

Evaluation of pilots Innovation Act Criminal Procedure – Preliminary questions and Mediation in criminal cases

An empirical legal study into the application of the preliminary ruling procedure and mediation in criminal cases

prof. dr. F.G.H. Kristen (UU)
prof. dr. M.J. Dubelaar (RU)
prof. dr. J. Bijlsma (UU)
dr. R.S.T. Gaarhuis (UU)
dr. M.A. Simon Thomas (UU)
dr. M.A.P. Timmerman (RU)
B.T. Huijnen LLB (UU)

Colofon

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Summary

Introduction

The Innovation Act on Criminal Procedure introduced two innovations for criminal proceedings in criminal courts. The first innovation concerns the possibility for the trial judge in a pending criminal case to submit a preliminary question to the Dutch Supreme Court on a legal question that is of particular importance and which transcends the case, with a view to making a decision in that criminal case.

The second innovation concerns the manner in which a criminal case is settled, namely through mediation under the supervision of the criminal court. If the mediation is successful, the court can refrain from discussing the substance of the criminal case and declare that the criminal case has ended with the so-called end-of-case declaration.

Both innovations anticipate the modernisation of the Code of Criminal Procedure, an ongoing major legislative operation that should lead to the entry into force of a new Code of Criminal Procedure in 2029. Pilots have been launched for both innovations on the basis of the Innovation Act Criminal Procedure: the pilot preliminary questions to the Dutch Supreme Court in criminal cases and the pilot mediation in criminal cases. The latter pilot in turn consists of two pilots, namely the pilot mediation in criminal cases with juvenile suspects and adolescents at the district courts of Gelderland and Overijssel, and the pilot mediation in serious traffic offences at the district court of Zeeland-West-Brabant.

In Article II of the Innovation Act Criminal Procedure, the legislature has determined that an evaluation will take place within two years after the start of the pilots of the Innovation Act Criminal Procedure. This evaluation is intended to enable the legislature to make a timely decision on what to do with the statutory regulations on which the pilots are based. No later than three years after the entry into force of the Innovation Act Criminal Procedure, the legislature must decide whether or not to continue the statutory regulations laid down in the Innovation Act Criminal Procedure (see Article IV). If it is decided to maintain the statutory regulations, this can be done by extending the pilots and thus keeping them part and parcel of the current Code of Criminal Procedure, and then including the statutory regulations in the new Code of Criminal Procedure. With a view to making this decision, the government has formulated evaluation criteria in the explanatory memorandum to the bill for the Innovation Act Criminal Procedure.

The present study provides the evaluation of the pilots preliminary questions and mediation in criminal cases. The study focuses on three overarching main research questions that are based on the already mentioned evaluation criteria. These are the following three overarching main research questions:

- 1) What can be established on the basis of the study into the pilots preliminary questions to the Supreme Court in criminal cases and mediation in criminal cases about the extent to which the statutory regulation of the preliminary ruling procedure of Articles 553-555 Code of Criminal Procedure (CCP) and that of mediation in criminal cases of Articles 571-574 CCP are sufficient or require adjustment?
- 2) Are accompanying measures necessary, for example adjusting work processes or additional investments?

3) What can be said on the basis of the study into the pilots preliminary questions to the Supreme Court in criminal cases and mediation in criminal cases about the financial consequences that follow from the statutory regulations of Articles 553-555 CCP and of Articles 571-574 CCP?

In order to answer these overarching research questions, eight specific research questions were formulated for each pilot.

Approach and methods

The research aims to evaluate the pilots preliminary questions and mediation in criminal cases of the Innovation Act Criminal Procedure. In order to answer the first overarching main research question, a study was conducted using the classical legal research method into the meaning and scope of the statutory regulation of the preliminary ruling procedure in Articles 553-555 CCP as well as the statutory regulation of mediation in criminal cases of Articles 571-574 CCP. To this end, the parliamentary documents of the aforementioned statutory regulations was examined using the legislative historical interpretation method.

Subsequently, in order to obtain an impression of the application of the aforementioned statutory regulations in legal practice, classical legal research was conducted into the case law in which the statutory regulations were explained and applied.

In addition, an empirical legal study was conducted into (experiences with) the application of the statutory regulations of the preliminary ruling procedure and mediation in criminal cases. This study consists of a primary qualitative empirical study through semi-structured interviews and group interviews, supplemented with a working session for the preliminary ruling procedure, two field trips for mediation in criminal cases. A total of 23 people were interviewed. For the pilot preliminary questions the respondents work at the Dutch Supreme Court, at the office of the Procurator General of the Supreme Court, as well as on the level of district courts (judge, public prosecutor's office and defence counsel). The pilot mediation in criminal cases involves respondents working at the level of district courts (judges, public prosecutor's office, mediation agencies and defence counsels). All these respondents were questioned about, among other things, their experiences with the application of the preliminary ruling procedure and mediation in criminal cases where the end-of-case declaration is concerned.

The results of the combination of these different methods were analyzed via triangulation in connection with each other. This generated answers to the three overarching main research questions and the eight specific research questions for both the pilot preliminary questions and the pilot mediation in criminal cases.

Overall conclusion

Pilot preliminary questions

The study clearly shows that the statutory regulation of the preliminary ruling procedure is currently sufficient. The fact that within the period covered by the current evaluation of the pilot only two district courts have submitted preliminary questions that have led to one preliminary ruling by the Dutch Supreme Court does not change the assessment on the statutory regulation. The preliminary ruling procedure is a useful instrument alongside other existing instruments for bringing legal questions in criminal cases to the Supreme Court. The study has revealed six possible explanations that, individually or in conjunction with each other, can clarify why limited use has been made of the preliminary ruling procedure. However, these possible explanations are not

related to the design or scope of the statutory regulation. In short, we currently see no reason to adjust the statutory regulation of the preliminary ruling procedure. Nevertheless, we will formulate four recommendations below for the use of the preliminary ruling procedure.

The study shows that a few accompanying measures can be considered when it is decided to prolong the pilot preliminary questions or when the statutory regulation of the preliminary ruling procedure is definitively included in the Code of Criminal Procedure. These measures are firstly aimed at creating more awareness of the possibilities (and impossibilities) of the preliminary ruling procedure, not only among the judges, but also among the public prosecutors and the defence counsels. Secondly, an important objective of the accompanying measures is to give the legal practice time to position itself with regard to the preliminary ruling procedure. We propose the following accompanying measures, summarized below:

- Provide information to judges and parties to the criminal proceedings about the possibility of submitting preliminary questions, the conditions that apply and the procedure that must be followed.
- Emphasize in internal and external communications the possibilities that the preliminary ruling procedure offers to obtain a quick answer from the Supreme Court on a legal question in an pending criminal case and other advantages of the preliminary ruling procedure. Judges can make more use of the preliminary ruling procedure. The public prosecutor's office and defence counsels can use the statutory possibility to initiate the submission of a preliminary question.
- When the opportunity present itself, the preliminary ruling procedure can be used to submit a relatively simple preliminary question about, for example, the interpretation of an element of a criminal offence.
- Give district courts and appeal courts time to position themselves in various respects with regard to the preliminary ruling procedure.
- Investigate whether the Procurator General's office at the Supreme Court as well as the Supreme Court can be informed about upcoming preliminary questions and the period within which they will be submitted in the digital portal.
- Investigate whether, and if so, how the Supreme Court can, after receiving a preliminary question, give the lower courts an indication of the period within which the Supreme Court expects to answer the preliminary question.

Structural costs associated with the preliminary ruling procedure can be covered by the Procurator General's office at the Supreme Court as well as by the Supreme Court within the current financial and organizational frameworks. In the event of limited use of the preliminary ruling procedure, there is no need for the Procurator General's office and the Supreme Court to provide for structural investments. Should the number of preliminary questions increase significantly in the future, consideration could be given to a structural investment in the legal support of the criminal division of the Supreme Court, for example with additional capacity at the Scientific Bureau of the Supreme Court for preparing answers to preliminary questions. For the lower courts, structural costs can also in principle be covered within the existing financial and organizational frameworks. Both at the Supreme Court and the Procurator General's office as well as at the lower courts, some incidental investments of limited size have been made.

Pilot mediation in criminal cases

The study into mediation in criminal cases shows that the statutory regulation (Articles 571-574 CCP) provides an adequate basis for the use of mediation in the trial phase. The regulation provides a procedure, method of operation and instrument for the district court to divert a criminal case from the criminal proceedings after the start of the trial by means of an end-of-case declaration. The fact that the statutory regulation of mediation in criminal cases works follows from the use of the end-of-case declaration in 15 criminal cases during the pilot. At the same time, it must be noted that this number is relatively limited in light of the size of the total caseload in criminal matters. Various explanations for this have emerged from the study. These explanations relate, among other things, to the type of criminal offence on which the pilot focuses. For example, mediation is often used at an early stage for serious traffic offences and criminal offences involving juvenile suspects, after which the public prosecutor takes the decision to settle the case out of court. As a rule, these cases will not be brought to court. Cases with juvenile suspects are also somewhat atypical, because the public prosecutor does not bring these cases to court quickly at all. If this does happen, it is because the public prosecutor wants a substantive hearing of the criminal case by a court and/or the imposition of a specific criminal sanction by a court, which makes it less obvious to use the end-of-case declaration, even if the parties have come closer together through mediation during the trial phase.

The study also shows that respondents have different opinions about the extent to which there would be a need in legal practice for the instrument of the end-of-case declaration, about the way in which this declaration is positioned in relation to the judicial decision-making model and about the fact that the public prosecutor can block such a declaration. Practical obstacles are also pointed out, for example when there are multiple suspects, or the suspect is also being prosecuted for criminal offences that are not covered by the mediation. Respondents also expose a more fundamental bottleneck in the implementation of the statutory regulation. This bottleneck occurs in the situation in which the parties have entered into dialogue with each other and this has also led to successful mediation, but in which the decision on the amount of compensation which needs to be paid is subsequently left to the court. In order to be able to assess the victim's damage, the court will have to deal with the case on the merits. However, after a substantive hearing, as can be inferred from a ruling by the Court of Appeal Arnhem-Leeuwarden of 26 April 2023 (ECLI:NL:GHARL:2023:3610), an end-of-case declaration is no longer an option.

The study also shows that a number of issues still require attention if it were decided to definitively introduce the end-of-case declaration. For example, the statutory regulation leaves a number of important questions unanswered, which leads to uncertainty in legal practice. The legal position of the suspect after an end-of-case declaration is unclear, for example with regard to obtaining a Certificate of Good Conduct, judicial documentation and the compensation for damages or for legal costs. There is also currently no statutory regulation on who should monitor compliance with any conditions that may be attached to the end-of-case declaration. Apparently for this reason, this possibility has not yet been used.

We propose the following accompanying measure:

- Adjust the GPS administrative system in such a way that the possibility of an end-of-case declaration can also be administered therein.

On the basis of the present study, no robust statements can be made about the financial consequences of the introduction of the statutory regulation of mediation in criminal cases. The pilot was too short for that. Furthermore, the administration of the data about the settlement of criminal cases does not provide sufficient insight into the caseflows, which means that no hard data is available about the phase in which the mediation was started and the actual use of the new statutory regulation of mediation in criminal cases.

Recommendations

The study has led to the following recommendations for both pilots.

Recommendations for the pilot preliminary questions

- Prolong the pilot preliminary questions so that the district courts and courts of appeal can position themselves in relation to the new preliminary ruling procedure.
- Implement the proposed accompanying measures when it is decided to prolong the pilot preliminary questions or when it is decided to give the statutory regulation of the preliminary ruling procedure a definitive place in the Code of Criminal Procedure.
- When more preliminary questions have been answered by the Supreme Court and these answers have been used by judges to take decisions in the criminal cases submitted to them, it can be investigated to what extent the preliminary ruling procedure has contributed to *i)* the quality and legitimacy of judgments of lower courts, *ii)* the prevention of the lodging of an appeal and/or cassation and in that respect has led to saving time and resources, and *iii)* the development of the law and unity of the law.
- Due to the limited experience with the preliminary ruling procedure to date, we do not consider an extension of the statutory regulation to procedures outside the Code of Criminal Procedure to be currently appropriate. Based on the results of a future evaluation, the question can be considered whether such an extension is appropriate.

Recommendations for the pilot mediation in criminal cases

- Prolong the pilot mediation in criminal cases so that mediation can be tested in the trial phase in other types of cases. Create a uniform format for the administration of data about the settlement of criminal cases so that better insight can be obtained into the caseflows.
- Make visible which objectives are served by the statutory regulation in Articles 571-574 CCP and how they relate to each other.
- If the end-of-case declaration is introduced nationwide, create a clear framework for monitoring compliance with any conditions and clarify what the end-of-case declaration means for the legal position of the suspect and his right to legal aid.
- Introduce the proposed accompanying measure for the pilot mediation in criminal cases.