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Pre-trial detention in the Netherlands. Legal principles versus practical reality: research report

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*Pre-trial detention in the Netherlands:
legal principles versus practical reality*

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Pre-trial detention in the Netherlands: legal principles versus practical reality

Research report

J.H. CRIJNS, B.J.G. LEEUW & H.T. WERMINK

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Universiteit Leiden

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The faculty is committed to a broad programme of education. Nearly 1,000 students choose to study Law at Leiden on an annual basis. In the Netherlands students automatically qualify for university entry after having received a pre-university diploma (VWO). The total number of students at the Law School is currently around 4,500, including about 300-400 international students. The number of academic and support staff totals 450.



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Foreword

Research of this kind can only be conducted with the assistance of stakeholders and practitioners in the field. We therefore, first of all, wish to thank the Council of the Judiciary, the Dutch Association of Criminal Lawyers (*Nederlandse Vereniging voor Strafrechtadvocaten*), the Public Prosecution Service and all individual judges, defence lawyers and prosecutors who provided information for this research.

Secondly we wish to thank our research assistants Franck Budde, Ybo Buruma jr., Aurora de Leeuw and Celine Ozephius for all their work done in assisting the main researchers in drafting this report.

Finally, we wish to thank the project coordinator Fair Trials for coordinating this ambitious and important European research project.

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The goal of this report is to provide an overview of the use of pre-trial detention in practice in the Netherlands. In recent years there has been a lot of discussion and criticism of the (extensive) use of pre-trial detention in Dutch criminal procedures. In this report we will assess whether this criticism is justified, and if so, what steps need to be taken to alleviate the concerns that exist regarding pre-trial detention. The overarching conclusion of our research is that Dutch legislation on pre-trial detention meets the relevant standards of the European Court of Human Rights (ECtHR). This leads us to the conclusion that legislative changes are not strictly necessary. However, our research shows that the way in which the legal rules on pre-trial detention are applied in practice is rightly criticised by defence lawyers, academics and even judges themselves.

This report starts in chapter 4 with a description of the context in which it should be read. An overview of the Dutch legal framework on pre-trial detention is given, as well as a brief description of the debate that has taken place in the Netherlands in recent years on the topic of pre-trial detention. Five chapters in which the results of the research are discussed follow this chapter on context. These chapters concern the procedural aspects of the decision making process on pre-trial detention (chapter 5), the substantive aspects (chapter 6), alternatives to pre-trial detention (chapter 7), review of pre-trial detention orders (chapter 8) and the outcomes of cases in which pre-trial detention is applied (chapter 9). The report concludes in chapter 10 with the conclusions of our research and recommendations for the various stakeholders dealing with pre-trial detention.

Over the course of the research project we visited nine of the eleven District Courts in the Netherlands, resulting in observations of 109 hearings on pre-trial detention. We also reviewed 56 case files and interviewed six judges and three prosecutors. The defence lawyers survey was completed by 35 defence lawyers.

1.1 DECISION MAKING PROCEDURE

Although depending on the complexity of the individual case hearings on pre-trial detention in the Netherlands can be quite brief, Dutch procedure on pre-

trial detention in practice generally meets the standards set by the Strasbourg Court and EU law. Suspects have legal representation, for free in case they cannot afford it themselves, and are brought before a judge within a reasonable time. Suspects who do not speak the Dutch language are provided with an interpreter and receive a letter of rights in their own language. The only point of concern is that some defence lawyers point out that the content of the case file available at the first hearing is sometimes too limited given that the investigation is still ongoing and not all the information is available yet.

1.2 THE SUBSTANCE OF DECISIONS

When looking at the substantive aspects of the practice of pre-trial detention, the high frequency of pre-trial detention that is being ordered must be highlighted as a point of concern. This raises questions on whether the principle of pre-trial detention as a measure of last resort is sufficiently protected. In most cases that were analysed in the case file review and hearing monitoring, requests by the prosecutor for applying pre-trial detention are granted by the judge(s). One caveat that should be made is that there might be a selection effect, meaning that prosecutors might only request pre-trial detention in cases where they feel that such a request will be granted by the judge. Besides the high number of pre-trial detention orders, another pressing concern is that in most cases the reasoning of decisions on pre-trial detention is quite brief and in general and abstract terms, which is problematic in light of Strasbourg case law. Finally, grounds for pre-trial detention are easily accepted by the judges. Especially defence lawyers indicate that grounds like the recidivism ground and the shocked legal order ground are accepted in a lot of cases, even though the existence of those grounds in the specific case is not proven sufficiently.

1.3 USE OF ALTERNATIVES TO DETENTION

Closely connected with pre-trial detention being applied in a lot of cases is the fact that alternatives to pre-trial detention currently only exist as conditions to a suspension of the pre-trial detention. This means that a judge first has to consider whether pre-trial detention should be ordered, before making a second consideration on whether the pre-trial detention should (conditionally) be suspended. This raises the question whether judges will appropriately consider a suspension given that they have already decided that pre-trial detention can be ordered. We feel that alternatives to pre-trial detention are underused, especially in the first phase of pre-trial detention. More 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. For instance with regard to bail, judges are reluctant to set bail conditions, because they are either unfamiliar with this alternative or they fear that this will lead to inequality and class justice since poor suspects will not be able to meet the financial requirements to receive bail.

1.4 REVIEW OF PRE-TRIAL DETENTION

Reviews of pre-trial detention orders take place regularly. All orders for pre-trial detention are subjected to a specific time limit. Once this limit is reached a review of the pre-trial detention order will take place (assuming the prosecutor wants to keep the suspect in pre-trial detention). Alternatively, a suspect or his defence lawyer can always request a hearing to review the pre-trial detention if they believe that the conditions for pre-trial detention are no longer met or when they want to request a suspension of the pre-trial detention. If a case is not ready for trial, but the suspect has been in pre-trial detention for 104 days, a pro forma trial is held to assess the progress of the investigation and to see whether the suspect should stay in detention. These pro forma trials take place every three months until the substantive trial takes place or the suspect is (conditionally) released from detention.

1.5 CASE OUTCOMES

With regard to the outcome of trials where pre-trial detention is ordered we found in the case file review that in almost all cases the criminal process ended in a conviction. In these cases the time served in pre-trial detention is deducted from the sentence in case of a conviction (Article 27 CCP). If the suspect is acquitted of all charges he can claim financial compensation for the time served in pre-trial detention (Article 89 CCP). No compensation is provided if the final sentence is lower than the time served in pre-trial detention.

1.6 RECOMMENDATIONS

Our research leads us to the following recommendations to the various stakeholders dealing with pre-trial detention.

i. To the legislator

1. In order to make alternatives to pre-trial detention more common, these should be made available independent of the decision whether pre-trial detention is allowed. The proposals in this regard the Government is currently considering, are a step in the right direction.

ii. To the Public Prosecution Service

2. Public prosecutors should be more critical in their assessment whether pre-trial detention is strictly necessary in a specific case.
3. Public prosecutors could be more active in proposing alternatives to pre-trial detention (for instance suggesting specific conditions for the suspension of pre-trial detention to the court), possibly after discussing this with the defence lawyer before a scheduled pre-trial detention hearing.

iii. To the courts

4. The recent discussion amongst judges on whether pre-trial detention is necessary as often as it is used, should be continued and intensified.
5. When considering alternatives to pre-trial detention, judges should take the principle that pre-trial detention must be a measure of last resort, more into account, especially when alternatives to pre-trial detention become more available, as recommended in this report.
6. Decisions to apply pre-trial detention should be better reasoned, giving more insight in the reasons for applying pre-trial detention in a specific case. This in order to conform with European and national obligations.
7. The existence of grounds for pre-trial detention must be viewed more critically. Especially with regard to the shocked legal order the question can be raised whether this ground should be used as often as it currently is.

iv. To the Council of the Judiciary and/or the Ministry of Security and Justice

8. More funds should be made available to provide time for judges to substantiate their pre-trial detention decisions more extensively.
9. Research should be done into the effectiveness of alternatives to pre-trial detention, in particular electronic monitoring and (money) bail. This research should also focus on ways to make these alternatives function properly in the Dutch system.

2 Introduction

2.1 BACKGROUND AND OBJECTIVES

This report is one of ten country reports outlining the findings of an EU-funded research project that was conducted in ten EU Member States in 2014 – 2015.¹

More than 100,000 suspects are detained pre-trial across the EU. While pre-trial detention has an important part to play in some criminal proceedings, ensuring that certain suspects will be brought to trial, it is being used at a huge cost to the national economies. Unjustified and excessive pre-trial detention clearly impacts on the right to liberty and to be presumed innocent until proven guilty. It also affects the ability of detained persons to enjoy fully their right to a fair trial, particularly due to restrictions on their ability to prepare their defence and gain access to a lawyer. Further, prison conditions often endanger the suspect's well-being.² For these reasons, international human rights standards including the European Convention on Human Rights (ECHR) require that pre-trial detention is used as an exceptional measure of last resort.

While there have been numerous studies on the legal framework governing pre-trial detention in EU Member States,³ limited research into the practice of pre-trial detention decision making has been carried out to date. This lack of reliable evidence motivated this major project in which NGOs and academics from ten EU Member States coordinated by Fair Trials International (Fair Trials) researched pre-trial decision making procedures. The objective of the project is to provide a unique evidence base regarding what, in practice, is causing the use of pre-trial detention. In this research, the procedures of decision making were reviewed to understand the motivations and incentives of the stakeholders involved (defence practitioners, judges, prosecutors). These findings will be disseminated among policy-makers, judges, prosecutors and defence lawyers, thereby informing the development of future initiatives aiming at reducing the use of pre-trial detention at domestic and EU-level.

1 England and Wales, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania and Spain.

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

3 For instance Van Kalmthout, Knapen & Morgenstern 2009.

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

The Roadmap also included the task of examining issues relating to detention, including pre-trial, through a Green Paper published in 2011. Based on its case work experience and input sought through its Legal Expert Advisory Panel (LEAP)⁴ Fair Trials responded to the Green Paper in the report ‘Detained without trial’ and outlined the necessity for EU-legislation as fundamental rights of individuals are violated in the process of ordering and requesting pre-trial detention. Subsequent Expert meetings in 2012 – 2013 in Amsterdam, London, Paris, Poland, Greece and Lithuania affirmed the understanding that problems with decision making processes might be responsible for the overuse of pre-trial detention and highlighted the need for an evidence base clarifying this presumption. But to date, no legislative action has been taken with regards to strengthening the rights of suspects facing pre-trial detention. However, the European Commission is currently conducting an Impact Assessment for an EU measure on pre-trial detention, which will hopefully be informed by the reports of this research project.

2.2 REGIONAL STANDARDS

The current regional standards on pre-trial detention-decision making are outlined in Article 5 of the European Convention on Human Rights (‘ECHR’). Article 5(1)(c) ECHR states that a person’s arrest or detention may be “effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”. Anyone deprived of liberty under the exceptions set out in Article 5 “shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the

4 <http://www.fairtrials.org/fair-trials-defenders/legal-experts/>.

detention is not lawful” (Article 5(4) ECHR). The European Court of Human Rights (ECtHR) has developed general principles on the implementation of Article 5 that should govern pre-trial decision making and would strengthen defence rights if applied accordingly. These standards have developed over a large corpus of ever-growing case law.

2.2.1 Procedure

The ECtHR has ruled that a person detained on the grounds of being suspected of an offence must be brought promptly⁵ or ‘speedily’⁶ before a judicial authority, and the “scope for flexibility in interpreting and applying the notion of promptness is very limited”.⁷ The trial must take place within ‘reasonable’ time according to Article 5(3) ECHR and generally the proceedings involving a pre-trial detainee must be conducted with special diligence and speed.⁸ Whether this has happened must be determined by considering the individual facts of the case.⁹ The ECtHR has found periods of pre-trial detention lasting between two and a half and five years to be excessive.¹⁰

According to the ECtHR, the court taking the pre-trial detention decision, must have the authority to release the suspect¹¹ and be a body independent from the executive and both parties of the proceedings.¹² The detention hearing must be an oral and adversarial hearing, in which the defence must be given the opportunity to effectively participate.¹³

2.2.2 Substance

The ECtHR has repeatedly emphasised the presumption in favour of release¹⁴ and clarified that the state bears the burden of proof on showing that a less intrusive alternative to detention would not serve the respective purpose.¹⁵

5 *Rehbock v Slovenia*, App. 29462/95, 28 November 2000, para 84.

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

7 *Ibid* para 62.

8 *Stogmuller v Austria*, App 1602/62, 10 November 1969, para 5.

9 *Buzadj v. Moldova*, App 23755/07, 16 December 2014, para 3.

10 *PB v France*, App 38781/97, 1 August 2000, para 34.

11 *Singh v UK*, App 23389/94, 21 February 1996, para 65.

12 *Neumeister v Austria*, App 1936/63, 27 June 1968, para 24.

13 *Göç v Turkey*, App No 36590/97, 11 July 2002, para 62.

14 *Michalko v. Slovakia*, App 35377/05, 21 December 2010, para 145.

15 *Ilijkov v Bulgaria*, App 33977/96, 26 July 2001, para 85.

The detention decision must be sufficiently reasoned and should not use 'stereotyped'¹⁶ forms of words. The arguments for and against pre-trial detention must not be 'general and abstract'.¹⁷ The court must engage with the reasons for pre-trial detention and for dismissing the application for release.¹⁸

The ECtHR has also outlined the lawful grounds for ordering pre-trial detention to be: (1) the risk that the suspect will fail to appear for trial;¹⁹ (2) the risk the suspect will spoil evidence or intimidate witnesses;²⁰ (3) the risk that the suspect will commit further offences;²¹ (4) the risk that the release will cause public disorder;²² or (5) the need to protect the safety of a person under investigation in exceptional cases.²³ Committing an offence is insufficient as a reason for ordering pre-trial detention, no matter how serious the offence and the strength of the evidence against the suspect.²⁴ Pre-trial detention based on "the need to preserve public order from the disturbance caused by the offence"²⁵ can only be legitimate if the public order actually remains threatened. Pre-trial detention cannot be extended just because the judge expects a custodial sentence at trial.²⁶

With regards to flight risk, the ECtHR has clarified that merely the lack of fixed residence²⁷ or the risk of facing long term imprisonment if convicted does not justify ordering pre-trial detention.²⁸ The risk of reoffending can only justify pre-trial detention if there is actual evidence of the definite risk of reoffending available;²⁹ merely a lack of job or local family ties would be insufficient.³⁰

16 *Yagci and Sargin v Turkey*, App 16419/90, 16426/90, 8 June 1995, para 52.

17 *Smirnova v Russia*, App 46133/99, 48183/99, 24 July 2003, para 63.

18 See above, note 9.

19 See above, note 17, para 59.

20 Ibid.

21 *Muller v. France*, App 21802/93, 17 March 1997, para 44.

22 *I.A. v. France*, App 28213/95, 23 September 1988, para 104.

23 Ibid para 108.

24 *Tomasi v France*, App 12850/87, 27 August 1992, para 102.

25 See above, note 22.

26 See above, note 14, para 149.

27 *Sulaoja v Estonia*, App 55939/00, 15 February 2005, para 64.

28 See above, note 24, para 87.

29 *Matznetter v Austria*, App 2178/64, 10 November 1969, concurring opinion of Judge Balladore Pallieri, para 1.

30 See above, note 27.

2.2.3 Alternatives to detention

The case law of the European Court of Human Rights (ECtHR) has strongly encouraged the use of pre-trial detention as an exceptional measure. In *Ambruszkiewicz v Poland*,³¹ the Court stated that the ‘detention of an individual is such a serious measure that it is only justified where other, less stringent measures have been considered and found to be insufficient to safeguard the individual or the public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law, it also must be necessary in the circumstances.’

Furthermore, the ECtHR has emphasised the use of ‘proportionality’ in decision making, in that the authorities should consider less stringent alternatives prior to resorting to detention,³² and the authorities must also consider whether the “accused’s continued detention is indispensable”.³³

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

2.2.4 Review of pre-trial detention

Pre-trial detention must be subject to regular judicial review,³⁴ which all stakeholders (defendant, judicial body, and prosecutor) must be able to initiate.³⁵ A review hearing has to take the form of an adversarial oral hearing with the equality of arms of the parties ensured.³⁶ This might require access to the case files,³⁷ which has now been confirmed in Article 7(1) of the Right to Information Directive. The decision on continuing detention must be taken speedily and reasons must be given for the need for continued detention.³⁸ Previous decisions should not simply be reproduced.³⁹

31 *Ambruszkiewicz v Poland*, App 38797/03, 4 May 2006, para 31.

32 *Ladent v Poland*, App 11036/03, 18 March 2008, para 55.

33 *Ibid.*, para 79.

34 *De Wilde, Ooms and Versyp v Belgium*, App 2832/66, 2835/66, 2899/66, 18 June 1971, para 76.

35 *Rakevich v Russia*, App 58973/00, 28 October 2003, para 43.

36 See above, note 13.

37 *Wloch v Poland*, App 27785/95, 19 October 2000, para 127.

38 See above, note 5, para 84.

39 See above, note 15.

When reviewing a pre-trial detention decision, the ECtHR demands that the court be mindful that a presumption in favour of release remains⁴⁰ and continued detention “can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention”.⁴¹ The authorities remain under an ongoing duty to consider whether alternative measures could be used.⁴²

2.2.5 Implementation

Yet, these guidelines are not being upheld in national courts and EU countries have been found in violation of Article 5 ECHR in more than 400 cases in 2010-2014.⁴³ Notwithstanding any possible EU-action on this issue at a later stage, the ultimate responsibility for ensuring that the suspects rights to a fair trial and right to liberty are respected and promoted lies with the Member States that must ensure that at least the minimum standards developed by the ECtHR are complied with.

2.3 PRE-TRIAL DETENTION IN THE NETHERLANDS

In recent years, the topic of pre-trial detention has often been discussed in the Netherlands. Figures show that the tool of pre-trial detention is used in a lot of cases in the Netherlands; in 2013 39.9% of the prison population consisted of pre-trial detainees.⁴⁴ As we will show in later chapters pre-trial detention is ordered in a large majority of the instances that it is requested by prosecuting authorities. In recent years the discussion amongst defence lawyers, academics and even judges has increased on whether the practice of pre-trial detention is still acceptable, also in light of ECtHR standards.⁴⁵ A lot of research has already been done in the Netherlands, which will be discussed in chapter 4. However, the current research adds a new aspect to the discussion since it is based on a research methodology providing input from defence lawyers, judges and prosecutors and empirical data of actual cases.

40 See above, note 14, para 145.

41 *McKay v UK*, App 543/03, 3 October 2006, para 42.

42 *Darvas v Hungary*, App 19574/07, 11 January 2011, para 27.

43 http://echr.coe.int/Documents/Overview_19592014_ENG.pdf.

44 <http://www.prisonstudies.org/country/netherlands>.

45 See for instance Crijns & Geelhoed 2011; Janssen & Van der Meij 2012; Klip 2012; Janssen, Van den Emster & Trotman 2013; Stevens 2008 and Stevens 2012.

3.1 GENERAL METHODOLOGY

This project was designed to develop an improved understanding of the process of the judicial decision making on pre-trial detention in ten EU Member States: England and Wales, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania and Spain. This research was carried out in ten Member States with different legal systems (common and civil law), legal traditions and heritage (for example Soviet, Roman and Napoleonic influences), differing economical situations, and, importantly, strongly varying usage of pre-trial detention in criminal proceedings (for example 12.7% of all detainees in Ireland have not yet been convicted⁴⁶ whereas in the Netherlands 39.9% of all prisoners have not yet been convicted⁴⁷). The choice of participating countries allows for identifying good and bad practices, and for proposing reform at the national level as well as developing recommendations that would ensure enhanced minimum standards across the EU. The individual country reports focusing on the situation in each participating country will provide in-depth input to the regional report which will outline common problems across the region as well as highlighting examples of good practice, and will provide a comprehensive understanding of pan-EU pre-trial decision making.

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

46 <http://www.prisonstudies.org/country/ireland-republic>, data provided by International Centre for Prison Studies, 18 June 2015.

47 <http://www.prisonstudies.org/country/netherlands>, data provided by International Centre for Prison Studies, 18 June 2015.

The five-stages of the research were as follows:

1. Desk-based research, in which the partners examined the national law and practical procedures with regards to pre-trial detention, collated publicly available statistics on the use of pre-trial detention and available alternatives, as well as information on recent or forthcoming legislative reforms. Based on this research, Fair Trials and the partners drafted research tools which – with small adaptations to specific local conditions – explore practice and motivations of pre-trial decisions and capture the perceptions of the stakeholders in all participating countries.
2. A defence practitioner survey, which asked lawyers for their experiences with regards to the procedures and substance of pre-trial detention decisions.
3. Monitoring pre-trial detention hearings, thereby gaining a unique insight into the procedures of such hearings, as well as the substance of submissions and arguments provided by lawyers and prosecutors and judicial decisions at initial and review hearings.
4. Case file reviews, which enabled researchers to get an understanding of the full life of a pre-trial detention case, as opposed to the snapshot obtained through the hearing monitoring.
5. Structured interviews with judges and prosecutors, capturing their intentions and motivation in cases involving pre-trial detention decisions. In addition to the common questions that formed the main part of the interviews, the researchers developed country-specific questions based on the previous findings to follow-up on specific local issues.

3.2 METHODOLOGY IN THE NETHERLANDS

The defence lawyer survey was first distributed to lawyers known by the researchers and in a later stage to defence lawyers through an email sent by the Dutch Association of Criminal Lawyers (*Nederlandse Vereniging voor Strafrechtadvocaten*). We received a total of 35 responses.

For the hearing monitoring in the Netherlands we decided to collect data on the initial decision on applying pre-trial detention. This decision is rendered by an investigative judge (*rechter-commissaris*) after a maximum of three days upon arrest and the initial detention ordered by the police. In addition we collected data on the decision taken by a panel of three judges after a maximum of fourteen days (*raadkamer gevangenhouding*) after the initial decision on applying pre-trial detention has been taken by the investigative judge. The hearings monitored all took place in courts of first instance. In the Netherlands, these hearings are closed to the public. Thus, it was necessary to get permission and cooperation from the Council of the Judiciary (*Raad voor de Rechtspraak*)

to attend these hearings. Permission was also required for the case file review and the interviews with judges. After submitting our research proposal through the normal channels in place for requesting access for doing external research, permission was granted.

To collect the hearing monitoring data, we decided to focus on the *raadkamer* hearings to maximize the chances of observing a sufficient amount of cases. Typically, on an average hearing day more cases are dealt with by that body than cases that are handled by the investigative judge. Most courts have one *raadkamer* a week, some of the bigger courts have two. When possible we tried to visit the initial hearings by the investigative judges on the same day following the *raadkamer* hearings in other cases. Over the course of the research project we visited nine of the eleven District Courts, resulting in observations of 109 hearings.⁴⁸ By visiting nine of the eleven courts across the country a good variety of urban and more rural areas was achieved.⁴⁹

We reviewed 56 case files in three different district courts.⁵⁰ The courts were selected by the Council of the Judiciary, who try to even out the workload of the different courts regarding requests and research such as ours. In order to have a sample of comparable cases, we asked for case files in two types of cases in which pre-trial detention is usually requested namely theft/robbery cases and assault cases. The cases were selected randomly by the three courts themselves from their archives of closed cases (generally cases in which the arrest took place in 2013 or 2014, although some cases were older with the oldest case originating in 2005).

In those same three districts the interviews with six judges (five district court judges and one investigative judge) were conducted. Finally, we conducted interviews with three prosecutors from departments of the Public Prosecution Service located in more urban areas of the Netherlands.⁵¹ Departments of the Public Prosecution Service in some other areas were contacted as well, but did not reply to requests to be interviewed. One planned interview with a prosecutor was cancelled due to urgent judicial matters. All interviews were tape-recorded.

48 District Courts of Amsterdam, Gelderland, Midden-Nederland, Noord-Holland (two days, one day for hearings by an investigative judge and one day for hearings by a *raadkamer*), Noord-Nederland, Oost-Brabant, Overijssel, Rotterdam and Zeeland-West-Brabant.

49 Given the high population density in the Netherlands no areas can be labelled as strictly rural.

50 District Courts of Gelderland, Midden-Nederland and Oost-Brabant.

51 Departments of the Public Prosecution Service in The Hague, Noord-Holland and Rotterdam.

4.1 INTRODUCTION

As noted earlier, there is an ongoing discussion in the Netherlands concerning pre-trial detention. The issue has also received much scholarly attention in recent years. Also, when conducting this research, we encountered a lot of interest in our research from defence lawyers, prosecutors and judges. In this chapter we will firstly give an overview of the legal framework regarding pre-trial detention. Thereafter, we will discuss some of the academic articles and existing research on pre-trial detention decisions to give an impression of the legal climate in the Netherlands regarding these decisions. Finally, some recent legal reforms and proposals will be highlighted.

4.2 THE LEGAL FRAMEWORK

Article 15 of the Dutch Constitution states that deprivation of liberty is only allowed when this deprivation has a legal basis. Pre-trial detention is regulated in the Code of Criminal Procedure (further: CCP).

4.2.1 Stages of pre-trial detention

The first stage of pre-trial detention is called *bewaring* and can last for a maximum of fourteen days (before the *bewaring* a suspect can be held by police for up to three days and fifteen hours). The *bewaring* can be ordered by an investigative judge upon a motion by the public prosecutor (Article 63 CCP). The hearing in which the decision is made about the *bewaring* must take place within three days and fifteen hours after the arrest. At this hearing the investigative judge also checks the legality of the arrest (Article 59a CCP). Before this hearing the defence is presented with the motion from the prosecutor containing the request for pre-trial detention and its reasons. The defence also receives the available evidence in the case file at that time. The second stage of pre-trial detention is the *gevangenhouding* and has to be ordered by a panel of three judges (Article 65 CCP), again upon a motion by the public prosecutor. The first hearing in this stage of the pre-trial detention takes place within fourteen

days after the initial pre-trial detention order was granted by the investigative judge (unless the initial order was for a shorter period).

4.2.2 Criteria for pre-trial detention

The criteria for applying pre-trial detention – both *bewaring* and *gevangenhouding* – can be found in Articles 67 and 67a of the CCP. Article 67 CCP states the circumstances (*gevallen*) in which pre-trial detention can be ordered. Article 67a CCP gives the legitimate grounds (*gronden*) for pre-trial detention. Pre-trial detention can only be ordered if there is at least one *geval* and one *grond*. When a judge concludes that the conditions for pre-trial detention are met, it is not mandatory to order pre-trial detention.

The circumstances of Article 67 CCP mainly concern the types of offences for which pre-trial detention is allowed (*gevallen*). The main rule in paragraph 1 of Article 67 CCP is that only suspects of offences which carry a minimum penalty of four years imprisonment can be held in pre-trial detention. A number of offences that fall below this four-year threshold, such as minor assault, verbal threatening of a person and destruction of property, are explicitly mentioned in paragraph 1 of Article 67 CCP and for these offences pre-trial detention is also allowed. Paragraph 2 of Article 67 CCP makes it possible to hold someone in pre-trial detention if the suspect does not have a fixed residence in the Netherlands, regardless of the offence. This does not mean, however, that pre-trial detention can be ordered solely for this reason, since the existence of a ground for pre-trial detention is also required. Paragraph 3 gives an additional criterion for all circumstances of Article 67 CCP, namely the existence of a serious suspicion (*ernstige bezzwaren*) that the suspect committed the offence of which he is suspected. This criterion of a serious suspicion is to be considered a stricter criterion than a reasonable suspicion (*verdenking*), which is the applicable criterion for less intrusive forms of deprivation of liberty preceding pre-trial detention ordered by a judge, such as arrest and the first three days of detention following upon arrest ordered by a police officer (*inverzekeringstelling*). This means that – in order to successfully request pre-trial detention – the prosecutor has to strengthen the reasonable suspicion to a serious suspicion during the first three days of detention.

The grounds for pre-trial detention are listed in paragraph 1 of Article 67a CCP. They include the existence of a flight risk of the suspect or a strong reason of public interest. Paragraph 2 of Article 67a CCP describes the five grounds that fall in the latter category:

- a. Suspicion of an offence that carries a maximum sentence of at least twelve years imprisonment and that has shocked the legal order.

- b. Strong suspicion that the suspect will commit another offence that (a) carries a minimum sentence of six years, (b) or an offence that threatens the health or safety of persons if released.
- c. A suspicion that a suspect has committed one of the listed offences in this paragraph (mainly assault, theft etc.) while having a prior conviction for a similar offence in the previous five years.
- d. Risk that the suspect will harm the investigation if released.
- e. Suspicion of an act of violence in a public space or against public servants (for instance the police, ambulance staff etc.) while this offence will be tried within a period of seventeen days and fifteen hours after arrest (i.e. before the first phase of the pre-trial detention, the *bewaring*, will expire).

Pre-trial detention can be ordered, when a judge believes that at least one of these grounds exists (provided there is also an offence that qualifies for pre-trial detention as well as a serious suspicion). This means that judges might use more than one ground for pre-trial detention. The judge is also allowed to add new grounds for pre-trial detention when the pre-trial detention is extended at each subsequent decision regarding pre-trial detention.

A final factor for the judge to take into account is Article 67a paragraph 3 CCP which states that the judge cannot order (a period of) pre-trial detention if it is to be expected that the final sentence would be of a shorter length than the amount of days spent in pre-trial detention. This means the judge deciding on (the extension of) pre-trial detention always has to anticipate the expected sentence in the specific case (*anticipatiegebod*).

4.2.3 Length of pre-trial detention

At first glance the maximum length of pre-trial detention appears to be 104 days (fourteen days of *bewaring* and ninety days of *gevangenhouding*). However, this does not mean that a suspect must be released after that period. This maximum period only guarantees that at that point the trial phase will commence. However, in more complicated investigations this is usually too early to start the substantive trial and the first trial date is used to extend the pre-trial detention and determine what investigative measures need to be taken (the so called *pro forma trial*) after which the trial is suspended until the next *pro forma trial* or – eventually – the substantive trial.⁵² In practice this means that suspects can be in detention for an extended period (there is no legal limit) since the aforementioned trial does not have to be the substantive trial. This means that in Dutch criminal law there is only a formal maximum length of

52 Dubelaar e.a. 2015.

pre-trial detention (104 days), as a result of the pro forma trial the real time served in pre-trial detention may be much longer. This does not mean, however, that depending on the particulars of the specific case the pre-trial detention can last endlessly, since the trial judge – during the pro forma trial deciding on the need of continuation of the pre-trial detention – always has to consider whether or not the legal criteria for pre-trial detention are still met. Especially the aforementioned obligation to anticipate the expected sentence in the specific case (*anticipatiegebod*), and – to a lesser extent – the obligation to see whether or not there are still one or more grounds for continuing the pre-trial detention are intended as safeguards against excessive periods of pre-trial detention.

4.2.4 Alternatives to pre-trial detention

Alternatives to pre-trial detention are available under the same conditions as pre-trial detention. This means that the judge will firstly assess whether the circumstances and grounds to order pre-trial detention are given. Once it is decided that this is the case, the judge can suspend pre-trial detention under specific conditions. The applicable criterion for suspending the pre-trial detention is the question whether the interests of the suspect in suspension of the pre-trial detention outweigh the interests of the criminal procedure in continuation of the pre-trial detention. This means that – before ordering the suspension of the pre-trial detention – the judge has to balance the relevant interests in the case carefully. Alternatives include parole supervision, electronic monitoring and an order to stay away from certain locations or persons. Additionally the general conditions that the suspect will comply to possible future court orders regarding the pre-trial detention and will cooperate with the execution of a possible future sentence to imprisonment (Article 80 paragraph 2 CCP) are also imposed.

4.2.5 Legal aid

After their arrest suspects are informed that they can consult with a lawyer before the first interrogation. A suspect can choose his own lawyer or he can be assigned a lawyer from a duty list (*piketlijst*). Assistance from a lawyer is free of charge in cases where the suspect is put in pre-trial detention.⁵³

53 Articles 38, 40, 41, 42 and 43 CCP and Article 43 Act on legal aid (*Wet op de Rechtsbijstand*).

4.3 THE EXISTING DEBATE ON PRE-TRIAL DETENTION

There has been an ongoing debate in the Netherlands on the topic of pre-trial detention in recent years. Several articles and studies have looked at the use of pre-trial detention in the Netherlands and whether this usage is in conformity with ECtHR standards.⁵⁴ However, an article by three judges from the District Court in Rotterdam in 2013 gave a really strong impetus to the discussion that is currently taking place on pre-trial detention in the Netherlands.⁵⁵ In this article the judges called for an (internal) discussion on the use of pre-trial detention that should lead to a new approach to the use of this tool. The judges describe the practice of pre-trial detention as an 'efficient cookie factory'. They state that in virtually all cases brought before a judge an order for pre-trial detention will be given (which is also one of the findings of this research, see chapter 6) and believe it is overused.⁵⁶ They point out that this leads to a situation where the percentage of pre-trial detainees in the prison population in the Netherlands is the highest in Europe, and the high usage of pre-trial detention leads to a high amount of financial compensation yearly for suspects who are later acquitted.⁵⁷ In their article the judges argue that changes in the practice of pre-trial detention should come from a discussion amongst judges themselves regarding the way in which they apply the legal standards for pre-trial detention. They see little necessity for legislative changes, but look for a positive effect in a stricter approach to the existing legal standards and a better and more extensive reasoning of pre-trial detention decisions.⁵⁸

4.4 RECENT REFORMS AND FUTURE PROPOSALS

Changes to the Code of Criminal Procedure in the field of pre-trial detention are discussed often. The most recent legislative change was the addition of a new ground for pre-trial detention in Article 67a CCP. Namely, the ground to hold a suspect in pre-trial detention if an offence is committed in a public space or against a public official. These types of offences are dealt with via so-called superfast procedures meaning that they will be tried within seventeen days after the offence was committed. The reason for this change, as given by the Government, is that it is more effective to punish perpetrators immedi-

54 Crijns & Geelhoed 2011, Janssen & Van der Meij 2012, Klip 2012, Stevens 2008.

55 Janssen, Van den Emster & Trotman 2013.

56 See also Stevens 2009.

57 Janssen, Van den Emster & Trotman 2013, p. 430.

58 Janssen, Van den Emster & Trotman 2013, p. 438 & 443-444.

ately rather than having a suspect wait a couple of weeks or months before trial.⁵⁹

Besides this relatively minor recent change the Government in 2014 announced an extensive revision of the Code of Criminal Procedure (*Project Modernisering Wetboek van Strafvordering*). The goal of this revision is to keep the Code up to date with changing circumstances in society. The Government also specifically pays attention to (the practice of) pre-trial detention. As part of this modernization process the Government released several discussion papers dealing with a number of topics under consideration for legislative changes, one of these topics is pre-trial detention. In its discussion paper the Government looks at several changes to the pre-trial detention system. First of all, there are some technical changes regarding the offences for which pre-trial detention can be ordered and the level of suspicion that is necessary. It is not likely, however, that this will have a strong impact on reducing the amount of orders for pre-trial detention.⁶⁰ Further, the government is planning to add the principles of proportionality and subsidiarity as general principles for the adjudication of criminal justice to the Code of Criminal Procedure. It is not to be expected that this will result to a reduction of pre-trial detention either, since these principles – codified or not – already apply to the decision of pre-trial detention. More promising and fundamental are the changes that the Government is proposing regarding the use of alternatives to pre-trial detention. The Government is firstly planning to come with proposals to further legally regulate the conditions under which pre-trial detention can be suspended. This in order to stimulate the judge to suspend the pre-trial detention in a larger amount of cases. The exact form of this regulation is not clear yet. Secondly, the Government is looking at the possibility to impose measures to restrict the freedom of persons and influence behaviour separate from the pre-trial detention.

4.5 JURISPRUDENCE OF THE ECtHR CONCERNING THE NETHERLANDS

Although some points of concern regarding the Dutch procedure on pre-trial detention will be highlighted in this report there has been very little case law from the Strasbourg Court concerning the Netherlands regarding pre-trial detention. However, this does not mean that the ECHR has had no influence on the application of pre-trial detention in the Netherlands.

The shocked legal order ground has been challenged before the Strasbourg Court. However, in a couple of decisions in 2007 the Court did not find that

⁵⁹ *Kamerstukken II* 2011/12, 33 360, nr. 3, p. 1-2.

⁶⁰ Mols 2015, p. 87.

this ground violated the ECHR in those cases.⁶¹ Therefore, the perception now is that this ground in principle is acceptable to the Strasbourg Court. This perception was challenged by the *Geisterfer v. The Netherlands* judgment that the Court handed down at the end of 2014.⁶² In this judgment the Court found that there had been a violation of Article 5 ECHR since the shocked legal order ground could no longer be a ground for pre-trial detention in that case. This has lead lawyers to argue that this ground can no longer be applied in practice. However, in our view the conclusion that the Court has drawn in this judgment was very much a result of the specific circumstances of that case. Our research shows that this ground is still used frequently by judges to justify pre-trial detention.⁶³

61 *Kanzi v. The Netherlands*, App 28831/04 (Dec.), 5 July 2007; and *Hendriks v. The Netherlands*, App 43701/04 (Dec.), 5 July 2007.

62 *Geisterfer v. The Netherlands*, App 15911/08, 9 December 2014.

63 See chapter 6.

5 Procedure of pre-trial detention decision making

5.1 INTRODUCTION

Although substantive defence rights for suspects are important, these rights can only be effectuated properly if there is an effective procedure in place to do so. Therefore, we will first look at the procedural aspects concerning the practice of pre-trial detention decision making. As we have seen in paragraph 2.2.1, case law of the ECtHR demands that a suspect arrested must be brought promptly before a judicial authority and that this judicial authority, taking the decision on (the continuation of) pre-trial detention, must have the authority to release the suspect and be a body independent from the executive and the parties involved in the proceedings. Furthermore, the ECtHR demands an oral and adversarial hearing, in which the defence must be given the opportunity to effectively participate. Regarding the procedure of pre-trial detention decision making in the Netherlands our research shows that generally the practice is consistent with both national law and ECtHR standards.

5.2 ACCESS TO A LAWYER AND THE CASE FILE

The results from the case file review and hearing monitoring show that a lawyer represented the suspect in all cases and that the suspect had the possibility to be present during the hearing(s).⁶⁴ Also in all cases monitored and reviewed the suspect was brought before the investigative judge within a reasonable time, complying with the Dutch statutory limit of three days and fifteen hours (Article 59a CCP). On average, suspects were brought before the investigative judge after two days and fourteen hours. At this hearing the investigative judge will review the legality of the arrest and make a decision on a request by the prosecutor to hold a suspect in pre-trial detention for up to fourteen days (if such a request is made). Lawyers had access to the case

⁶⁴ In one case the lawyer did not show up at the hearing where the extension of the pre-trial detention was at stake, even though his client was there. The presiding judge interrupted the hearing to have the clerk of the court contact the lawyer to ask why he was not present. The lawyer was under the impression that his client would not come to the hearing and was therefore not present. After receiving this information from the lawyer the judge decided to move ahead with the hearing.

file in all monitored cases and were immediately granted access to additional evidence when this was not yet added to the case file. However, lawyers sometimes have little time to discuss the case file with the suspect prior to the initial hearing. In 2.8% of cases monitored (only three times) lawyers requested extra time with their client prior to the hearing. One third of the lawyers surveyed indicated that they have thirty minutes or less to review the case file. However, one lawyer notes that this also depends on the time the lawyer arrives at the court:

‘It depends on what time the case file is available. Nowadays this should be at 9.00 a.m. on the day of the initial hearing. Depending on the time of the hearing there is enough time to review the file (at least one hour). Usually this hour is not achievable because the lawyer is still at another place, or just late.’

Lawyers participating in the survey indicate that the time for review and the completeness of the case file is also very dependent on the case.⁶⁵ One prosecutor indicated during an interview that it matters whether a suspect was arrested while committing the offence or whether the suspect was arrested on a warrant. In the latter instance there is more time to compile a more comprehensive case file that can be handed over to the defence. When an offence was committed only shortly before the hearing it is more difficult to assemble a large case file. The investigative judge will then have to decide whether the amount of evidence available is enough to warrant the pre-trial detention of the suspect.

Suspects can choose their own lawyer, and if they do not have their own lawyer one will be provided for them by way of a duty scheme. In all cases concerning pre-trial detention the lawyers are publically funded.⁶⁶ In the Netherlands, there is no distinction between private lawyers and legal aid lawyers.

5.3 RIGHT TO BE PRESENT

The suspect was present at 100% of the initial hearings, and at 83% of the review hearings. In the survey the lawyers indicate that the suspect will always be present during the initial hearing, since it is not possible for the suspect to choose to not be present at this hearing. If a suspect decides not to be present at the review hearing the judge will only continue if a signed waiver

65 Thirteen out of 35 lawyers surveyed (37.14%) have actively indicated that the time for review and the completeness of the case file is very dependent on the case. Other lawyers didn't indicate as much in the blank spaces of the survey, but we can assume they would agree.

66 See paragraph 2.2.5.

is presented in which the suspect waives his right to be present. This procedure is based on the waiver requirements set by the ECtHR in the jurisprudence on the right to be present under Article 6 ECHR. The results from the lawyer survey suggest that some suspects do decide to waive the right to be present, however in all cases it is their decision to do so. Some relevant quotes from the 35 lawyers participating in the survey in this regard (these quotes generally reflect the responses from most lawyers in the survey):

‘Transport from the detention facility to the Court (sometimes past several other courts) is experienced by suspects as very annoying, the same goes for waiting in the cells at the Court. Therefore, some of them choose not to be present. If a request is being made for the suspension of the pre-trial detention the suspect will generally be present.’

‘The suspect will almost always be present because they themselves can best explain their personal circumstances, also the *gun-factor* (goodwill) is important.

‘Usually the suspect is present. Sometimes the suspect will decide not to be present. That usually only happens when it is expected that the pre-trial detention will be extended regardless of whether he is present or not’

‘The longer pre-trial detention lasts the larger the chance is that the suspect will not be present at hearings’

From these quotes it can be concluded that when the suspect decides not to be present this is often a result of practical issues for instance the long wait at the court and the transport from the detention facility (which is not always close to the court).

In all cases reviewed and monitored where a suspect did not speak the Dutch language an interpreter was provided, as was confirmed by the results of the hearing monitoring. The detention order is translated in the language of the suspects if he is not Dutch.

5.4 LENGTH OF PRE-TRIAL DETENTION HEARINGS

Regarding the length of the hearings a distinction has to be made between the initial hearing (*bewaring*) and the *raadkamer* hearing (*gevangenhouding*). The former averages at around 24 minutes, while the latter averages at around eleven minutes. The longest three-day hearing was 48 minutes, while the shortest was only eight minutes. The longest *raadkamer* hearing was 38 minutes and the shortest was just one minute. A main reason for this difference is that in the initial hearing the investigative judge conducts a more thorough questioning of the suspect on the facts of the case. At the *raadkamer* hearing the

focus is more specifically on the legal requirements for pre-trial detention, namely whether the level of suspicion required and grounds for pre-trial detention exist. An interrogation of the suspect regarding the facts of the case does not take place. The judges are familiar with the facts of the case since they will have reviewed the case file in advance. Most of the time during these hearings is spent by submissions of the prosecution and defence lawyers. On average the prosecutor speaks for 2.3 minutes and the lawyer for four minutes during the review by the *raadkamer*. During the hearing observations one instance was observed where the judge cut short the defence lawyer submission. In all other cases the defence was given the time it wanted. However, 40% of the lawyers surveyed indicate in the defence lawyer survey that they feel that there can be pressure from the court to keep their submissions short in duration to keep up with the scheduling of cases.⁶⁷ We did not observe any hearings where it appeared that the judges treated the submissions from the defence lawyers and the prosecution differently. 65.7% of the defence lawyers in the survey indicate that the judges treat the submissions fairly.

Usually the decision is handed down the day after the hearing in the case of the *raadkamer* hearings, the decision in the three-day hearing by the investigative judge is announced immediately. In both cases a written decision will be provided.

⁶⁷ Fourteen out of 35 lawyers surveyed (40%) indicated this in the defence lawyer survey. Since this wasn't the exact question (and these fourteen lawyers indicated this in a comment in the blank spaces of the survey), other lawyers might feel the same way.

6 Substance of pre-trial detention decision making

6.1 INTRODUCTION

In the previous chapter it was concluded that the procedural practice of pre-trial decision making is generally in accordance with existing national and European legal norms. The main area where problems are seen with regard to pre-trial detention in the Netherlands is in the substantive aspects of pre-trial detention decision making. As we have seen in paragraph 2.2.2 the ECtHR has repeatedly emphasized the presumption in favour of release, which means the state bears the burden of proof on showing that a less intrusive alternative to detention would fail to serve the purpose at stake. Furthermore, the case law of the ECtHR demands that pre-trial detention decisions are sufficiently substantiated in light of the specific circumstances of the case, meaning that arguments for and against applying pre-trial detention may not be 'general and abstract'. According to the ECtHR the mere suspicion of a criminal offence is insufficient as a reason for ordering pre-trial detention, no matter how serious the particular offence and the strength of the evidence for the suspicion are. The only lawful grounds for applying pre-trial detention are: 1) the risk that the suspect will fail to appear for trial; 2) the risk the suspect will spoil evidence or influence witnesses; 3) the risk of re-offending; 4) the risk that releasing the suspect will cause public disorder; and 5) – in exceptional cases – the need to protect the safety of a person under investigation.⁶⁸ In light of this case law of the ECtHR the practice of pre-trial detention in the Netherlands has some problematic aspects, which will be outlined in this chapter. The following problems can be identified in Dutch practice: 1) the high amount of pre-trial detention that is being ordered; 2) the way in which judges apply the grounds that are necessary for pre-trial detention; and 3) the reasoning of pre-trial detention decisions.

⁶⁸ More detailed requirements for the application of each of these grounds are outlined in paragraph 2.2.2.

6.2 HIGH AMOUNT OF PRE-TRIAL DETENTION

First of all, the high amount of pre-trial detention that is being ordered in the Netherlands must be highlighted as a point of concern. Statistics show that in recent years (2010-2014) around 45% of the prison population consists of pre-trial detainees.⁶⁹ During our hearing monitoring we saw that in 53% of the monitored initial hearings and in 76% of the monitored *raadkamer* hearings pre-trial detention was ordered, without conditional release.⁷⁰ In our case file review that number was even higher; pre-trial detention was ordered, without conditional release, in 84% of initial review hearings, and was renewed in 91% of cases.⁷¹ This shows that in a large majority of the cases that were analysed in the case file review and hearing monitoring, requests by the prosecutor for applying pre-trial detention were granted by the judge(s). One caveat that should be made is that there might be a selection effect, meaning that prosecutors might only request pre-trial detention in cases where he feels that such a request will be granted by the judge. Nevertheless, the high amount of pre-trial detention in the Netherlands – especially compared to other EU-countries – raises questions whether the principle of pre-trial detention as a measure of last resort is protected enough. Lawyers point out the following in this regard in the lawyer survey:

‘Make pre-trial detention special again, instead of automatic application.’

‘Pre-trial detention is used far too easily.’

‘It appears that pre-trial detention is the rule and the rejection or suspension of pre-trial detention the exception. A lot of investigative judges and/or *raadkamers* appear fearful to turn down a request from the prosecutor to order pre-trial detention. (...)’

From the surveys it is clear that all defence lawyers feel that pre-trial detention is overused. This conclusion is also drawn in various academic articles and

69 Dienst Justitiële Inrichtingen 2015, p. 31 (figure 5.2): 48% in 2010, 49% in 2012 and 43% in 2014.

70 The cases monitored at the *raadkamer* hearings after fourteen days were not the same cases as monitored at the initial hearings.

71 The higher percentage of decisions in favour of renewing pre-trial detention at the *raadkamer* hearings compared to the decisions to apply pre-trial detention at the initial hearings may be explained by a certain selection effect, meaning that the more questionable cases have already been filtered out by the investigative judge during the initial hearing. The higher percentage of decisions in favour of applying or renewing pre-trial detention in the case file review compared to the decisions to apply or to renew pre-trial detention in the hearing monitoring may be explained by the fact that the case file review only concerned (serious) theft/robbery cases and assault cases, whereas the hearing monitoring concerned all types of cases.

has been identified by judges themselves as well.⁷² This raises serious doubts about whether the principle that pre-trial detention is a measure of last resort is sufficiently guaranteed. It is not easy to point out a reason for this high amount of pre-trial detention based on our research. One factor that might play an important role is the lack of availability of effective alternatives to pre-trial detention, this will be discussed further in the next chapter.

6.3 GROUNDS FOR PRE-TRIAL DETENTION

As we have seen in paragraph 2.2 the case law of the ECtHR unequivocally states that – at the background of the general subsidiarity principle and the hereto related presumption in favour of release – it is the state that bears the burden of proof of showing that a less intrusive alternative to detention would not serve the respective purpose for pre-trial detention. According to legal scholars the practice of pre-trial detention in the Netherlands contrasts sharply with this basic principle, especially because the judge easily accepts grounds for pre-trial detention.⁷³

Although our research design is not fit to give insight into the question whether or not decisions of the judge on the existence of grounds for pre-trial detention in individual cases were justified, the aggregated results of our analysis show that this criticism cannot be discarded as being totally unfounded. As we have seen in the previous paragraph, requests of the public prosecutor for applying or renewing pre-trial detention were granted by the judge in the large majority of cases, which shows that in all these cases the judge accepts one or more grounds for pre-trial detention.

A closer look at the results of our research shows that the risk of reoffending is most used as ground for pre-trial detention, both in decisions of the investigative judge (initial hearing; figure 1) and in decisions of the *raadkamer* (figure 2).

72 See among others Janssen, Van den Emster & Trotman 2013 and Mols 2015.

73 See among others Stevens 2013 and Janssen, Van den Emster & Trotman 2013.

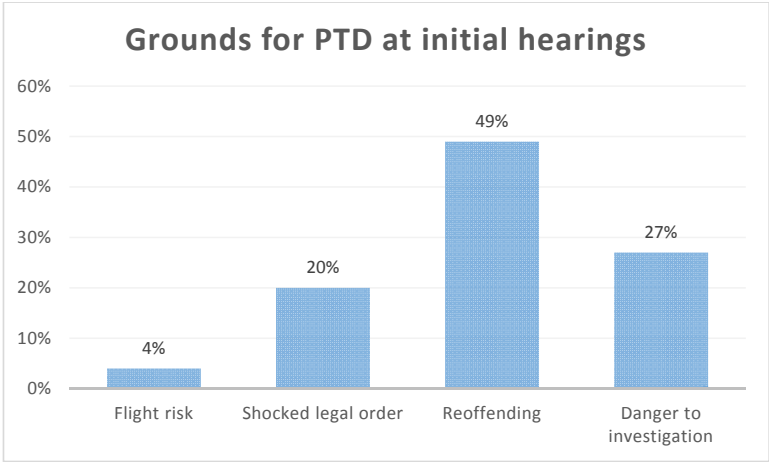


Figure 1

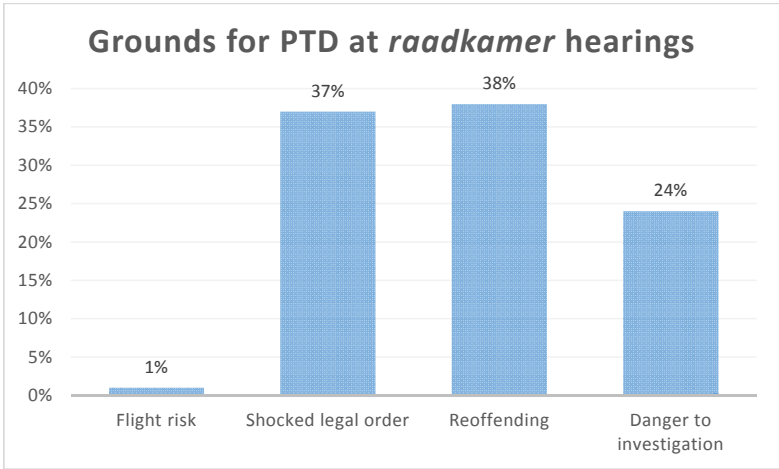


Figure 2

As we have seen in paragraph 4.2 judges are allowed to use more than one ground for pre-trial detention. Our research shows that judges often make use of this possibility. For example, the danger to the victim ground was used in combination with the reoffending ground 80% of the time. As shown, the most used ground for pre-trial detention is the risk of reoffending, during the initial hearings the reoffending ground was used solely or in combination with another ground 81% of the time.

Several points can be noted with respect to the grounds for pre-trial detention. First of all, we have found that the ground of danger to the investigation is easily accepted, even though it does erode over time. The ground is accepted

far less frequently at the *raadkamer* hearing than at the initial hearing (after three days), as judges become more wary as more time goes by.

Risk of reoffending is easily accepted whenever the suspect has a criminal record, especially when it concerns roughly the same types of crime. It can therefore be concluded that judges tend to place great weight on things that have happened in the past to assess whether there is a risk of reoffending in the future, which may be at odds with the relevant case law of the ECtHR.⁷⁴ This is confirmed by the responses given by the judges interviewed. One judge explained that judges are faced with the question ‘do we want to risk it?’, indicating that pre-trial detention is sometimes also seen as necessary to protect society.

The public order ground has, as previously stated, a legal definition attached to it, but we see that often, instead of considering whether there is a suspicion of an offence that carries a maximum sentence of at least twelve years imprisonment and that has shocked the legal order, judges only look at the maximum sentence of at least twelve years imprisonment, and seem to conclude that whenever that is the case, there is also a shocked legal order.

Lastly, the flight risk is quickly accepted. Despite the relevant case law of the ECtHR on this point,⁷⁵ lack of an official fixed abode in the Netherlands almost instantaneously leads to accepting flight risk as a ground for pre-trial detention. In an interview, one prosecutor explains this by saying that you want to know where you can find someone, if this is not possible then pre-trial detention will be requested (and ordered) more quickly.

The evidence used by judges is generally quite abstract. As described in paragraph 4.2 there needs to be a serious suspicion (*ernstige bezwaren*), but there are few rules as to what this entails exactly other than that there has to be a higher level of suspicion than the level necessary for the initial arrest. That means that all judicial decisions are explained, but regarding the evidence of *ernstige bezwaren*, the reasoning might still be too vague for suspects to understand, or for researchers to properly weigh.

6.4 THE REASONING OF PRE-TRIAL DETENTION DECISIONS

A third point of concern relates to the reasoning of pre-trial detention decisions. Although Article 78 paragraph 2 CCP gives an explicit obligation to the judge to substantiate his decision, when he orders pre-trial detention, we have seen

⁷⁴ See paragraph 2.2.2.

⁷⁵ See paragraph 2.2.2.

that this does not always happen. Despite this legal obligation and the aforementioned case law of the ECtHR, in most cases the reasoning of decisions on pre-trial detention is quite brief and in general and abstract terms. However, according to one judge who was interviewed during our research, this does not mean that judges deciding on pre-trial detention do not scrutinize the criteria for applying pre-trial detention seriously.

However, a significant majority of the defence lawyers surveyed is very critical of the reasoning of decisions by judges.⁷⁶ This must be highlighted as one of the most pressing issues that came up from the lawyer survey. The following remarks are made on whether the existence of a strong suspicion (*ernstige bezwaren*) and grounds for pre-trial detention are reasoned in an adequate way:

‘The investigative judge usually tries to give some reasoning. The *raadkamer* hardly ever does and at pro forma trial usually the standard reasoning that the conditions for pre-trial detention are still met is used.’

‘In my view when applying the twelve year and shocked legal order ground judges always accept the ground far too easily by claiming that the offence is serious and therefore the legal order is shocked.’

‘Biggest problem is the lack of specific reasoning. As a defence lawyer you quickly get the impression that pre-trial detention in practice serves as a prelude to the forthcoming sentence.’

‘In practice my experience is that the judge looks at a case and the suspect and simply makes the decision ‘do I keep them or not?’. If necessary by way of a suspended pre-trial detention. The answer to that first question then carries on in the answering of the legal questions necessary for pre-trial detention. Nothing a defence lawyer can say will compensate that.’

‘The reasoning of decisions regarding pre-trial detention is often standard and not specifically focused on the case. Judges often suffice with listing the legally required grounds without indicating specifically why the grounds for pre-trial detention exist in that case.’

‘Judges rarely explain why a serious suspicion (*ernstige bezwaren*) exists. Unfortunately, it is often the case that a serious suspicion is found by referring to the

76 25 out of 35 lawyers surveyed (71%) have indicated that judges never or only rarely substantiate their decision on the existence of a serious suspicion (*ernstige bezwaren*), while 27 out of 35 lawyers surveyed (77%) have indicated that judges never or only rarely substantiate their decision that there are one or more sufficient grounds for applying pre-trial detention. 21 out of 35 lawyers surveyed (60%) have indicated that judges sometimes use illegitimate presumptions or justifications for their decision to order pre-trial detention.

fact that a previous body, for instance the investigative judge, has also ruled that the suspicion is there.'

'I would like to see that decisions are better reasoned, especially by *raadkamers*. That is the most important thing. Now we often do not know anything (...) I do not mind being denied – otherwise you should not become a lawyer – however I do want to know why.'

Although a more nuanced view is also expressed:

'Judges explain the grounds for pre-trial detention and also why they apply in the specific case. A good barometer is the reaction of clients: in most cases they understand which ground apply and why. Even if a client does not agree, they usually understand why the judge takes a different view.'

The quotes shown above are a reflection of the general responses in the survey regarding the reasoning of pre-trial detention decisions. The fact that decisions have very limited reasoning, and in a lot of cases reasoning that is very general and not focused on the specific case, is seen as a major and fundamental problem by a lot of defence lawyers.⁷⁷ Often it is not clear to them why judges make certain decisions. Even though this does not mean that judges reach their decisions lightly this must be highlighted as a point of concern.

Finally, in drawing conclusions regarding the reasoning of decisions a distinction must be made between the initial hearing after three days and the subsequent *raadkamer* hearings after fourteen days. This can for instance also be seen in the first quote mentioned above. At the three day hearing the investigative judge will give his or her decision immediately and deliver this judgment orally to the suspect. In the observed hearings the judge gave a detailed explanation on the reasons for granting or refusing the order. A decision is later provided giving the decision in writing, however this written decision is briefer. The decisions from the *raadkamer* hearing are usually handed down the day after the hearing. We were able to review most of the written decisions from the cases that we observed. The reasoning in these decisions varied depending on the court; some courts used formalistic reasoning while others were more detailed. This also depended on the quality of the defence submissions. Examples of good practice can be seen at the District Court of Gelderland. For instance this section where it explains why the reoffending ground can be accepted in a specific case:

⁷⁷ 8 out of 35 lawyers surveyed (22%) mentioned in the final comments underneath the survey that they believe the lack of reasoning, or the lack of specificity of this reasoning, is to be considered as a fundamental problem. Other lawyers surveyed (12 out 35; 34%) indicated similar things in the blank fields underneath questions about reasoning. See for similar criticism on the reasoning of pre-trial decisions Janssen & Van der Meij 2012.

‘The suspect has been in contact with the police and judicial authorities with regard to violent offences and has recently been convicted for an attempt at heavy assault and a minor assault. Even so he is now again suspected of a new and heavy violent offence. There is a serious risk that the suspect will again commit an offence that carries a minimum sentence of six years and/or that risks the health and safety of persons.’

And another example:

‘The suspect is suspected of burglary from a house. Investigations show that the suspect is also suspected of several burglaries from houses in Germany. It therefore must be feared that the suspect will reoffend.’

The court takes into account the psychiatric condition of the suspect in another case when assessing whether a risk of reoffending exists:

‘The suspect has been in contact with the police and judicial authorities with regard to violent offences. The suspect was still in a probation period. The offence he is suspected of has been committed while the suspect was suffering from psychological and/or social problems and/or aggression problems. The suspicion concerns very serious actions and as long there is no insight into the mental condition of the suspect there is a risk of reoffending. This means there is a serious risk that the suspect will again commit an offence that carries a minimum sentence of six years and/or that risks the health and safety of persons.’

7.1 INTRODUCTION

In chapter 6 we have indicated that the high amount of pre-trial detention that is being ordered must be highlighted as a point of concern. An important factor in possibly bringing down this number is the availability of effective and reasonable alternatives to pre-trial detention. Therefore, in our research we have also looked at the use of these alternatives.

First it should be noted that strictly speaking in the Dutch system there are no alternatives to pre-trial detention. The judge can decide whether to order pre-trial detention or not. However, after deciding to order pre-trial detention the judge can – immediately or during the execution of the pre-trial detention – decide to suspend the execution of the pre-trial detention (Article 80 paragraph 1 CCP). Meaning the suspect is released, but has to abide by the conditions that the judge has set, usually until the moment that the trial will take place, although the judge can decide on any timeline that he sees fit. With regard to the conditions attached to the suspension of the pre-trial detention, the Code of Criminal Procedure makes a distinction between general and specific conditions. If the judge decides to suspend the pre-trial detention, this will always be under the general conditions; that the suspect will comply to possible future court orders regarding the pre-trial detention and that he will cooperate with the execution of a possible future sentence to imprisonment (Article 80 paragraph 2 CCP). Furthermore, the judge may attach certain specific conditions to this suspension, for instance parole supervision, electronic monitoring, restraining order or any other condition the judge may find appropriate in light of the specific circumstances. Money bail may also be considered as a specific condition attached to the suspension of the pre-trial detention (Article 80 paragraph 3 CCP), although judges hardly use this option in practice.

7.2 THE CONDITIONAL SUSPENSION OF PRE-TRIAL DETENTION

When deciding whether to suspend the pre-trial detention the criterion that the judge uses is whether the personal interests of the suspect outweigh the interests of the criminal investigation. If that is the case the suspect will be released conditionally. Relevant personal interests in this regard are, for

instance, the need to take care of (young) children, close relatives in need of help, the risk of being fired from a job when not showing up for work and the risk of losing a house. An important factor for deciding whether to suspend the pre-trial detention according to one judge is whether the so-called 'drie W's' are present (Dutch phrase meaning the presence of a job, house and partner). If that is the case a person will probably be suspended from pre-trial detention sooner since the chances of reoffending are lower than for a suspect who for instance is homeless and does not have a job. Since these personal interests will nearly always be at stake in cases of pre-trial detention, these interests will only outweigh the interests of criminal justice in detaining someone when they are really pressing.

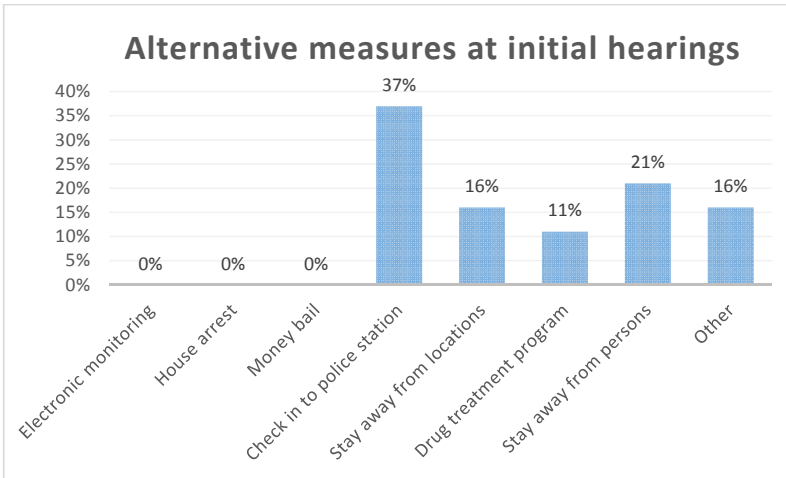


Figure 3

In the hearing monitoring we observed that at the initial review pre-trial detention was suspended in 16% of the cases in which pre-trial detention was ordered. In the majority of cases suspects had to check in to police stations or with a probation officer (figure 3). We did not see any cases where electronic monitoring was ordered, but judges did order the probation services to investigate the possibilities of electronic monitoring on several occasions, usually on the suspects request. Such an investigation is a prerequisite to ordering electronic monitoring as a condition for the suspension of the pre-trial detention. The most commonly applied conditions at this stage are the check-in order and the order to stay away from certain persons. The fact that these conditions are the ones most commonly applied at this stage has to do with the fact that other conditions, like electronic detention and drug treatment, are usually only ordered once there is a report from the probation services. Due to the short period between arrest and this initial hearing such a report is usually not available, unless the suspect is already known from previous cases, accordingly

these alternatives are considered rather impractical as an immediate alternative to pre-trial detention.

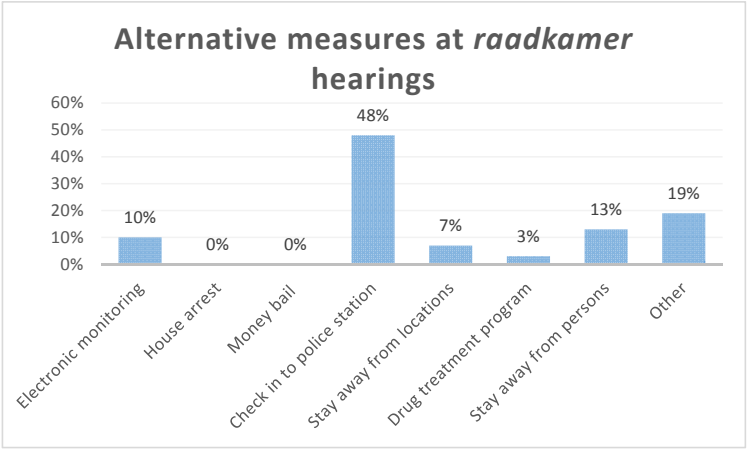


Figure 4

At the *raadkamer* pre-trial detention was suspended in 13% of the cases in which pre-trial detention was ordered. When pre-trial detention was suspended, electronic monitoring was applied in a few cases (figure 4). The most often applied condition for the suspension of the pre-trial detention is, once again, the obligation to report to the police or probation officers. This condition was imposed solely or in combination with other conditions in 94% of the cases.

Although bail can be applied as an alternative for pre-trial detention, judges are generally quite reluctant to do this. Some of them indicate that they are quite unfamiliar with this alternative and the way it could be applied. Others indicate that they are quite reluctant to order bail because they fear this will cause class justice, meaning that – despite the possibility to order specific bail amounts according to the financial situation of the individual suspect – this may lead to a situation where suspects with money will be released and others without any money would stay in pre-trial detention since they could not afford bail.⁷⁸ As the previous figures show, we did not observe any case where bail was ordered.

More research and discussion is necessary to fully develop alternatives for pre-trial detention in terms of new legislation and better use of existing alternatives. For instance money bail is mentioned in the criminal code but is hardly

⁷⁸ Answers given in the interviews with judges.

ever applied and electronic monitoring can only be imposed when there is a report from the probation service on whether it is possible to use electronic monitoring in the specific circumstances of the suspect. Drafting such a report takes some time, and can be an obstacle for a quick suspension of the pre-trial detention. A vast majority of the defence lawyers surveyed (89%) believe that alternatives to pre-trial detention are not used often enough:

'Judges generally make too little use of the conditional suspension of the pre-trial detention. In my experience they mostly do that in later stages of the investigation.'

Defence lawyers and academics point out that especially money bail is a tool that should be used more often, especially since this alternative is already provided for in national law.⁷⁹ However, more practical aspects (how high should the bail be, should money be transferred or is a bond sufficient etc.) currently stand in the way of effectively using this tool. Judges in the interviews confirm this and say that they would be willing to use money bail more often, but are unsure whether the practical aspects as described above to use this alternative frequently are in place.

⁷⁹ 25 out of 35 lawyers surveyed (71%) pointed out that especially bail is an underused alternative for pre-trial detention. See in this regard also Polman 2015.

8.1 INTRODUCTION

In previous chapters we focused on the initial decisions regarding pre-trial detention. These decisions are very important given the impact that they have on the suspect. However, in order to reduce the time spent in pre-trial detention and to prevent pre-trial detention being applied in cases where it should not be applied, an effective periodic review of pre-trial decisions is absolutely crucial. Therefore, we have also looked at the way in which pre-trial detention is reviewed once it is underway. A distinction has to be made between the *raadkamer* hearings and the pro forma trials after the trial has commenced.

8.2 RAADKAMER HEARINGS

As indicated earlier, in the hearing monitoring we mainly focused on the *raadkamer* hearings. This means that a lot of the cases we observed can be seen as review hearings. Therefore, a lot of what was discussed above already gives an indication of the way in which the review of pre-trial detention is done. However, it should be noted that there is a gap of fourteen days at most between the initial decision of the investigative judge and the *raadkamer* hearing. Additional evidence is often collected during that period so legally the decision is a new decision.

The first review moment is when the initial fourteen days of pre-trial detention (*bewaring*) end. The *raadkamer* can then decide, upon a request by the prosecutor, to extend the pre-trial detention for a period of up to ninety days. Usually if a decision is made to extend the pre-trial detention this will be for a period of thirty, sixty or ninety days. When pre-trial detention is ordered by the *raadkamer* for less than ninety days and the prosecutors feels the pre-trial detention should continue, another request by the prosecutor will have to be made and another review will take place. Separately from this periodic review of the pre-trial detention initiated by the prosecutor to extend the term of pre-trial detention, the defence can make a request for a review at any time in order to request the termination or the suspension of the pre-trial detention. This happens when the defence argues that the conditions for applying pre-trial detention are no longer met (termination request) or the personal interests

of the suspects outweigh the interests of the investigation (suspension request). In the hearing monitoring we reviewed a number of cases where these requests by the defence were dealt with. This sometimes led to the conditional release of the suspect. These procedures are similar to an ordinary pre-trial detention hearing; the defence can explain its request and present evidence supporting it (for instance medical files if the request is connected to a medical condition the suspect has that makes it necessary to suspend the pre-trial detention) and the prosecutor will respond to it. Judges can ask questions if they wish and will usually issue their decision the next day.

8.3 PRO FORMA TRIALS

As discussed in paragraph 4.2.3 at a cursory reading of the Dutch Code of Criminal Procedure the maximum length of pre-trial detention seems to be 104 days (fourteen days of *bewaring* and ninety days of *gevangenhouding*). However, legally as well as in practice the pre-trial detention can last for a much longer period. The reason for this is that Article 66 paragraph 2 CCP states that if the defendant is in pre-trial detention at the moment the trial stage starts or if the pre-trial detention is ordered for the first time by the trial court itself (the so called *gevangenneming*), the pre-trial detention lasts until sixty days after the final judgement by the court has been handed down. Unless the court at a later moment during the trial stage decides to release the suspect because the statutory criteria for applying pre-trial detention are no longer met or pre-trial detention is no longer considered as being necessary or proportionate. In practice this means that suspects can be in pre-trial detention for quite a longer period than 104 days, especially because of the fact that the trial stage does not necessarily have to start with the substantive trial leading to the final judgement of the court. In many complicated and/or serious cases this first trial date is intended to supervise the progress of the investigation of the case by the public prosecution service and the police and/or to decide on the continuation of the pre-trial detention (the so called *pro forma* trial) after which the trial is suspended for usually two to three months until the next *pro forma* trial or – eventually – the substantive trial takes place. As a result of the *pro forma* trial the real time served in pre-trial detention may be (much) longer than the fourteen days of *bewaring* ordered by the investigative judge and the ninety days of *gevangenhouding* ordered by the *raadkamer*.

This does not mean, however, that regardless of the specific case the pre-trial detention can last endlessly, since the trial judge – during the *pro forma* trial deciding on the need of continuation of the pre-trial detention – always has to consider whether or not the legal criteria for pre-trial detention are still met. Especially the obligation to anticipate the expected sentence in the specific case (*anticipatiegebod*) and – to a lesser extent – the obligation to see whether

or not there are still one or more grounds for continuing the pre-trial detention are important safeguards for excessive periods of pre-trial detention. Furthermore, the longer the pre-trial detention, the easier the relevant criterion for the suspension of pre-trial detention – the personal circumstances of the defendant outweighing the interest of the criminal proceedings – will be fulfilled.

So, although pre-trial detention is ordered quite easily in the Netherlands, excessive periods of pre-trial detention rarely occur. Statistics show that periods of pre-trial detention of more than six months are exceptional, the average time spent in pre-trial detention is 104 days and 31% of pre-trial detainees is detained less than 110 days.⁸⁰ In the case file review this was the case in 11.4% of all cases, as we will see in the next chapter.

80 Dienst Justitiële Inrichtingen 2015, p. 39.

9

Outcomes of criminal proceedings in which pre-trial detention is applied

9.1

OUTCOMES

During the case-file analysis the final outcome of the case was recorded to see whether the accused was acquitted or found guilty, and – if the latter was the case – whether or not a custodial sentence was ordered. In 96.4% of the cases where pre-trial detention was ordered, the case resulted in a conviction. Only in one case (1.8%) the accused was not convicted, this was because he was diagnosed with a psychiatric condition and was placed in a psychiatric facility. In all 96.4% of the cases reviewed that ended in a conviction the accused was sentenced to a custodial sentence (in some cases combined with one or more other sanctions such as community service and/or compensating the victim). In 31.5% of the cases reviewed the length of this custodial sentence was one day to six months; in 29.6% of the cases the accused was sentenced to six months to twelve months imprisonment and in 33.3% of the cases to imprisonment for a period of one to three years (figure 5). Only in two cases (3.8%) the accused was sentenced to imprisonment for more than three years.

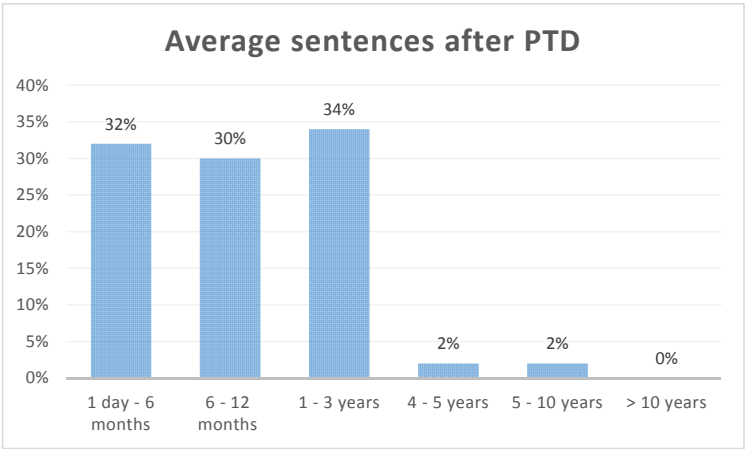


Figure 5

The main conclusion that can be drawn from this data is that it appears not to be the case in the Netherlands that pre-trial detention is applied in a lot of cases in which it later turns out that the suspect was innocent or is not

convicted. That in itself is a promising conclusion. However, this does not necessarily mean that pre-trial detention was justified in all cases, since this question has to be answered separately from the question whether someone committed the offence. In the literature warnings are issued about pre-trial detention being a self-fulfilling prophecy; pre-trial detention can become an important factor for the judge in deciding whether to convict a suspect or not.⁸¹

9.2 TOTAL DURATION OF PRE-TRIAL DETENTION

According to the data of the case-file analysis the vast majority of suspects are in pre-trial detention for somewhere between one month and six months (81.8%). Only in 9.1% of the cases the pre-trial detention lasted more than six months and in 2.3% of the cases – i.e. one case – for more than one year. In 6.8% of the cases the suspect stayed in pre-trial detention for less than one month.

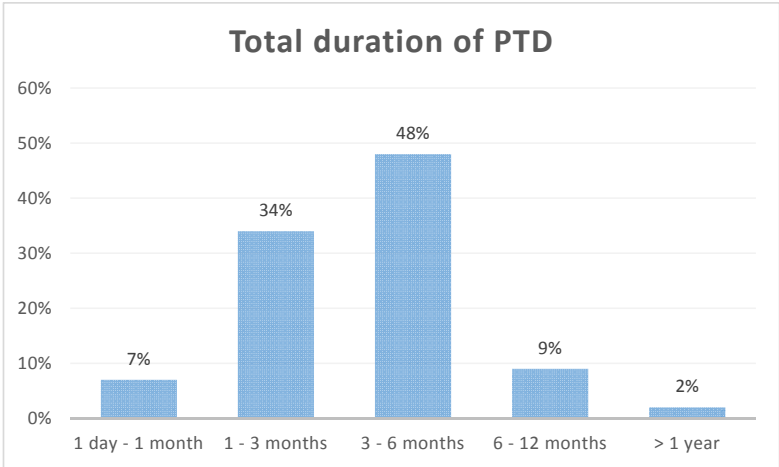


Figure 6

In the light of the legal framework on pre-trial detention – especially the different stages of pre-trial detention and the maximum length thereof (*bewaring* for fourteen days and *gevangenhouding* up to a maximum of ninety days after which the trial phase starts) these findings are not very surprising. In cases where the judge decides that the suspect should stay in pre-trial detention

81 See among others Stevens 2010.

until the trial phase starts the pre-trial detention will last for approximately a hundred days.

10.1 CONCLUSIONS

The main conclusion of our research is that the Dutch legislation on pre-trial detention meets the relevant standards of the ECHR and that no major changes to the legislative structure are strictly necessary. There is a clear legal structure for applying pre-trial detention, alternatives to pre-trial detention are available as conditions for the suspension of pre-trial detention and periodic opportunities for review of the pre-trial detention by an impartial judge exist. However, the way in which this legislative structure is used in Dutch practice raises some concerns. These concerns have been highlighted before in academic literature on pre-trial detention. This report can confirm some of the doubts that have been raised in recent years by way of the empirical data that we have collected.

When reviewing the application of pre-trial detention in the Netherlands we first looked at the procedural aspects regarding the pre-trial detention decision making process. There we have seen that the procedure generally works as it should and basic defence rights are guaranteed by law and sufficiently protected in practice. For instance, in all cases legal representation by a defence lawyer is guaranteed and funded by way of legal aid. Also, interpretation of hearings was available in all monitored and reviewed cases for all suspects who did not speak Dutch. Some concerns were raised about the timely access to the case file. However, it appears that this is an unavoidable aspect of the fact that timeframes for decision making are very short and not all research is done in time for hearings on pre-trial detention. We have found no evidence of case files deliberately being withheld from the defence. The length of pre-trial detention hearings varies depending on the stage of the criminal procedure. Especially *raadkamer*-hearings can be quite short. However, the main reason for this is that the judges will have reviewed the case file before the hearing and its content therefore does not have to be repeated entirely at the hearings. The focus of the hearing is on the submissions of the defence and the prosecutor. We did not observe any situations where it appeared that judges treated the submissions of the defence and the prosecutions differently. After the initial period of pre-trial detention, and when the trial phase has started, periodic review of the pre-trial detention takes place by way of the ‘pro forma’-trial if a case is not ready to be tried. These pro forma trials ensure that the judge can review the progress of the investigation on the one hand, but can also

review regularly whether pre-trial detention is still necessary and meets the legal requirements. In practice this does lead to situations where judges will decide to release pre-trial detainees from detention if the investigation has already taken some time and it is not expected to lead to a substantive trial in the near future.

While procedurally only minor points of concern can be highlighted, this is very different when looking at the substantive aspects of pre-trial detention decision making. First of all the high amount of pre-trial detention that is being applied must be pointed out. This raises the question whether pre-trial detention is really used as a measure of last resort in the Netherlands. We have seen in our empirical research that in a large majority of cases the request of the public prosecutor to order pre-trial detention is granted. Secondly, there is a problem regarding the reasoning of pre-trial detention decisions. Despite the aforementioned case law of the ECtHR, in most cases the reasoning of decisions on pre-trial detention is quite brief and in general and abstract terms. Defence lawyers in the survey also confirm that this is a problem. Finally, when looking at the actual decisions it appears that grounds for applying pre-trial detention are easily accepted.

Finally, alternatives to pre-trial detention are little used, especially in the first phase of the pre-trial detention. The fact that alternatives to pre-trial detention are not used often enough is a main reason for the high amount of pre-trial detention orders. The reason for this appears to be the fact that the question of alternatives is reached after the judge has already decided to order pre-trial detention, this is due to the structure of the legislative framework. This is one of the only points where a legislative change might be beneficial. Also, the relative unfamiliarity with common alternatives like money bail leads to the situation where these alternatives are hardly used. We think that further research into the possibilities of an effective and practical use of alternatives to pre-trial detention might lead to a situation where these alternatives will be used more often. This will automatically lead to a drop in the number of people who are detained pre-trial.

10.2 RECOMMENDATIONS

i. To the legislator

1. In order to make alternatives to pre-trial detention more common, these should be made available independent of the decision whether pre-trial detention is allowed. The proposals in this regard the Government is currently considering are a step in the right direction.

ii. To the Public Prosecution Service

2. Public prosecutors should be more critical in their assessment whether pre-trial detention is strictly necessary in a specific case.
3. Public prosecutors could be more active in proposing alternatives to pre-trial detention (for instance suggesting specific conditions for the suspension of pre-trial detention to the court), possibly after discussing this with the defence lawyer before a scheduled pre-trial detention hearing.

iii. To the courts

4. The recent discussion amongst judges on whether pre-trial detention is necessary as often as it is used, should be continued and intensified.
5. When considering alternatives to pre-trial detention, judges should take the principle that pre-trial detention must be a measure of last resort, more into account, especially when alternatives to pre-trial detention become more available in light with the other recommendations of this report.
6. Decisions to apply pre-trial detention should be better reasoned, giving more insight in the reasons for applying pre-trial detention in a specific case. This in order to conform with European and national obligations.
7. The existence of grounds for pre-trial detention must be viewed more critically. Especially with regard to the shocked legal order the question can be raised whether this ground should be used as often as it currently is.

iv. To the Council of the Judiciary and/or the Ministry of Security and Justice

8. More funds should be made available to provide time for judges to substantiate their pre-trial detention decisions more extensively.
9. Research should be done into the effectiveness of alternatives to pre-trial detention, in particular electronic monitoring and (money) bail. This research should also focus on ways to make these alternatives function properly in the Dutch system.

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