liberty' mentioned in article 67a CCP. This ground applies when there is a suspicion of commission of an act which, according to its legal definition, carries a sentence of imprisonment of 12 years or more and that act has caused serious upset to the legal order. While the legal definition requires that the legal order must be upset by the committed criminal offence, it does not give a further qualification of this criterion. The parliamentary history does not provide clarification on this point neither. Nevertheless, the underlying principle of this stipulation seems to be that certain severe criminal offences cause so much upset to the legal order that pre-trial detention would be desired, if not necessary, to cushion this upset.[110] The Dutch Supreme Court has determined, in accordance with the case law of the ECtHR, that the maximum sentence or the alleged offence cannot be decisive in determining whether there is a serious upset to the legal order. There should be more to underline this finding, although it does not indicate what this should be.[111]

The ECtHR assessed the ground of serious upset to the legal order in the 2007 cases of Kanzi and Hendriks against the Netherlands.[112] The ECtHR accepts that if there are concrete indications that the release of the suspect could cause public disorder, this can 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 also 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', and that the passage of time will generally weaken the justification of pre-trial detention based on such considerations.[113]

The ECtHR adopted a more critical approach in the case of Geisterfer against the Netherlands to the notion of shocked legal order.[114] In this case, the ECtHR repeated that social disturbance, caused by offences of a particular gravity, can justify pre-trial detention in exceptional circumstances. These grounds, however, can only be deployed on the basis of facts capable of showing that release of the accused would actually disturb social order. Accordingly, the continuation of pre-trial detention on this ground is only legitimate if public order remains actually threatened.

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 demonstrates that this ground is still frequently used by judges as a ground for pre-trial detention,

---

[110] Corstens & Borgers 2014, p. 455, with references.
[111] Corstens & Borgers 2014, p. 455, with references.
[112] ECtHR 5 July 2007, *Kanzi v. the Netherlands*, appl. no. 28831/04 and ECtHR 5 July 2007, *Hendriks v. the Netherlands*, appl. no, 43701/04.
[113] ECtHR 5 July 2007, appl. no. 28831/04, *Kanzi v. the Netherlands* and ECtHR 5 July 2007, *Hendriks* v. the *Netherlands*, appl. no. 43701/04.
[114] ECtHR 9 December 2014, *Geisterfer v. The Netherlands*, appl. no. 15911/08.

e.g. in approximately 20% of the cases handled by the examining judge.[115] They found that even though the requirements deriving from the legal definition require more scrutiny, judges only tend to take into account that there is a suspicion of a crime that carries a sentence of 12 years or more, and seem to conclude that whenever that is the case, there is also a shocked legal order.[116]

One public prosecutor notes:

> "[m]urder and manslaughter. And also rape I would say. Then you have that ground immediately. I think nobody would not apply pre-trial detention in such cases." (PP1)

The lack of motivation provided in arguing if there is a serious upset to the legal order might be explained by the lack of clarity about the precise meaning and context of this criterion. What it is that exactly establishes the ground of serious upset to the legal order is not easy to define.[117] This is acknowledged by respondent J5: "There are no fixed guidelines, or rules that have been developed in case law. It is merely just a feeling."

However, another judge (J6) claims that the substantiation of this '12-years-ground' has been taking shape over the years:

> "There's a solid foundation, where we all pretty much do the same – some exceptions aside." (J6)

The criterion is described unequivocally by different respondents as: "It would be socially unacceptable that somebody would be released" (PP7), "If I would release this person, this would cause a lot of outrage in society" (J5) and "I would not be able to explain it to society when somebody would go out, because then the shit would hit the fan" (J2). In this approach, the relationship between the release of a suspect and the response to that in society is most significant and decisive.

The Netherlands Institute of Human Rights has found that the justification for the 12 years and serious upset to the legal order-ground is often defective. In analysing the 38 case files (of the 222 case files that were investigated) in which this ground was used, they searched for the two required aspects of the ground: (1) the suspicion of a criminal offence that carries a sentence of imprisonment of 12 years or more and (2) that that act has caused serious upset to the legal order. They concluded that in 23 of the cases the first element was not substantiated and in 25 cases the second component was not substantiated. In only two of the 38 cases, a reference to the specific circumstances of the case was provided.[118]

5.3.3 The risk of reoffending

The ground of reoffending aims to prevent the risk of recidivism of serious offences and to protect society against persons who repeatedly commit criminal offences. According to the legal definition in article 67a CCP the ground of reoffending knows three forms: (1) If there is a serious risk the suspect will commit an offence which, according to the law, carries a prison

[115] Crijns, Leeuw & Wermink 2016, p. 30. This is almost similar to the percentage of cases in which the Netherlands Insititute of Human Rights found this ground used: in 38 of the 222 cases this ground was used, which equals 17% of the cases. College voor de Rechten van de Mens 2017, p. 26.
[116] Crijns, Leeuw & Wermink 2016, p. 32.
[117] As acknowledged by Janssen, Van den Emster & Trotman 2013, p. 435.
[118] College voor de Rechten van de Mens 2017, p. 26-27.

sentence of six years or more; or (2) if there is a serious risk that the suspect will commit an offence whereby the security of the state or the health or safety of persons may be endangered, or that could give rise to a general danger to goods. This ground can also be accepted when (3) it concerns suspicion of one of the offences explicitly mentioned in article 67a, section 2, CCP such as threat (*bedreiging*), assault (*mishandeling*), theft (*diefstal*) or the handling of stolen goods (*heling*), 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. The latter ground concerns offences that are often committed by persistent offenders. These crimes are also referred to as 'acquisition-crimes': crimes committed to provide for a criminal and/or antisocial lifestyle, e.g. drug-addictions. With all these three groups the offence concerning the fear of reoffending does not have to be similar to the one that the suspect is currently being suspected of. As to the latter group, there also does not have to be a connection between the two facts.[119]

The research by Crijns, Leeuw and Wermink shows that the risk of reoffending is most regularly used as ground for pre-trial detention, both in decisions of the examining judge and in decision of the court in chambers. During the initial hearings, the fear of reoffending ground was used in 81% of the cases.[120] The Netherlands Institute for Human Rights concluded that even in 91% of the cases decided on by the examining judge this ground was accepted.[121] Respondents DL8, PP2, PP3, PP6 and J5 also acknowledge that the ground of reoffending is the most frequently used ground in practice.

In 2013, judges Janssen, Van den Emster and Trotman qualified the reoffending ground as a 'stopgap', a 'catchall', or the 'mother of all grounds'.[122] That this ground is used as a catchall is confirmed by our respondents. A public prosecutor (PP1) acknowledges that she resorts to the ground of reoffending when other grounds cannot be invoked. A judge notes that in some cases there is a serious upset to the legal order, but there is no suspected criminal offence of 12 years or more. Therefore, the 12-years ground cannot be invoked. In such cases, he may decide to resort to the ground of reoffending under (1): 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.

> "When you don't have a 12-years ground, you may still feel that it's necessary to find out why a suspect may have done what he did. You want to clarify that, or he might do it again tomorrow. And well, there you have the six years ground. But factually it is a fake upset to legal-order ground in such cases, I fear." (J2)

In principle, the ground of reoffending can be derived from the criminal record of the suspect, e.g. a recent past conviction or a disorder. Even without this information, nevertheless, Janssen, Van den Emster and Trotman have indicated that judges in practice are prepared to accept the ground of reoffending based on the suspicion and the (relative) seriousness of the fact.[123] Other arguments can play a role in accepting this ground, such as the type of criminal offence. With financially lucrative crime for example, it is accepted that the suspect will

[119] Janssen, Van den Emster & Trotman 2013, p. 436.
[120] Crijns, Leeuw & Wermink 2016, p. 36.
[121] College voor de Rechten van de Mens 2017, p. 28.
[122] Janssen, Van den Emster & Trotman 2013, p. 436.
[123] Janssen, Van den Emster & Trotman 2013, p. 436.

reoffend. Also, the personality of the suspect can be a factor. When, for example, the suspect has addiction issues, psychological or psychosocial problems, or he/she has a short fuse, this can be a reason to accept the ground of risk of reoffending.[124]

The practice that in cases of first offenders the risk of reoffending is accepted on the basis of the type of the alleged criminal offence or the personality of the suspect is confirmed by our respondents. One defence lawyer in this respect critically notes:

> "Especially the ground of reoffending is often dragged in by the head and shoulders. Although somebody has no previous criminal records it is said that somebody has a lucrative business which can only be stopped by judicial interference, otherwise he would proceed with his criminal business. With such reasoning you could put everyone, also people like us, into pre-trial detention." (DL2)

A prosecutor acknowledges that it is indeed sometimes argued that there is a risk of reoffending in a case of a first offender. He puts forward that this requires a solid motivation, though:

> "For example, with drugs, hemp. There might be a very bad financial situation, but with the seizure of all the materials used for growing this hemp you have ended the situation. In such cases you need to be able to have good reasons to argue why, although somebody has not committed a criminal offence before, you think there is a ground of reoffending." (PP3)

A defence lawyer remarks that suspects of drug-related crimes are far more often kept in pre-trial detention than, for example, suspects in fraud cases. Even when people have no criminal records, the lucrative aspect of drug-related crimes is often accepted as reason to establish a risk of reoffending. Also suspects of inexplicably disproportionate violent crimes can risk pre-trial detention on the reoffending ground without prior records (DL5, DL6). Other examples that are mentioned in this respect are dealing drugs over a long period of time and the involvement in a criminal organization (PP4).

This approach of the ground of recidivism raises the question whether this is an adequate way to assess the risk of recidivism, because it is founded on the thought of being on the safe side by locking up a person. This, however, is not in accordance with the legal framework that prescribes that there must be 'a serious risk' of reoffending.[125] Some of our respondents put forward the view that this should be narrowly interpreted as 'a serious risk of reoffending within the timeframe until the hearing of the case by the trial judge'. Defence lawyers DL5 and DL6 also critically note that this line of reasoning solely focusses on the crime of which one is suspected, neglecting the absence of a criminal record. This is especially troublesome when it is taken into to consideration that a professional risk-assessment is unlikely to have taken place by this stage of the proceedings (PO1, PO2).

In their research on the motivation of pre-trial detention, the Netherlands Institute for Human Rights has found that in 60% of the cases where the ground of risk of reoffending is used, the examining judge refers back to a specific criminal offence that has been committed before. However, when the examining judge accepts the risk of reoffending solely on the basis of the alleged criminal offence or the personality of the suspect, a solid argumentation as to the fear of reoffending in the specific case is often lacking.[126]

---

[124] Corstens & Borgers 2014, p. 458, referring to Janssen, Van den Emster & Trotman 2013 and Stevens 2012/36.
[125] As noted by Corstens & Borgers 2014, p. 458.
[126] College voor de Rechten van de Mens 2017, p. 28.

It's clear from the above that Dutch legislation leaves a lot of room for the judge to decide on the ground of reoffending. It is also clear that judges actually use this room and that the ground is used a lot, even when different judges might come to different conclusions in similar cases. In the next chapter, in which we will elaborate further on the alternatives for pre-trial detention as well as on the vignette-study we did (see chapter 2), some more examples will be given as to the responses we got.

5.3.4 Danger to the investigation

According to article 67a CCP, detention on remand can be ordered "if necessary in reason for discovering the truth otherwise than through statements of the suspect". This is often referred to as the danger of collusion or the danger to the investigation. It entails the risk that the suspect will harm the investigation if released. Crijns, Leeuw and Wermink found that in 27% of the cases they studied the ground of danger to the investigation is used.[127] This ground will especially play a significant role in the initial phase of the criminal proceedings, since then the investigation is in full swing. The ground is used when, for example, there are multiple suspects, or other suspects are not yet arrested (PP7, J2) or witnesses still need to be heard (J2). Respondents note that this ground is mainly used in bigger or long-term investigations (PP3, PP5, J2). This ground is often dropped with the passing of time when there are other grounds to substantiate the pre-trial detention. Janssen, Van den Emster and Trotman, however, indicate that judges are hesitant to do so when there are no other grounds applicable to the case. In such cases, judges tend to uphold the ground of danger to the investigation, although it is unclear what the content of the investigation is or what it is that the suspect could to do to frustrate the investigation. In such cases, there is – again – the tendency to invoke the material shadow goals in order to order the pre-trial detention.[128]

A defence lawyer notes that once somebody is kept in pre-trial detention a suspension is hardly ever accepted when the ground of danger to the investigation is used (DL5, J4). The development of this ground over time nevertheless allows for an active role of the defence lawyer.

> "This ground is very much subject to change. As a lawyer, you can keep pushing that the investigative measures do in fact take place and to keep arguing against the existence of this ground. With other grounds this is much more difficult. The ground of reoffending, for example, is far less dynamic." (DL5)

The Netherlands Institute for Human Rights found that this ground was put forward in 63 of 222 researched decisions, but, again, it noted that in 35% of these cases, no substantiation whatsoever had been given, while in 39% of the cases, only a very shallow and undistinctive substantiation had been given. The institute argues that judges should specify what investigative activities necessitate the continued detention of the suspect.[129]

5.3.5 Expedited proceedings

As stated earlier, since 2015 the possibility of expedited proceedings can constitute an autonomous ground for pre-trial detention in some specific cases (art. 67a, section 2, under 4° CCP). In the Netherlands, we speak of expedited proceedings when the trial judge hears the merits of the case within the time-frame of the remand in custody: so, within 17 days and 18

[127] Crijns, Leeuw & Wermink 2016, p. 30.
[128] Janssen, Van den Emster & Trotman 2013, p. 437.
[129] College voor de Rechten van de Mens 2017, p. 29.

hours since the arrest of the suspect.[130] This new ground is applicable if someone is suspected of:

- one or more of the crimes defined in articles 141, 157, 285, 300-303 or 350 CCP (vandalism, fire setting, physical abuse, threats of violence)
- and this crime has been committed
    - in a public area or
    - against one or more public officials (policeman, ambulance staff, fireman etc.)
- and the crime has caused social unrest
- and the adjudication of the criminal offence will commence within 17 days and 18 hours after the arrest of the suspect.

In short: on the basis of this ground, pre-trial detention with a view to expedited proceedings against suspects of crimes in public areas or against public officials, such as policemen, firemen, and ambulance staff is facilitated. Respondents in our research have stated that this specific ground is hardly ever used, as suspects of such crimes will usually also fall under one or more of the traditional grounds (fear for recidivism, fear for collision or fear for serious upset to the legal order). Only one of the respondents has ever witnessed the use of this ground to substantiate the remand in custody:

> "In three years, I think I have seen this ground being used only one time. It is never used as the sole ground to substantiate pre-trial detention. Moreover, you don't need this ground. It was only introduced for the sake of appearance." (J4)

However, there can be confusion as to the application of pre-trial detention in relation to expedited proceedings in case of other crimes. All other cases in which expedited proceedings are possible fall outside of the scope of the ground for pre-trial detention discussed above. Yet, as described in chapter 4, the possibility of expedited proceedings can still be of influence in the decision-making process concerning the pre-trial detention. Also, we've mentioned in § 5.3.1 that in some cases (the mobile bandits were mentioned in this respect) the risk of flight in combination with the possibility for expedited proceedings is seen as a specific ground for pre-trial detention. All in all, we felt that there was some confusion as to the actual scope of the new 'expedited proceedings'-ground in the CCP and the way some practitioners seemed to understand this ground.

5.4 Conclusion

During the initial hearing the examining judge decides on the request for remand in custody by the public prosecutor. At the hearing, he/she will investigate whether the requirements for remand in custody are fulfilled, including which grounds could carry remand in custody. Nevertheless, these grounds do not seem to play a very distinctive role in the decision-making process of the examining judge. Previous research already showed that the legal framework may seem to formulate a rather strict set of criteria, but that these criteria do not appear to be that restrictive in practice. Judges primarily answer the fundamental question whether they think in a particular case somebody should be kept in pre-trial detention or not, and only then provide the grounds to substantiate their reasoning. This substantiation is often quite trivial and sometimes absent altogether.

Our respondents confirm these findings. This is most apparent regarding two grounds: the 12-years ground and the risk of reoffending. On the basis of the legal framework, the 12-years ground is only applicable in case of serious upset to the legal order. Although these as-

[130] Police arrest: max three days and 18 hours. Remand in custody: max 14 days. See chapter 1.

pects are formulated cumulatively, in practice the criterion that the offence has caused a serious upset to the legal order is often derived from the severity of the offence – and offences that carry a maximum prison sentence of 12 years or more are considered as severe offences in general.

A similar broad interpretation of a legal ground for remand in custody has been shown with regards to the risk of reoffending. Although the legal framework requires that there is a serious risk of reoffending, this risk is in practice often derived from the severity of the alleged criminal offence or the personality of the suspect. This allows for a very broad interpretation of this ground, even for first offenders. This ground is used the most often and can be considered a 'catchall' when the other grounds are not present, which allows for a very wide use of remand in custody. As such, it provides for a realisation of so called shadow goals, such as the protection of society against a certain suspect.

The often very short and abstract argumentation of the grounds used to substantiate remand in custody might suggest that there are many possibilities for active defence lawyers to argue against the existence of one or more of the grounds brought forward by the public prosecutor. In practice, though, there is limited room for success due to the broad margin of appreciation the judges have. In this respect, the suspension of the remand in custody seems to provide more room for defence lawyers to be able to have their client await their trial in freedom. The possibilities for suspension will be discussed in the next chapter.

6 Suspension or not

6.1 Introduction

Alternatives for pre-trial detention can only be applied in the Netherlands after the pre-trial detention is suspended. If the judge has decided that an order for remand in custody is in place, he can subsequently decide to suspend the execution of the pre-trial detention. The suspension will usually continue until the suspect is eventually convicted to a custodial sentence, although the judge can terminate it at any moment. Inherent to this system is that pre-trial detention is not used as a last resort: instead of looking at the less intrusive measures first, the most severe measure (i.e. pre-trial detention) has to be applied before less severe measures (in the context of the suspension) can be considered.

If the judge decides to suspend the pre-trial detention, this will always be under the general conditions that the suspect will comply with any future court orders regarding the pre-trial detention and that he/she will cooperate with the execution of a possible future sentence to imprisonment (art. 80, section 2, CCP). Furthermore, the judge may apply specific conditions to the suspension. The specific conditions and how far these are used as alternatives for pre-trial detention will be discussed in the next chapter (art. 80, section 1, CCP). In this chapter, the question under what circumstances the judge is willing to suspend the pre-trial detention will be answered.

6.2 Suspension or not: three situations

As was already indicated by Crijns et al., the judge weighs the personal interests of the suspect against the interests represented in the legal grounds (interests of the criminal investigation and society in general), before deciding on an eventual suspension of the pre-trial detention. The number of suspensions is relatively low and seems to be rather stable through the years. Crijns et al. observed in their study 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.[131] 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 pre-detentions were suspended at the initial hearing and 12% at the court in chambers.[132] Berghuis, Linckens and Aanstoot, however, found a substantially higher proportion of suspensions by investigation judges since 2011 (2011: 33.8%; 2012: 35.0%; 2014: 36.4%) and see that as a result of the changed attitude of the judges towards pre-trial detention.[133] The numbers provided by Berghuis, Linckens and Aanstoot have been confirmed by the Netherlands Court of Audit in 2017 which, unfortunately, does not provide more recent statistics.[134]

From our interviews it became clear that three types of situations can be distinguished: (1) cases that are absolutely not eligible for suspension; (2) cases that are possibly eligible for suspension and (3) cases in which pre-trial-detention is applied to make it possible to suspend the suspect under conditions – the 'improper suspensions', as one of our respondents called them (J1). From our point of view the last two categories are of course the most interesting, but before elaborating on those, we will shortly summarise what our respondents said about the first category, the non-eligible cases.

Ad 1 – Cases that are not eligible for suspension

[131] Crijns, Leeuw & Wermink 2016, p. 36-37.
[132] Council for the Administration of Criminal Justice and Youth Protection 2011, p. 15.
[133] Berghuis, Linckens and Aanstoot 2016, p. 80, see chapter 1 for a further explanation.
[134] Algemene Rekenkamer 2017, p. 24.

Some of the grounds for pre-trial detention do not seem compatible with conditional suspension. One of the respondents firmly stated that suspension of pre-trial detention is really not an option if the decision to apply pre-trial detention is based on fear of collusion and/or the 12-years/fear for shocked legal order-ground:

> "If you use alternatives in cases in which pre-trial detention is based on one of these ground, these grounds are actually insufficient substantiated." (J6)

It is indeed difficult to imagine a condition that could restrict the danger that a suspect harms the criminal investigation in a sufficient way (in case that danger really exists). In the same way, you can argue that when the shock to the legal order as a ground for pre-trial detention is caused by the offence, no real conditions exist to soften that shock on the short term. Not many of our respondents made such a clear distinction, however. According to Van den Brink, who did extensive research on the practice of pre-trial detention in juvenile cases,[135] the first question the judge asks him/herself when he/she has to decide about a decision to suspend is 'how an eventual decision to suspend the pre-trial detention relates to the seriousness of the offence'.[136] Many of our respondents also stated that many offences were just too serious to suspend the pre-trial detention. In line with the first argument to justify the (wide) use of pre-trial detention in general as explained in chapter 3, the bottom line is that a judge feels he/she should be able to "explain the release to a neighbour". This criterion partly coincides with the shocked legal order. Of the eight prosecutors we spoke to, three specialised in very serious cases: severe sexual offences, human trafficking and murder cases or comparable severe crimes. They all said that suspension in their cases was actually no option, although one judge remembers a case where he has suspended the pre-trial detention, although it concerned a rather severe sexual offence. This case concerned an elderly person, without previous criminal offences. "I didn't want to send him to prison and I have released him under stringent conditions, while there was a serious upset to the legal order." Still, this can be qualified as (highly) exceptional, as the respondent also notes, this decision "wasn't easy to take" (J5).

The criterion often goes (far) beyond the shocked legal order, however, as Van den Brink shows very well in his dissertation. HIC are often mentioned as a category of offences that are too serious to suspend for, but as explained in chapter 3, no consensus exists on the exact definition of these crimes. 'Social impact', 'direct victims', 'harm' or 'violence' were terms often used to describe the type of cases in which suspension was actually not an option. However, these criteria are not set in stone and as a result, over time, suspension of pre-trial detention will become an option in these cases, as will be shown below.

Ad 2 – Cases that are possibly eligible for suspension

A second category consists of cases that are possibly eligible for suspension. In these cases, a real consideration is made between the seriousness of the case and the personal circumstances of the suspect. It will have become clear from the former section that it depends on the respondent at what moment category one becomes category two. Following the line of reasoning of J6, in cases like these pre-trial detention will mostly have been applied on the grounds of recidivism or risk of flight. From the responses to the vignette and from the case files we studied it becomes clear, however, that prosecutors or judges also weigh the importance of the shocked legal order against personal circumstances. From the general interviews, but in particular from the responses to the vignette, it becomes clear how respondents weigh the personal circumstances of the suspect. While almost all respondents expressed the opinion that

[135] Van den Brink did this research for his PhD-thesis which he recently defended and will appear in 2018: Van den Brink 2018.
[136] Van den Brink 2018.

this suspect of a nightly home burglary would definitely be put in remand detention in first instance, there were differences of opinion on the question if this case would allow for suspension at a certain stage. Given the fact that it was an adult perpetrator here, who was convicted before, who was still living with his parents and without a job, most of the judges and prosecutors we interviewed did not see much reason to suspend. The personal circumstances that were mentioned that could possibly change this attitude towards suspension were the mental state of the offender, his/her day activities or a possible confession/willingness to give a statement. The assessment would change dramatically if the suspect were to have a job, his/her own house and a family. According to many of our respondents, the chances of suspension would highly increase then, although probably not in the early stage of the pre-trial detention.

Addiction (to drugs, alcohol and/or gambling) was also mentioned as an important personal circumstance to take into consideration regarding a possible suspension. If addiction had been a reason to commit the offence, this was often seen as a strong reason to apply pre-trial detention, because of the increased risk of recidivism. Addiction of the suspect or mental health problems could also be reasons to suspend the pre-trial detention in order to enable treatment in an early stage. This category will be discussed in the next section.

Finally, the residence status of the suspect was mentioned as an obstacle for suspension of the pre-trial detention. Not so much because of a supposedly greater flight risk, but more because of a reluctance to apply conditions or the lack of available conditions that could sufficiently reduce the risk of reoffending by this category of suspects. Respondents put forward the view that it seems counterintuitive to use scarce resources available for rehabilitation programmes or probation trajectories if it concerns people who hardly speak Dutch or who are illegal migrants that are likely to be deported (PP3, PP4, PP5).

Ad 3 – Cases in which pre-trial detention is imposed to make conditional suspension possible ('improper suspensions')
Finally, a category of cases can be distinguished in which pre-trial detention is applied in order to enable conditional suspension. One of our respondents referred to this category as the category of 'improper suspensions':

> "You have a broad range of improper suspensions. In these cases, the prosecution service asks for remand in custody, not to detain a person, but to give a person a framework for treatment, something that should actually have happened earlier by giving him a behaviour order." (J1)

Probably it is better to speak of improper remands, because in these cases pre-trial detention is mostly applied to create a legal framework to apply probation supervision or other types of supervision, help or treatment. We do not necessarily speak here of 'improper' in legal terms (as in unlawful). As has been demonstrated in chapter 5, the grounds for pre-trial detention can be broadly interpreted and judges and prosecutors almost never have difficulties to substantiate a remand decision. Particularly the risk of reoffending is a 'catchall'-ground in this regard. Prosecutors and judges admit that they use the pre-trial detention decision in these cases to create a framework to do something that 'probably makes sense', because they are pretty sure that in case they release somebody without conditions, the delinquent behaviour will continue because the underlying problems are not addressed. Respondents give many examples of these type of decisions:

> "You can come in a situation where the time spent in pre-trial detention comes close to the sentence you want to demand at the trial. And in that case, you suspend just to look at his behaviour until the trial. Let's see how he behaves during that period and whether he complies with the conditions. And then, at the trial you can say: 'he ruined it, so we simple ask for an unconditional prison sentence'. Or: 'he did well, so he does not have to go back to prison, but we use a conditional part of the sentence as an incentive to keep up the good behaviour'." (PP7)

> "Cases of inconvenient following (stalking) for example. If somebody does not have a criminal record, it is difficult to substantiate a risk of recidivism. You can try the six years ground [as discussed in § 5.3.3, eds.), but not in that case because inconvenient following is not threatened with six years imprisonment. In these cases, I probably take an improper decision. Because you accept a grave suspicion and the risk of reoffending, but subsequently decide to suspend. Because that is the best solution in that case. You suspend with a condition of a contact ban, even if this is a little bit distorted." (J5)

> "It also happens that you ask for remand detention, but you immediately let the examining judge know that you agree with a suspension. In that cases you do want somebody to appear before the examining judge, but you actually think that somebody could be suspended under certain conditions. In domestic violence cases this happens sometimes." (PP3)

In cases in which the offence itself is severe enough to ask for remand detention, we came across different opinions on what aim or strategy should have priority in this stage. Prosecutors know that in cases where they agree with suspension under the condition that a person follows treatment, this may lead to the judge imposing a lower prison sentence or even denying punishment. Some prosecutors are willing to take this for granted, because they consider treatment to be the more important objective in this stage. Others prioritise punishment, even at the expense of necessary treatment.

One prosecutor clearly described the dilemma. She explains that for youths, treatment as part of conditional suspension always merits the actual execution of pre-trial detention. But for adults, she is more hesitant. She explains that it's counterproductive to offer treatment as a part of conditional suspension from pre-trial detention, only to have the suspect sent to jail at a later stage by the trial court. And sometimes public prosecutors really want the suspect to spend time in jail, no matter how much he/she might benefit from some kind of treatment.

> "Imagine if I would have a rapist who would have ambushed his victim. Even if treatment was immediately possible for that person, a treatment for sexual offenders. I still would find it difficult to go to the examining judge saying that we want remand detention based on a shocked legal order [rape is a '12-years-crime', eds.] because we consider it very scary that this person was lying in the bushes until somebody came by, while at the same time I would ask for suspension in order to start treatment. And if I did that, at the hearing before the trial court, his therapists will say: 'a prison sentence will thwart the treatment'. And in that case your hands are empty as to what sentence to demand. On the other hand, this is a lousy line of reasoning, because: what are you aiming at exactly? It's not like a prison sentence will have such a favourable impact on him. These are the dilemmas we're facing. And then there's also the victim who of course doesn't want this rapist to reoffend, but on the other hand seeks retribution". (PP1)

Another prosecutor:

> I:[137] "And if the condition for suspension turns out to work very well, somebody is admitted to a clinic, what will be the effect on the sentence?"
> R: "A huge effect,"
> I: "In what sense?"
> R: "Positive. If they comply with all the conditions. And that is the preventive part of the conditions that you also award somebody. Just punishment, that doesn't help anybody." (PP5)

Both prosecutors show that they are faced with a dilemma: on the one hand, they understand that a prison sentence will likely have a mainly detrimental effect on the wellbeing of the suspect. On the other hand, the Prosecution Service does not want to give out the message that, for e.g., a violent rapist would not spend time in prison: society in general, and victims in particular, may not feel that justice has been done.

6.3 Role of the players/factors that influence the decision

Whether the judge will be willing to grant a suspension will very much depend on the availability of enough concrete information supporting conditional suspension. On the one hand, this information would have to substantiate that personal interests of the suspect outweigh the interests served by pre-trial detention. On the other hand, the information should contain guarantees that the conditions attached to the release provide a solid alternative related to the ground(s) of the pre-trial detention – in most cases: preventing recidivism or eliminate the flight of absconding.

As already indicated in the former paragraph, important information that can plea for release is related to the housing situation of the suspect, his/her day activities, his/her family circumstances and possible (mental) health problems. Preferably this information is available at the hearing of the examining judge through a preliminary probation report (*vroeghulprapportage*). This report gives information about earlier trajectories of the suspect at the Probation Service, personal circumstances of the suspect and the possibilities of supervision in case of a suspension.

We saw mixed views about the availability of this pre-trial report and the quality of it (see chapter 7). In at least one of the court districts in which we conducted interviews, a pilot-project was going on, where the Probation Service tried to produce a pre-trial report in every case. Indeed, the examining judge we spoke to in this district mentioned that a pre-trial report was available in "at least 80% of the cases" (J4). In another court district a judge spoke of "a few in every 25 cases" (J1) or "in 60-70% of the cases that you need one" (J2).

Although we know from earlier research that the suspects' denial of the crime is not a formal reason to refuse probation interference,[138] several respondents mention that suspects need to admit the offence before a pre-trial report is made up (DL7, PP6, PO1). Another probation officer made a clear distinction between suspects who refused to say anything at all and suspects who refused to speak about the offence but were willing to speak about their social circumstances. In the latter cases, she did not have difficulties with writing a report (PO3). Also, several other contra-indications for writing a report are mentioned, such as: the (non-Dutch) nationality or insufficient residence status of the suspect; the status as a persistent offender; the seriousness of the suspicion (murder, PP4) or the time of the request (requests made on Friday are mentioned as problematic). Despite the awareness of the importance,

[137] 'I' stands for 'Interviewer'. 'R' stands for: 'Respondent'.
[138] Boone 2002, p. 175-180.

many respondents were sceptical about the quality of the pre-trial reports, but mostly admitted that this was due to the short period between the arrest and the hearing before the examining judge (three days and 18 hours or less). Sometimes the probation officer can rely on information that is already known about the suspect because of an earlier probation contact, but this also indicates of course that the suspect is a recidivist who, by definition, has less chance to be suspended. In other cases, probation officers can ask the suspect about his/her personal circumstances, but the time is often too short to check this information sufficiently. Even if enough information is available, time also often is too short to organise alternatives such as electronic monitoring or a treatment. We will elaborate on this in the next chapter.

The hearing before the court in chambers, within two weeks after the hearing before the examining judge, allows more time for a proper report. To our surprise, however, probation officers and defence lawyers told us that it is policy not to report again about a suspect who had already been reported on before the examining judge (PO1, PO7). Besides, not all respondents seem to realise that it is always possible to suspend a pre-trial detention in between the initial hearing of the examining judge and the hearing of the court in chambers.

> R: "In case the probation officer sees possibilities for a suspension in that period, they mostly don't do that on their own initiative, but through the prosecutor or the defence lawyer; they can call. This is possible."
> I: "After three days and before 14 days?"
> R: "Yes. (…). All these things can happen in those 14 days."
> I: "And does it also happen?"
> R: "It happens. It doesn't happen very frequently, but it is possible. In that case I can adapt. It is still possible to suspend. I sometimes tell the defence lawyer at the hearing. We do not have enough indications now, we don't know yet if he can stay in that clinic." (J5)

Respondents agree that the initiative to ask for a suspension mostly comes from the defence lawyer and that it is also his/her job to collect the information that is necessary to convince the judge. Although the prosecutor can declare in advance that he/she will not object to an eventual suspension or let the examining judge know informally that it is probably better to suspend in a certain case, he/she does not feel responsible for collecting the information necessary to convince the judge of a suspension.

A complicating factor is that, although it's mostly the defence lawyer who is held responsible for the collection of information to substantiate a suspension, he/she does not have the autonomous power to directly request the Probation Service for a pre-trial detention report. If he/she thinks a pre-trial report is of importance, a request will have to be made to the prosecutor, who will then decide if the Probation Service gets the assignment to report. Although most of the prosecutors and defence lawyers say that the prosecutor is mostly willing to follow these requests, exceptions were also mentioned:

> "Several times, my clients, who are not always the smartest persons, were visited by a probation officer at the police station responding like: 'I have no idea who you are, so I don't cooperate.' Subsequently when I asked the prosecutor if a probation report could be made and that my client is willing to cooperate, the prosecutor said: 'He didn't cooperate in the stage of the pre-trial report, so we are not going to try again.' And in these cases I think: 'I explained you that he didn't know who the probation officer was and that he is now willing to cooperate. And now I have a client whose mother is seriously ill, who has to have a breast amputation, so he has every reason to cooperate'." (DL3)

And by a prosecutor:

> I: "Do you always follow such a request?"
> R: "No, I would like to know why the lawyer thinks that a suspect will suddenly start to talk to a probation officer if he or she remained silent or denied at first. And also, because it takes quite a while. I won't ask for probation information as standard procedure." (PP6)

In the absence of a (sufficient) probation report, it's up to the (good) defence lawyers themselves to try and collect the necessary information to substantiate a request for suspension. They will call (possible future) employers and will try to get in touch with family members or doctors for written statements. They are hindered of course by the same constraints in time and information as the probation officers are. The prosecutors and judges in general take a rather passive attitude in this regard. In case the suspect has some money to spend for his/her defence, some lawyers even ask a private probation organisation to write a report:

> "We sometimes use a private probation bureau. If an official report of the Probation Service is not available or not good enough and my client has some money to spend, I ask them to write a report for 500-600 euro." (DL3)

While the defence lawyers thus play a very important role, they have found themselves in a rather tight corner in the past years. While the EU-directive on access to a lawyer (2013/48/EU) has been implemented in the Netherlands, the legal aid scheme to finance the lawyers is found to be insufficient, which leaves them with limited resources. Lawyers in the Netherlands have fiercely campaigned for a considerable extension of the budget available for legal aid schemes. Lawyers have even sued the state in order to force it to broaden the financial compensation (as well as the room for true pre-trial assistance), which has been to no avail.[139] Very recently, a state commission has come to the conclusion that financial compensation for all state paid lawyers in the Netherlands is insufficient and that this is a threat for the quality of legal assistance, suggesting that an investment of 127 million euros would be necessary.[140] The Minister for Legal Protection (an additional minster at the Ministry of Justice and Security) has announced that he will not follow this recommendation, though.[141]

6.4 Conclusion

In the Netherlands, the vast majority of alternatives for pre-trial detention can only be applied after the pre-trial detention is suspended. Suspension happens on a regular basis, but not on a large scale. In this chapter, we distinguished three types of cases: (1) cases that are absolutely not eligible for suspension; (2) cases that are possibly eligible for suspension and (3) cases in which pre-trial-detention is applied to make conditional suspension possible – the 'improper suspensions' or, more precisely, 'improper remands'. It can depend on rather arbitrary circumstances whether a case from the second category indeed results in a suspension of pre-trial detention. These circumstances can regard the availability of a useful probation report and/or the initiative, dependent on the effort and dedication, of the defence lawyer. The prosecutors and judges in general take a rather passive attitude.

[139] HR 13 September 2016, ECLI:NL:HR:2016:2068.
[140] Commissie Van der Meer 2017.
[141] Beleidsreactie eindrapport Commissie evaluatie puntentoekenning rechtsbijstand d.d. 27 November 2017.

7 Alternatives for pre-trial detention

7.1 Introduction

As explained in chapter 5, autonomous alternatives for pre-trial detention do not exist in the Dutch criminal law system.[142] Alternatives can only be applied in the framework of a suspension of the pre-trial decision. The law does not mention a (limited) list of conditions that can be attached to a suspension (contrary to, for example, the conditional prison sentence and conditional release from a prison sentence), but doesn't mention any limitations either. This allows creativity for the judge to tailor the alternatives that can be used. In absolute numbers, the application of these so-called alternatives does not happen on a large scale, as has been shown in § 6.2. The impression we received from the interviews, however, is that respondents in general are very supportive towards alternatives and aware of the fact that conditions can fulfil a very useful role in the reduction of actual pre-trial detention. However, practical obstacles seem to stand in the way of a wider use of these alternatives.

7.2 Types of alternatives

As said, the use of alternatives in the phase of pre-trial detention is hardly regulated in the Netherlands. The general conditions attached to a suspension of the pre-trial detention are that the suspect will comply with possible future court orders regarding the pre-trial detention and that he/she will cooperate with the execution of a possible future sentence to imprisonment (art. 80, section 2, CCP). The only special requirement mentioned explicitly in the law is the financial bail to guarantee the fulfilment of the conditions of a suspension (art. 80, section 1, subsection 3, CCP). While the law doesn't mention any other specific conditions, criminal justice practitioners have plenty of room to suggest and apply tailor made conditions. We came across very original types of conditions, indeed, but in practice, the following list of conditions are mostly used and were also systematically addressed in the interviews. We mention them briefly in this paragraph and go deeper into their possibilities and restrictions in paragraph 4.

- Reporting to the police
- Contact ban
- Electronic monitoring
- Financial guarantee
- Hand in identity papers
- Location order (house arrest)
- Location ban
- Probation order (eventually including training orders)
- Treatment (clinical or ambulant).

7.3 Subsidiarity principle

In relation to the use of special conditions related to the decision to suspend the pre-trial detention, Uit Beijerse concludes that conditions could only be added as far as they contribute to the underlying goals of the pre-trial detention in a less intrusive way than pre-trial detention does (the subsidiarity principle).[143] This restriction actually also follows from the fact that alternatives for pre-trial detention can only be applied in the Dutch system in the context of a suspension of the pre-trial detention. Strictly, the condition attached to the suspension should

[142] With the exception of the behavioural order, explained in chapter 4.
[143] Uit Beijerse 2009, p. 316.

therefore contribute to the realisation of the objective on which the pre-trial detention it is grounded, namely:

- Shocked legal order
- Risk of recidivism
- Risk of absconding
- Risk of collusion (harming the investigation)
- Expedited proceedings against suspects of unsettling crimes in public areas or against public officials.

It is in particular difficult to imagine less intrusive measures that can prevent collusion or diminish the shock that an offence threatened with an unconditional prison sentence of 12 years or more caused to the legal order. To repeat the judge we already cited in chapter 6: a suspension of pre-trial detention based on these grounds suggests that the grounds have been applied in the wrong way and that there actually is an 'improper remand'. The real issue with regard to these grounds is therefore that they are actually applied more broadly than a strict legal interpretation would allow for. Given this reality, it is probably possible in some cases to use less intrusive measures than pre-trial detention to realise the real objective the judge has in mind.

Much consensus exists on the opinion that alternatives (conditional suspension) can reduce the risk of recidivism and, to a lesser extent, the risk of absconding. The availability of alternatives can therefore result in reduced application of pre-trial detention based on one of these grounds. Also with regard to these grounds, the fundamental problem is that they are so widely interpreted that it is difficult to judge if an alternative for detention meets the subsidiarity ground or not. When the recidivism ground in the context of the pre-trial decision is strictly interpreted as 'recidivism until the hearing', as several of our respondents do, the room to apply alternative measures is much more restricted than when a broader interpretation is applied ('recidivism in the foreseeable future').

To answer the question if a condition is in accordance with the subsidiarity principle, it is therefore necessary that the judge clarifies in every individual case which exact aims he/she wants to serve with the pre-trial detention and, if these aims are compatible with the legal grounds for pre-trial detention, if the conditions attached to a suspension are suitable to serve those particular aims.

While a lot of our respondents have a willing attitude towards suspension under condition as an alternative for pre-trial detention, several practical issues are mentioned to stand in the way of a broader use of these alternatives. We will elaborate on this in the next paragraph.

7.4 Opportunities and obstacles

General

We have established that the judge can consider replacing detention in the pre-trial phase by a less intrusive measure, but only if he/she has concrete information about the availability of such an option as well as guarantees that the conditions attached to the release provide a solid alternative related to the ground of the pre-trial detention (such as preventing recidivism). This information, however, is often difficult to get in an early stage of the investigation. As mentioned before, a (preliminary) probation report is not always available at the hearing before an investigation judge. Even if a report is available it often misses crucial information. If a probation report is not available, the defence lawyer is expected to deliver the necessary information:

> "But you have to be able to explain the examining judge: In case you suspend, this is going to happen. He can stay somewhere, people will look after him." (DL4)

The defence lawyer also has to deal with several obstacles. Respondents mention three interrelated obstacles when trying to realise alternatives for pre-trial detention: time, capacity and information. Many practical issues are mentioned. The fact that many social workers have a confidentiality obligation and are not willing to share information for that reason, even not in case the suspect gives permission. Even if they are willing to share information, they ask for money, after which the defence lawyer has to discuss with his/her client who is going to pay for that information (DL1). They need names and addresses to make concrete appointments, but the client doesn't know this information by heart and has to hand in his/her phone at the prison door (D7). Suspects often don't give permission to approach referents, in particular not if the defence lawyer knows him/her only for a short time and a relationship of trust is still missing or developing (DL7, PO6). Capacity issues arise when a more intensive behavioural intervention or treatment is necessary. Clinics often have waiting lists, but even a simple intake cannot be realised within the three days before the hearing before the investigation judge. The practical time pressure was described to us in length by probation officers and defence lawyers:

> "They [prosecution service, eds.] have three days to hold a suspect at the police station. After 2.5 days, they decide that they will bring a suspect before the investigating judge. By that time, it is often 3 o'clock in the afternoon. Then, we still have to look for the right file, and have to go there. We arrive at the police station at 4 pm. After we had a conversation, we still have to type the report. You often see that colleagues do that in the evening or very early in the morning. Not a very good timing to do research." (PO2)

> I: "And when will the suspect be brought before a judge?"
> R: "This is often already the next day. For that reason, it is very difficult to collect information in such a short time. It often happens that colleagues spoke to somebody in the evening or at the end of the afternoon and the next morning yet are stressing to try to reach somebody. And the report has to be send out, because the suspect is brought before the examining judge already in an hour or so." (PO8)

Electronic monitoring

The use of electronic monitoring (EM) in the context of pre-trial detention has increased in recent years. In 2016, it was applied 345 times in the context of a suspension of pre-trial detention.[144] In relative numbers, EM is still used only in exceptional cases (in 2016 13,500 suspects were put into pre-trial detention; see chapter 1). Earlier research showed that the main causes for the reluctant use of EM in the pre-trial phase were that judges said they were rarely advised to impose EM and that EM had a bad reputation in the eyes of the prosecutors who associated it with all kind of technical problems and failures.[145] The association with technical failures seems to have disappeared in this study, but we still came across a huge lack of knowledge and initiative. The initiative to apply EM in the pre-trial phase usually comes from the defence lawyer. Defence lawyers who are really active in this field are rather positive about the results:

[144] Annual Report Dutch Probation Service 2016, p. 24.
[145] Boone, Van der Kooij & Rap 2017, section 3.

> "I always succeed. As soon as I have a positive report for EM, I always succeed." (DL4)

Other defence lawyers are more reluctant, however:

> R: "Electronic monitoring I see much less. I see it with colleagues, sometimes, but it is not a condition that is used very often."
> I: "What do you think the reason is?"
> R: "The practical implementation I assume. I also think judges are not very much aware of this possibility."
> I: "The Probation Sservice does not advice it either?"
> R: "No, I never saw it. It happens in the phase of conditional release [after sentencing, eds.], but not in this phase." (DL3)

That EM is not at the front of the prosecutor's mind when deciding on suspension is illustrated when one of the prosecutors we interviewed for our report realises that one of the cases he has to handle shortly would have been very suitable to suspend with EM:

> "Coincidentally, I just discussed a case with the *'parketsecretaris'* [clerk, eds.] which will be on a pro *forma*-hearing next Monday. A domestic violence case, behaviour that typically never stops. But, we only realised five minutes ago, that this would be a case, that it would actually be a good idea to apply electronic monitoring in this case, because he returns to her all the time. But, it's Friday now, this case will be in court on Monday, that is not going to work, we won't get that realised anymore. But, this would have been an example that would really have been a good idea in this case." (PP1)

In this context, the idea of one of the defence lawyers (DL4) to introduce a standard prescription that prosecutors have to investigate the possibility of EM in case of pre-trial detention is maybe not such a bad idea.

Defence lawyers agree that realising EM is complicated and takes too much time. It necessitates a report by the Probation Service. This organisation will then have to conduct a feasibility study at the house of the suspect.[146] As stated earlier, the defence lawyer can't take the initiative to ask for a probation report, only the prosecutor or judge can give an assignment.

> "You have to move heaven and earth to get a report from the Probation Service. (…) And there aren't that many contraindications: if someone has a house and has means to sustain himself then EM is an option. But you just have to make sure to set the procedure in motion, which is hard if the public prosecutor's office won't cooperate." (DL5)

Altogether, it takes at least five days to organise EM, which makes it impossible to apply in the stage of the hearing before the examining judge. Consequently, the judge may then feel that he/she has no other option than to order remand in custody for 14 days in order to allow for a report on the EM to be drawn up. Some respondents mention that the judge will sometimes arrange for some kind of scheme in which he/she will suspend the pre-trial detention as soon as the EM-system is up and running (DL4, PP8, J1, J4).

[146] Boone, Van der Kooij & Rap 2017.

Probation officers confirm the complexity and time-consuming character of the investigation:

> "The problem is, that we need enough days to investigate this, the electronic monitoring. And the client has to give permission you know. The client has to say, ok I want to cooperate, I have a fixed address and my parents also want to cooperate, in the case he lives with his parents. Afterwards the house needs to be checked and we also have to check if he doesn't have debts. So, altogether, it is rather complicated" (PO6).

Although it is formally also possible to ask for a suspension of pre-trial detention in the phase between the examining judge and the hearing in the court in chambers, as we explained in chapter 6, this doesn't happen very often and the result is that EM only plays a role in most cases from the moment that the case is dealt with in the hearing(s) before the court in chambers.

Financial bail

Although financial bail is the only alternative for pre-trial detention that is explicitly mentioned in the CCP, earlier studies show that it is almost never used.[147] In the 109 hearings Crijns et al. observed, it was never applied.[148] The arguments mentioned in both studies were that judges are unfamiliar with the alternative and the way it could be applied and are afraid it will result in class justice. In our study, we find some support for financial bail as an alternative for pre-trial detention. But a first practical problem that is mentioned by the defence lawyers is that most of the defendants don't have any money to offer as a deposit. If they do have a substantial amount of money available, however, this can easily strengthen the suspicion against him/her, in particular in cases of property crimes. This puts defence lawyers in a dilemma as to the amount of money they should offer for their client to raise:

> "How can he get to fifteen thousand euros? So, you do not want to propose such an amount of money, but if you're going to say: "well, he can borrow five hundred somewhere", they [the judge and/or the public prosecutor, eds.] are never going to accept that either of course. So, it is also a bit of a split." (DL5)

Several respondents do have experience with financial bail, however, although only incidentally. In particular, cases in which the suspect has a foreign nationality are mentioned. The deposit is used in these cases as an additional incentive to return to the Netherlands for the hearing. What helps a lot, according to one of the defence lawyers who successfully proposed bail in a number of cases, is that you tell the judge exactly how it works, including the account on which the money has to be deposited (DL4).

One of the examining judges we interviewed is explicitly enthusiastic about using bail and gives many examples, in particular of cases in which flight risk is used as a ground for pre-trial detention. The most pressing issue, according to him, is how to assess the amount of money which makes somebody come back without bankrupting him/her, since often little information is available about the financial position of the suspect. He, again, sees an important role for the defence lawyer in this respect:

---

[147] Council for the Administration of Criminal Justice and Youth Protection (*Raad voor de strafrechtstoepassing en jeugdbescherming, RSJ*) 2011, Polman 2015, Crijns, Leeuw & Wermink 2016.
[148] Crijns, Leeuw & Wermink 2016, p. 37.

"Now, I see awareness growing in this respect. It would help a lot if defence lawyers would learn in their training that they should use the three days before the hearing, not only to collect letters from the family and a contract of the employer, but also to sit together with their client and discuss: what if financial bail becomes an issue, what could you offer? What could your family contribute? Can I call your mother? (…). I think if they would be prepared on that in their training, they really could be a driver. If we receive a request three times a day, we will start with developing a guideline within a few months. Because you have to have an opinion about it than or you should at least be able to say no against it if you really don't want it." (J6)

Treatment

As has already been discussed in chapter 6, the need for treatment is often mentioned by respondents as a reason to suspend the pre-trial detention (or even apply it in first instance). A first condition is, however, that the problems are recognised and the right authorities are available to make a diagnosis. Even if these conditions are met, the obstacles that stand in the way of realising the use of alternatives for pre-trial detention (mentioned earlier in this chapter) surface even more urgently when it comes to realising treatment. Again, it is mostly the defence lawyer who initiates the investigation to this possibility, but in case of more serious and visible mental incapability or an addiction, the Probation Service will be involved to write a pre-trial report. All respondents mention time pressure and lack of capacity as major problems:

I: "Does everything have to be arranged before the suspension can be realised?"
R: "Yes, often is has to. But it is really a lot of work, because of the waiting lists. To be successful, you should actually meet a probation officer who is very committed to your client and really tries everything he can to realise it. In that case it happens sometimes. But it really is very difficult." (DL3)

I: "But you say, clinical treatment is impossible, because we cannot organise that within three days. But can you organise it within 14 days?"
R: "No, the judge wants that sometimes, because we do receive such requests once in a while. The Court in chambers request a report within a week, because somebody has to be admitted to a clinic. Forget it. You have to write advices. Place is lacking, intake, diagnostics. It won't work. I would want it to work, because in some cases the need is very visible. But, in particular in the case the suspect him or herself doesn't want to be helped, it is impossible." (PO2)

7.5 Monitoring and responses to non-compliance

An important question is how conditions are monitored and what responses will follow if a suspect violates these conditions. The Prosecution Service is responsible for supervising conditions that are applied in the pre-trial detention stage.[149] The enforcement of conditions is part of the general supervising responsibilities of the police. According to a prosecution guideline, the Prosecution Service notifies the police of the conditions that are imposed and indicates which actions are expected from the police.[150] Also, the Probation Service can be involved in monitoring the conditions applied in the context of a suspension of the pre-trial detention, but only in cases where it has received a formal assignment of the Prosecution Service or the judge. The Prosecution Service remains responsible, however. According to the

[149] Aanwijzing voorwaardelijke vrijheidsstraffen en schorsing van voorlopige hechtenis onder voorwaarden, *Stcrt* 2015, 5390.
[150] *Stcrt* 2015, 5390, section 3.5.

prosecution guideline mentioned above, committing a new offence 'can result in the termination of the suspension or a request for a new remand order, depending on the nature of the offence and the special conditions'.[151] Violating one of the special conditions of the suspension can result in an order of the Prosecution Service to arrest the suspect and a request to the judge to end the suspension of the pre-trial detention. Both the judge and the prosecutor, however, have huge discretionary powers in this respect.[152] In case the suspect is also supervised by the Probation Service, the service should inform the Prosecution Service when conditions are violated. This procedure is not very protocolled, though. When electronic monitoring is added to a suspension order, the monitoring officer receives a notification should the suspect violate his/her location ban or order or tamper with the equipment. The monitoring officer uses a protocol to determine which party needs to be informed. In some cases, the monitoring officer may contact the suspect, for example to urge him/her to leave an exclusion zone. In case of a specific victim the police may be called in to protect the victim (this element is further addressed below). In other cases, the monitoring officer informs the probation officer who may contact the suspect immediately or the following day. Depending on the severity of the violation, the probation officer may inform the prosecutor.[153]

Our research wasn't robust enough to give a general picture of the extent to which suspects comply with the conditions and of the responses to violations. Some actors are only confronted incidentally with this situation, while probation officers did not always seem to make a clear difference between supervising conditions in the context of a suspension of the pre-trial detention and supervising conditions in another context. Responsibilities and procedures seem to be further worked out when electronic monitoring is added to a suspension order. In general, we did not get the impression that conditions are monitored very intensively. In cases of location orders or location bans without electronic monitoring, the extent to which violations become known depends in a great deal on the notifications of directly involved civilians (victims, shopkeepers etc.) to the police. Violations happen and can result in a termination of the suspension order, so much is clear. But respondents also give examples of cases in which a violation of the conditions resulted in an alteration of the suspension order (art. 81 CCP) or simply a continuation of the suspension order.

One prosecutor (PP8) describes the dilemma of, e.g., incurable addicts that get a conditional suspension of pre-trial detention on the condition that they do not use drugs and/or alcohol. The chances that they will not comply to this condition are very high. At the same time, the crimes that these people commit will likely not lead to long prison sentences. So, with the anticipation requirement in mind, actual execution of pre-trial detention is also not really an option.

> "You can end up in a weird situation where sometimes you didn't really think about it and just followed the advice from the Probation Service to ask *inter alia* for a ban on alcohol and/or drugs, even in cases where you know that the suspect actually has a pathological problem and couldn't possibly comply. And then, obviously, from a urine test it appears that someone didn't comply with this condition whereas at the same time he does comply with the other conditions and actually is doing relatively well. And then we do nothing, which is a bit of a two-fold message: you won't act if someone does not comply, which of course is undesirable. I think we may sometimes ask for a ban on alcohol or drugs too easily. (…) In theory, all those conditions seem very good, but in practice they sometimes just bother you."

[151] *Stcrt* 2015, 5390, section 3.6.1.
[152] Silvis & Van Oort 2015.
[153] Boone, Van der Kooi & Rap 2015.

7.6 Replacing pre-trial detention or aggravating suspension?

In the context of the use of pre-trial detention as *ultima ratio*, a crucial question is of course whether (and if so, in how far) alternatives for pre-trial detention really replace pre-trial detention or if they only contribute to the use of supervisory measures in the pre-trial phase. In the latter case, strict supervision of conditions applied to the suspension of pre-trial detention can in theory even result in more pre-trial detainees.[154] Reliable statistics that can help us to answer this question do not exist. As described in chapter 1, we observe a decline of the number of pre-trial detainees together with an increase of the number of suspensions, which says nothing about the relation between these two developments of course. From the literature, we know that a high rate of prisoners often goes together with high levels of supervision in the community.[155] This points at a reversed relation and a potential net widening effect of alternatives for detention, but we also have examples of the opposite.[156]

In chapter 6 we already differentiated between three types of cases with regard to the decision to suspend. We have the impression that in type 2-cases (cases that are possibly eligible for suspension), the availability of an alternative could absolutely make the difference between continuation of pre-trial detention or not. We also distinguished type 3-cases, however, in which pre-trial detention is applied just for the reason to suspend it conditionally, a clear example of net widening. In these type of cases, violation of the condition and subsequent pre-trial detention could potentially lead to an increase of pre-trial detainees.

7.7 Conclusion

Within the criminal justice system, alternatives for pre-trial detention can only be applied within the framework of a suspension of the pre-trial detention, with the exception of the behavioural order that can be applied by the prosecution order outside the scope of the pre-trial detention (chapter 4). Inherent to this system is that pre-trial detention is not used as a last resort. Instead of looking at the less intrusive measures first, the most severe measure has to be applied before less severe measures can be considered. From a legal perspective, the use of alternatives for pre-trial detention should be in accordance with the subsidiarity principle. Alternatives should (only) be used in case they can fulfil the underlying goals of the pre-trial detention in a less intrusive way than detention does. It is difficult to imagine that this condition is met when pre-trial detention is applied on the ground of collusion or the shock that an offence threatened with an unconditional prison sentence of twelve year or more caused to the legal order. Much consensus exists, however, on the opinion that less intrusive measures can reduce the risk of recidivism or absconding. The availability of alternatives can therefore result in reduced application of pre-trial detention based on one of these grounds. The judge, however, only considers replacing detention in the pre-trial phase by a less intrusive measure, if he has concrete information about the availability of such an option and how it can be applied. Lack of time, capacity and information are mentioned by respondents as interrelated obstacles to realise these alternatives in time.

[154] Boone & Maguire 2017, p. 4.
[155] Phelps 2013, p. 51-80.
[156] The stabilisation of the remand population in England and Wales and the modest decline of the Belgian Prison Population since 2015 seemed to have been influenced by the use of electronic monitoring, for example (Hucklesby et al. 2016, p. 10).

8 Procedural safeguards/appeal

8.1 Introduction

An important safeguard in the Dutch pre-trial detention practice lies in the procedure following the remand in custody. As discussed previously, remand in custody can continue for a maximum of 14 days (art. 64 CCP). The public prosecutor who wishes for the pre-trial detention to continue afterwards will have to request the court in chambers for a detention in custody-order. The court in chambers will hold a hearing in the presence of the suspect, his/her lawyer and the public prosecutor, after which it will decide straight away on an eventual order for detention in custody. Detention in custody can be ordered for a maximum of 90 days (art. 66 CCP), after which the trial court should start hearing the case. The court in chambers can order this 90 days term straight away, but it can also initially order a 30 or 60 days term, which implicates that, on the initiative of the public prosecutor, a new hearing will have to take place after the initial term before the order can be renewed for another 30 or 60 days. After these 90 days (so 104 days after the order for remand in custody), the trial against the – by then – defendant will have to start. In reality, most complex investigations will not have been finished by then, which leads to so-called *pro forma* hearings, where the trial court will hear the case for no other reason than to decide on the continuation of the pre-trial detention, which it can then extend for 60 days on each occasion. At each of the hearings, both the defence and the public prosecutor can argue the (dis)continuation of the pre-trial detention or the suspension of its execution. On each occasion, the court in chambers, and later on the trial court, will have to give a written and substantiated decision.

An important exception in this regard is made for cases in which there is a suspicion for terrorist crimes: after the first 90 days, the court in chambers can extend the pre-trial detention during 2 years, with a maximum of 90 days at a time.

At all times, in addition to the hearings in connection to the order for (extension) of pre-trial detention, the suspect can request for termination of the pre-trial detention (art. 69 CCP) or for the suspension of the execution (art. 80 CCP). In general, changed circumstances will be put forward to substantiate these requests. The request will be heard by the court in chambers.

Possibilities to appeal against a decision on pre-trial detention are limited. The order for remand in custody by the examining judge cannot be appealed. Only one appeal against an order for (extension of) detention in custody by the court in chambers or the trial court is possible. Also, decisions on the request for termination of pre-trial detention and/or suspension of the execution can be appealed only once. The appeal shall have to be lodged at the Court of Appeal and will be heard by the Court of Appeal in chambers.

In this chapter, we'll mainly describe the procedure surrounding the (extension of) the order for detention in custody by the court in chambers. Firstly, the procedure before the court in chambers, i.e. the hearing, is described. Questions that are addressed in this part are: how does the hearing take place, who are the players involved in this decision-making process and what is their role? After this, the focus will shift to the content of the decision-making process, focusing on the legal grounds for detention in custody as given in article 67a CCP, their meaning in practice, their interpretation, evaluation and the motivation provided by the court in chambers when it decides to apply detention in custody in a specific case. We'll briefly discuss the appeal procedure. Finally, a conclusion will be provided.

8.2 The procedure before the court in chambers

A first interesting observation from one of the public prosecutors is that the administration at his office is organised in such a way that the procedure for detention in custody will automatically be initiated when an order for remand in custody has been given by the examining judge.

Should the prosecutor find that, after 14 days, there is no need for an extension of the pre-trial detention, action must be taken to end the new procedure, which strikes him as a bit odd (PP3).

Previous research showed that the hearing in chambers is much shorter than the hearing before the examining judge.[157] Our respondents confirm these findings. The hearing mostly takes no more than five to ten minutes. It's very likely that at one session of the court in chambers, 20 to 30 pre-trial cases will be heard.

The court in chambers consists of three judges. Other than at the hearing by the examining judge, a public prosecutor will be present at the hearing in chambers. However, most respondents confirm that in most cases this prosecutor will not be the prosecutor that is actually dealing with the case: one prosecutor will handle all the hearings in one session and as such he/she will have gotten short briefings from his/her colleagues for each case. There is the rare exception, though, when a prosecutor will insist on handling the hearing for his/her own case, especially when it's complicated (e.g. PP8). This leads to the finding, especially by lawyers, that the public prosecutor present at the hearing has no detailed knowledge of the case, other than the briefing he/she got. This leads to mixed feelings by both the lawyers and the public prosecutors. On the one hand, a lawyer (DL4) finds that it can be of advantage that the prosecutor isn't as well-informed on the case as the lawyer. On the other hand, other lawyers (DL6, DL8) regret that nuances may get lost in translation. Some public prosecutors and judges also acknowledge that it's not ideal (PP1, PP6, J3). Also, on the one hand, prosecutors have to provide information at a short notice about one of the many cases they are dealing with at that time, which doesn't always allow them to really delve into the details. One of the prosecutors put forward the view that it's likely that his clerk might know more about the case than him (PP2). On the other hand, the prosecutor who will be present at the session at the court in chambers will have to prepare all the cases in a short period of time (again: up to 20 or 30 cases per session is no exception) and as such there simply is not enough time to thoroughly get to the bottom of each individual case.

Another observation made by some of the lawyers is that the short duration of the hearing does not allow for a long plea and that it can be practical to write down your arguments and send them to the court in chambers shortly before the hearing, so that the judges can read them while preparing the hearing:

> "That way there's no need for long oral pleading" (DL4).

The fact that dozens of cases are heard in one session of the chambers in court and that there is only limited time to prepare the case implies that the judges do not have a lot of time to get a thorough look at each case. One of the judges (J3) we interviewed acknowledged this and explained that it's not unusual when a clerk prepares the case and makes a summary of the most important parts of the case-file, which enables the judges to swiftly familiarise themselves with the casefile.

These observations (dozens of hearings in one session, very short time span per hearing) suggest a mostly superficial approach to the hearing by judges and prosecutors involved. The Netherlands Institute for Human Rights has pointed out that courts in chambers often simply refer back to the decision of the investigating judge (see chapter 1). Indeed, among the lawyers in our research, some feel that it's quite hard to get the court in chambers to distance themselves from the decision made by the examining judge:

[157] Crijns, Leeuw & Wermink 2016, p. 25-26.

> "I think they take that as the starting point of their decision and that it has considerable weight. We see that later decisions often refer back to the first decision by the examining judge. (…) The examining judge really hears the suspect, the court in chambers will not extensively hear him again." (DL6)

On the other hand, other lawyers feel that their pleas are heard and that the court in chambers makes a new assessment (DL3, DL4). Judges and public prosecutors also explain that it really is a procedure that allows for new deliberation:

> "Of course, we have the decision on remand in custody and the grounds on which that order was based, but we really look at all that again: is there a grave suspicion? Do we also acknowledge the grounds?" (J1)

A public prosecutor explains that, especially when the case file for remand in custody wasn't very convincing, there will be a real need for a more thoroughly substantiated request, even when the time between the hearing by the examining judge and the hearing by the court in chambers can, in practice, be limited to not more than one week (PP7). Another public prosecutor explains that on the one hand, both the lawyer and the public prosecutor will have their say on the grounds put forward in the request, but on the other hand that there hardly ever is an extensive debate:

> "If they don't think that the grounds are there, they'll just deny the request." (PP1)

Another public prosecutor adds that, in his perception, the hearing at the court in chambers is the moment where all parties have properly studied the casefile and that this really can lead to changes (PP6).

8.3 The grounds for detention in custody

Because the procedure before the court in chambers follows so quickly after the procedure before the examining judge, a significant change in potential grounds for pre-trial detention is not something that occurs often. Therefore, much of what has been said about the grounds for pre-trial detention in the previous chapters of this report still applies here. That said, the relevance of the fear for obstruction of justice, in particular, can change over time. If the prosecutor puts forward this ground, the court in chambers might choose to order detention in custody for 30 days or 60 days, rather than ordering 90 days straightaway. This will allow the court in chambers to evaluate the progress of the investigation and decide on the need for its continuation (DL2, DL5, PP1). Most of the respondents agree that at some point the relevance of this ground expires and that the decision by the court in chambers or the trial judges will also depend on the expediency displayed by the public prosecutor, although one of the lawyers claims that it can take very long before judges accept that the public prosecutor doesn't give enough priority to a swift research (DL5). It rarely happens that the fear for collusion is the only ground for pre-trial detention (J1), but as we already mentioned in the previous chapters, the abandoning of this ground at some point in the procedure is likely to influence decision-making on possible suspension of the pre-trial detention (also DL2), which we'll delve into in the next section.

As for the other grounds for pre-trial detention, most respondents say that the appreciation of these grounds is not likely to change in the court in chambers or during the *pro-forma* hearings.

8.4 The length of detention in custody

Detention in custody can be ordered for a maximum of 90 days (art. 66 CCP), after which the trial court should start hearing the case. The court in chambers can order this 90 days term straight away, but it can also initially order a 30 or 60 days term, which implicates that, on the initiative of the public prosecutor, a new hearing will have to take place after the initial term before the order can be renewed for another 30 or 60 days. The legislator has chosen this system so that in cases that are very serious and in which the results of the investigation are very strong (e.g. a murder case with a suspect who has already confessed in full), the court in chambers can order detention in custody for 90 days straight away. In other words: if the court in chambers doesn't foresee any substantial changes that would lead to debate on the lawfulness and grounds for pre-trial detention, it can order 90 days. In literature, there doesn't seem to be much elaboration on this topic and significant case-law hasn't emerged either. The court in chambers seems to have a lot of discretion.

There is quite a variety of experiences that our respondents share with us. Among the lawyers there seems to be a general feeling that prosecutors will mostly ask for 90 days at once. Most of the prosecutors acknowledge this (PP1, PP2, PP3, PP4) although some prosecutors state that, especially in cases where the fear of collusion-ground is used, they will ask for 30 or 60 days (PP7, PP8). One of the prosecutors puts forward the view that there can be differences between regional courts: one court will use 90 days as a starting point and only depart from that when there are sufficient reasons. Another court will, for example, always limit the order to 30 days in cases with the fear of collusion-ground (PP5).

One of the lawyers mentioned that she felt that lately the court would vary more than before:

> "In my idea, it's not always 90 days at once anymore. If there really are reasons to ask for a probation report that could support a suspension, then you see that the court in chambers will order 30 or 60 days. (…) Public prosecutors will always ask for 90 days. No prosecutor will say: 'let's do 30 days to begin with'. I find that they are quite firm." (DL3)

Another lawyer still feels that an order for 90 days is pretty much the norm these days, although she also thinks there can be differences between regional courts (DL6).

Two prosecutors mention a tactical reason to ask for 60 days rather than 90. After 60 days, the investigation may have generated information that could substantiate the suspicion of more crimes than the one(s) a person is already held in pre-trial detention for. The number of suspected crimes the order for pre-trial detention is based on can consequently be expanded, which can contribute to more certainty as to the extension of pre-trial detention orders in the phase of *pro forma*-hearings (PP1, PP2). After the 90 days have passed, such an expansion would not be possible anymore. Other respondents made no mention of this specific tactic.

All in all, we feel that in most serious cases in which the investigation has already provided adequate incriminating material against the suspect, an order for 90 days is quite common. Exceptions mentioned in this regard are the need for additional reports in order to deliberate on a possible suspension or the wish to monitor the progress of the investigation. These situations could cause the judge (and perhaps also the prosecutor) to take an order for 30 or 60 days as a starting point.

8.5 Suspension

In previous chapters, we have reflected on many aspects of suspension of the execution of pre-trial detention. Most respondents acknowledge that the amount of time since the start of the investigation will have an impact on the willingness of the judges to allow for a suspension of the pre-trial detention. From that point of view, periodic review of the pre-detention is indeed a remedy.

At the same time, the research of Crijns et al. shows that the examining judges suspended pre-trial detention in 16% of the cases, while the court in chambers suspended pre-trial detention in 13% of the cases.[158] This doesn't really suggest that within the time-frame of the first 104 days there is a significant increase in chances of suspension of pre-trial detention. Our respondents also provided a mixed image in this regard. Some suggest that the best chances for a successful request for suspension are to be had in front of the court in chambers, rather than before the trial court at a pro-forma hearing (DL3, PP3). Another lawyer's experience is quite the opposite:

> "Once he's been inside for 14 days, it's easier to leave him there." (DL5)

All in all, it's not really possible to distinguish a specific moment in the pre-trial proceedings that provides the best opportunity for the suspect and his/her lawyer to request a suspension.

That said, most respondents suggest that a more prolonged continuation of the pre-trial detention will eventually make the judges more willing to suspend the execution of the pre-trial detention (also see chapter 6). While the grounds for pre-trial detention (most often: fear of reoffending or fear for serious upset of the legal order) are mostly still deemed to be present, it is the weighing of interests that is different. The court (in chambers) weighs the interest of the release of the suspect against the interest of public safety requiring immediate deprivation of liberty, and that assessment may result in the benefit of the suspect. This practice raises the question if it wouldn't be more correct to simply lift the order for pre-trial detention, as apparently the public interest is not at stake anymore. However, as discussed earlier in this report, it is much to the frustration of a lot of lawyers that these decisions are hardly ever substantiated. It is therefore quite difficult to really get behind the assessment that the court has made. This is especially true for the decisions where the request for suspension gets rejected.[159]

> "It's my impression that, if they reject a request from the public prosecutor, they tend to give some more reasoning to the decision than they do when they reject something from the defence lawyer. But still it is very summarily. It won't make you feel like: 'OK! Now I know what the main point is'." (DL6)

As has also been discussed earlier in this report, some measurements have been taken to improve the substantiation of these decisions. During our research, some of the respondents (e.g. J6) addressed these measurements and seemed to acknowledge that, very gently, some improvements became visible, most notably the decisions of the Court of Appeal in Amsterdam, who have really made a point of substantiating and then publishing their decisions on pre-trial detention cases.

As to the chances of success in a request for suspension, both lawyers and public prosecutors put forward the opinion that substantiated arguments regarding personal circumstances of the suspect can be of pivotal importance. After some time, for example at the hearing before the court in chambers, more information is available to allow for a framework of conditions that

[158] Crijns, Leeuw & Wermink 2016, p. 36-37.
[159] Crijns, Leeuw & Wermink 2016, College voor de Rechten van de Mens 2017.

both facilitate release of the suspect and prevent the risk of reoffending. The lawyer properly knows the case-file and he/she has been able to gather relevant information, such as a tenancy agreement or an employment contract, to substantiate that his/her client has a regular daytime activities.

> "That's when all the cards are on the table and that's the moment where a suspension certainly is possible." (PP7)

Another public prosecutor puts forward the view that, also to his regret, it really depends on the initiative of the lawyer whether possibilities for suspension will be discussed, as the public prosecutors will not actively seek that option often:

> "As a suspect, you sometimes really are left to your own devices: if you have a lawyer that's not active, you'll be inside for 90 days just like that. (…) If someone got an order for 90 days it doesn't happen very often that a prosecutor would take the initiative to file for a suspension in between." (PP3)

Active lawyers will benefit from informal consultations between the lawyer and the prosecutor: if the lawyer can get a prosecutor to agree on suspension of the execution before the hearing, then it is of course easier to sway the judges in this regard (PP5, PP6, DL3, DL4, DL5). All in all, it can always be a good thing if a lawyer will draw the prosecutor's attention to this specific case:

> "It can urge you to ask for a (new) report by the probation office. (…) A lawyer can bring things to your attention that you might not have thought of otherwise. Also, he can provide arguments that substantiate the need of a suspension, information that, even as a prosecutor you just don't have by default. (…) I would certainly contact the prosecutor if I were a lawyer." (PP5)

The possibility to request the suspension of the pre-trial detention (art. 80 CCP) outside of the regular hearings regarding the pre-trial detention is very important. If the lawyer has compiled all the necessary information to substantiate a request for suspension of pre-trial detention, he/she doesn't have to wait for the next regular hearing.

It is clear that as time goes by and more relevant information comes available, chances for a suspension of the execution of the pre-trial detention become higher. As has been pointed out in chapters 6 and 7, there is an important role for the lawyers in this regard: they are the ones who have to compile the information that can prove to the judges that on the one hand the suspect has proper daytime activities such as a job, that he/she has a family to support and/or a house to pay for and that, on the other hand, there is a risk of losing the job, and/or the house, which might put the family at risk (J6).

8.6 Probation Service

Not all necessary information for a suspension can be compiled by the lawyer. Information on special conditions like electronic detention, mental health care, addiction treatment etc. will mostly have to be provided by the Probation Service. Probation officers give mixed reactions when asked about their involvement in the phase after the initial order for remand in custody. As mentioned in chapter 6, they will usually provide a preliminary probation report very shortly after the arrest of the suspect (*vroeghulp*, which means 'pre-trial assistance'). After that, they mostly do not get consulted again before the actual hearing on the merits of the case

by the trial court. While requests for additional reporting in the context of a hearing before the court in chambers for the purposes of a possible suspension of the case are not uncommon, it's not something that is done in the majority of the cases. This leads to a paradoxical situation. The time before the hearing by the examining judge is often too short to gather enough relevant information to substantiate a request for suspension of the execution. This often leads to superficial pre-trial assistance reports. However, once the order for remand in custody has been given and more time becomes available to the Probation Service, no additional undertakings are done unless specifically ordered. Two explanations can be given for this paradox. Firstly, even when the period of time between the hearing before the examining judge and the hearing before the court in chambers might appear quite large (in theory 14 days), in reality it's much smaller, because hearings before the court in chambers mostly take place only once a week. Also, the work at the Probation Service is not organised such as to give priority to additional reporting in this stage of the pre-trial proceedings. This means that requests for additional reporting always come in on top of other duties, which doesn't allow for swift action.

Another difficulty in this regard that needs addressing is that lawyers have no direct relationship to the Probation Service. As mentioned in chapters 6 and 7, they are dependent on the public prosecutor to order more reporting from the Probation Service. Of course, the process of approaching the public prosecutor, persuading him/her to call on the Probation Service and the subsequent order of the prosecutor to the Probation Service can take up quite some time.

8.7 Appeal

Apart from the legal obligation of periodical review of the necessity of pre-trial detention, there is also the option to appeal the decisions concerning the detention in remand by the court in chambers or the trial court. One of the Courts of Appeal hears these appeals. The public prosecutor's office is represented by advocates-general. One important restriction applies: a suspect can only appeal once against an order for (extension of) detention in remand. Similarly, he/she can only appeal once against the rejection of a request for suspension of the execution of pre-trial detention. The information we gathered in our research on this topic was rather scarce, as we didn't speak to appeal judges or advocates-general. Most lawyers agreed that the appeal procedure often was rather frustrating, as, again, the hearings would be very concise, the appeal judges would be very formalistic and the decisions would hardly contain any substantial reasoning.

> "One of my colleagues [a rather famous Dutch lawyer, *eds*.] compares it to talking to three chestnut trees. And that's really what it is. They'll have the attitude: 'why are you here? Everything is obvious, isn't it?'." (DL2)

> "It's the most atrocious procedure I know of." (DL7)

Again, it's important to recall the discussion mentioned in chapter 1, which led to a programme that should lead to improvements. The approach of the Amsterdam Court of Appeal mentioned earlier in this chapter is an example of that.

8.8 Conclusion

There has never been much discussion in the Netherlands about the availability of adequate safeguards in the procedure leading to pre-trial detention. That is not to say that it is undisputed that these safeguards offer an effective remedy to certain shortcomings in the procedure as assessed in the previous chapters. In our research it became clear that, due the rather short

interval between the remand in custody and the detention in custody, the latter is mostly seen as a logical and often inevitable continuation of the pre-trial proceedings. While on paper, the hearing before the court in chambers offers a more thorough approach, by three judges rather than one, the practice does not fully represent that image. The large scale of the sessions (30 hearings per session are not uncommon), the brief hearings and the concise decisions without much particular reasoning suggest an assembly line rather than a thorough individual approach. Indeed, our research did not provide us with information to suggest that the Courts of Appeal depart from the decisions by the examining judge on a large scale, especially not regarding the grounds for pre-trial detention. Particularly in cases where the court in chambers will decide a 90-day period of detention in custody, the question may be if a real remedy is actually provided for – especially since the appeal procedure before the Court of Appeal seems to suffer from the same shortcomings.

However, the responses we got also seem to suggest that lawyers that take the time to invest in gathering relevant information and that provide their arguments beforehand to the public prosecutor and/or the judges really can make a difference. If the lawyer can call individual attention to his/her client's case and thus break through the routines of the procedure, there can be room for a more tailor-made approach. This does not necessarily have to lead to immediate suspension of the execution. However, the court in chambers may be more likely to start with an order for 30 days of detention in custody, to allow the lawyer and/or the Probation Service to provide additional relevant information. This is easier said than done, though. Time is still an important factor, as is the lack of continuity in the involvement of the Probation Service. Lawyers need to get to the bottom of the case. This leads us to the conclusion that, as in all the other phases of the pre-trial proceedings, a lot depends on the lawyer. This is a practice that neither follows from the legislation and its background nor from the case law. These rather suggest that the presumption of innocence, proportionality (is pre-trial detention really necessary?) and subsidiarity (if pre-trial detention is indeed a necessity, are there any alternatives available?) should dictate both the proceedings and the decision-making by the prosecutor and the judge. From that point of view, the seemingly casual attitude that the lawyers are the ones to provide the material for a suspension seems remarkable. Also, it's those suspects that really can prove that there is something at stake for them who will be able to successfully request for a suspension. Those without a job, without a house, without any relevant daytime activities etc. will be hard-pressed to convince the judges that a suspension will not end up in them lapsing into their alleged ill-behaviour.

In the more complicated cases, pre-trial detention can continue for months on end. Even when it may have appeared out of the question at first, it seems that the passage of time plays an important role in the decision of the judges to eventually suspend the execution of the pre-trial detention. The anticipation requirement is not something that is specifically mentioned in this regard, though. The judges will rather decide that the interest of continuation of the pre-trial detention is being outweighed by the interest of the suspect to be released. These decisions aren't always substantiated very thoroughly.

9 Pre-trial detention and European instruments (European Supervision Order and European Arrest Warrant)

9.1 Introduction

Two so-called mutual recognition instruments, the European Arrest Warrant (EAW) and the European Supervision Order (ESO) are relevant for this research. While the EAW seems to be used somewhat regularly within the EU, the ESO is much less known and, as a consequence, the instrument doesn't seem to be used that often (yet). Even the EAW is not common in the daily practice of most of the practitioners we spoke to. Recent research by colleagues from the Utrecht University has shown that, for example, most lawyers are not familiar with the EAW-proceedings.[160] Our research has confirmed these findings: most of the respondents we spoke do not encounter proceedings like these on a regular basis, which is not surprising as we understand that in total around 850 arrest warrants were received by the Netherlands in 2016.[161]

In our research, we didn't get much response on the practice of pre-trial detention in relation to these mutual recognition instruments but we will report on the information that we did receive.

9.2 The European Arrest Warrant

The framework decision on the EAW (2002/584/JHA) is implemented in the Netherlands in the Surrender Act. According to this act, the public prosecutor has the authority to order provisional detention upon receipt of an EAW. In the Surrender Act, this detention is called *'inverzekeringstelling'*, which is the term normally used for police detention. While police detention in regular criminal cases cannot last longer than three days, (art. 58 CCP), in EAW cases, when ordered by a public prosecutor from the Amsterdam department of the public prosecutor's office,[162] the police detention of a requested person whom an EAW has been received for, can last until the day the court decides upon the EAW (art. 21 Surrender Act). This decision on the EAW will have to be made within 60 days after the arrest of the requested person. The Surrender Act also provides for a 'provisional arrest' of a person for whom a so-called Schengen Information System (SIS) signal has been issued (art. 15 et seq.). Until the original and complete EAW has been received, an examining judge will have to decide about continuation of the detention (art. 18). On the grounds of article 64 of the Surrender Act, deprivation of liberty based on the act can be suspended, but the conditions to be set can only address the prevention of flight. While the Surrender Act doesn't hold specific grounds for this custody pending surrender, this provision suggests that the only eligible ground for detention is the risk of flight (PP6). The system of the Surrender Act is extraordinary for the Netherlands, because in the majority of the cases, the public prosecutor can decide upon provisional detention and its suspension without judicial intervention.

One of the public prosecutors we spoke to who specialises in EAW-cases told us that the most important aspect of this detention is to make sure that the requested person can indeed be surrendered and that the Dutch authorities can fulfil their international duties. So, if a person has no connection to the Netherlands whatsoever, it can be quite hard to maintain that there is no risk of flight. Also, the severity of the penalty the requested person is facing after surrender can be a determinative aspect. With regard to the latter aspect it should be noted that there is a variety of cases in which EAWs are issued, some of which are not very serious crimes and/or crimes that have been committed a long time ago.

---

[160] Graat et al. 2017.

[161] Numbers were mentioned during a guest lecture at the Utrecht University by an employee of the Amsterdam District Court, based on preliminary data he got from the Public Prosecutor's Service. We use them with kind permission.

[162] The competent authority for the EAW in the Netherlands.

The public prosecutor needs relevant information to determine a risk of flight of the requested person: information as to the social background of the requested person, whether he/she has a job in the Netherlands and/or a permanent/temporarily address. But the police will not interrogate the requested person on those subjects: they only have to arrest him/her so that he/she is available for the EAW proceedings. The Probation Service doesn't play any role in these proceedings. The hearing by the public prosecutor before the preliminary detention is therefore very important, as it is the only way for the public prosecutor to gather the necessary information.

The specialised public prosecutor we spoke to told us that she felt quite some discretionary power in deciding whether or not a suspension of the arrest would be a realistic option. She pointed out that perhaps the *ultima ratio*-principle of pre-trial detention comes to full justice in the EAW-proceedings, more than in regular pre-trial detention cases. In the past five years, she and her colleagues have developed a more lenient approach regarding the suspension of the detention. In her experience, the number of suspended persons that fail to turn up at the hearing and/or the actual moment of surrender, is low:

> "I think we are pretty much forerunners regarding the suspension. In the EAW-cases it's pretty much: 'suspension, unless'. (…) We trust the people to be present at the hearing before the court and, as a rule, they are. Of course, sometimes they don't show up, which is burdensome, because you'll have to spend resources in order to track them down again. If the requested person is Dutch and has a permanent residence and his whole live is here: where are they going to go? Of course, if people are in a huge criminal network and it appears that they are continuously travelling from Amsterdam to Dubai and Southern America, then we might consider the risk of flight too high. But as far as I'm concerned, people that have been living here for years can continue the tidy life that they are living. I don't even really take their criminal record into account, that doesn't really play a substantial role with regard to the suspension of the detention." (PP6)

These responses seem to suggest that on the one hand Dutch public prosecutors find it very important to be able to comply with the obligations under the EAW framework decision, while on the other hand they don't seem very reluctant to suspend the requested person, as long as there is no risk of absconding. The fact that the Surrender Act doesn't mention specific grounds for the provisional detention seems to imply that the risk of reoffending, collusion and/or public disorder are not considered as circumstances that should play a significant role in the decision-making process.

9.3 The European Supervision Order

9.3.1 Introduction

The framework decision on the application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (Framework Decision 2009/829/JHA) is implemented in a new title of the CCP (Book 5, Title 3; art. 5:3:1 et seq. CCP[163]). The Netherlands will apply all supervision measures mentioned in article 8, subsection 1 of the FD:

[163] The Law on the revision of the regulation of international cooperation in criminal matters (*Stb.* 2017, 246), which will come into force at 1 July 2018, will renumber this title to Book 5, Title 7, art. 5.7.1 et seq.

(a) an obligation for the person to inform the competent authority in the executing state of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings;
(b) an obligation not to enter certain localities, places or defined areas in the issuing or executing state;
(c) an obligation to remain at a specified place, where applicable during specified times;
(d) an obligation containing limitations on leaving the territory of the executing state;
(e) an obligation to report at specified times to a specific authority;
(f) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed.

The Netherlands have also declared (ex art. 9 of the framework decision) that they are prepared to use electronic monitoring as a supervision measure.[164] The Public Prosecution Service has been appointed as the competent authority (art. 6 framework decision; art. 5, section 3, subsection 4, CCP). Within the Public Prosecution Service, the Centre for International Legal Assistance in Criminal Matters – Noord Holland (CILA)[165] has been appointed as the central authority concerning the ESO.[166] The CILA processes all incoming and outgoing requests based on the framework decision and it decides independently on the incoming requests. A public prosecutor working at the CILA tells us that the ESO is becoming more acknowledged, which leads to an increase in requests and actual executions of supervision orders. The prosecutor told us that most prosecutors may not want to choose a suspension straight away, but that the ESO allows them to think ahead just in case the judge might want to consider a suspension:

> "At first we thought: 'you don't put someone in pre-trial detention just to allow him to return to his home-country as soon as possible.' But we found that, in practice, the instrument meets a certain demand. (…)" (PP9)

The CILA sees an important role for itself in creating awareness of the ESO, to which end it provides information to all departments within the public prosecutor's service and the judiciary. The CILA participates in the European Justice Network (EJN),[167] which also provides a judicial atlas[168] that allows the identification of the locally competent authority that can receive requests for judicial cooperation and provides a fast and efficient channel for the direct transmission of requests according with the selected measure. Still, it seems that the Netherlands is one of the few countries that have one central authority for the ESO.

In 2016, the Netherlands have forwarded eight cases, up until the time of writing in 2017: eight cases. There were two incoming cases in 2016, but in 2017 this number has risen significantly to ten.

9.3.2 Forwarded supervision orders

---

[164] Art. 1 Implementation decree mutual recognition supervision measures as an alternative to provisional detention (*Uitvoeringsbesluit wederzijdse erkenning toezichtmaatregelen als alternatief voor voorlopige hechtenis*).
[165] Internationaal Rechthulp Centrum (IRC) Noord-Holland, department WETS-ETM.
[166] As well as mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty (Framework Decision 2008/909/JHA).
[167] <https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx>.
[168] <https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry.aspx>. Requests to the Dutch authority on ESO can be mailed to <wets-etm@om.nl>.

As for the *forwarded cases*, the respondent from the CILA told us that the 28-day term prescribed by the framework decision seems too tight. As the majority of other countries do not have central authorities, it can be quite hard to find the right official to deal with:

> "Sometimes the legal atlas doesn't provide much more information than that we should contact the "court in the place of residence of the suspect". How do I know exactly which court that is and whom to contact? Sometimes we have to do an internet search to find the right information. On the other hand, the EJN provides us with contact points that we can use when we are really at a loss for information." (PP9)

Also, in some countries, judicial intervention is required before the ESO can be applied. These proceedings rarely take place within 28 days. Also, in some countries a judge will want to review the suspension order periodically:

> "I'm amazed about the capacity some countries deploy for this. In some countries, they demand a request for extension every three months, which will then again be brought before a judge." (PP9)

Another problem this respondent told us about is that the execution of the order may not be in line with the contents of the order. One of the Dutch lawyers we spoke to at an expert meeting told us about a case in which the Dutch authorities had forwarded a supervision order that stipulated that the suspect could not leave his country of residence. However, the executing state applied the order that the suspect could not leave his municipally. The public prosecutor we spoke to acknowledged that these can be difficult situations because there is no procedure to challenge a faulty implementation of the supervision order. She also gave the example of a country that refused to recognise the supervision order, stating that there was no double criminality (art. 14, section 3, framework decision), while she was convinced that there was:

> "Then I wrote a letter, stating that I would politely like to bring to their attention that, in my opinion, the decision was not right. Then they altered their decision, so that worked. But if too many authorities in one country only decide very occasionally, then there can be a lack of expertise. (…) I think it's a shortcoming in the framework decision that I have no recourse. There's nothing I can do." (PP9)

As stated above, the number of forwarded cases is not very high. Virtually none of the practitioners we spoke to seemed to be familiar with the proceedings. Only one of the lawyers we met during an expert meeting had a relevant experience and he told us that if it hadn't been for his persistency, nothing would have happened, as both the public prosecutor dealing with the case and the trial court were not familiar with the proceedings either. The public prosecutor from the CILA that we spoke to confirmed that there still seems to be little knowledge about the proceedings, although she was surprised to hear that so few of the people we spoke to had heard about the ESO.

Even when the CILA provides a lot of information and also facilitates the proceedings as well as possible, a bottleneck for the public prosecutors can very well be the rather complicated certificate that has to be filled in. The prosecutor will have to provide a lot of information and having to fill out the form will, according to our respondent at the CILA, likely be a barrier too many for a lot of prosecutors. This, combined with the lengthy procedure, does not really make the instrument appear very interesting for minor crimes.

9.3.3 Incoming supervision orders

As for the *incoming supervision orders*, our respondent at the CILA told us that most incoming orders will regard suspects of more serious crimes. The few cases that have been received by the Netherlands so far seem mostly to contain the order to report to the authorities.

One specific problem can be that some member states seem to already release the suspects to the Netherlands before the supervision order has been recognised and implemented by the CILA. This can be a bit awkward, for example if the supervision measure implies that the suspect should report at a police station and the police station in question doesn't know about it: the CILA will of course have had to make arrangements for this first.

> "So, these people show up here at a certain police station and the police know nothing about it and we haven't recognised the supervision order yet. We haven't checked if these suspects actually belong in the Netherlands or not. We think that's a bit strange, we are not in control. Actually, we're put on the spot." (PP9)

Yet on the other hand, the CILA receives signals that the ESO is not being used. Our respondent gives the example of a country where some Dutch people have been suspended from pre-trial detention by the local judiciary, but they people are not allowed to leave that country. According to our respondent this is of course a situation where a supervision order would be perfect:

> "They are there, without income, job nor home. They're very uncomfortable there and we've informed the authorities that they can very well transfer them to the Netherlands with a supervision order. That will allow us to use supervision measures and they'll return for the trial." (PP9)

The Probation Service has a very limited role in the ESO proceedings, but it does have an international office that, according to the respondent from the CILA, has proven to be useful with both forwarded and incoming supervision orders. For forwarded supervision orders, the Probation Service can get information from similar organisations in the receiving state, in order to try and find out what realistic options are available. If incoming orders would contain the order to report to a more specific authority than the police, the Probation Service may be the first choice.

9.4 Concluding remarks

Compared to the daily practice of pre-trial detention, there are some noticeable differences regarding the practice of provisional detention in relation to the EAW. Our research didn't allow us to explore these differences thoroughly. The most striking difference seems to be that legislation does not mention specific grounds for provisional detention and that in practice, most attention goes to the risk of flight of the requested person. Apart from the Dutch obligations regarding the EAW discussed in this chapter, we point out again that the existence of this instrument of mutual recognition has, in the perception of some of our respondents, led to more scrutiny on the ground 'risk of flight' in regular Dutch cases in which the suspect has his/her residence in another EU-country (see § 5.3.1).

One of the main goals of the ESO is to encourage the use of alternatives for pre-trial detention. Since the implementation of the framework decision, the supervision order has only been used in a very limited number of cases, but there seems to be a rise in the numbers. Still, a lack of knowledge, the bureaucracy involved and the length of the proceedings seem to stand in the way of a really widespread use of the ESO. That said, those respondents that (after some explaining from our side) understood how the instrument works, seemed to acknowledge that it could be useful in certain kinds of cases, for example human trafficking

cases. These cases can involve very complicated and time-consuming investigations, in which suspects quite often have their residency abroad.

10 Responses to the vignette

We discussed the vignette (see appendix 3 for a description) with all defence lawyers, public prosecutors and judges. Our main question was how our respondent would act in a case like this and what would be the main arguments for applying pre-trial detention or not. Since probation officers are not directly involved in the decision to apply pre-trial detention we decided not to discuss the vignette with them. Although we included the most important results of the vignette study in our general analysis and thus in the earlier chapters of this report, we will give a short summary of the answers of the respondents in this chapter, along the following lines: what information do respondents need to make a decision regarding applying (or pleading against) pre-trial detention or not and what information is available at first instance? How do the respondents estimate the chance that the suspect will be put in remand detention or not? What are the arguments in favour and against pre-trial detention in this case and what alternatives would be applicable and under what conditions?

10.1 Information

In general defence lawyers tell us that the information presented in the vignette is more or less comparable to the information they receive at the moment they are involved in the case. Information can be disclosed to them in different ways. They can be called by the police, or notified by a so-called *piket-melding*. Only a few days later they receive a police file (if available). This means that defence lawyers are very dependent on the information they receive from their client in those few days preceding the hearing before the examining judge. Public prosecutors have more or less the same information available at the moment they have to take the initial decision to apply for remand detention, added with a possible criminal record and (a very brief) police file (if available). In general the judges say they have too little information to take a decision and would ask for a probation report to get a clearer picture of the personal circumstances of the suspect or ask for this information during the hearing. All respondents ask what the nature of the earlier offence was, what sentence was imposed and what the daily activities of the suspect are.

10.2 Probability of remand detention (grounds)

Six out of eight prosecutors say that they would definitely bring this case before the examining judge. The two other public prosecutors show some reservation and say they need more information regarding the earlier offence and the personal circumstances of the suspect. Also, most judges and defence lawyers express the expectation that this suspect would be put into remand detention. The first and most important argument mentioned is the seriousness of the offence. “This is almost a no-brainer’ I would say”, one of the defence lawyers says (DL2). In particular the fact the burglary occurs at night and the presence of a young child in the house support the decision to apply pre-trial detention. Although only some judges and prosecutors explicitly mention the ground they would base their decision on, it becomes clear that fear of recidivism is most obvious in this case. Therefore, it is important that the subject was previously convicted. For most judges, the earlier conviction is enough to substantiate fear of recidivism, no matter what that conviction was for. A minority, however, expressed the opinion that the subject should have been convicted for a similar offence to substantiate fear of recidivism. Only some defence lawyers critically argue that one earlier conviction is insufficient to substantiate fear of recidivism, in particular since the probation period for the conditional sentence was almost finished at the time the burglary was committed.

10.3 Arguments in favour and against pre-trial detention (personal circumstances)

As explained in the former section, the severity of the offence and the fact that the suspect appeared to be a recidivist were the most important arguments why most respondents expected that this case would result in pre-trial detention in first instance. Respondents had different opinions regarding if this case would allow for suspension at a certain stage. According to the defence lawyers the personal circumstances as presented in the vignette do not give much reason for a suspension. To submit a successful request for submission, they would need other information, 'sick parents', 'a job interview', 'a doctor's visit'. A good probation report could probably provide them with the necessary information. Also, a confession would increase the room for a suspension. Given the fact that it was an adult perpetrator here, who was convicted before, who was still living with his parents and without a job, most of the judges and prosecutors we interviewed did not see much reason to suspend. They were in particularly worried about the lack of daily activities. The fact that he was still living with his parents pointed to a weak character and probably also financial problems, (both circumstances that could increase the risk of recidivism) according to most of our respondents. Some, however, considered this to be a stable (and thus positive) factor in the life of this suspect. Personal circumstances that were not mentioned in the description of the vignette, but that could possibly increase the possibility of a suspension according to some of the judges or prosecutors, were: a confession or willingness to give a statement, a possible job, his own house or family. Addiction would decrease the possibility of suspension according to all respondents. Mental illness, however, could increase the possibility of suspension under the condition of treatment. Since some prosecutors mentioned that they expected a sentence of three to four months for this offence, the anticipation order did not put them under pressure to suspend.

10.4 Room for alternatives

The availability of alternatives for remand detention didn't seem to be a decisive factor regarding the decision to apply pre-trial detention or not. None of the respondents spontaneously mentioned electronic monitoring as an alternative for instance. However, if the circumstances of the case gave reason for a suspension (for example because of the passing of time or a change of the personal circumstances) most respondents would propose (defence lawyers) or add conditions to a suspension. In particular the public prosecutors would insist that the suspected person had some daily activities before the considered suspension, as for example (voluntarily) work, a course or treatment. This would normally be realised in the context of a probation order.

10.5 Summary

Although variation existed in the responses to the vignette, in general we would expect that the suspect in this case would be put in remand detention for at least a period of time. The pre-trial detention could be suspended, however, after a certain period, normally under the condition that the suspect has some daily activities.

11 Conclusion

The Netherlands has a low prison rate per capita and prison sentences are relatively short. The rate of pre-trial detainees per capita is also relatively low. However, the relation between the number of convicted prisoners and pre-trial detainees shows that, in 2016, an average of 43.6% of the detainees in the Netherlands were in pre-trial detention, which, compared to other countries in the EU, is very high. We agree with the Dutch Court of Audit that there are significant differences between the countries as to the composition of the pre-trial detainee-population and the caveats between the data-compilations provided for the international statistics. We also agree that, therefore, meaningful quantitative comparison is difficult and that the relatively high percentage of pre-trial detainees is not a decisive factor in the Dutch debate on pre-trial detention rates. However, there are more reasons to assume that the population of pre-trial detainees in the Netherlands is higher than can be legitimised in the context of the principle of last resort. In past years, there has been a lot of debate about the practice of pre-trial detention. Judges participating in this debate have put forward the opinion that application of pre-trial detention is quite standard in certain cases and that the legal requirements to substantiate the grounds for pre-trial detention allow for shallow reasoning. Multiple researches highlight that little scrutiny was put forward in the pre-trial detention proceedings.

In our study, we come to similar conclusions with regard to the use of the grounds for pre-trial detention. Fear of reoffending and fear of serious upset to the legal order are the most common grounds for pre-trial detention. Most respondents agree that both of these grounds can be substantiated quite easily. Especially the ground of risk of reoffending was found to be substantiated quite easily. Even a first offender that has committed a crime can be considered as a potential recidivist if needs be. The scrutiny applied to the other important grounds (fear of absconding and fear of obstruction) seems paradoxical: the public prosecutor will usually have to bring forward more solid arguments to use these grounds. The new ground (facilitate expedited proceedings against suspects of unsettling crimes in public areas or against public officials) is hardly ever used and is deemed superfluous.

The apparently limited restraining effect of the safeguards implied by the statutory grounds for pre-trial detention, however, is not considered as the most important reason nor an obstacle for the wide use of pre-trial detention according to our respondents. The wide use of pre-trial detention in the Netherlands is more often explained in terms of 'legal culture' or even 'legal policy' (politics). Most of our respondents, even some of the lawyers, acknowledge that in certain types of cases there are many advantages to using pre-trial detention as an advance on the final sentence. This is supported by three important arguments. The first argument is that you cannot explain to the victims of a serious offence or to society in general that somebody who just committed a serious crime gets released within hours or days. 'Can you explain it to your neighbour?' is often heard as a criterion. The second line of reasoning is that it is assumed to be much better for the offender to serve his/her time directly after arrest, instead of being released and detained again after months or – sometimes even – years. The third argument can be considered as the reverse of the second one. Prosecutors and examining judges or court in chamber judges are convinced that the trial court will be hesitant to send someone who has been suspended from pre-trial detention (or against whom an order for pre-trial detention has been refused) back to jail. It is their perception that trial courts impose more lenient (unconditional) prison sentences, if any, when the suspect is not detained at the moment of the hearing. Therefore, the fear that a convicted offender will escape a deserved punishment is a third reason not to suspend.

Within the Dutch criminal procedure, autonomous alternatives for pre-trial detention do not exist. Alternatives can only be applied in the framework of a suspension of the pre-trial detention with the exception of the so-called behavioural order that can be issued by the Prosecu-

tion Service outside the scope of the pre-trial detention framework. Inherent to this system is that pre-trial detention is not used as a last resort. Instead of looking at the less intrusive measures first, the most severe measure has to be applied before less severe measures can be considered. The use of alternatives for pre-trial detention should be in accordance with the subsidiarity principle. Alternatives should (only) be used if they can fulfil the underlying goals of the pre-trial detention in a less intrusive way than detention does. Much consensus exists on the opinion that alternatives (conditions) can reduce the risk of recidivism and, to a lesser extent, risk of absconding. The use of alternatives can therefore result in reduced application of pre-trial detention based on one of these grounds. The fundamental problem, however, is that the grounds for pre-trial detention are so widely interpreted that it is difficult to judge if an alternative for detention meets the subsidiarity ground or not. Many respondents give examples of so-called 'improper remands', cases in which remand detention is applied, not to detain a person, but to create a framework for probation, treatment or other forms of help and assistance. Prosecutors and judges admit that they use the pre-trial detention decision in these cases to create a framework to do something that 'probably makes sense', because they are pretty sure that if they release someone without conditions, the delinquent behaviour will continue because the underlying problems are not addressed. In these cases, it is clear that the conditional suspension of the pre-trial detention does not meet the subsidiarity requirement. That is not to say that suspects wouldn't benefit from an approach with a more binding framework regarding behaviour and/or treatment, though. However, we agree with our respondents that the current legislation on pre-trial detention is not primarily designed to provide that framework and sometimes seems to be used in an improper manner to coach people towards guidance and counselling.

In general, however, we got the impression that alternatives can fulfil a useful role in attempts to reduce the use of pre-trial detention. A broad category of cases exists in which the grounds for detention are constantly weighed against the personal circumstances of the offender. Whether the judge will be willing to grant a suspension will very much depend on the availability of enough concrete information supporting conditional suspension. On the one hand, this information would have to substantiate that personal interests of the suspect outweigh the interests served by pre-trial detention. On the other hand, the information should contain guarantees that the conditions attached to the release provide a solid alternative related to the ground(s) for the pre-trial detention – in most cases: preventing recidivism. Important information that can plea for conditional suspension is related to the housing situation of the suspect, his/her day activities, his/her family circumstances and possible (mental) health problems.

Preferably this information is available at the hearing of the examining judge through a probation (pre-trial) report. This report gives information about earlier trajectories of the suspect at the Probation Service, personal circumstances of the suspect and the possibilities of supervision in case of a suspension. The extent to which these reports are available and the moment of their availability fluctuate a lot between regions, while probation officers indicate that they often have a real struggle to produce a sufficient preliminary probation report before the hearing of the examining judge. To our surprise, their organisational structure does not seem to allow them to write an improved or extended version for the hearing in chambers. A complicating factor is that, although it's mostly the defence lawyer who is held responsible for the collection of information to substantiate a suspension, he/she does not have the autonomous power to directly request the Probation Service for a pre-trial detention report. If he/she thinks a pre-trial report is of importance, a request will have to be made to the prosecutor, who will then decide if the Probation Service gets the assignment to report. Although most of the prosecutors and defence lawyers say that the prosecutor is mostly willing to follow these requests, exceptions were also mentioned.

In the absence of a (sufficient) probation report, it's up to the (good) defence lawyers themselves to try and collect the necessary information to substantiate a request for suspension. They will call (possible future) employers and will try to get in touch with family members or doctors for written statements. They are hindered of course by the same constraints in time and information as the probation officers are. Financial compensation for the activities of lawyers during pre-trial detention is found to be insufficient. The prosecutors and judges in general take a rather passive attitude in this regard.

There is rather scarce regulation on the conditions that can be applied as an alternative for pre-trial detention in the Netherlands. The general conditions attached to a suspension of the pre-trial detention are that the suspect will comply with possible future court orders regarding the pre-trial detention and that he/she will cooperate with the execution of a possible future sentence to imprisonment. In case requirements regarding the behaviour of the suspect are attached to the suspension of pre-trial detention, the suspect has to cooperate with some kind of identification measure. The only special requirement mentioned explicitly in the law is the financial guarantee for the fulfilment of the conditions of a suspension. Other types of requirements that can be added to a suspension are not mentioned in the law, but the CCP does not give any restrictions either. Requirements that are regularly added to a suspension of the pre-trial order are: reporting at the police station, location ban, location order, probation order, electronic monitoring, behaviour counselling and treatment for substance addiction.

These so-called alternatives are applied on a regular basis, but not on a large scale in absolute numbers. In particular practical obstacles seem to stand in the way of a wider use. The necessary information to suspend under conditions is often not available at an early stage and respondents also point to a lack of capacity for the more substantial requirements like facilities for treatment. Although we came across some respondents who support financial bail, it is still almost never applied. Respondents don't know exactly how it works and experience many practical and fundamental constraints. Although electronic monitoring as a condition to suspend pre-trial detention is used more often now than it used to be,[169] it still takes between five to 14 days to organise it and can therefore not prevent the application of pre-trial detention at the earliest stage.

As in many other European countries, foreigners are overrepresented in Dutch prisons and (in an equal amount) in pre-trial detention. With 23% of the pre-trial detainees being foreigners in 2015,[170] the Netherlands take a rather average position. We found no concrete evidence that pre-trial decisions were biased concerning foreigners. That said, it is likely that the usual explanations for the overrepresentation of foreigners in criminal law statistics apply to the Dutch pre-trial detention practice. While the risk of absconding might be an appropriate ground for pre-trial detention regarding foreigners, it is common policy that this ground is not accepted for foreigners who have a known residency in other EU countries. One specific group of EU-foreigners, the 'mobile bandits', often from Romania, deserves a mention. These more or less organised gangs, which commit a lot of street-robberies (pickpocketing), tend to be kept in pre-trial detention so that their case can be heard in a so-called expedited proceeding.

Another specific mention should go to the practice where illegal immigrants that are suspected of crimes that are deemed not too serious tend to be handed over to the immigration police, who will likely apply immigration detention. This practice might influence the relatively low number of foreigners in pre-trial detention, as foreigners in immigration detention are not included in the number of pre-trial detainees.

[169] Boone, Van der Kooi and Rap 2016.
[170] Council of Europe Annual Penal Statistics (SPACE I) Surveys over 2015.

The European Arrest Warrant (EAW), introduced in 2002, has led to a new category of provisional detention, namely the detention of requested persons awaiting their surrender to the requesting state. The EAW framework decision has been implemented in the Netherlands through the Surrender Act. This act doesn't explicitly provide for any specific grounds for pre-trial detention, but as the main objective of the EAW is to have the requested person available for surrender, in practice the responsible public prosecutor will have to determine whether or not there is a risk of absconding. Most of our respondents didn't encounter the EAW-procedure on a regular basis. One public prosecutor of the Amsterdam branch of the Public Prosecution Service, specialised in these cases, put forward the opinion that the policy in EAW-cases is rather lenient when it comes to suspending the provisional detention.

To reduce the overrepresentation of foreigners in European remand centres, the European Supervision Order (ESO) has been introduced. The ESO allows foreign suspects[171] to fulfil the conditions of suspension of the execution of pre-trial detention in their country of residence. The instrument has not been widely used in the Netherlands up until recently. Only very few of our respondents had ever used or considered to request for or apply the order. Many had never heard of it or had no clue what to do if they would consider using it. The IRC Noord-Holland[172] has been appointed as the central authority concerning the ESO (Framework Decision 2009/829/JHA) and processes all incoming and outgoing requests. A respondent of the IRC put forward the view that the ESO is becoming more acknowledged, which leads to an increase in requests and actual executions of supervision orders.

As we mentioned at the start of this summary, our research shows similar results to other research executed in recent years. The debate on the practice of pre-trial detention in the Netherlands is still very much alive. In November 2016, the Ministry of Justice and Security has presented preliminary plans to review the legislation on pre-trial detention. In short, these plans suggest that a procedure of 'provisional restriction of liberty' should take the place of the order of pre-trial detention followed by a conditional suspension of the execution. The envisioned provisional restrictions will be similar to the conditions for suspension used in the current system. Only if the restrictions are breached will the examining judge be requested to order pre-trial detention. However, the provisional restriction of liberty as proposed will be applicable in a far wider range of cases than the current system of suspended pre-trial detention. Reactions, therefor, are mixed. On the one hand, there is a degree of satisfaction that the government is aiming at a serious decrease in pre-trial detention orders. On the other hand, there is concern that the system could draw in more suspects, enabling some serious restrictions on people's liberty while the judicial framework lacks scrutiny and offers few safeguards.[173] The Council of the Judiciary and the Board of Procurators General have already informed the minister that they do not support the proposed change in legislation and that they prefer to keep the system as it is, with a more fundamental focus on the presumption in favour of release of the suspect.[174]

All in all, it remains to be seen whether the Ministry of Justice and Security will maintain the proposal as it is. And even if the proposal will eventually become into legislation, this will most likely take years. We feel that most of the reactions on the proposed legislation make clear that the aim for more alternatives for pre-trial detention is welcomed, but that the

[171] EU citizens.
[172] Centre for International Legal Assistance in Criminal Matters – Noord Holland, department WETS-ETM.
[173] See the advice of the Dutch legal bar association, p. 33 (<https://www.advocatenorde.nl/juridische-databank/download/wetgevingsadviezen/426682/2>).
[174] Advice of the Council of the Judiciary on the proposal, p. 28 (<https://www.rechtspraak.nl/SiteCollectionDocuments/2017-22-advies-boeken-1-en-2-nieuwe-WvSv.pdf>. Advice of the Board of Procurators General, p. 13 (not available on-line at the moment of writing this report).

proposed legislation may not be the instrument that will provide the necessary change in mind-set. As we have shown in this report, it is not the legislation as such that has been determinative in the practice of pre-trial detention in the past years: it's rather our legal culture. A more restricted application of pre-trial detention is, in our view, primarily a matter of a shift in legal culture and a more generous approach towards alternatives. Discussion about the legitimacy of the current pre-trial detention practice is not dependant on new legislation and should focus on the relation between – on the one hand – the aims (and thus the grounds) of pre-trial detention and – on the other hand – the aims of conditional suspension. Within the current system it should already be possible to find a practice that is in line with the principles of proportionality and subsidiarity. New legislation could, then, confirm this new balance. At the same time, the thorough notion of proportionality and subsidiarity should prevent the feared net-widening effect.

Recommendations

- The Prosecution Service and the judge should have the legal responsibility to investigate the possibility of a suspension with or without conditions in every case. Whether a suspension is realised or not should not depend on the arbitrary activity of the defence lawyer, but should be systematically investigated in every case.
- The current review of pre-trial detention by the court in chambers does not always offer an effective remedy. We favour a practice in which additional reporting by the Probation Service – aimed at exploring the possibilities of conditional suspension by the court in chambers – is the rule rather than the exception.
- Prosecutors and judges should constantly be (made) aware of all the practical aspects regarding conditions/alternatives. Limited practical knowledge on (or experience with) the possibilities of (e.g.) financial bail, electronic monitoring or the European Supervision Order (ESO) should not be to the detriment of suspects in pre-trial detention.
- We agree with the basic ideas that lead to the proposal to abolish the suspension under conditions and the introduction of the provisional restriction of liberty. However, it is not necessary to wait for a change in legislation. To reduce the use of remand detention, the question that should be considered in the pre-trial stage is not if detention should be applied or not, but what restrictions of liberty are necessary to fulfil the aims that are at stake in this stage of the criminal justice process.

Literature

Algemene Rekenkamer 2017
Algemene Rekenkamer, *Voorarrest: verdachten in de cel. Een kwantitatieve analyse van inverzekeringstelling en voorlopige hechtenis,* 14 November 2017.

Uit Beijerse & Kunst 2000
J. uit Beijerse & D. Kunst, 'Het huis van de bewaring voorbij. De schorsing van de voorlopige hechtenis onder bijzondere voorwaarden in de praktijk', *Trema* 2000 (9), p. 418.

Uit Beijerse 2009
J. uit Beijerse, 'De toepassing van een volwassenensanctie op 16- of 17-jarigen: pro's, contra's en alternatieven', *Delikt en Delinkwent* 2009/75, p. 319.

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

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

Bezem & Thelosen 2017
E.E.M. Bezem en S. Thelosen, 'Het recht op verblijf is niet absoluut. Het risico van een strafrechtelijke veroordeling', *Strafblad* 2017 (3), 42, p. 304-311.

Boone 2002
M. Boone, 'Reclasseringsvoorlichting en culturele diversiteit', *Proces* 2002, nr. 11/12, p. 175-180.

Boone, Jacobs & Lindeman 2016
M. Boone, P. Jacobs and J. Lindeman, 'Detour towards pre-trial detention as *ultimo ratio*; workingpaper', *http://www.irks.at/detour/publications.html* 2016, p. 5-9.

Boone, Van der Kooij & Rap 2016
M. Boone, M. van der Kooij & S. Rap, 'Current uses of Electronic Monitoring in the Netherlands', *Utrecht University,* January 2016, https://openaccess.leidenuniv.nl/handle/1887/49489.

Boone, Van der Kooij & Rap 2017
M. Boone, M. van der Kooij & S. Rap, 'The highly reintegrative approach of electronical monitoring in The Netherlands', *European Journal of Probation* 2017, p. 46-61.

Boone & Maguire 2017
M. Boone & N. Maguire, *Introduction, in: The Enforcement of Offender Supervision in Europe. Understanding breach processes*, Routledge 2017.

Van de Bunt & Van Gelder 2012
H. van de Bunt en J.L. van Gelder, 'The Dutch Prosecution Service', *Crime and Justice* 2012/1, p. 117-140.

Van den Brink 2017
Y.N. van den Brink, 'Voorlopige hechtenis en voorlopige vrijheidsbeperking. Het einde van de schorsing onder voorwaarden?', *Strafblad* 2017 (5), 415-423.

Van den Brink 2018
Y.N. van den Brink, *Voorlopige hechtenis in het Nederlandse jeugdstrafrecht. Wet en praktijk in het licht van internationale en Europese kinder- en mensenrechten* (diss. Leiden), Deventer: Kluwer 2018.

Buruma 2013
Y. Buruma, 'Onschuldig gedetineerd', *NJB* 2013, afl. 30, p. 1929.

Canton & Hammond 2012
R. Canton & N. Hammond, 'Foreigners to Justice? Irregular Migrants and Foreign National Offender in England and Wales', *European Journal of Probation* 2012, p. 4-20.

Centraal Bureau voor de Statistiek 2016
Centraal Bureau voor de Statistiek, *StatLine*, januari 2016.
Centraal Bureau voor de Statistiek 2017
Centraal Bureau voor de Statistiek, *StatLine*, oktober 2017.
College voor de Rechten van de Mens 2017
College voor de Rechten van de Mens, *Tekst en uitleg. Onderzoek naar de motivering van voorlopige hechtenis*, maart 2017.
Commissie Van der Meer 2017
Commissie evaluatie puntentoekenning gesubsidieerde rechtsbijstand, *Andere tijden. Evaluatie puntentoekenning in het stelsel van gesubsidieerde rechtsbijstand*, 2017.
Corstens/Borgers 2014
G.J.M. Corstens, *Het Nederlandse strafprocesrecht* (bewerkt door M.J. Borgers), Deventer: Kluwer 2014.
Council of Europe 2015
Council of Europe, 'Prison population', *Annual Penal Statistics (SPACE I)*, survey 2015
Crijns, Leeuw & Wermink 2016
J.H. Crijns, B.J.G. Leeuw & H.T. Wermink, *Pre-trial detention in the Netherlands: legal principles versus practical reality*, Den Haag: Eleven International Publishing 2016.
Dienst Justitiële Inrichtingen 2015
Dienst Justitiële Inrichtingen, *Gevangeniswezen in getal 2010-2014*, mei 2015.
Dienst Justitiële Inrichtingen 2017
Dienst Justitiële Inrichtingen, *DJI in getal 2012-2016,* juli 2017.
Docter & Baar 2017
M.A. Docter en J.L. Baar, 'De motivering van voorlopige hechtenis schiet tekort. De gronden die tot eerdere artikelen en commentaren hebben geleid, zijn nog onverkort aanwezig', *TPWS* 2017/50, p. 178-184.
Hucklesby et al. 2016
A. Hucklesby, K. Beyens, M. Boone, F. Dünkel, H. Green and G. McIvor, *Creativity and effectiveness in the use of electronic monitoring: a case study of five European jurisdictions*, 2016: University of Leeds, http://28uzqb445tcn4c24864ahmel.wpengine.netdna-cdn.com/files/2016/06/EMEU-Creativity-and-effectiveness-in-EM-Long-version.pdf.
Jacobs, Van Kalmthout & Von Bergh 2006
M.J.G. Jacobs, A.M. Van Kalmthout & M.Y.W. von Bergh, 'Toepassing van bijzondere voorwaarden bij voorwaardelijke vrijheidsstraf en schorsing van de voorlopige hechtenis bij volwassenen', *WODC,* 2006, p. 75.
Jacobs & Van Kampen 2014
P. Jacobs & P.T.C. van Kampen, 'Dutch "ZSM Settlements" in the Face of Procedural Justice: The Sooner the Better?', *Utrecht Law Review* 2014 (4), p. 73-85.
Janssen, Van den Emster & Trotman 2013
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 (6), p. 430-444.
Graat et al. 2017
J. Graat, B. Oude Breuil, D. van Uhm, E. van Gelder & T. Hendrikse, *Part IV Dutch Report. The Netherlands*, 2017: Utrecht University (National report for the project 'Transfer of Prisoners in Europe'). See: https://euprisoners.eu/documents.
Klip 2012
A.H. Klip, 'Voorlopige hechtenis', *Delikt en Delinkwent* 2012, p. 83-93.
Kurtovic & Boone 2015
E.G. Kurtovic, M.M. Boone, 'Collateral Consequences and the Principle of Proportional Punishment', in: F. De Jong, J.A.E. Vervaele, M.M. Boone, C. Kelk, F.A.M.M.

Koenraadt, F.G.H. Kristen, D. Rozenbilt & E. Sikkema*, Overarching Views of Crime and Deviancy – Rethinking the Legacy of the Utrecht School.* Den Haag: Eleven International Publishers 2015, p. 401-418.

Van der Laan 2009

N. van der Laan, 'De voorlopige hechtenis lotto. Een pleidooi voor motiveren en publiceren', *NJB* 2009, p. 4215-2420.

Lindeman 2017

J.M.W. Lindeman, *Officieren van justitie in de 21e eeuw. Een verslag van participerend observatieonderzoek naar de taakopvatting en taakinvulling van officieren van justitie*, Boom Juridisch: Den Haag 2017.

Maguire, Beyens & Boone 2015

N. Maguire, K. Beyens, M. Boone, A. Laurinavicius and A. Persson, 'Using vignette methodology to research the process of breach comparatively', *European Journal of Probation,* 2015 7(3), p. 241–259.

Melossi 2013

D. Melossi, 'The Process of Criminalisation of Migrants and the Question of the European Union as a 'Land of Immigration'', in: T. Daems, D. Van Zyl Smit, and S. Snacken, *European Penology?*, 2013: Oxford, Hart Publishing, p. 125-145.

Nederlandse Orde van Advocaten

Nederlandse Orde van Advocaten, 'Advies over de wetsvoorstellen tot herziening van Boek 1 en 2 Wetboek van Strafvordering', 30 juni 2017, see: https://www.advocatenorde.nl/juridische-databank/details/wetgevingsadviezen/426682.

Openbaar Ministerie

Openbaar Ministerie, 'Aanpak Top 600 van criminele veelplegers in Amsterdam', see: https://www.om.nl/organisatie/landingspagina/amsterdam/aanpak-top600/.

Phelps 2013

M.S. Phelps, 'The Paradox of Probation: Community Supervision in the Age of Mass Incarceration', *Law & Policy* 2013, volume 45, issue 1-2, p. 51-80.

Polman 2015

B.J. Polman, 'Het instituut van de borgsom in het Nederlandse strafprocesrecht. De voor- en nadelen in nationaal perspectief', *Ars Aequi* 2015, p. 437-447.

Raad voor de Strafrechtstoepassing en Jeugdbescherming 2011

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

Robroek 2017

R. Robroek, 'De motivering van de voorlopige hechtenis in Nederland en het EVRM', *Delikt en Delinkwent* 2017/6, p. 43-56.

Rovers et al. 2010

B. Rovers, M. Bruinsma, M. Jacobs, M. Jans, H. Moors, M. Siesling, C. Fijnaut, *Overvallen in Nederland. Een fenomeenanalyse en evaluatie van de aanpak*, Den Haag: Boom Jurdische Uitgevers 2010.

Silvis & Van Oost 2015

J. Silvis & C. van Oort, 'Commentaar art. 82 Sv', *SDU Commentaar Strafvordering* 2015.

Stevens 2010

L. Stevens, 'Voorlopige hechtenis en vrijheidsstraf. De strafrechter voor voldongen feiten?', *NJB* 2010, p.1520-1525.

Stevens 2012a

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

Stevens 2012b
L. Stevens, 'Incapacitation by pre-trial detention', in: M. Malsch & M.J.A. Duker (Eds.), *Incapacitation: Trends and New Perspectives*, London: Ashgate Publishing 2012, p. 97-108.
Stevens 2013
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.
Taskforce Overvallen 2011
Advies van de Taskforce overvallen aan de Minister van Veiligheid en Justitie voor acties ter verbetering van de ketenaanpak van overvalcriminaliteit in Nederland, januari 2011, see: http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/02/09/actieprogramma-ketenaanpak-overvalcriminaliteit.html.
Wermink, De Keijser & Schuyt 2012
H. Wermink, J.W. de Keijser, P.M. Schuyt, 'Verschillen in straftoemeting in soortgelijke zaken. Een kwantitatief onderzoek naar de rol van specifieke kenmerken van de dader', *NJB* 2012, afl. 11, 647, p. 726-733.
WODC 2014
Wetenschappelijk Onderzoek- en Documentatiecentrum, *Criminaliteit en rechtshandhaving,* Den Haag 2014.

Case law

ECtHR 26 June 1991, appl. no. 12369/86, Letellier/France.

ECtHR 5 July 2007, appl. no. 28831/04, Kanzi/The Netherlands.

ECtHR 5 July 2007, appl. no, 43701/04, Hendriks/The Netherlands.

ECtHR 9 December 2014, appl. no. 15911/08, Geisterfer/The Netherlands.

Appendix 1 – Respondents

The judicial organisation in the Netherlands has 10 districts. We have randomly numbered these districts such as to demonstrate the geographical spread of the population of our respondents. The number between brackets indicates the years of professional experience of the respondents.

Code	M/F	Location	Specialisation/function
DL1	M	District 1	Defence lawyer (>10 years)
DL2	M	District 2	Defence lawyer (>20 years)
DL3	F	District 2	Defence lawyer (>5 years)
DL4	M	District 3	Defence lawyer (>5years)
DL5	F	District 4	Defence lawyer (>10 years)
DL6	F	District 4	Defence lawyer (>10 years)
DL7	F	District 5	Defence lawyer (>5 years)
DL8	F	District 2	Defence lawyer (>5 years)

Code	M/F	Location	Specialisation/function
PP1	F	District 6	Public prosecutor (>15 years).
PP2	F	District 4	Public prosecutor (>10 years).
PP3	F	District 5	Public prosecutor (>15 years).
PP4	F	District 2	Public prosecutor (>15 years).
PP5	F	District 3	Public prosecutor (>15 years).
PP6	F	District 4	Public prosecutor (>10 years).
PP7	M	District 2	Public prosecutor (>10 years).
PP8	F	District 6	Public prosecutor (5-10 years).
PP9	F	District 7	Public prosecutor (>20 years).

Code	M/F	Location	Specialisation/function
PO1	F	District 2	Probation officer (5-10 years).
PO2	F	District 6	Probation officer (10-15 years).
PO3	F	District 6	Probation officer (unknown).
PO5	F	District 3	Probation officer (unknown).
PO6	M	District 4	Probation officer (5-10 years).
PO7	F	District 3	Probation officer (5-10 years).
PO8	F	District 7	Probation officer (>25 years).

Code	M/F	Location	Specialisation/function
J1	M	District 5	Criminal law judge (<5 years).
J2	M	District 3	Criminal law judge, examining judge (> 20 years; partly in other functions within criminal procedure).
J3	M	District 8	Criminal law judge (5-10 years); other rele-

			vant experience within criminal proceedings.
J4	M	District 6	Criminal law judge, examining judge (>20 years).
J5	M	District 6	Criminal law judge, examining judge (5-10 years).
J6	M	District 4	Criminal law judge, examining judge (>10 years)
J7	F	Court of Appeal	Criminal law judge of the Court of Appeal, before that criminal law judge at a district court. (>15 years).

Appendix 2 – Dutch legislation

Article 67

1. An order for pre-trial detention can be issued in case of suspicion of:
   a) an offence which, according to its legal definition, carries a sentence of imprisonment of four years or more; artikelen.
   b) one of the offences defined in Articles 132, 138a, 138ab, 138b, 139c, 139d, §§ 1 and 2, 141a,137c, § 2, 137d, § 2, 137e, § 2, 137g, § 2, 151, 184a, 254a, 248d, 248e, 272, 284, § 1, 285, § 1, 285b, 285c, 300, § 1, 321, 323a, 326c, § 2, 326d, 340, 342, 344a, 344b, 347, § 1, 350, 350a, 350c, 350d351, 395, 417bis, 420bis.1, 420quater and 420quater of the Criminal Code (*Wetboek van Strafrecht*);
   c) one of the offences defined in:
      - […]

2. 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 within the jurisdiction of the regional courts and which, according to its legal definition, is punishable by imprisonment (*gevangenisstraf*).
3. The previous paragraphs are only applied when it appears from the facts or circumstances that there are serious indications against the suspect.

Article 67a

1. An order based on Article 67 can only be issued:
   a) if it is apparent from particular behaviour displayed by the suspect, or from particular circumstances concerning him personally, that there is a serious danger of absconding;
   b) if it is apparent from particular circumstances that there is a serious reason of public safety requiring the immediate deprivation of liberty.

2. For the application of the preceding paragraph, only the following can be considered as a serious reason of public safety:
   -1º. 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;
   -2º. 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;
   -3º. 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 of the Criminal Code, 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;
   -4º. if it concerns 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 18 hours after the arrest of the suspect.
   -5º. if pre-trial detention is necessary in reason for discovering the truth otherwise than through statements of the suspect.

3. 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.

Article 80

1. The trial court can – *ex officio*, or on the application of the prosecution or at the request of the suspect – order that the pre-trial detention shall be suspended as soon as the suspect, after putting up guarantees or not as the case may be, has declared himself willing to comply with the conditions governing the suspension. Such application or request shall state reasons.
2. The conditions governing the suspension shall in all cases include the following:
    -1. that the suspect not seek to evade the execution of the pre-trial detention order if its suspension should be terminated;
    -2. that the suspect, should he be sentenced to a custodial sentence other than [in lieu of a fine or a community service order] for the criminal act for which the pre-trial detention was ordered, not seek to evade its execution. (…)

Article 87

1. For the public prosecutor, it shall be possible to lodge an appeal within fourteen days against the decisions of the investigating judge or the Regional Court to suspend or alter the suspension [of pre-trial detention] to the Regional Court or the Court of Appeal respectively.
2. A suspect who has requested the Regional Court to suspend or lift his pre-trial detention can appeal against a refusal of that decision to the Court of Appeal once only, no later than three days after its notification. The suspect who has appealed against the refusal of a suspension request cannot afterwards appeal against the refusal of a request to lift his pre-trial detention. The suspect who has appealed against the refusal to lift his pre-trial detention cannot afterwards appeal against the refusal of a suspension request.
3. The appeal shall be decided as speedily as possible.

Appendix 3 – Vignette

A 23 year old male is suspected of burglary in a house at 3 o'clock at night, while the house-owners and their 4 year old daughter were sleeping upstairs. He got into the house by cutting the window in the front door to unlock it. The next morning, the owners discovered that precious jewellery, a laptop and money, altogether worth 3000 euro, was stolen. The police identified the suspect from cctv recordings. The suspect is currently unemployed and was sentenced two years ago to a conditional prison sentence, with an operational period of two years. Apparently, he is living with his parents.

As an example, we include the questions we put forward to the public prosecutors we interviewed.

Vragen voor de officier van justitie/Questions for the public prosecutor

Sketch the situation in which the prosecutor will be informed about this case

Organizational factors

- Hoe wordt je geïnformeerd over deze zaak?/*How were you informed about this case*
- Welke informatie heb je over de zaak?/*What information will you normally have about this case?*
- Hoe kom je aan je informatie?/*How do you get this information?*
- Welke opties staan open?/*What options do you have? (NB: ask directly for pre-trial alternatives in case he/she does not mention these spontaneously*)?
- Hoe groot is de kans op gevangenhouding?/*What are the odds for pre-trial detention?*
- Welke alternatieven zouden geboden kunnen worden? Zullen ze beschikbaar zijn?/*What possible alternatives could be available?*
- Welke informatie of argumenten zijn bepalend?/*What information and/or arguments are determinative?*
- Zal die informatie beschikbaar zijn?/*Will that information be available?*
- Hoeveel tijd heb je om in een dergelijke zaak te investeren?/*How much time do you normally have for cases like these?*
- (Welke beslissing verwacht je)?/*(What decision do you expect in this case?)*

Factors related to the individual/person

- Maakt het een verschil waarvoor hij de vorige keer is veroordeeld?/*Does the specific criminal offence for which the suspect has been convicted last time make a difference?*
- Maakt het een verschil of hij eerder voor inbraak is veroordeeld?/*Would a prior conviction for burglary make a difference?*
- Maakt het een verschil of hij bekend heeft of niet?/*Would it make a difference if the suspect would confess to this burglary?*
- Maakt het een verschil of hij huisvesting (vaste woon-of verblijfplaats) heeft?/*Would it make a difference if the suspect had a fixed place of residence or not?*
- Maakt het een verschil of het een drugsverslaafde betreft die steelt om zijn verslaving in stand te houden?/*Would it make a difference if the suspect was a drug addict, stealing to pay for his drugs?*

- Maakt het uit of iemand een verblijfsstatus heeft?/*Does the fact that someone has a permit of residency make a difference?*
- Maakt het een verschil of iemand een buitenlandse nationaliteit of buitenlands uiterlijk heeft?/*Does the nationality or the appearance that the suspect could be a foreigner make any difference?*

Factors related to the offence

- In hoe verre beïnvloedt de te verwachten sanctie de beslissing?/*How will the expected sentence influence your decision?*
- Welke aspecten van de daad, beïnvloeden de straf in het bijzonder?/*What aspects of the offence are particularly determinative for the sentence?*
- Hoe zou de beoordelen zijn als het een bedrijfsinbraak betrof?/*Would you decide differently if it would be a breaking and entry combined with burglary in a business premises?*