Maastricht University | Universiteit Antwerpen | DCU Ollscoil Chathair Bhaile Átha Cliath Dublin City University | KU LEUVEN

EmpRiSe

RTS and related rights in pre-trial suspects' interrogations in the EU: Legal and Empirical study and promoting best practice

POLICY REPORT NETHERLANDS

by Dr Anna Pivaty, Peggy ter Vrugt and Dr Dorris de Vocht

EXECUTIVE SUMMARY

The RTS (RTS) is a right firmly embedded in the Dutch legal system and is a critical component of the right to a fair trial. Individuals can exercise their RTS long before a case is heard in court as this right applies from the initial stages of criminal proceedings, including throughout police questioning. The rationale for this right is linked to the broader concept of the presumption of innocence, ensuring that the burden is on the state to prove that an individual has committed an offence. Despite the significance of the RTS, little is known about its operation in the pre-trial phase of criminal proceedings.

In this EU-funded project, entitled 'The RTS and Related Rights in Pre-Trial Suspects Interrogations in the EU: Legal and Empirical Study and Related Best Practice' (the EmpRiSe Project), we address this gap in knowledge by conducting legal and qualitative empirical research in four European jurisdictions. This policy report focuses on the research conducted in the Netherlands, presenting findings and recommendations based on analysis of legislation, case law and practice.

Key findings: The scope of RTS in Dutch law is limited. This is due to the narrow interpretation of the rationales for RTS and privilege against self-incrimination, limited scope of the privilege, absence of provisions regulating the use of undue pressure during interrogations, and the possibility to draw adverse consequences from silence in terms of evidence, sentencing and possible compensation for unjustified pre-trial detention. Due to the limitations on remedies for violations of RTS at the investigative stage, it offers only a limited degree of protection for the suspect. The practical effectiveness of RTS is further undermined by the lack of enforcement of the right of access to the case file prior to questioning and restrictions on the role of a lawyer during interrogation.

In practice, RTS was viewed mostly negatively by the interviewed police and judges, and its exercise by the suspect as morally reproachable and as an attempt to frustrate truth-finding. Legal advice to remain silent and the role of the lawyer at the investigative stage were likewise viewed largely negatively. Suspects were believed to remain silent for reasons associated with guilt and the desire to escape criminal responsibility. Several negative consequences of reliance on the RTS at the investigative stage were identified, such as the risk of adverse inferences from silence (including that a defence presented later will not be found credible), greater likelihood that pre-trial detention will be prolonged, the risk that requests for further investigation by the defence will be rejected, and the risk of negative consequences with regard to sentencing.

Key Recommendations

- **Clarify the rationales for RTS and the privilege against self-incrimination in legislation and case law, grounding them more explicitly in the rationale of protecting personal autonomy and privacy of the suspect as a requirement of procedural fairness.**
- **Provide greater legal guidance on (the safeguards around) conducting interrogations and on what constitutes pressure during interrogation. Certain interrogation methods should be declared unlawful such as persuasion to waive RTS and undermining legal advice.**

Project ID: 802102 Call: Just-JACC-AG-2017

- **Develop further safeguards with regard to taking suspect's silence or the failure to give an (satisfactory) account or mention certain facts (sufficiently early) in relation to evidence, in addition to the evidentiary threshold. Such safeguards should include, as a minimum, access to (effective) legal advice at the investigative stage, and the duty to provide information about the key elements of evidence, before the suspect is expected to provide a statement.**
- **Strengthen the right to legal assistance at the investigative stage by removing the restrictions on the role of a lawyer during interrogation.**
- **Ensure that information about the accusation and the key elements of the evidence should be provided to the suspect and their lawyer before any questioning. The respective legislative provisions should be supported by further regulations from the Public Prosecutor's Office and/or DSC case law to become effective in practice.**
- **Strengthen the remedies for breaches of RTS, particularly due to irregularities in the conduct of interrogation and the use of undue pressure, by determining that, as a rule, such breaches should result in exclusion of evidence. A more restrictive approach should be taken to the exceptions to the exclusion of evidence rule.**
- **Provide training for practitioners across the criminal justice spectrum, and particularly police, prosecutors and judges to increase their awareness of the importance of RTS as a cornerstone of a fair trial, as well as of (implicit) assumptions concerning RTS and reasons for remaining silent, defendants who choose to remain silent, and the influence of these assumption on individual decision-making.**

The EmpRiSe project

The EmpRiSe Project is an EU-funded study, examining the law and practice relating to the RTS (RTS) during suspect interrogations at the investigative stage of the criminal justice process. By comparing the different processes and issues in four European jurisdictions (Belgium, Ireland, Italy and the Netherlands), the EmpRiSe Project hopes to identify good practice in relation to safeguarding the RTS in the pre-trial phase of criminal proceedings.

A review of the law on the RTS has been carried out in each jurisdiction, followed by qualitative empirical research that used interviews, focus groups, case file analysis and observations of suspect interviews to examine the practice and unpick the perceptions held by professionals working within the criminal process in relation to the RTS. This has facilitated the development of recommendations that will improve the practice of suspect interviewing and decision-making in the criminal justice system.

This policy report focuses on the research findings in the Dutch context. The empirical phase of the research in the Netherlands consisted of in-depth (focus groups) interviews with 14 police officers engaged in suspect interviewing across the country of all levels of seniority (including those with specific specialisations, such as interviewing vulnerable suspects, children or sexual offenders), as well as 11 judges working on criminal cases, including investigative judges. The study has generated over 24 hours of registered interview data. The findings from interviews were complemented by a study of 25 court case files collected in the archives of a court in the South of the Netherlands. Through these interviews and the case file analysis this study has garnered previously unrecorded insights into the operation of the RTS and the perceptions of those who frequently encounter it within their roles.

Background

The pre-trial stage of the Dutch criminal process has undergone significant changes in the recent years, *inter alia* due to the introduction of the right to legal assistance and other procedural rights of the accused at the investigative stage under the influence from the case law of the European Court of Human Rights

(ECtHR) and recent developments in EU law. The current reform aimed at modernising the Code of Criminal Procedure envisages significant changes with regard to the role of the pre-trial stage. The new Code will place even greater emphasis on the investigative stage with the aim of reducing the overall length of the criminal proceedings. An increased emphasis on the investigative stage also means that suspects and their lawyers will be expected to make (full) use of their defence rights and make strategic choices – such as for instance formulating their defence or making requests for further investigation – much earlier than envisaged at the inception of the current 1926 Dutch Code of Criminal Procedure (DCPP). The proposed reform is believed to signify a move from a traditionally non-adversarial pre-trial stage to a *de facto* adversarial model of pre-trial investigation, where the defence party acquires additional responsibilities for fact-finding and for challenging the prosecution case. The adversarial model of pre-trial investigation, however, is being implanted in the traditionally inquisitorial procedural style, characterised *inter alia* by reliance on the written *dossier* compiled by the prosecutor and by limited procedural autonomy of the suspect, who is considered a key source of relevant information and thus an object of an investigation.

The law and practice around the RTS, as discussed further in this Policy Report, reflect the tensions between the move towards a more adversarial pre-trial investigation and the inquisitorial procedural tradition. The principle of personal autonomy of the defendant is paramount to an adversarial process. An adversarial system is premised on the defendants' ability to enjoy 'practical and effective' procedural rights, and to freely determine the degree of their participation in the proceedings. In this respect, defendants' unhindered ability to exercise their RTS – the ultimate means of refraining from participation in the proceedings against them - is crucial. An inquisitorial process, however, is premised on encouraging the defendant to participate - and hence to waive their RTS - in order to facilitate the truth-finding.

Besides the influences from the procedural tradition, European criminal justice systems encourage greater participation of defendants under the pressures of unmanageable caseloads, austerity and the resulting drive for 'efficiency'. The demands for participation are further increased by the presumed need to cater to the wishes of the victims and the society to get wrongdoers to (publicly) admit their responsibility. As the result of these demands, the RTS in criminal proceedings is (again) being challenged.

Already as early as 2002, Schipper, the president of the Court of Appeal in Amsterdam at the time, held a speech in which he argued for the abolition of the caution at the court hearing. According to him, the duty to provide the caution 'shows insufficient […] respect for the victims and their possible relatives and can lead to incomprehension […] among citizens.' This statement was met with much criticism arguing that the suspect has the privilege against self-incrimination and that the judge, police and other authorities should take the presumption of innocence into account.

Research findings: Legislation

The scope and meaning of RTS

The implementation of RTS in 1926 DCPP was viewed as an important milestone leading to a more just, humane and professional criminal justice process. The DCPP does not contain an explicit norm on the right to remain silent. Instead, it contains provisions that prohibit the interrogating authorities from applying excessive pressure to obtain statements from the suspect (*pressieverbod*), along with a 'RTS caution' to be given to the suspect. Another element of the RTS codified in art 29 is the so-called 'freedom [of the suspect] to make a statement' (*verklaringsvrijheid*): 'in all cases when someone is heard as a suspect, the interrogating judge or official refrains from anything that appears as an attempt to obtain a statement, which cannot be considered as given freely.'

Despite the fundamental importance attached to art 29 DCPP, the provision caused many debates and criticism. Questioning the suspect during police

interrogations was and is still viewed as an important part of truth-finding. In this respect, RTS is viewed as an obstacle to effective truth-finding.

The main purpose of art 29 was to avoid coercion during the interrogation of the suspect. Especially during the police interrogations in the 19th century improper methods of interrogation were used, subjecting the suspect to excessive pressure. Ensuring the freedom from excessive pressure is a rather narrow rationale for RTS, as it only aims at deterring extreme forms of coercion but still allows a degree of pressure to be acceptable.

The Dutch Supreme Court (DSC) derives RTS from the privilege against self-incrimination, known in the Netherlands as the *nemo tenetur* principle, meaning that no one may be compelled to provide evidence against himself nor forced to contribute to their own conviction. By recognising this link, DSC went further than the legislator by emphasising the autonomous position of the suspect within the criminal justice system. The development of this case law was influenced by the adoption of the European Convention on Human Rights by the Netherlands in 1950 and the resulting increased focus on the rights of the defence.

Deriving RTS from the *nemo tenetur* principle, however, might suggest that the right covers only the information that is incriminating for the suspect. The position of the Dutch Supreme Court on this matter is somewhat unclear. The ECtHR held that RTS cannot be reasonably confined to directly incriminating statements, because even *prima facie* exculpatory statements can be used in support of the prosecution, for example to undermine the defendant's credibility.

The nemo tenetur principle and RTS

The recognition of the link between RTS and the *nemo tenetur* principle, however, did not so far lead DSC to extend the reach of RTS or the privilege to other evidence than oral or written statements of the suspect given in the course of an interrogation. Thus, for instance, RTS and the privilege against self-incrimination do not allow the suspect to refuse to provide biometric materials to unlock a smartphone.

DSC adopted a narrow 'material-based' approach to the privilege against self-incrimination by stating that it can only be invoked in case where a criminal charge exists and where it concerns material which is dependent on the will of the suspect. DSC considers all material, which exists outside of the suspect's 'psyche' – and which therefore can be obtained without requiring the suspect to speak – as 'material that exists independently from the suspect's will'.

This is based on the DSC interpretation of a side passage in the ECtHR case *Saunders v the UK* (para. 69). However, other rationales for deciding which material obtained from the suspect falls under the privilege against self-incrimination can be derived from ECtHR case law. These include: whether active cooperation of the suspect is required ('means-based' criterion); the use to which the material is put; or the extent to which the obligation to provide information interferes with the suspects' mental freedom ('mental privacy'), as opposed to physical freedom.

The interpretation of DSC implies that RTS and privilege against self-incrimination can only be triggered when a testimonial statement is used in the criminal proceedings, which has been obtained under coercion. The privilege against self-incrimination and RTS thus have an identical scope of application, with the former offering no additional protection for suspects in the Netherlands as compared to RTS.

Legal consequences of invoking RTS

Exercising RTS during the investigative stage is not without risks. When the suspect does not answer some questions, adverse consequences may follow. Courts may take the silent attitude of the suspect into account both in terms of evidence and sentencing.

Since the late 1990s, the 'absolute' nature of the right has been eroded by the DSC case law, which has allowed for a suspect's silence, including at the investigative stage, to be taken into account when assessing the evidence against them. In a well-known dictum, DSC stated that a suspect's refusal to make a statement or to answer certain questions cannot in itself be considered 'evidence' of guilt. However, judges may take the suspect's silence into account when the latter does not give a 'reasonable' explanation with regard to the circumstances which, taken separately or in conjunction with other evidence, are incriminating for them.

The DSC suggested that the evidentiary threshold for allowing inferences from a suspect's silence is lower than proof beyond a reasonable doubt. It defined this standard, citing relevant ECtHR case law, as a *prima facie* case, interpreted as 'a circumstance, which by itself or in combination with other evidence calls for the conclusion that the suspect has committed the offence'. The evidence must be such that, in combination with the suspect's failure to provide an explanation, the only reasonable or common-sense conclusion is that the suspect is guilty. This suggests that an inference can be the 'tipping point' which tilts the scales from a position below the burden to proof, to reaching the burden of proof in the particular case.

Inferences from silence, or the failure to provide a 'credible' explanatory account (sufficiently early in the course of the proceedings) can be used for different purposes. First, they are used to strengthen presumptions made with regard to certain elements of criminal offences, such as criminal intent in money laundering, knowledge of illegal origin in the crime of trading stolen goods, and involvement in joint enterprise. This line of reasoning emerged around 2015, and the body of such case law is growing. It was criticised as resembling the use of silence as evidence of guilt.

Second, invoking RTS at the early stages of the investigation undermines the credibility of a defence such as a justification or excuse, as well as a so-called *Meer en Vaart* defence, where the suspect argues that the facts used for a conviction also fit within an alternative and not highly improbable exculpatory scenario.

The safeguards concerning the use of inferences from silence at the investigative stage are not spelled out in Dutch (case) law. Although the right of early access to a lawyer has been recently strengthened, Dutch courts do not consider formal procedural guarantees – such as whether the suspect was cautioned and understood the caution, whether he had adequate access to a lawyer, and whether he was informed about the accusation and the evidence (whether the 'case was put before them') - as separate and independent safeguards when drawing inferences from suspects' silence. This is because the possibility of drawing of adverse inferences is not considered as a separate issue by Dutch courts, but it is only one factor in the (often complex) decision on suspect's guilt, based on the 'holistic' assessment of the evidence.

Following a conviction, Dutch courts may also take the suspect's silence or 'non-cooperative behavior' into account when determining the sentence. The Supreme Court decided that it is not incompatible with the purpose of art 29 DCCP to consider the refusal to provide (a) statement(s) as an aggravating circumstance which could lead to a higher sentence. Exercising the RTS may also have a negative effect on the length of the sentence. When a suspect remains silent, the Court may consider that they 'have not taken responsibility for their own actions' and are behaving disrespectfully towards victims or relatives because the exact story remains unknown.

The exercise of the RTS may also influence the chances of obtaining compensation for the time spent in pre-trial detention for instance, where a case ends in an acquittal. In that case, a decision on compensation will be taken by the court on the basis of grounds of fairness. If the suspect has invoked RTS, this may lead to refusal of his request for compensation.

The Court of Appeal in the Hague held in a 2007 case that the mere fact that the person concerned has invoked his RTS is insufficient to refuse the request for compensation of unjustified pre-trial detention. However, practice shows that it is still often rejected on this ground. Lower courts consider that due to invoking RTS, the former suspect had made no attempt to prove their innocence and therefore no grounds of fairness were present.

Interrogations: A lack of rules and limitations

There is no legal provision in Dutch law providing for a definition of 'interrogation'. In case law, interrogation is defined as 'all questions stated to a person – who is considered a suspect – concerning his involvement in an alleged criminal offence'.[53]

Some questions asked by the police to a (potential) suspect do not fall under the definition of an interrogation. The DSC has determined that questions aimed at the identification of the suspect should not be viewed as an interrogation, even if the personal data are part of the suspicion, for instance, regarding allegations of false identity information. Questions to the suspect as to whether they are willing to cooperate in a (preliminary) breath test or analysis, or a blood test, also do not amount to an interrogation, although an inference may be drawn from their refusal. A 'spontaneous declaration', such as a statement willingly given by the suspect during transportation to the police station – can be used as evidence without the suspect being cautioned beforehand. The obligation to provide caution arises only before the start of an official interrogation. Combined with the absence of reliable recording of conversations outside the interrogation room, this results in the risk of abuse.

Article 29 DCCP prohibits obtaining a suspect's statement against their free will. The concept of improper or 'undue' pressure is not further defined by legislation. It is for courts to decide on a case-by-case basis. The threshold for 'improper pressure' set by the Dutch courts is rather high.

According to DSC, certain verbal and non-verbal pressure is permissible, even if the manner of questioning is very intrusive and at times inappropriate. Threatening with violence or torture, eviction or with losing custody over the suspect's children or threats that family members will be arrested and detained is impermissible. Promises, trickery and gifts in exchange for cooperation are, in some cases, also considered to be improper. However, it is permissible to point the suspect to their supposedly weak evidentiary position, 'confront' them with lies and inconsistencies in their story, or 'remind' them of the possible negative consequences of remaining silent, such as the length of time they can be detained and the measures that can be taken against them, including the possible use of custodial coercive measures.

Making false promises or telling obvious lies with the aim of obtaining a confession is impermissible. However, realistic promises have been accepted, for instance, saying 'if you give a full statement, you can go home.' However, exaggerations and making unnuanced or hard-to-substantiate statements are not seen as meeting the threshold of 'unlawful pressure'.

Good practice example: *A particular type of an undercover operation that was used by Dutch law enforcement is the so-called 'Mr. Big method', employed to elicit confessions of serious crimes from 'silent' suspects. Undercover officers befriend the suspect and lure them into a fictitious criminal organisation by inciting them to commit a series of minor crimes. The suspect is then interviewed for a promotion in the group by a fictitious 'leader' of the organisation (Mr. Big), who pressures him to confess to a serious crime.*

Recently, the DSC ruled, reviewing two judgements concerning the Mr. Big method, that in both cases the court had not sufficiently justified their finding that the use of the Mr. Big method did not affect the suspect's freedom of making a statement. If the freedom to give a statement is affected, according to the DSC, the only possible remedy is evidence exclusion.

The District Court of Amsterdam applied these criteria in two cases where suspects had made confessional statements via the Mr. Big method. In both cases, confessions were excluded from evidence. Although the use of Mr. Big method has not (yet) been declared unlawful, the new stricter requirements formulated by DSC may prevent Dutch authorities from using the Mr. Big method in the future. Mr. Big-style investigations are prohibited in the United States, the United Kingdom and Germany.

Limitations with regard to obtaining a remedy

Remedies with regard to breaches of RTS at the investigative stage are very limited. The case law on remedies of violations of the RTS covers two types of violations: the failure to provide the RTS caution, and excessive interrogative pressure.

The failure to provide caution should in principle lead to excluding the statement from evidence according to well-established case law. However, the rule does not apply automatically. If it is deemed that the suspect has not been harmed in their interest by the failure to provide the caution, then the given statement may be used as evidence. Suspects are deemed not be harmed in their interests if they were made aware of the relevant legal provisions (for instance, at earlier interrogations); when their lawyer does not object to the failure to give caution; or when they repeat the same statement at subsequent interrogations.

With regard to unacceptable pressure during the (police) interrogations, the DSC has accepted – in the *Zaandam* case – a reduction of the sentence imposed on the accused. In this case, interrogation tactics consisting of threats of using physical force, exercising strong psychological pressure and abuse of authority to intimidate were used to obtain a confession. Remedies such as exclusion of evidence or stay of prosecution are used rarely in respect of irregularities occurring during interrogations. Exclusion of evidence may be applied where the court rules that the statement was given against the suspect's free will, however the threshold for such a finding is high.

Good practice example: *To our knowledge, there has been only one case in which the prosecutor was banned from pressing charges for reasons related to how the interrogation was conducted. This case concerned a suspect with limited mental capacity who was told by interrogating officers that he could only be prosecuted for a maximum of three offences (which was false) and therefore it would be better for him to just tell the truth. The Court of Appeal in Amsterdam ruled that this act was a serious violation of the principle of due process.*

The right to legal assistance and access to the case file

The right to (effective) legal assistance, and the right of access to the information about the accusation and the evidence, (to be informed about the 'case' against oneself) are important safeguards of the RTS at the investigative stage. This link is insufficiently recognised in Dutch law.

As noted earlier, Dutch courts do not seem to consider the degree to which suspects were informed about the 'case' against them before being expected to provide a statement or give an explanation, as relevant when drawing an inference from silence. On the contrary, failure to provide sufficient details to police (for example, concerning suspects' whereabouts or actions around the time of the offence); or changing these details at the later stages after suspects obtain access to the case file may contribute to the finding that the suspect's exculpatory account is not credible. This is based on the premise that suspects who speak later or change their statements aim to 'adjust' their version to the 'official' account of the events. According to the established practice and contrary to the provisions of the written law (art. 30 DCCP), suspects and their lawyers obtain access to the case file once the case is referred to court (for suspects at liberty), or shortly before first pre-trial detention hearing before the judge, if detention is envisaged. No disclosure is usually provided before initial police interrogations.

Since 2016 all criminal suspects in the Netherlands acquired a right to assistance of a lawyer during police interviews, in addition to the right to pre-interrogation consultation introduced earlier. New legislation envisages (i) the right to consult with a lawyer for 30 min before the first police interrogation (which can, upon request, be extended by another 30 min if this is compatible with the interests of the

investigation) and ii) the right to have a lawyer present *during* the interrogation.

With the implementation of the abovementioned Directive, the Dutch legislator also adopted a regulation containing the rules of lawyers' participation in the interrogation. According to this, the lawyer can address questions and comments to the interrogating officer but they can only do so before or at the end of the interview. During the interview, a lawyer may intervene to signal that undue pressure is allegedly being exercised, that the suspect does not understand a question or that the suspect is unfit for questioning due to their physical or mental state. If none of these three situations occur, the lawyer must sit still and keep quiet during the interrogation. The lawyer may not answer questions on behalf of the suspect, unless the officer conducting the interrogation and the suspect consent. The suspect and their lawyer can request a time-out followed by an additional private consultation, but the interrogating police officer can refuse the request if they believe that allowing multiple consultations would hinder the interview. At the end of the interrogation, the lawyer will be given the opportunity to make remarks on how the questioning and the suspect's answers was reported in the official interrogation record.

This legislative implementation of the right of access to a lawyer during the interrogation was criticised. The restrictions on the lawyer's participation in the interrogation fostered concerns about whether suspects are able to effectively exercise their defence rights, and most notably the right to remain silent. The DSC ruled that these regulations were not unlawful by stating that 'these rules did not, in any way, diminish a practical and effective access to a lawyer during the police interrogation'.

Lawyers' professional associations such as NOVA and NVSA disagree with this conclusion. They consider the current limitations on the role of the lawyer during the interrogation too restrictive and in breach of art. 3 (3) (c) EU Directive 2013/48 on the right of access to a lawyer.

On 21 May 2021, the appellate disciplinary court in Den Bosch rejected a complaint against a lawyer, who had allegedly broken the disciplinary rules of the legal profession by intervening too often during an interrogation, despite 10 warnings from the police (and thus failing to adhere to the government regulation containing the rules of lawyers' participation in the interrogation).

The lawyer intervened 25 times inter alia to remind the client of their agreement to remain silent while waiting to obtain access to the dossier. Interrogating officers considered that due to the lawyer's interventions they could not continue, and stopped the interrogation. The disciplinary court held that the lawyer acted in line with his professional goal to advance the interests of his client, namely to ensure that the latter adheres to the decision to remain silent and to put an end to the interrogation. A lawyer has no professional obligation to ensure that the officers are able to maintain control of the interrogation.

Research findings: Practice

Attitudes to the RTS and to suspects who remain silent

Remaining silent' or the 'use of the RTS' was described by the respondents of this study primarily as a procedural strategy and not so much as the exercise of a (legitimate) procedural right. The word 'strategy' implies that the person should bear the eventual (negative) consequences of pursuing it. Also, in the traditionally inquisitorial procedural context, 'strategic' action by the defence seems to be viewed in (even) more negative terms than, for instance, in a traditionally adversarial context.

The borders between the exercise of RTS and 'non-cooperative' behaviour of suspects were often unclear. 'Silence' was sometimes equated to 'non-cooperative' behaviour or behaviour that 'sabotages' the goals of the investigation or of the proceedings.

This is a problematic view of the RTS from the standpoint of ECtHR case law and EU law.

'Now ok, [a 'silent' suspect] is someone who actually does not cooperate with his own conviction. He yeah gives no response to questions that I pose, so actually I need to ensure that I have evidence against him. He actually does not cooperate.' (Police respondent 10)

There was a strong belief that innocent people do not resort to the RTS. Remaining silent was sometimes viewed as preventing authorities from obtaining all necessary information or even described as sabotaging the main goal of criminal proceedings: truth finding. Linked to this – rather inquisitorial – perspective on the goal of criminal procedure and the position of the suspect therein, is the fact that where suspects expressly invoke their RTS, questioning (by the police as well as the investigative judge) will usually continue and inquiries will be made into the reasons for remaining silent. Where the RTS is understood in this way, its scope is effectively limited to the prohibition of the use of force or other illicit methods of obtaining a statement from the suspect. This understanding corresponds to the prevailing interpretations in the Dutch law as described above.

'All sorts of ideas are being read into the right to silence such as that because you [the suspect] remain silent then they [judges] find you guilty or not. But it should not be so. The right to silence is a safeguard against the use of violence, which should be prevented, and it is nothing more than that.' (Judge respondent 10)

Whether silence is perceived as a legitimate procedural strategy seems to depend on several factors such as the perceived strength of the available evidence and the moment at which the right is exercised. Silence at the early stages was perceived by some as more 'understandable' than at other stages because the defence does not yet have access to the *dossier*. However, according to others it would raise a suspicion that the suspect and the lawyer are waiting in order to 'adjust' their statement to the information in the *dossier*.

Police respondents said that facing suspects who remain silent in an interrogation reduces their feeling of professional satisfaction and results in more work and effort. Although obtaining a statement of the suspect is not always necessary for 'solving' the case, obtaining a statement from the suspect was considered important as a desired outcome of an interrogation. A suspect's decision to remain silent disturbs the 'natural flow' of the interrogation. Judge respondents noted that where a suspect remains silent, this interferes with their ability to deliver good quality judgments.

'The only thing is that if someone responds to questions, then you can make a better judgment, for your own consciousness, because you get a picture of the suspect as a person. So, it is then in the interest of the quality of verdicts.' (Judge respondent 11)

To what extent professionals (police and judges) understand and accept the reasons for remaining silent may not only impact the intensity of interrogations but may also influence decision-making at the later stages of the proceedings.

Perceptions of reasons for remaining silent

Suspect's 'silence' – unless it is only (very) short-termed – was usually associated with deliberate and strategic reasoning of the suspect and/or of the lawyer. Mostly 'experienced' criminals were believed to remain silent, and not the 'first offenders' (unless advised so by their lawyer), or at least not throughout the whole proceedings.

'Now, I find that the right to silence is simply there for hardened criminals who do not talk. This is a general tendency. A criminal does not talk. He does not do it. If they [police] have evidence, then too bad for him, then he just sits out the sentence, but he never talks about the incriminated case. This is actually a standard

reason [for invoking the RTS]. ' (Police respondent 9)

Minors and other suspects considered 'vulnerable' (persons with intellectual disabilities or mental disorders) were believed unlikely to remain silent. There was a strong belief that innocent people do not resort to the RTS.

It is not a piece of evidence if you remain silent, but people who have nothing to hide, they do not remain silent. This is a kind of a common-sense instinct that everyone has, isn't?' (Judge respondent 8)

Deliberate and strategic silence was associated with the desire to 'wait and see' what kind of incriminating information has been collected by the authorities, and possibly to fabricate an exonerating account. Legal advice, belonging to a criminal organisation, mistrust to the police or 'cultural reasons' were frequently mentioned as reasons for remaining silent. Respondents also noted that the frequency of the use of the RTS is associated with the type of an offence: for instance, suspects of drug-related offences are more likely to remain silent than suspects of shoplifting. However, it is likely that other factors play a role here, such as the particular characteristics of the suspects of particular offences or the nature of the evidence that is likely to be available in the different types of offences. The (perceived) strength of the evidence and the knowledge of the case file were also named as relevant factors determining the suspect's decision whether or not to remain silent.

The findings described above largely correspond to findings of existing empirical research. For instance, they seem to confirm the findings from the research on innocent suspects' behaviour stating that such suspects are more likely to waive their RTS (among other procedural rights). Practitioners inferred from the fact that innocent people are more likely to speak, that where the suspect does not respond to questions about the criminal offence, he is most probably guilty. On the whole, it seems that exercising the RTS is mainly viewed as a strategy chosen by suspects who are most probably guilty. None of the respondents in our study associated remaining silent with being innocent. This line of reasoning may be problematic since the assumption that guilty suspects are more likely to remain silent is not substantiated by existing research.

Perceptions of the role of lawyers

Respondents believed that lawyers have a considerable influence on the suspect's decision to remain silent. They also expressed the view that the (perceived?) increase in the number of suspects remaining silent during the investigative stage is inextricably linked to the post-*Salduz* introduction of legal assistance before and during interrogation.

'Actually since Salduz, since lawyers are present at the first interrogation, I believe almost 90% of first interrogations are simply the right to silence. Unless you have people that really want help and can benefit from speaking openly right away.' (Judge respondent 4)

Another recent study demonstrated that a large majority of surveyed police officers (74% of 1009) are of the opinion that due to the presence of a lawyer during the police interrogation, suspects are less likely to make a statement. However existing empirical research does not support the assumption that the rates of the use of RTS have increased following the introduction of the right to legal assistance at interrogation. The findings concerning the link between the RTS and the use of RTS are inconclusive. Legal assistance is only one factor that influences the use of the RTS, and many other factors are likely to play a role in practice.

Respondents expressed a predominantly negative view on the lawyer's advice to invoke the RTS. For instance, some respondents were of the opinion that lawyers 'force' suspects to remain silent against their own wishes. In addition, it was frequently stated that lawyers help clients to fabricate (false) defences that 'fit' within the contents of the case file. In this context, especially judges questioned whether advising suspects to remain silent is always in the best interest of the latter.

'But the mindless 'stay silent', especially combined with a nonsensical story at the hearing, yeah that is not particularly credible. And what additionally gives me an uneasy feeling, and this in particular is when you get the feeling the lawyer made up a scenario together with the suspect. So, the lawyer looked at the dossier together with the suspect and said: 'Look, if it went like this then they can do nothing to you'. Okay, I do not think a lawyer should do that, honestly.' (Judge respondent 8)

The perceptions of legal advice expressed by the respondents in this study mostly do not correspond to the findings form earlier (observational) studies of the investigative stage. These studies suggest, for instance, that the likely influence of legal advice on the suspect's behaviour at the first interrogation(s) depends on many different factors, including the lack of knowledge of the case file. Also, they indicate that lawyers often tend to be more 'careful' and nuanced in their advice on the RTS, than it is the case in the opinion of our study's respondents. Generally, the rather negative perceptions of legal advice are not surprising, given the strong inquisitorial roots of the Dutch criminal justice system: advising to remain silent is a manifestation of an adversarial approach to defence, whilst in the Netherlands the lawyers' role is often viewed as simply to 'control the procedure'.

The respondents' perceptions of the lawyer's role *during* interrogation with regard to the advice to remain silent were – similarly to their perceptions of legal advice at the investigative stage in general – mostly negative.

Nevertheless, the interviewed police officers were aware of the boundaries that they cannot overstep in the presence of the lawyer. The respondents acknowledged that lawyers have become regular participants of interrogations. Police officers noted that they sometimes have preparatory conversations with a lawyer to plan the interrogation as effectively and efficiently as possible. This form of 'cooperation' appears to have become established police practice and illustrates that the police's view of the role of the lawyer is not only negative.

Police interrogations of silent suspects

In terms of how much the police 'relies' on suspect statements to 'solve' a case, there was some support in our findings of the hypothesis that the importance of the suspect statement for police investigations is decreasing, because greater reliance is made on other evidence (for instance, forensic evidence). In more 'serious' cases, however, the perceived importance of the suspect's statement remains high. More specifically, the perceived need for the suspect statement is higher if the case involves victims.

'Victims also often get to read the statements, victims also often have a lawyer who asks for the dossier and the dossier then reaches the victim but they have no use for it, also for processing the event, if there is only half a page of statements. So you do not only do this for the application of criminal law or procedure but also to promote the participation of the victim.' (Police respondent 8)

In this study, there was a strong perception that in cases dealt with by local investigation departments greater efforts are invested now than in the past to collect forensic and other types of evidence before attempting to interrogate a suspect. It should be kept in mind, however, that this research relied on the perceptions of police officers and not on observations of actual practice.

According to respondents, the objectives of interrogating a 'silent' suspect (such as or) would differ depending on the type of the case. For instance, the objective of trying to 'break' silence and obtain a statement was typical of investigations into sexual offences, and the objective to create the possibility of drawing inferences from the suspect's

silence at a later stage was typical in cases involving organized or white-collar crime.

As to how Dutch police officers react to suspects remaining silent, the respondents indicated they would prefer confrontation with available evidence, to the use of emotional or psychological pressure. Nonetheless, it appears that the use of a considerable amount of pressure is considered appropriate and expected where forensic or other technical evidence is lacking.

'If you have nothing, if you have no forensic evidence and no other evidence, yes then it will be very difficult to build pressure on the suspect, then you would yeah use his emotions that could give a particular type of pressure, if he is sensitive to that.' (Police respondent 9)

Respondents reported several different tactics to overcome silence such as building rapport, trying to address the underlying reasons for remaining silent, building cognitive pressure by strategic disclosure or offering a time-out with the lawyer. A greater degree of emotional or psychological pressure might be used especially in more serious cases (murder, manslaughter, sexual crimes etc). However, some police respondents questioned whether lengthy and intensive interrogations without introducing new information is effective. In addition to this, certain tactics such as intimidation or threat with the use of force were universally characterised as 'old school'. The interviewed police officers often said that they 'would not insist' on questioning 'experienced' suspects because they know 'in advance' that it will be fruitless. Paradoxically, this may result in 'first-offenders' (or other less-resilient suspects) being subjected to relatively greater pressure during interrogation than suspects who are considered more resilient, such as 'experienced' suspects or 'hardened criminals'.

Judicial oversight of police interrogations

The interviewed judges had a positive (or even optimistic) view on the manner in which police interrogations of suspects were conducted. Judges believed that police interrogations of suspects were – as a rule – conducted in an appropriate manner.

Well yeah alright, the police officers, they, they all give the caution, what I see is that 99% of the police officers are super decent. And they pose the questions in a proper manner. And when the suspect then says 'silence', on many pages, 46 pages in a row. It makes you think how is this even possible. I would not be able to do that. So that is done in a very proper way.' (Judge respondent 1)

It is important to note that this view is predominantly based on the written records of interrogations which

– in contrast to the results of earlier empirical studies on the accuracy and completeness of these records – are considered as reliable accounts of what happened in the interrogation room.

In addition to this, judges generally did not feel the need to investigative actively whether the interrogation was indeed conducted fairly, and felt that raising any issues in this respect was mainly the responsibility of the lawyer. The fact that lawyers rarely complained about how the interrogation was conducted, was perceived by judges as indicative of the fact that overall interrogations are carried out in a proper manner. The actual presence of a lawyer in the interrogation room was also mentioned as a guarantee for proper interrogations. Thus, it might be that following the introduction of the right to legal assistance at police interrogations, Dutch judges consider themselves partly relieved from the duty of investigating the possible irregularities in the conduct of police interrogations (relying on the lawyer to signal such irregularities). Even where a judge would establish that the interrogation was conducted improperly, it is unlikely that a remedy would be afforded (e.g. that evidence would be excluded) where a suspect has remained fully or partially silent,

but did not confess or admit involvement in the suspected offence. Interestingly, none of respondents mentioned that the prosecutor – given his rights-protective role – might be a meaningful actor in ensuring the lawfulness of police interrogations.

Remaining silent and the determination of guilt

As for the influence of remaining silent on decisions concerning guilt or innocence, the respondents indicated that silence would generally be interpreted negatively (in the suspect's disadvantage).

> *'Yes I am afraid so [that suspect's silence or failure to give a response would influence the judge's judgment on guilt]. I think it should not happen. But if you use silence for some questions but not for others, then there are people – and I would do it myself too I think – who would question that. And those questions that are not answered, those are convincing, that can help the internal conviction. It is not really allowed, but I do think it works that way.' (Judge respondent 6)*

Only in a small number of cases, where the evidence is weak, would remaining silent result in an acquittal. Remaining silent can be used 'against' the suspect, if it is considered that he fails 'to give a plausible account' *(aannemelijke verklaring)* for certain circumstances or facts that 'scream' for an explanation. This has to be decided on a case-by-case basis and some judges indicated they sometimes struggle with this rather subjective criterium.

In general, the study has shown that a suspect's silence or rather the failure to provide a 'satisfactory' or credible account where the evidence against the suspect is considered to be strong is likely to reinforce the conclusion that the suspect is guilty.

As for providing alternative scenarios at a certain stage of proceedings, judges made clear that a lot will

depend on the timing and the content of the scenario. When an alternative scenario is provided only after obtaining (full) access to the case file or at a late stage of proceedings, judges may be reluctant to accept it.

> *'You see a lot of suspects that remain silent, silent, silent and start talking at the hearing and you will often see those statements fit the dossier perfectly, their statements are fit to the dossier. In other words, they give such a statement that aims to let them get away with it, it fits exactly with the evidence.' (Judge respondent 5)*

Judges may also be reluctant to further investigative the alternative scenario and adjourn the trial for this purpose if it is only presented for the first time during the trial. Initial silence on advice from the lawyer is not a sufficient excuse for the 'lateness' of the scenario:

> *'[T]he singular explanation: 'yes, it was the advice of my lawyer' is not sufficient in my opinion… Yes, you do ask: 'why didn't you make that statement at the police?' And 'how come you suddenly remember that now?'. There are all kinds of things, look you cannot predict what will be said, usually: 'yes, my lawyer advised me that'. So, I would simply follow that. And you would say: 'but if you now know that you did not do it, then why don't you tell the police that? That makes sense, right?'. (Judge respondent 9)*

As for the content of the scenario, judges indicated to value not only the level of detail of the alternative scenario but also whether (and to what extent) it corresponds with the information in the case file. This clearly presents the defence with a dilemma: either to provide an account early or before obtaining access to the case file and run the risk that it might be found inconsistent with the information in the case file, or to provide an account after having had access to file and run the risk that the scenario would be found non-credible or untruthful. These findings

correspond to the findings of psychological research into the evaluation of alibis of innocent suspects, arguing that innocent suspects face unrealistic requirements to their alibis.

Remaining silent and decisions concerning pre-trial detention

As for the possible consequences of exercising the right to remain silent, this study suggests that silence as such does not play a significant or decisive role in the initial decision to place the suspect in pre-trial detention. The initial decision to place the suspect in pre-trial detention is taken on the basis of whether or not there exists a certain level of suspicion *(ernstige bezwaren*) which is often established on the basis other evidence than the suspect's statement, unless it contains an admission or a confession. Similarly, a denial is unlikely to lead to a release at this procedural stage. In contrast, a suspect's silence may be more relevant for the decisions concerning prolongation of pre-trial detention or subsequent release. As these decisions are mostly based on the consideration of certain risks (such as the risk of tampering with evidence or subsequent re-offending) the exercise of the RTS is likely to contribute to the finding that the suspect presents a risk of either interfering with the investigation or re-engaging into criminal behavior.

'It is often already quite clear what happened and the moment you start speaking there is a higher chance that I end your detention or that I let you go. Because it is also about what is the risk of recidivism? Because that is often the ground you keep somebody on. Yes, and then it is definitely nice if I know a little more about somebody. If I do not know anything, and somebody is remaining fully silent while something quite serious has happened, then I think 'well I am not letting him back into the community'. (Judge respondent 1)

Furthermore, suspect's silence – especially when it is full and consistent – may interfere with the ability to obtain reports concerning the suspect's personality and the likelihood of reoffending, or cause a negative advice, which may lead to a greater likelihood that the judge would 'play it safe' and decide to keep the suspect in detention pending investigation and trial.

'And as far as release from detention is concerned, with these requests it can be a disadvantage when there is serious suspicion and you do not speak, the probation service can then provide an advice in which, I have even had that yesterday, in which they say yes there is so much incriminating evidence and if it is true then he is deeply embedded in a criminal organization. We cannot estimate how to reduce the risk of recidivism if he does not tell us how he got involved in this, what the reason is of his involvement in all of this. So we cannot simply formulate under what conditions he can be released. Then lawyers tend to get angry, because that equates to punishing people for remaining silent. But then I say: 'no, that is not punishing you for remaining silent, but it is a consequence of remaining silent'. (Judge respondent 4)

Besides the decisions on pre-trial detention, the exercise of the RTS by a suspect may have an influence on other procedural decisions taken at the investigative stage, such as decisions to conduct investigative actions on behalf of the defence. In this respect, interviewed judges stated they might be more reluctant to grant a request of the defence to conduct additional investigation or to question certain witnesses (again), since remaining silent might mean that the reasons as to why additional investigation is required, will not become (sufficiently) clear.

Remaining silent and sentencing and other outcomes

In the context of the potential influence remaining silent may have on the outcome of the case, respondents indicated that a suspects' silence as such cannot lead to a higher sentence but it can – however – have an indirect influence. For example, remaining silent (as well as a denial or failure to confess) may be interpreted as 'failure to provide openness of the state of affairs' or a 'failure to take responsibility for the impugned offence'. More indirectly, full or partial silence may be considered as the unwillingness to cooperate with the investigation and the proceedings, particularly where the evidence is perceived to be strong, and 'calling for an explanation' from the suspect, which might in turn have adverse consequences as far as the nature and amount of the sanction are concerned.

'In my eyes, if the dossier really screams for an explanation and everything points in the same direction and [the suspect] does not make a statement, he remains silent, says nothing or denies, in spite of the load of evidence that truly point his direction, then I am definitely prone to say 'well, then it will be used against you in the determination of the sentence, yes.' (Judge respondent 2).

Suspects who do not (fully) confess may be considered as not showing sufficient 'remorse', which might lead to a harsher sentence. On the other hand, confessing and expressing regret is likely to be considered a factor leading to a lower sentence. Whether silence is taken into account in the sentencing stage may depend on the type of case: for example, it appears more likely in cases involving considerable harm to victims or cases of high public resonance. Furthermore, a suspect's full or partial silence (and lack of cooperation) may make it challenging or even impossible for judges to assess their mental health or the propensity towards committing criminal offences in the future (recidivism). Suspects who remain silent fully or partially might also be less likely to be able to benefit from social assistance or mediation programs or other alternatives to a trial.

Conclusions and Recommendations

This Policy Report has provided an overview of some of the many issues addressed within the national report on the EmpRiSe research in the Netherlands. For further information, please consult the sources named in the end of this Report and/or contact Dr Anna Pivaty (anna.pivaty@ru.nl).

Recommendations with regard to legislation, case law and secondary regulations:

1. RTS and the privilege against self-incrimination should be grounded more explicitly in the rationales of protecting personal autonomy and privacy of the suspect as a requirement of procedural fairness in legislation and case law.

The current approach, which aims at deterring undue pressure at interrogation and ensuring reliability of evidence is highly instrumentalist, inappropriately narrow when compared to ECtHR standards and EU law, and is not 'future-proof', as it does not adequately respond to current threats to personal autonomy and privacy caused for example by the rise in digital investigations.

2. The current narrow approach to the privilege against self-incrimination, which covers only the evidence of testimonial nature already protected by RTS, should be revised. The privilege should additionally be grounded in the 'means-based' criterion, such as the required degree of suspect's

cooperation and/or of interference with the suspect's privacy. On this reading, contents of a smartphone, for instance, should be protected by the privilege.

3. Greater legal guidance should be provided on (the safeguards around) conducting interrogations and on what constitutes pressure during interrogation. Interrogation methods involving deception, manipulation and persuasion to waive RTS such undermining legal advice or references to negative consequences of remaining silent or benefits of confessing should be declared unlawful.

4. A provision in the law and/or secondary legislation should be considered, according to which it should be impermissible to inquire into the reasons for remaining silent.

5. Courts should adopt a stricter approach to the use of excessive pressure at interrogations, following the example of the recent case law with regard to the Mr. Big interrogation method.

6. Further safeguards should be developed with regard to taking suspect's silence or the failure to give a (satisfactory) account or mention certain facts (sufficiently early) into account in relation to evidence, in addition to defining the evidentiary threshold. Such safeguards should include, as a minimum, access to (effective) legal advice at the investigative stage, and the duty to provide information about the key elements of evidence, before the suspect is expected to provide an account.

7. Courts should consider undertaking the analysis of whether any inference *may* be drawn from the defendant's silence as described in no. 6 above, taking into account the relevant safeguards, before proceeding to the overall evaluation of evidence.

8. Courts should refrain from drawing a conclusion that the defence/alternative scenario was fabricated and is therefore not credible merely from the fact that it was provided 'late'. Such a conclusion may follow only if prosecution proves, with reference to concrete facts, that the delay was deliberate with an intention to mislead the court by fabricating an explanation matching with the evidence in the *dossier*.

Unless the fact of delay with intent to mislead is proven, advice from the lawyer to remain silent should be considered sufficient to preclude the possibility of drawing an inference from silence at the pre-trial stage.

9. The Dutch Supreme Court should consider revise line of its case law, according to which the failure to provide a credible account by the defendant can trigger a presumption that certain elements of the offence are proven, such as joint enterprise or criminal intent in money laundering cases. (The possibility of relying on presumptions in these types of cases should be assessed *inter alia* from the standpoint of the ECtHR standards independently from the impact of the suspect's silence).

10. The right to legal assistance at the investigative stage should be strengthened by removing the existing restrictions on the role of a lawyer during interrogation.

11. Information about the accusation and the key elements of the evidence should be provided to the suspect and their lawyer before any questioning. The respective legislative provisions

should be supported by further regulations from the Public Prosecutor's Office and/or DSC case law to become effective in practice.

12. Referring to or considering the use of RTS or suspect's failure to 'cooperate' with the proceedings, where this implies *only* the use of RTS, when determining whether a suspect should obtain compensation for unjustified pre-trial detention, should be considered unlawful.

13. Referring to or considering the use of RTS, or suspect's failure to 'cooperate' with the proceedings, to demonstrate remorse or to provide a satisfactory explanation to the victims, where this implies implying *only* the use of RTS, as an aggravating circumstance leading to a harsher sentence should likewise be considered unlawful.

14. Remedies for breaches of RTS, particularly due to irregularities in the conduct of interrogation and the use of pressure, should be strengthened by determining that, as a rule, such breaches should result in exclusion of evidence. A more restrictive approach should be taken to the exceptions to the exclusion of evidence rule.

Recommendations for policy and practice:

1. The exercise of RTS should not be equated to 'non-cooperation' with the proceedings or the truth-finding in policy and/or practice. Non-cooperation should be consistently interpreted as active, deliberate and unlawful behaviour of the suspect aiming to frustrate the proceedings, such as tampering with witnesses or evidence or failure to comply with lawful orders of the judge or investigative authorities.

2. The exercise of RTS should be viewed in the practice of criminal justice actors as 'morally neutral' and a legitimate exercise of a procedural right.

3. In no case should the exercise of RTS be viewed or described in court rulings or other official documents including probation reports as: indication that the suspect is guilty of the incriminated offence; manifestation of propensity to criminal offending; proof of absence of remorse, lack of insight or other similar negative conclusions concerning defendant's personality and/or behaviour, which may affect decisions on pre-trial detention and sentencing.

4. Criminal justice practitioners should become sufficiently aware that RTS may (also) be used by innocent suspects and that it may be invoked for reasons other than those associated with guilt.

5. Criminal justice practitioners should recognise the role of a lawyer as a legitimate and professional player at the investigative stage, who considers multiple factors when providing advice to remain silent (other than to protect the client from self-incrimination), actively defends his client, and has an ethical obligation to refrain from assisting the client in fabricating defences or misleading the court.

6. Police and judges should respect the suspect's wish to exercise RTS and refrain from inquiring into the reasons for remaining silent or using persuasion to overcome silence, particularly with regard to first offenders and vulnerable suspects.

7. The need for a confession as key to the prosecution case should be minimised as much as possible, including by encouraging the emerging police practice of conducting as much evidence-

-gathering as possible before interviewing the suspect.

8. Criminal justice practitioners, and particularly judges, should refrain from any statements, which frame participation in the proceedings as a moral obligation of the suspect, for instance due to the concern for the interests of the victim(s) and/or the society in case of 'overwhelming' evidence.

9. Judges should refrain from relying on written records only when examining whether a suspect interrogation was conducted by police in an appropriate and fair manner.

10. Consideration should be given to introducing a requirement to audio(visually) record all suspect interrogations at the investigative stage.

11. Prosecutors should play a more active role in overseeing the legality and fairness of interrogations conducted by the police.

12. Where a suspect delays giving a statement until after access to the case file is provided, this should not be automatically regarded as an attempt to mislead the authorities by 'adjusting' the statement to the existing evidence. Suspects should not be expected to provide an account or explanation before they are informed of the 'case' against them.

13. The exercise of RTS alone should not be a sufficient reason to refuse requests of the defence for additional investigation, including for examining prosecution witnesses.

14. The fact that the defence or alternative scenario was provided 'late' should not on itself be a reason to refrain from attempting to verify its credibility.

15. The exercise of RTS should not be considered as a factor leading to the finding that the suspect presents a risk of either interfering with the investigation or re-engaging into criminal behaviour as the ground for the prolongation of pre-trial detention or refusal to grant release.

16. The exercise of RTS should not be considered as a reason to hinder access to a probation report or mental health assessment in the context of pre-trial detention decisions or sentencing.

Recommendations for training:

1. Practitioners across the criminal justice spectrum, and particularly police, prosecutors and judges should be trained to increase their awareness of the importance of RTS as a cornerstone of a fair trial, as well as of (implicit) assumptions concerning RTS and reasons for remaining silent, defendants who choose to remain silent, and the influence of these assumption on individual decision-making.

2. Police, prosecutors and judges should be trained to increase awareness of the role of the lawyer in the context of police interrogations.

3. Joint professional training of police, prosecutors and judges on the one hand, and defence lawyers on the other hand, should be considered to increase mutual trust and overcome negative assumptions concerning defence lawyers, their advice and role in the criminal proceedings.

4. Defence lawyers should be trained with the goal of equipping them with practical strategies to

ensure better enforcement of RTS at the investigative stage.

5. Police should be trained in ethical interviewing techniques aimed at information-gathering, which respect RTS and refrain from persuasion and manipulation to overcome silence.

6. Judges should be trained to raise awareness of the limitations and safeguards with respect to the use of inferences from silence for the purposes of evidence assessment.

7. Judges should be trained on the importance of and approaches towards evaluating the fairness and appropriateness of interrogation methods used by police.

8. Judges should be trained to raise their awareness of assumptions around truthful and false defences (such as alibis) and to equip them with evidence-based strategies to assess credibility of defences and alternative scenarios.

Recommendations for research:

1. Research on judicial decision-making with regard to inferences from silence, the weight attached by judges to silence and failure to provide a satisfactory explanation in different types of cases, and factors influencing these decisions.

2. Research on the suspects' perspective on RTS including decision-making with regard to the use of RTS, challenges experienced by suspects who remain silent and their perceptions of the consequences of remaining silent.

3. A comprehensive, preferably multi-jurisdictional study, involving practitioners across the criminal justice spectrum on the perceptions of legitimacy and attitudes towards RTS.

4. Research on the (possibly changing) role and need/expectations to obtain a suspect statement in police investigations and in criminal proceedings in general, given the developments in forensic investigations on the one hand, and pressures related to criminal justice policies on the other hand, such as time constraints and increased attention to the need of the victims.

This Policy Report was written on the basis of the following sources:

1. ter Vrugt, P. (2021), A Pragmatic Attitude: The Right to Silence in the Netherlands, *New Journal of European Criminal Law*, Volume 12, Issue 3, pp. 389-407, https://doi.org/10.1177%2F20322844211028312 (open access).

2. Daly, Y., Pivaty, A., Marchesi, D., ter Vrugt, P. (2021), Human Rights Protections in Drawing Inferences from Criminal Suspects' Silence, *Human Rights Law Review*, Volume 21, Issue 3, pp. 696–723, https://doi.org/10.1093/hrlr/ngab006 (open access).

3. Pivaty, A., ter Vrugt, P., de Vocht, D., Knehans R. (2021), The Right to Silence at the Investigative Stage in Law and Practice: Country Report Netherlands, www.empriseproject.org/publications (open access).

This Policy Report was funded by the European Union's Justice Programme (2014-2020)

Project ID: EmpRiSe - 802102 Call: Just-JACC-AG-2017