Summary

Fifteen years of defendants who refuse pre-trial forensic psychiatric assessment

Prevalence rates, information needs by public prosecutors and judges, and sentencing in court

The present study is about defendants who refuse to participate in pre-trial forensic psychiatric assessments that are conducted on behalf of their criminal court case, in short, an assessment report. The goal is to contribute to a solution for the so-called 'problematic influence of assessment refusal'. This influence refers to the problem that it is more difficult to write a psychiatric assessment report when the defendant refuses to participate, which in turn makes it more difficult for the judge to decide on the most suitable trajectory for the defendant: either punishment in prison or treatment in a forensic psychiatric hospital.

In the Netherlands, a psychologist, a psychiatrist or both can be requested to write a forensic psychiatric assessment report. The public prosecutor, the examining judge or the court, can order this assessment when questions have arisen about the defendants mental health. When the assessment is conducted by two mental health professionals, one of whom has to be a psychiatrist, it is called a double forensic psychiatric assessment report. This type of multidisciplinary forensic psychiatric assessment is obligated by law for the imposition of the most far-reaching judicial treatment order that can be imposed on a defendant with mental health issues in the Netherlands: disposal to be treated on behalf of the state (in Dutch: *terbeschikkingstelling*) or the tbs order. The judge is the one who decides on the imposition of this measure after receiving two assessment reports. The assessment can occur in a house of detention and is then called an ambulatory assessment, or in a forensic psychiatric observation clinic, called the Pieter Baan Centre. Although the judge makes the final decision, the forensic psychiatric assessment report is thereby an important source of information in the criminal court case.

In the forensic psychiatric assessment report, the mental health professional answers a specific set of seven standard questions raised by the court. The first question that has to be answered is about the level of cooperation of the defendant. Next is a question on the forensic psychiatric diagnostics: are there any mental disorders and if so, which ones? The question that follows is whether or not the mental health professional thinks this disorder was present during the crime, there has to be simultaneity. In the next question, the court asks the mental health professional to state their opinion on how much the disorder influenced the crime that was committed and this is then determined on a recently implemented three-point scale: full accountability, diminished accountability or no accountability. In the sixth question, the mental health professional is asked to give a risk assessment on the chance of recidivism and finally, the mental health professional is asked to advise on the necessity of a compulsory treatment measure or a prison sentence. When the defendant refuses to cooperate with the assessment, it is more difficult to answer the courts' questions and this in turn may lead the judge to be unable to impose a treatment measure such as a tbs order. Several aspects of the possible problematic influence of assessment refusal have remained unknown up till now and are the focus of the present study:

1 To gain insight into the prevalence rate of assessment refusal in the past fifteen years.
2 To analyze the influence assessment refusal has on the capability of the mental health professionals to answer the court's questions.
3 To determine which information is necessary for public prosecutors and judges when defendants refuse to participate in the assessment to still be able to give a suitable sentencing advice and to make a suitable decision on this defendant.
4 To determine which sentence is most often imposed on a defendant who refuses pre-trial forensic psychiatric assessment.
5 To examine the arguments judges use to motivate their decisions.

The research questions are:
1 How many (absolute numbers and proportions) defendants have refused to participate in the past fifteen years in both ambulatory forensic psychiatric assessments and in clinical forensic psychiatric assessment?
2 Are there any shifts between the number of defendants who refuse to participate between the ambulatory and clinical setting?
3 Are there differences between the different regions in the Netherland in the amount of defendants who refuse to participate? The five different regions in which the Netherlands Institute for Forensic Psychiatry and Psychology (NIFP) is organized will be used to determine this.
4 Which part of the forensic psychiatric report or which of the courts' questions are mostly influenced by the refusal?
5 Does the forensic psychiatric assessment report of a defendant who refuses to participate, without a conclusion on disorders or treatment advice, include enough information for the public prosecutor to give a suitable sentencing advice and for the judge to impose a suitable sentence?
6 Based on which information do public prosecutors and judges advise and decide at present?
7 Based on which information is it better for a public prosecutor to advise and for a judge to decide on a defendant who refuses to participate in pre-trial forensic psychiatric assessment? These analyses will focus on risk assessments, group observations (in clinical examinations) and forensic network analyses.
8 What sentences are imposed on defendants who refuse to participate?
9 How do the judges motivate these sentences?

Methods

Several research methods were employed in the present study. For the prevalence rates of assessment refusal (research questions 1-4) quantitative analyses were performed on data that had already been collected by the NIFP for management purposes (retrospectively for 2002-2016). Further, a questionnaire was developed to determine the prevalence rate of assessment refusal in 2017 prospectively. In this questionnaire, in fourteen questions the level of cooperation and the impact this has on the assessment report is determined. Psychiatrists and psychologists who give feedback on the assessment reports of their colleagues were asked to fill out this questionnaire.
In order to determine the need for information of public prosecutors and judges a semi-structured interview was developed and fifteen judges and fourteen public prosecutors were interviewed (research questions 5-7).
To determine the sentences that were imposed on defendants refusing to participate (research question 8) and the motivations behind these sentences (research ques-

tion 9), verdicts were looked up of all defendants who refused to participate in the assessment between 2012-2016 (N=458) at the only clinical location in the Netherlands, the Pieter Baan Centre (PBC). For 401 defendants (88%) the verdicts of their first trial in court were found and 115 verdicts of the Court of Appeal were traced back (25%).
To examine the motivations behind these sentences (research question 9), 40 cases were randomly chosen and examined in depth: 20 verdicts in which a defendant who refused assessment was given a tbs order and 20 verdicts in which a defendant who had refused assessment was imposed a prison sentence. A systematic coding sheet was then used to determine all motivations behind the sentencing.

Results

Prevalence rates

Ambulatory prevalence rates of assessment refusal
Determining the number of defendants who refuse forensic psychiatric assessments is a way to look at the size of the problem of this refusal. The prevalence rate of assessment refusal in the ambulatory setting (double reports) in 2002-2016 is relatively stabile, on average 11% of defendants refuse the assessment (range 7%-15%). The last five years the rate of assessment refusal remained stable as well: 12% in 2012 and 11% in 2016. Most defendants refused in the Dutch region. Assessment refusal has impact on the way the research questions by the court can be answered: in 18% of all cases with a defendant who refused assessment a judgement is given on the level of accountability and in 9% an advice is given on the treatment that is necessary for the defendant. These percentages are an estimation of the actual amount of defendants who have refused assessment, that is, the number of reports listed as cancelled due to assessment refusal. This is due to the fact that not all reports in which defendants have refused to participate are registered as such. Therefore this number is likely to be an underestimation of the actual refusal rate in the ambulatory setting. This is a limitation to the ambulatory retrospective rate of assessment refusal.
For 2017, it was possible to prospectively monitor the number of defendants who refuse assessment. With the questionnaire that was specifically developed for this part of the study, the actual rate of assessment was calculated and not estimated as we did in the ambulatory retrospective study. The questionnaire was filled in by psychologists and psychiatrists who give feedback to forensic psychiatric assessment reports of their peers. In 22% of the double reports in 2017, defendants refused to participate. Next to this, an additional 10% partially refused to participate. There is no significant difference between the different NIFP regions in the prospective analyses. This rate of assessment refusal is more reliable than the retrospective analyses, as the rate reflects the exact amount of defendants who have refused the assessment, as indicated by the professionals who give feedback to the reports. A limitation to this part of the study is that the response rate of returned questionnaires was 50% and there is no possibility to know the rate of assessment refusal of the other 50%. Assessment refusal does have an impact on the amount of court questions that can be answered: in 19% of the reports a diagnosis was given, in 9% a conclusion about simultaneity was given, in 5% it was stated whether or not the disorder had an influence on the crime, in 3% there was a judgement on the level of accountability and in 6% of the reports a treatment advice was given.

Clinical prevalence rates of assessment refusal (Pieter Baan Centre)
The prevalence rate of complete assessment refusal in the clinical setting, the PBC, in 2002-2017 is 39% on average. Next to this number, 12% refuses partially. The proportion of complete assessment refusal has increased from 23% in 2002 to 43% in 2017. Until 2007 this increase is gradual, in 2008 assessment refusal increased by 15%-points. The proportion of partial assessment refusal in the clinical setting also increased in the 15 years we examined: from 1% in 2002 to 21% in 2017. The last five years the amount of complete assessment refusal in the PBC slightly decreased: from 46% to 43% and the number of partial assessment refusal increased from 12% to 21%.
In the PBC, reports are mainly written in criminal cases of defendants who appear before court for the first time (93% of all reports written in 2002-2017). The other 6% are assessments written for other reasons, for instance the prolongation of the tbs order. From the analyses it appears that most assessment refusal occurs in primary court cases and not so much in reports written for other purposes, such as the prolongation of the tbs order (7% of these defendants refuse assessment) or treatment advice for an ongoing tbs order (6% of these defendants refuse assessment). Also, it was found that for the defendants who were studied in the PBC, more of the courts' questions were answered than in the ambulatory setting: in 28% of the reports a diagnosis was formulated (17% complete and 11% partial assessment refusal), in 16% a conclusion about simultaneity was given (8% complete and 8% partial assessment refusal), in 16% there was a judgement on the level of accountability (8% complete and 8% partial assessment refusal), and in 18% of the reports a treatment advice was given (8% complete and 10% partial assessment refusal).
Many of the defendants that were clinically examined, were first examined in the ambulatory setting: 71%. The number of reports in which assessment refusal occurs in the ambulatory setting as well as in the clinical setting depends on the measure of assessment refusal that is used. When looking at reports that have been cancelled due to assessment refusal in the ambulatory setting as a measure of assessment refusal, 59% also refuses assessment in the clinical setting. When looking at the amount of defendants for whom it was not possible to reach a conclusion on the level of accountability due to assessment refusal, 48% also refuses assessment in the clinical setting. Finally, of all defendants for whom it was not possible to give a treatment advice, 45% also refuses the clinical assessment. A number of cases in which defendants refused in the ambulatory setting, lead to participation in the clinical setting: 39% of all cancelled reports, 50% of cases without a judgment on the level of accountability and 45% of the cases in which no treatment advice was given.

Information needs for judges and public prosecutors
Conclusions on the judges' information needs
1 *Judges are confronted with defendants who refuse assessment at a smaller scale than mental health professionals of the NIFP/PBC and therefore sometimes lack experience in sentencing such a defendant.*

From the interviews it appears that individual judges, even those with a lot of experience (in years and in the amount of times they imposed the tbs order) are not often confronted with defendants who refuse assessment, only a few times a year. This is due to the fact that the tbs order is not imposed often (97 unconditional tbs orders and 69 conditional tbs orders in 2016). Further, in the limited amount of cases in which a tbs order may be warranted, not all defendants refuse assessment. This limits the amount of expertise that can be build up by each individual judge. In cases in which the tbs order is prolonged this is different, these are quite regularly

scheduled on a weekly or monthly basis in each district thereby making it more easy to build up experience with these cases. However, as shown above, assessment refusal occurs most often in primary court cases. By increasing the amount of knowledge about the problem of assessment refusal, it is therefore less likely that a lack of experience hinders the sentencing.

2 *Not all judges are informed of the fact that a disorder, or 'disturbed behavior' can be ascertained by themselves when firm conclusions about possible disorders and treatment advice are lacking.*

From a number of interviews it is shown that not all judges know that they are the ones who can establish a mental disorder when the mental health professional does not or can not draw a conclusion. Also, all judges were asked about the type of information they need to adequately sentence a defendant who has refused assessment. The judges differ in their responses to these questions, based on their knowledge of this topic. Those judges who do not know that they can also impose a tbs order when the mental health professionals have not been able to draw a conclusion about possible disorders nor have given a treatment advice due to assessment refusal, do not consider different additional sources of information very interesting. Instead, they state that all information should be interpreted by the mental health professionals and not by themselves. When these professionals are able to incorporate the information into their report, it is useful and otherwise it is not, as stated by the judges. Judges who do know that they are the ones who can also establish the presence of a mental disorder, stated that all information sources are important and relevant and there is no specific type of information that is of particular importance.

3 *Judges indicate that while sentencing a defendant, it is necessary to have a complete picture about this defendant. There are no specific information elements or sources that are necessary or decisive in the sentencing of a defendant, however different information elements and sources can be valuable in different cases.*

From the interviews it is shown that several types of information sources can be useful in establishing a mental disorder, it is not the case that all judges point at a particular information source as relevant in all cases. When in different moments, under different circumstances, from a number of different sources enough information emerges about possibly disturbed behavior or a disorder, a judge has enough information on deciding on an accurate sentence for a defendant. This means that any additional information that can be gathered can be important. In that case it is even more important that the behavioral experts report all the information that is available.

4 *In case of a defendant who refuses to participate, judges have an increased need for information sources for which the cooperation of the defendant is not necessary, such as the forensic social network analyses, observation material and old(er) reports.*

When the defendant refuses to participate the assessment, the importance that is attributed to other sources of information increases. More specifically, the importance that is attributed to information sources for which the cooperation of the defendant is not necessary, increases. For instance, the forensic social network analyses, in which the life course of the defendant is being examined, (group)observations, for instance from their stay in the forensic observation clinic, and old medical and/or judicial reports become more important. In clinical assessments, there is additional information available through observations during sports and work, and in a group setting. Also, police notes, (audio-) visual recordings of police examinations, older reports written by a psychologist or psychiatrist in a non-judicial context and

records of prior convictions may be of use. These alternative information sources are of particular use when the information about the defendant is as elaborate as possible.

5 *The main questions of importance for the court in case of a defendant who refuses assessment are the courts' questions about the disorder, the simultaneous occurrence of the disorder at the time of the offence and the risk of recidivism.*

With regards to mental health, judges are lay people. In this manner, they warrant for a forensic psychiatric assessment report that is as full and complete as possible. Preferably, all the courts' questions are answered, but when this is not possible due to assessment refusal, at the minimum the questions with regards to the disorder, the disorder at the time of the offence (simultaneity) and the risk of recidivism should be answered, as stated by the judges.

6 *The actual problem the defendant who refuses assessment poses, depends on the specifics of the case: defendants who refuse participation differ on a number of dimensions and therefore a limited amount of general statements by judges are possible.*

Several judges who were interviewed stated to several of the questions that were posed that the answer to a question depends on the case that is at hand. Defendants who refuse participation form a heterogeneous group, as stated by several judges, and they differ on a number of dimensions. The reason a defendant refuses may differ, for instance due to fear of a tbs-measure, out of pathological reasons, out of trial position; the level of refusal may differ also, from complete to partial to fluctuating during the assessment; the way the alleged crimes occurred and the level in which this can be discussed by the defendants can differ, sometimes the exact manner in which the crimes are committed are decisive in the diagnostic process and may or may not lead to the diagnosis of disorders; the main disorders that can be diagnosed can differ, and psychotic disorders are more easily diagnosed than personality disorders; the availability of other people testifying about the defendant may differ and the number of other information sources may differ. These dimensions are significant to the way the case is dealt with in court.

7 *Judges have mentioned a number of possible improvements for the mental heath experts in writing their forensic psychiatric assessment reports.*

The following suggestions were given to the behavioral experts who write the assessment reports: to collect as many additional information sources on a defendant, to invite the mental health experts to court to elaborate on their findings in court more often, to create a feedback loop for judges to hear how the sentence or treatment of a defendant turned out and if any recidivism occurred and to learn from this information, to hear hypotheses that the behavioral experts have on possible disorders that cannot be formally diagnosed due to assessment refusal, to receive a treatment advice that is as clear and concrete as possible and to make available any police information and audio- (visual) recordings of interrogations.

8 *Most judges indicate that when a defendant refuses to participate in the assessment it is mainly more difficult to impose a tbs order, and not so much a different sentence such as a prison sentence or a different treatment order. Assessment refusal can be counterproductive in this manner, because there is not much information on circumstances that may decrease the length of the sentence.*

A number of judges indicate that for the imposition of the tbs order several requirements in the law have to be met, as opposed to other sentences such as a prison sentence for which it is only necessary that the defendant is proven guilty of the

alleged crimes. When a defendant refuses to participate the assessment, chances are that he also refuses to abide by conditions that may be set in a conditional sentence, making less stringent alternative sentences less likely to succeed. Furthermore, several judges indicate that possible circumstances that decrease the length of the sentence will not become known when a defendant refuses to participate in the assessment.

9 *The threat that the Dutch disciplinary tribunal (Tuchtcollege) poses to psychologists and psychiatrists, in which these behavioral experts are not to draw conclusions on disorders when they have not conducted enough behavioral assessment, obstructs adequate decisions by the judge.*

Several judges have indicated that the threat that the Dutch disciplinary tribunal poses to behavioral experts is too large, resulting in the fact that these experts do not want to draw conclusions about a defendant who refuses the assessment. Instead, judges are left to draw these conclusions, while they are not the trained professionals to do this.

Conclusions on the public prosecutors' information needs

1 *The assessment report is an important source of behavioral information, and the public prosecutors rely on these reports to a great extend. Particularly, the questions on disorders, simultaneity of disorders and the alleged crime, and risk of recidivism have to be answered by the behavioral experts, according to the public prosecutors.*

The legal background of public prosecutors results in a lack of expertise on behavioral issues and in this manner, they largely depend on the behavioral advice that the experts produce. For the public prosecutor it is difficult to diagnose a mental disorder due to his legal training and lack of behavioral expertise. The public prosecutor is sometimes able to conclude that the defendant has a mental disorder. This is more likely to happen when the defendant suffers from a psychotic disorder than a personality disorder because a psychotic disorder has characteristics such as odd behavior that are also easily noticeable for lay people. It is also more easy for the public prosecutor to conclude that a defendant still suffers from a mental disorder when there has been a diagnosis of such a disorder in the past that has not been adequately treated. The risk of recidivism is another important issue, because when no such risk exists, it is not necessary to treat someone with a obligatory treatment measure. A clear and concise treatment advice in the assessment report is also wanted by the public prosecutors, as precise as the name of the warranted treatment facility and the necessary treatment is considered important by the public prosecutors.

2 *In the absence of clear diagnostic conclusions, the public prosecutors have indicated that it may help when the behavioral experts write down any hypotheses or alternative scenarios that they think may be applicable to a defendant to formulate an adequate advice for punishment in court.*

When the behavioral experts cannot draw diagnostic conclusions due to assessment refusal or cannot answer the other questions posed by the court, it is important that they write any possible disorders and scenarios on the way these disorders may have influenced the alleged crimes. This description may help the public prosecutor in formulating his sentencing advice.

3 The behavioral experts should make more use of available sources within the criminal case files.

It is the impression of the public prosecutors that there are often several sources of information within the criminal case files that are not being used by the behavioral experts in writing up their assessment reports. For instance, there is the 'social interrogation' report, in which the main people in the life of the defendant speak about things that are characteristic of the defendant. Also, written up interrogations of the defendant and audio- and video material, sometimes during or shortly after the alleged crime, is often available but not often examined by the behavioral experts. This material may help in determining if there was any disorder at the time of the crime and could be used more often, as stated by the public prosecutors. Further, not all defendants who refuse assessment need to be admitted at the PBC. Their double assessment process may be expanded by a forensic social network analysis first.

4 Not all public prosecutors know that they can still advise that a tbs order is warranted when conclusions about disorders are lacking.

When asking the public prosecutors about the information sources that they need to be able to formulate an adequate sentencing advice, some stated that not they but the behavioral experts should indicate the type of information that is necessary. These public prosecutors did not know that they can still advise on a tbs order when conclusions on possible disorders lack.

5 Several different information sources are important, especially sources in which the cooperation of the defendant is not necessary such as the forensic social network analyses, information from older files, testimony from witnesses and written reports of interrogations. It is important that the complete picture of a defendant becomes clear from these information sources.

Several public prosecutors indicate that not bits and pieces of information about the defendant are important, but that the complete picture matters. Preferably, all information is interpreted by the behavioral experts: what do the different information elements mean for a specific defendant.

6 When conclusions on a possible disorder cannot be drawn it is mainly more difficult to give a sentencing advice that involves a tbs order, not so much a different sentence or disorder.

When a public prosecutor wants to advise a tbs order, he has to clearly motivate and substantiate this sentencing advice in a statement. In this statement, he has to discuss the reasons why he thinks the defendant suffers from a mental disorder and he has to list the reasons why he thinks this disorder has contributed to the crimes that were committed. This is more easily done when the assessment reports list information on these topics. When the behavioral experts cannot write much in their reports, the public prosecutor himself has to look for leads in the defendants' case file and this takes up more time and effort. Several public prosecutors state that it is only more difficult to motivate a sentencing advice of a tbs order and not so much a sentencing advice that contains a different sentence, such as a prison sentence. For a prison sentence it is only obligated by law that the defendant is proven guilty of committing his crime. For this reason, some public prosecutors state that instead of taking the lengthy road to giving a sentencing advice on a tbs order, they sometimes advise a significant longer prison sentence. With this significant longer prison sentence, they try to motivate the defendant to change his opinion and instead participate with the assessment and it is also said that only a long prison sentence is adequate for protecting society.

7 *The Dutch medical disciplinary tribunal works against the efficiency of the forensic psychiatric assessment, in the same manner the advice many lawyers give their clients not to participate in the assessment.*

The Dutch medical disciplinary board is considered to be a significant influence on behavioral experts. One of their demands is that the professional has had enough contact moments with the defendant, otherwise he is not allowed to draw any conclusions on possible mental disorders. When they do not abide by the rules and regulations of this board, mental health professionals can be sued and they can lose their license to practice their profession. When a complaint is filed and proven accurate, they are then no longer able to work in their field of expertise. The forensic psychiatric field is an exceptional field within the field of medicine and therefore, according to several public prosecutors, different demands from the tribunal should apply to them. These public prosecutors recommend to examine the possibilities to alter the demands of the tribunal somewhat for forensic psychiatric assessment. Furthermore, lawyers should be educated on the facts and figures of the tbs order because it is thought that they are not always correctly informed about important aspects of this measure such as its duration, risk of recidivism and length of treatment. A client is not helped by a lawyer's advice against participation with the forensic psychiatric assessment based on the wrong assumptions.

8 *Judges should be better informed of their possibilities to conclude and establish a mental disorder, when the behavioral experts can not do so due to assessment refusal.*

According to several public prosecutors not all judges know of the possibilities to legally conclude that a mental disorder was indeed present at the time of the crime. There should be a group of expert judges in each legal region in the Netherlands that informs these judges on the correct procedures in these cases, according to these public prosecutors.

Decisions by judges

The tbs order can still be imposed on defendants who have refused forensic psychiatric assessment and this occurs in 24% of all cases in trial court and in 43% of all cases in appeal court (the population that was studied consists of all defendants who have refused assessment in the PBC between 2012-2016). When other treatment measures are also taken into consideration, one in three defendants is imposed some kind of obligatory treatment measure (34%). This number is 47% in appeal court. There is a high level of agreement between the decision in trial court and that in appeal: 84%. There is a small difference between type of decision: when a tbs order is imposed in trial court, in 91% of the cases this sentence is confirmed in appeal court. When a different sentence is first imposed in trial court, mainly a prison sentence, this decision is confirmed in appeal court in 82% of the cases and in 18% of the cases a tbs order or another type of judicial treatment order is imposed.

A large amount of verdicts in trial court were found: 89% of the entire population of defendants who refused participation between 2012-2016. Therefore the finding that 24% of the decisions on defendants who refuse participation in trial court are tbs-impositions is reliable. In appeal court, less verdicts were found (25% of the population) and it is unknown if there were more appeals that we did not find or if there are no more appeals. In this manner the finding that 43% of all verdicts in appeal court are tbs-impositions is less reliable.

The sentencing advice by the public prosecutor and the decision by the judge show a high level of agreement: 81% in trial court. In appeal court, there is an even higher level of agreement between the public prosecutors' sentencing advice and

the decision in court: 95%. The sentencing advice by the public prosecutor also shows a high level of agreement with the treatment advice that was given by the PBC. When the PBC advises a tbs order, the public prosecutor gives the same sentencing advice in 95% of the cases. The sentencing advice of the public prosecutor differs somewhat more when the PBC gives a different treatment advice than a tbs order: in 20% of these cases the public prosecutor still advises to impose a tbs order, in 30% of these cases he advises a different treatment measure and in 40% he advises a prison sentence.
The PBC has been able to answer several of the courts' questions for defendants who refused assessment: for 36% of these defendants the question on disorders was answered, for 20% simultaneity of disorder and the alleged crime was answered, for 20% the level of accountability was determined and for 23% a treatment advice was given (n=401, only cases in trial court are described here). It is therefore wrong to conclude that it is impossible to write an assessment report on defendants who refuse this assessment. The results further show that in most cases in which a tbs order was imposed, the question on disorders was answered: 79%. This is more often than the amount of times the question on disorders was answered for the cases in which a different obligated treatment measure was imposed (63%) and in which a different sentence was imposed (19%). The results show similar differences on the other questions posed by the court. Looking at the data from another point of view, it is also shown that when the courts' questions are answered, the judge more often imposes a tbs order: when the PBC established that there is a disorder, 51% of the defendants get a tbs order. When the PBC establishes simultaneity of disorder and crime, 61% of the defendants are imposed a tbs order. Similar results are found when an impact of the disorder on the crime is established (60% tbs orders) and when a treatment advice is given (56% tbs orders). When the PBC is not able to draw conclusions on the disorders, it is rare for the judge to impose a tbs order: only 20 out of 240 times (8%, next to this number, in an additional 13 cases a different treatment measure is imposed).
Finally, there are also cases in which the judge does not appear to base his decision on the answers given to the courts' questions and he does not impose mandatory treatment (a tbs order or a different mandatory treatment order). This occurs in 34% of all cases in which the PBC concludes that there is a disorder present in the defendant, in 20% of the cases in which simultaneity of disorder and crime is established, in 23% of all cases in which the disorders have been found to impact the crime and in 26% of the cases in which a treatment advice was given.

Motivations by the judge

1 *Judges do not often mention in their verdicts that observation reports or police files, besides the present assessment report, have influenced their decision on the defendant who refused assessment.*

Prior assessment reports more often influence the judges' decision in cases in which a tbs order has been imposed (11 times) as compared to cases in which a prison sentence was imposed (2 times). In both types of cases, those with a tbs order (6 times) and those with a prison sentence (9 times), the judge takes prior convictions into consideration.

2 *In the twenty cases in which a defendant who refused assessment was sentenced to a tbs order, the courts' questions are more often answered by the behavioral experts than in the twenty cases in which a prison sentence was imposed.*

The behavioral experts have answered the question on disorders in 14 out of 20 tbs-cases as compared to 4 cases in which a prison sentence was imposed. Simultaneity of disorder and crimes was established in 7 out of 20 tbs-cases and in 1 out of 20

cases in which a prison sentence was imposed. The question on diminished accountability was answered 7 times in tbs-cases and 3 times in cases with a prison sentence. Also, the risk of recidivism was more often estimated to be high in the tbs-cases (8 times) as compared to the cases in which a prison sentence was imposed (1 time). Finally, the PBC more often gave a treatment advice in cases with a tbs measure than in cases with a prison sentence (7 versus 2 times).

3 *In the twenty cases in which a tbs order is imposed, the judge more often concludes himself (and not the behavioral experts) that there is a disorder, simultaneity of disorder and crime, influence of the disorder on the crime and diminished accountability than in the cases in which a prison sentence is imposed.*

The judge has concluded himself that there is a disorder in 6 of the 20 cases in which tbs orders were imposed and in 1 of the 20 prison sentences. Also simultaneity (4 versus 0 times), influence (5 versus 1 time) and diminished accountability (10 versus 1 time) is established by the judge himself more often in cases in which a tbs order is imposed than in cases in which a prison sentence is imposed. A high risk of recidivism is also concluded more often by the judge in the tbs orders than in the prison sentences.

4 *When the judge establishes the disorder himself (6 times) he does so based on prior assessment reports or probation reports (4 times) or based on the present assessment report in which he finds enough leads to conclude a disorder is present (2 times).*

The defendant has cooperated with some of these prior reports but not with all. It is also seen that in these prior reports, disorders have been diagnosed that have not been treated adequately (4 times); in the other 2 cases the judge concludes that there is a disorder based on his interpretation of the assessment report.

5 *Whenever the judge is the person who establishes simultaneity and influence of the disorder into the crime, usually the judge follows the same motivations as he does when concluding that there is a disorder, namely that there is a long-lasting pattern of problems or disorders that has not been adequately treated and has lasted over several years and thereby also at the time of the crime.*

When the judge himself establishes simultaneity and influence, there usually is a pattern of longer existing and sometimes diagnosed problems and disorders. These are usually chronic in nature and simultaneity and influence of disorder and crime are deducted from the fact that when these problems have existing for a long period in time, they must have also influenced the disorder at the time of the crime.

6 *Prior to the imposition of the tbs order, the judge considers a number of lesser invasive orders.*

In 7 of the cases in which a tbs order was imposed, the judge mentioned that he considered to impose a conditional tbs order, however, that this less intrusive measure is not sufficient to reduce the danger a defendant poses. In 4 cases the judge mentioned that treatment as part of the conditions in a conditional order is not enough to limit the danger and in 1 additional case the judge mentioned a less intrusive measure is not possible but he did not specify which alternatives he considered.

Answers to the research questions

1 *How many (absolute number and proportion) defendants have refused to participate in the past fifteen years in both ambulatory forensic psychiatric assessments and in clinical assessments?*
   a In the ambulant setting, at least an average of 11% of all defendants refuse to participate in forensic psychiatric assessment (double multidisciplinary reports, retrospective results). The average number of defendants who refuse to participate is stabile in the past fifteen years. This number is an underestimate of the actual number of defendants who refused to participate as it was not registered throughout the years and it had to be estimated.
   The prevalence rate of ambulant assessment refusal in 2017 was examined prospectively. In these double reports, 22% refused their participation fully and an additional 10% refused to participate in part.
   b The prevalence rate of assessment refusal in the clinical setting (PBC) between 2002-2017 is 39% on average, an additional 12% refuses partially. The number of defendants who fully refuse to participate has increased from 23% in 2002 to 43% in 2017. Until 2007 this increase is gradual, in 2008 the increase was 15%-points. In the last five years, the number of defendants who refuse fully has decreased slightly, from 46% to 43%. The amount of defendants who partially refuse has increased from 1% in 2002 to 21% in 2017.

2 *In the past fifteen years, are there any shifts in the number of defendants who refuse to participate between the ambulatory and clinical setting?*

The amount of overlap between the ambulant and clinical setting is large: 71% of the defendants who are examined in the PBC have been examined in the ambulant setting as well. The prevalence rate of assessment refusal in both the ambulant setting as well as the clinical setting depends on the measure that is used to determine assessment refusal. The most accurate measure is the number of reports that have been registered as cancelled due to assessment refusal. This number shows that of all reports that were cancelled due to assessment refusal, 59% also refuses to participate in the PBC and 39% cooperates with the clinical assessment. Finally, we looked at the possibility that there has been a shift in assessment refusal from the ambulant to the clinical setting. This was done by analyzing each defendants assessment refusal both ambulant and clinical per year for all the years that we studied. A shift was not seen, this is likely due to the stability of assessment refusal in the ambulant setting (11%, range 7-15%).

3 *Are there differences between the different regions that the Netherlands Institute for Forensic Psychiatry and Psychology (NIFP) in the amount of defendants who refuse to participate?*

In the ambulant retrospective analyses, assessment refusal was highest for the NIFP-region Zuid-Holland. It is not clear why this difference was found. It is possible that in this region, the registration of the number of cancelled reports due to assessment refusal is different from the other regions. In the ambulant prospective analyses, no differences were found between the different NIFP-regions.

4 *Which part of the forensic psychiatric report or which question of the court is mostly influenced by the refusal?*

In the retrospective ambulant prevalence rate analyses only the amount of influence of assessment refusal on the courts' question on accountability and treatment advice can be analyzed. For these defendants, in 18% of the cases the question on

disorder was answered and for 9% of these defendants, a treatment advice was given.
In the prospective ambulant prevalence rate analyses, the forensic mental health professionals were able to answer the courts' question on disorders more often than any of the other courts' questions. The ability to answer to courts' questions depends on the level of assessment refusal: more questions can be answered when the defendant cooperates more with the behavioral experts. For 19% of the defendants who fully refused to cooperate, the question on disorders was answered, while this question was answered for 76% of those defendants who partially refused to participate. For 9% of the defendants who fully refused to cooperate, the question on simultaneity is answered, while this question is answered for 50% of those defendants who partially refuse. These percentages are comparable for the questions on influence of the disorder on the crime and the level of accountability. For 6% of the defendants who fully refused a treatment advice was given and for 40% of defendants who partially refuse a treatment advice was given.
In the clinical setting, the PBC, the amount of questions that can be answered was examined for the period 2002-2017 and for the past five years (2012-2016). In 2002-2017, for 28% of the defendants the question on possible disorders was answered (17% of defendants who fully refuse and 11% of defendants who partially refuse). Also, for 16% of the defendants the question on simultaneity of disorder and offence was answered (8% of defendants who fully refuse and 8% of defendants who partially refuse), for 16% the question on the level of accountability was answered (8% of defendants who fully refuse and 8% of defendants who partially refuse), and for 18% a treatment advice was given (8% of defendants who fully refuse and 10% of defendants who partially refuse).
In 2012-2016, more of the courts' questions were answered in the PBC: for 36% of the defendants the question on possible disorders was answered (as compared to 28% in 2002-2017). Also, for 20% of the defendants the question on simultaneity of disorder and offence was answered (as compared to 16% in 2002-2017), for 20% the question on the level of accountability was answered (as compared to 16% in 2002-2017), and for 23% a treatment advice was given (as compared to 18% in 2002-2017).

5 *Does the forensic psychiatric report of a defendant who refuses to participate, without a conclusion on disorders or advise on the right trajectory, include enough information for the public prosecutor to give a sentencing advice and for the judge to make the right decision?*

The judges as well as the public prosecutors indicate that they highly value the assessment report as a source of information on the defendant. When conclusions on disorders and the treatment advice cannot be given by the behavioral experts due to assessment refusal, it is hard for the public prosecutor and the judge to still find enough clues on a possible disorder. The assessment report in those cases does not always contain enough information to advise on a fitting sentence nor to decide on the best possible verdict for this defendant. There is variation in the assessment reports in which sometimes not a single question is answered and other times several questions are (partially) answered, while the available information appears to be comparable. On the one hand, it is important to write down any available information, on the other hand, public prosecutors and judges prefer that this information is interpreted by the behavioral experts.

6 Based on which information do public prosecutors and judges advise and decide at present?

Judges as well as public prosecutors indicate that it is important that all of the courts' questions are answered but most importantly that the questions on the disorder, simultaneity of disorder and crime and the risk of recidivism are answered by the behavioral experts. When the behavioral experts are able to answer the courts' questions, the rest of the information in the report is of less importance. When they are not able to answer these questions however, the other information in the report becomes more important and judges and public prosecutors indicate that they prefer the behavioral experts to write as elaborately as they can in order for the public prosecutors and judges to draw conclusions themselves. Several public prosecutors and judges do not know that they can give a sentence advice regarding a tbs order or that they can impose a tbs order when this has not been advised by the behavioral experts. They therefore completely follow the conclusions of the behavioral experts.

7 Based on which information is it better for a public prosecutor to give his sentencing advice and for a judge to decide on a defendant who refuses to participate forensic mental health assessment? These analyses will focus on risk assessments, group observations (in clinical examinations) and the forensic network analyses.

When the assessment report is incomplete, public prosecutors and judges indicate that they look for more information sources that do not warrant the cooperation of the defendants. These are for instance the forensic social network analysis, information from previous files or records, testimonies by witnesses and interrogations (public prosecutors) and the forensic social network analysis, information from observations and older records (judges). Both the public prosecutors as well as the judges indicate that the complete picture that is being painted about a defendant is what matters. This is what is necessary for the public prosecutor to give a sentencing advice that suits the defendant and this is also what is necessary for the judge to decide on the most suitable sentence or punishment or treatment for a defendant. When at different times, under different circumstances, from different sources, over a longer period in time there is enough information to indicate disturbed behavior or a disorder, the public prosecutor and judge can still advise on and impose a tbs order.

Risk assessments are important because when the risk is high, there is a need for treatment, and if the risk is not high, there is no need for treatment. Several public prosecutors and judges indicate that they are capable themselves to assess the risk of recidivism. They look at prior convictions, the current alleged crimes, the defendants attitude during the trial and the impression they get from the defendant. Observations by behavioral experts are important to the judges, however they prefer that the behavioral experts give their opinion on how to interpret these observations. The public prosecutors are less clear about observation material, some of them indicate that this is important, whereas others do not.

8 What sentences are imposed on defendants who refuse to participate?

In trial court, a tbs order is imposed to 24% of all defendants who have refused assessment, in 9% of the cases, a different obligatory treatment measure is imposed and to 66% of the defendants a prison sentence is imposed. When treatment in a different obligatory setting is also taken into consideration, one in three defendants who refuse assessment nevertheless have to undergo some sort of obligatory treatment measure.

In appeal court, as far as this could be established, 43% of the cases is imposed a tbs order, 4% receives a different obligatory treatment measure and 53% receives a different sentence, mainly a prison sentence.
When the amount in which the courts' questions are answered is taken into consideration in the sentencing, the chance of an imposition of the tbs order increases to 51%. When the PBC answers the question on simultaneity, 61% of the defendants who have refused assessment are imposed a tbs order, when the influence of the disorder on the crime is established, 60% receives a tbs order and when a treatment advice is given, 56% of the defendants is imposed a tbs order.

9 How do the judges motivate these sentences?
Judges do not often mention that observation material or police records play an important role in determining their decision about a defendant who has refused assessment. They do on the other hand often mention that prior convictions were important in this decision, and this applies to both defendants who have refused assessment and are imposed a tbs order and those who are imposed a prison sentence. Prior behavioral assessment reports are often considered by a judge when deciding on the defendant and this happens more often when the defendant is imposed a tbs order than when he is imposed a prison sentence. In the tbs cases the courts' questions were more often answered than in the prison cases despite of the assessment refusal. Also, the judge more often determines that there is a disorder present in the cases in which a tbs order is imposed than in the cases in which a prison sentence is imposed. The high risk of recidivism is another reason behind the imposition of a tbs order, as indicated by the judges, and this high risk is more often established in the tbs orders than in the prison sentences. When the judge is the one who determines that there is a disorder and the behavioral experts were not able to do so, there is often a long lasting pattern of disorders present that has not been treated adequately. The simultaneity of disorders and crime follows from the fact that this pattern, as it has been present for a longer period of time, must have also been present during the crime. Prior to the imposition of a tbs order the judge in more than half of the cases considers imposing a less intrusive measure, however, this measure is not deemed adequate in reducing the amount of danger a defendant poses. While imposing a prison sentence, the consideration of less severe measures or sentences is hardly mentioned by the judge.