



# Driving under the influence of drugs

baseline measurement

## Summary

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# Summary

## Introduction

The approach to dealing with the offence of driving under the influence of drugs is currently based on the catch-all clause of article 8, section one, of the 1994 Road Traffic Act (Wegenverkeerswet, hereinafter referred to as WWV1994). In practice, there are problems with this approach. So an amendment to the WWV1994 has been proposed, namely in the form of the addition of a fifth section. The aim of the amendment is not just to make it easier to establish the suspicion of the use of drugs by drivers but also to make it easier to prosecute. The amendment of the Act is expected to be implemented in mid-2017.

During discussions on the proposal for the change in legislation in the Lower House various parties asked for an assessment of the new act. In response to this the Minister of Security and Justice has promised to assess the act within a period of five years.

Within this framework DSP Groep was commissioned by the WODC to carry out a study into the investigation and prosecution of drivers who violated the ban on driving under the influence of drugs. The issue at the heart of the study was as follows:

*“How is driving under the influence of drugs investigated and sanctioned with regard to the implementation of the amended WWV1994 and with what result?”*

The study looked at the current and proposed working processes within investigation and prosecution. It also provided an interim assessment of the policy logic behind the proposed change in legislation. The study is a so-called ‘baseline measurement’ that is expected to be repeated following the implementation of the act. A comparison of the results of the two measurements will make it possible to ascertain what changes happen with regard to practical implementation following the introduction of the act. To ensure that this comparison can also be reliably carried out the appendix to the report contains extensive details of the design of this follow-up measurement and the points of attention involved.

## Study method

The study used various methods. First of all, desk research was carried out into legislation, policy documents, parliamentary papers and literature. A survey was also held among 272 traffic officers in the core teams (in Dutch: Basispolitieteams) of the National Police. 208 respondents filled in the survey (in part), which gave a net response of 76%. Thirdly 26 semi-structured interviews were held with people directly involved in the investigation and prosecution of the criminal offence in question. In addition to traffic officers in the core teams these were judges, public prosecutors, employees at the Driver Licensing Centre (CBR), the Dutch Forensic Institute (NFI) and policy-makers at the National Police and the Ministry of

Security and Justice. The Public Ministry for Central Processing (CVOM) responded only in writing. Finally an analysis was carried out of the data registers of the National Police, the NFI and the CBR.

## Context and scope of study

There are two limitations to the study. The first one is the degree of detail for parts of the study. Initially the field work was supposed to take place in the period immediately before and immediately after the implementation of the amendment to article 8 WW1994, so that the baseline measurement would provide not only a clear, accurate picture of the old method but also a description of the initial experiences with the new act. However, the implementation was postponed several times – because of the procurement of the saliva testers – as a result of which only the period of one year before the implementation could be studied. Because of the shift in the implementation date not a lot was known about the precise effect of the new legal framework and as a result of this, little concrete effect was realised by the chain partners. The effect of this was that this report could only report to a limited extent on the preparations.

The second limitation is the non-optimal study period as regards quantitative data regarding the number of criminal cases studied. The figures were taken from the period 2013-2015, but in 2015 there were stoppages and work-to-rules among the police because of the deadlocked CAO (collective labour agreement) negotiations. It is not clear how much these actions affected the numbers of cases dealt with nationally, but there is a chance that a distorted picture has emerged for 2015.

## Answers to the research questions

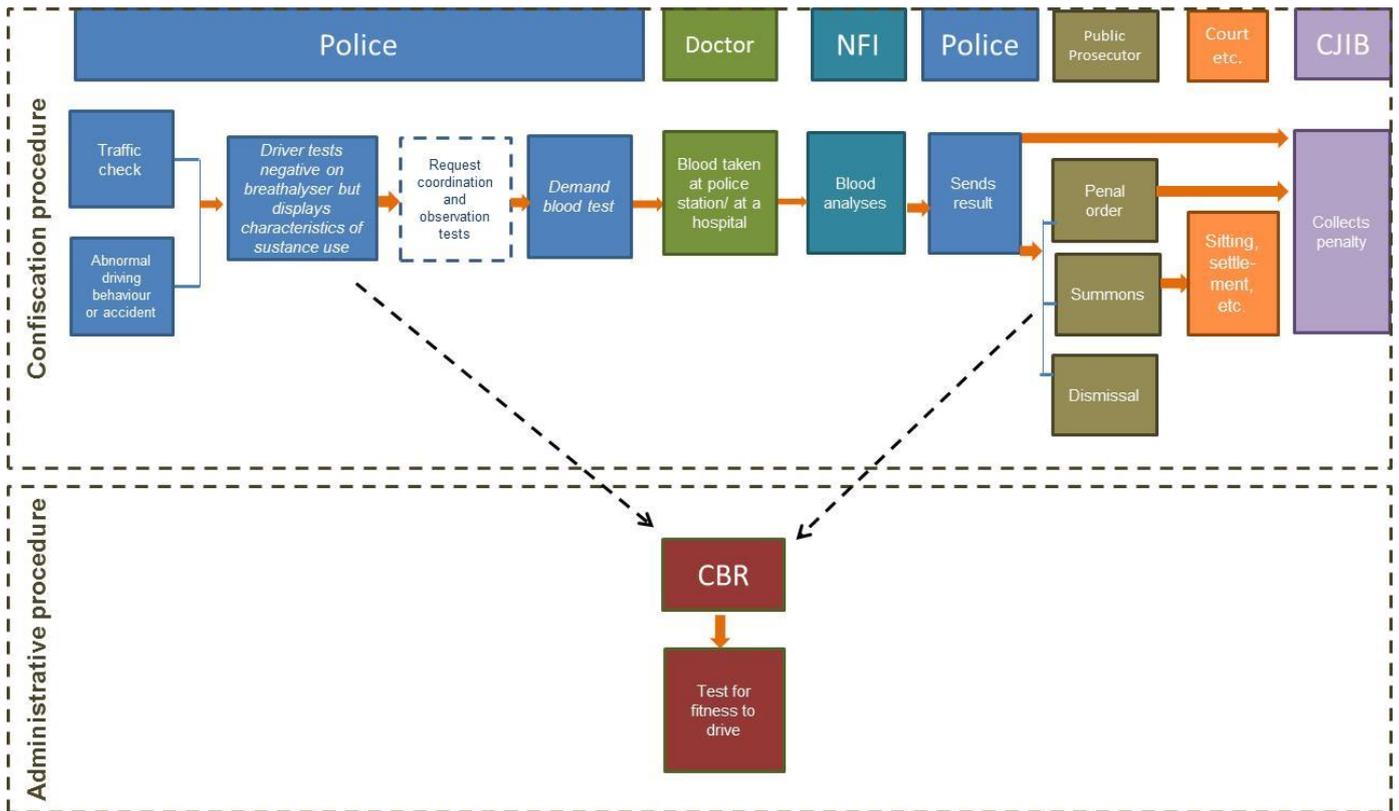
The core question, stated in 1.1, was broken down into several research questions that were answered in the baseline measurement. In this section the research question is stated first and then followed by the answer.

### **How do the processes work in 2014/2015:**

- a How is drug usage investigated, prosecuted and sanctioned?
- b Which actors are involved? Who does what, at which stage of the process?
- c If figures or valid estimates are available, what do they say about the results in terms of investigation, prosecution and sanctions?

The entire process of investigation, prosecution and sanctions consists of several stages. The broad outlines of these are summarised in figure 1 (see the next page).

Figure 1 Diagram of the investigation and prosecution of drug use in traffic



The first stage is to confirm the suspicion by the police that the driver has been using drugs. In principle there are two reasons for this. Firstly, the driver may be driving erratically or may be involved in an accident. Secondly, during a normal (traffic) check the driver may display the physical or behavioural characteristics of substance use.

In principle the police officer first of all ascertains whether there was any alcohol consumption. If this is not the case, the driver can be asked to cooperate (voluntarily) in several coordination and observation tests. The results of these tests or other indications – such as the presence of drugs or the smell of cannabis – may be a reason for the police to classify the driver as a suspect.

If the driver is classified as a suspect, the matter is treated as both an administrative and a criminal matter depending on whether the criteria for both regulations are met.

With regard to the administrative route the police can confiscate the driving licence and inform the Driving Fitness division of the CBR about the facts established using a so-called 'notification'. This confiscation procedure is a traffic safety measure in administrative law that is implemented by the Driving Fitness division of the CBR. The CBR then decides, on the basis of the criteria listed in article 23 of the Regulations on Measures Relating to Ability and Fitness to Drive, whether an investigation into 'ability' is appropriate. After assessing the notification and imposition of the test the CBR will temporarily suspend the driving

licence. If the test then shows dependency on the substance(s) concerned, the CBR will declare the driving licence invalid. This is called the confiscation procedure.

For the case to be dealt with as a criminal case a blood test is the appropriate method for obtaining proof of a violation of article 8, section one, of the WVV1994. In this case the driver will be asked by the investigating officer, pursuant to article 163 of the WVV1994 section four, for their permission for a blood test to be carried out. The suspect is then taken to the police station for blood to be taken, unless there is a mobile police station at the scene. If the suspect – in the case of an accident – is taken to hospital, blood can also be taken there. If the suspect does not give permission, the (Assistant) Public Prosecutor can order the suspect to cooperate with the blood test.

The blood test can only be carried out by a doctor. The blood can currently be taken no earlier than one hour after the suspect has been ordered to cooperate with an interim test of exhaled air (articles 15 and 16 of the Alcohol Testing Decree). Where applicable, the police can impose a temporary driving ban on the driver in accordance with article 162 WVV1994.

The doctor takes two tubes of blood and these are sent to the NFI. A report is drawn up in the police registration system: the Enforcement Database (Basisvoorziening Handhaving, BVH). The blood is then analysed at the NFI. The test must be carried out by the NFI shortly after the blood has been taken as traces of drugs disappear from the blood relatively quickly. The NFI tests for various main groups (different types of drugs and medicines) and then determines to what extent the fitness to drive is jeopardised.

If the result of the test is positive, the suspect can ask for a second opinion in the form of a second analysis or a second test. This test is carried out at the suspect's initiative and the suspect's cost. The suspect gave two tubes of blood when blood was taken; the second tube is analysed in this second test. A second test can be carried out in an accredited laboratory.

If the suspect tests positive for drugs (or alcohol), the police hand over the matter to the Public Prosecutor. The Public Prosecutor decides whether to prosecute. It bases its decision as regards the sentence on the Criminal Proceedings Directive for driving under the influence of alcohol and/or drugs and driving while banned (2015R055). In contrast to alcohol there are no limits in the Directive regarding blood concentrations that determine criminality. However, the Directive does draw a distinction between single drug use and multiple drug use. Combined use results in a harsher sentence because of the increased negative effect on the fitness to drive. It can be derived from the Directive that the Public Prosecutor derives the burden of proof primarily from the conclusion by the NFI that the fitness to drive – according to the blood analysis – was probably adversely affected.

The number of drugs cases recorded by the police was between 1,100 and 1,200 per year during the period 2013-2015, a fraction of the number of drivers who were booked for alcohol consumption. The study was not able to ascertain what percentage of the drugs cases recorded were ultimately prosecuted. However, on

the basis of the interviews it can be concluded that this number was low and moreover that offenders are often only prosecuted in combination with another fact such as the driver causing a (fatal) accident.

Figures relating to the administrative settlement of the CBR confiscation procedure show a strong downward trend for the period 2013-2015. Whereas in 2013 752 notifications were issued, in 2015 this figure was 395. Virtually all the notifications result in an investigation with a test with regard to fitness to drive. In around three-quarters of cases the investigation leads to the driving licence being invalidated as a result of the outcome of the test or non-cooperation with the test. In around a quarter of cases the driving licence is returned without any restrictions after the completion of the test and the investigation.

As other studies have shown that the number of car drivers with psychoactive substances in their body who have consumed alcohol is not higher than or is scarcely higher than the number of car drivers who have taken (a combination of) drugs, but that the number of arrests because of drug use is a fraction of the number of arrests because of alcohol consumption, it has to be concluded that the chance of a driver being sanctioned for drugs is relatively small.

#### **What difficulties are there in the approach? What works well?**

*What is the opinion of investigating officers of the user-friendliness and the reliability of the tracing of drug use and the availability of doctors to take blood?*

The survey and the interviews show that the investigation and prosecution of drivers using drugs has several difficulties, the lack of a reliable preselection instrument being the biggest. Police officers out in the field at the moment have no objective, reliable way of establishing a suspicion of drug use. In fact the only things that a well-founded suspicion can be based on at the moment are the coordination and observation tests – not to be confused with the legally standardised psychomotor test (PMT) that is soon to come into force – or the observation of suspicious behavioural characteristics or circumstances. However, these things have not been standardised and can thus result in differences in the way in which they are handled as the result of a lack of experience with such things.

Right across the police organisation the current practical implementation is rated as 'poor'. For the above-mentioned reason there is a tendency among the police to avoid the blood-test route and to initiate an administrative procedure against the arrested driver via a CBR confiscation procedure. This is an inappropriate way of proceeding as the confiscation test focuses on the question of dependency, is not intended as a sanction and is not supported by the volume figures. The Ministry of Infrastructure and the Environment is now amending subsidiary regulations to implement the Act on drugs taken by drivers in administrative law and also to avoid a situation in which the confiscation test for dependency at the CBR (which is totally for the cost of the person involved) is imposed too often and loses its effectiveness. The influx of cases related to the use of recreational drugs is often unwelcome, as studies into this have shown that substance dependency with regard to these drugs is often a lot less than in the case of other categories of drugs.

Once the well-founded suspicion has been confirmed in the street and the driver has been taken to the police station to give blood, there are then no significant barriers in the process, according to the findings of the survey and the interviews. The blood can virtually always be taken by a doctor within the set deadline and the analysis by the NFI is carried out properly.

According to the interviews, prosecution (and conviction) of drivers purely on the basis of article 8 WWV1994 is rare. When it happens, it is usually in combination with another punishable offence such as causing an accident. In this case the biggest obstacle is that a link has to be demonstrated between the drug use and the cause of the accident. In the case of a straight prosecution in accordance with (only) article 8 WWV1994 there are no obstacles, as the conclusions of the NFI clearly establish criminality.

**How often is blood that has been taken at the request of the police for testing for drug use sent to the NFI? To what extent are the request forms filled in systematically and completely?**

The survey was not able to ascertain with any reliability how often blood was taken as part of suspected driving under the influence of drugs and how often this was sent to the NFI. However, the survey did show that the request forms are estimated to contain 5% -10% administrative errors. Though these errors do not hamper the blood tests and can be easily remedied by the NFI. Cases in which the blood samples were unusable were rare. This can happen because the blood has been left lying around for too long and/or because it has been stored or transported at too high temperature.

**What are the characteristics of suspected driving under the influence of drugs (specified by drug)?**

Earlier research has shown that young men in particular drive vehicles under the influence of drugs during weekend evenings and nights. Above all party-goers form a high-risk group. This group uses a lot of XTC in particular. However, if the total number of kilometres driven under the influence of drugs is considered, then cannabis and cocaine are the most commonly used drugs.

The survey and the interviews with police officers clearly show that the police do not carry out profiling and are insufficiently equipped to estimate on the basis of physical appearance and (driving) behaviour which drugs are involved or whether drugs are involved at all.

**How often is a second test for drugs use carried out?**

Second tests are hardly ever carried out, according to the interviews with stakeholders. In the few cases that second tests were carried out – according to the NFI – the results were similar to those that the NFI carried out itself. Or the deviations could be explained by the decomposition of the substances. At the moment only the University Medical Centre in Groningen carries out these tests.

**How should the processes be carried out after the change in legislation comes into force: which actors are involved, who does what, at what stage of the process, by what deadline? What are the intended outcomes? In other words, what is the policy logic underlying the change in legislation?**

The Explanatory Statement to the change in legislation states that the implementation of the amended article 8 section 5 of the WVV1994 will give the police the powers to demand that suspects cooperate with a saliva test and the psychomotor test. In addition to doctors, nurses will also be authorised to take blood samples, and there will be legally standardised limits for drugs in the blood above which law-breaking is established. Finally, in the case of the combined use of drugs or the combined use of drugs and alcohol there will be lower limits above which a punishable offence is established. The aim of these measures – put briefly – is to ensure that a well-founded suspicion of drug use can more often be confirmed and that as a result of this blood will be taken and tested more often. All this should result in more prosecutions and more sanctions for people who violate the ban as set out in the new section five of article 8 of the WVV1994. This sanction will ultimately serve as generic and specific prevention, which should ultimately contribute to an increase in traffic safety.

The findings of this research show that positive changes may be expected from the new approach. However, it is important that a distinction be made between the theoretical possibilities of the new act and the effect of the new approach in practice. In theory the change in legislation provides a clear simplification of the approach to tackling the offence of driving under the influence of drugs. However, it is not yet certain that the number of prosecutions of drivers who drive under the influence of drug is increasing significantly. The interviews show that, although the police plan is to use the saliva testers, they do not plan to use them as part of random large-scale traffic checks, unless there are clear indications of drug use when a vehicle is being checked. Rather, selective checks will be carried out (for example in the case of events where drug use is suspected) or selective cases where there is a suspicion of drug use on the basis of concrete indications (such as conspicuous driving behaviour, the physical appearance of the driver, a smell of cannabis or the presence of drugs in the vehicle). The average chance of being caught when driving under the influence of drugs will probably not increase greatly as a result of this selective, limited use of the saliva test. However, whether drivers will tend to use fewer drugs after the implementation of the change in legislation will depend on more factors than just their chance of being caught, for example increased awareness among citizens of the risks of drug use by drivers and support for the new act. The extent to which the new act will contribute to an increase in traffic safety will therefore depend on the degree of information that will need to accompany the implementation of the change in legislation.

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