Executive summary

Article 12 of the Dutch Code of Criminal Procedure (DCCP) provides that a directly interested party ('rechtstreeks belanghebbende') can file a written complaint with the court of appeal ('gerechtshof') against – the omission of – a decision not to prosecute, to no longer prosecute or to prosecute by means of a penalty order. Thereby the directly interested party can ensure that the criminal case is still tried by a criminal court. The article 12 DCCP procedure is the only mechanism to review the decision of the public prosecutor not to prosecute specific criminal cases. Two requirements must be met before the court can consider the complaint: a) the complaint must be filed by a directly interested party and b) the criminal offense must not be prosecuted or a penalty order must have been issued. After the complaint has been received a written acknowledgement is sent to the complainant and the decision is made whether or not a hearing will be held to discuss the complaint. If the court finds the complaint admissible, then the court shall consider the main question: should (further) prosecution (in a criminal court) take place? In this decision both the question of evidentiary feasibility and that of prosecutorial discretion play a role. If the court finds the complaint manifestly inadmissible or manifestly unfounded, then it can, "without further investigation", declare the complaint inadmissible or unfounded. The procedure in Article 12 DCCP has for a long time been the subject of debate. The most important criticism, which this research focuses on, is the (too) lengthy processing times. Another point of criticism is the increase in the number of Article 12 DCCP cases. In 2009, the Minister of Justice announced a number of measures to address these issues (see 1.4).

This research consists of two sub-reports. In the first sub-report the qualitative research into the measures taken to reduce the the processing times of article 12 DCCP procedures and to prevent Article 12 DCCP procedures are discussed, as well as what the intended and the actual function is or has been of the taken measures. Secondly, by means of quantitative research the expectations of citizens who submit an Article 12 DCCP complaint have been examined as well as the experiences of the complainants in Article 12 DCCP procedures. An important starting point of the research presented here is that the confidence citizens have in the authorities increases significantly when citizens feel that they are treated fairly by the authorities. In this research attention is paid to the question how fair and just citizens who are victims or in any other way directly interested parties are treated and how they feel treated by the authorities, in this case the police, the Public Prosecution Service and the court of appeal. The degree to which parties consider that they, during the procedure, have been treated fairly and equitably is referred to in this report as the perceived procedural justice.

Sub-report I

In the qualitative research, as described in sub-report I, the question was: *Which measures have been taken since 2009 aimed at reducing the processing times of complaint cases and at the prevention of complaint cases and what is the intended and actual effect of the measures taken?* To answer this question interviews were held with persons working at the Ministry of Security and Justice, the Council for the Judiciary, the Board of Procurators General, the Courts and the Public Prosecution Service (offices at the district courts and the courts of appeal). Twenty-two interviews were held with a total of 31 people.

In chapter 3 the legislative history of Article 12 DCCP and the shifts that have occurred in the main objectives of the procedure throughout the course of time are described. While the procedure originally served a public interest (the review of the way in which the Public Prosecution Service uses its prosecution monopoly and discretion), the private or individual interests of the complainant are now the focus. Despite the limited access to the complaint procedure which the legislator assumed in 1985, the changes which the procedure has since then undergone have all served to ensure the possibility for potential complainants to file a complaint under Article 12 DCCP. As of May 1, 2002 the procedure was opened up to cases concerning a notice of discontinuation of prosecution ('kennisgeving van niet verdere vervolging'), a notice that the case has been closed or a transaction ('transactie') has been issued – previously a complaint was then no longer possible. The Explanatory Memorandum cites as an important reason for this amendment the strengthening of the legal position of victims and other directly interested parties. The starting point should be that "the right of a directly interested party to complain should not be lost before he becomes aware of a decision which implies that the suspect will not be summoned to stand trial." The same idea also underlies the opening up of the Article 12 DCCP procedure in cases in which a case is settled by a penalty order (Art. 12k DCCP). Besides by research into the literature, the question of the main objectives of the Article 12 DCCP procedure was also answered by raising that question in the interviews. The respondents consider the procedure as a necessary review of and reflection on the Public Prosecution Service as an organization with a lot of power and as a means to achieve a balance between the interests involved in the decision to prosecute. According to various respondents the procedure is a means of increasing the acceptance of the State as decision-maker and the legitimacy of the rule of law, as citizens experience that the State cannot decide cases affecting the interests of citizens without being monitored, but that a critical examination takes place. More specifically the Public Prosecution Service respondents point to the importance of the procedure for maintaining the authority of the Public Prosecution Service as the Service must account for their decisions, which are then exposed to criticism.

However, the majority of the respondents are of the opinion that the recognition of the interests of victims has increasingly come to determine the approach to the Article 12 DCCP procedure. Respondents working at the Public Prosecution Service as well as at the courts of appeal attach great importance to the procedure as a forum for complainants to put forward their interest in prosecution. The importance of the procedure is, for the respondents, also strongly influenced by the fact that the court deciding on the complaint is the last resort, that people have nowhere else to turn to. This approach of the procedure is reflected in the fact that the hearing of the complainant is considered to be the focal point of the procedure and that limited use is made of the statutory possibility to decide on complaints in writing, without a hearing.

In addition to interviews with officials professionally involved with the Article 12 DCCP procedure, fifteen interviews were held with individuals who started an Article 12 DCCP procedure. The interviews with the complainants show that they strongly feel that their story and their interests are insufficiently taken into account in the preliminary stages (police and Public Prosecution Service) and that they do not or have hardly had the opportunity to

give their account (see IV.1 Scooter op het schoolplein; IV.2 Winterbanden op velg; IV.3 Antikraak; IV.7 Gehavende erfenis; IV.10 Ontvreemde machines; IV.14 Verdwenen ledervoorraad).
These interviews confirm the position of the professional respondents that it is of vital importance that the complainants can eventually tell their story in court.
In chapter 4, the measures initiated to shorten the processing times and the way they have been implemented are discussed. The most important measure which was mentioned in the letter of the Minister in 2009 was that immediately upon receipt and registration of the complaint or shortly thereafter a hearing date should be determined. This measure would serve to exert pressure on the Public Prosecution Service to timely provide the required documents. Other measures announced in that letter concerned the immediate request of the advice from the Advocate General and the monitoring of the timeliness of the public prosecutor's report ('ambtsbericht'). The first finding is that most of the measures announced at that time by the Minister have actually been implemented. It should be noted that the measures mentioned by the Minister were at that time already being applied, therefore a very significant impact could not be expected. Moreover, the measures also have undesirable side effects. Exerting pressure on the Public Prosecution Service by immediately setting a hearing date usually only has a one-time or short-term effect. The respondents reported that often court hearings are forthcoming for which no documents have yet been received. Then these hearings have to be postponed.
In addition, the courts of appeal have implemented numerous measures which either aim to accelerate the courts' work in the case or to prompt the Public Prosecution Service (the office at the court of appeal ('ressortsparket') or through that office, the office at the district court ('arrondissementsparket') to (more) rapidly complete their work. For example, the courts try to decide cases more speedily, they send reminders to the Public Prosecution Service's office or filter complaints already upon receipt. Relatively little use is however made of the statutory option to quickly dispose of a case (by refraining from hearing the complainant) due to the abovementioned views of the judges regarding the nature and purpose of the procedure.
Although firm conclusions about the actual effect of the measures can barely be drawn, it can be concluded that there is a gap between the intended effects and the actual effects of the measures. Despite the measures taken to accelerate the settlement of Article 12 DCCP complaints, the processing times have on the whole not diminished in the years that have passed since the Minister announced measures in his letter of October 22, 2009. The processing times have even increased since the first assessment in 2011 on the basis the norm that 85% of the cases should be settled within six months (53% in 2011, 46% in 2012, 34% in 2013, 35% in 2014 and 34% in 2015).
The measures of which the respondents have the impression that they pay off (especially the 'weekdienstconstructie' in the Public Prosecution Service's office at the courts of appeal which had existed for about two years at the time of the interviews; the filtering and screening and the monitoring by the court staff of the receipt of the public prosecutor's report and the advice of the Advocate General) apparently have no significant effect on the total delay. The use of certain other measures implemented to shorten processing times, such as the Lean Six Sigma method and the setting up of a competition with a trophy, has

been limited to very few organisations so that significant impact thereof on the overall processing times was not expected anyway. Moreover, the respondents report that these measures have been and will only be effective for as long as they are operative and succeed in keeping managers and employees pay attention to the Article 12 DCCP procedure.
The most important conclusion regarding the deviation of the actual effect from the intended effect is that the measures are barely attuned to the reasons for the delay mentioned by the respondents (4.4). None of the measures offer a direct response to the face that the Article 12 DCCP procedure is comprised of so many stages. The fact that various organisations have a sequential task in the procedures is considered as the root of the long processing times: the organisations are interdependent, waiting for the other to finish its work. The consequences thereof are of course felt most by the courts of appeal, which are the aim and end station of this loop. They have to deal with hearing time reserved for Article 12 DCCP hearings which cannot be used because the public prosecutor's report, and therefore the Advocate General's advice, are not delivered yet, and are thus forced to work in jerks: once the Public Prosecution Service's office has caught up, there is a bombardment of cases that end up in the organisation of the court. Only implementation of the suggestion by some respondents to remove the role of the Advocate General (or that of the public prosecutor) would tackle this cause directly. Another major cause of the slow processing times is the low prioritization of Article 12 DCCP at the Public Prosecution Service's offices at the district courts and the police and the frustration that is felt there about having to do 'other people's work'. The only measures that have come to our attention that were directly aimed at combating the causes of low prioritization and inadequate awareness of the importance are the abovementioned implementation of the Lean Six Sigma method and the competition with accompanying trophy.
In chapter 5 the measures taken to prevent complaints are discussed. The measure announced in 2009 by the Minister, namely the obligation to provide reasons in the written decisions not to prosecute and to the invite victims in serious cases to discuss the decision not to prosecute with the public prosecutor has only been implemented very limitedly. The invitation to discuss the decision not to prosecute in more serious cases seems to have been introduced everywhere. Respondents mention that these discussions have an impact on the number of Article 12 DCCP complaints. The discussions – at which often also the victim's lawyer is present –often result in no complaint being filed, because an adequate explanation of the decision not to prosecute has been given, but also because the discussion sometimes leads to the reconsideration of the decision not to prosecute.
Completely different are the views of our respondents of the provision of reasons for the decision not to prosecute in the letters sent in average cases. The reasons for the inadequate implementation of the obligation to provide reasons as have been put forward by the respondents are explained 5.5.1.3. Two – related – reasons are mentioned. Firstly, attention is drawn to the fact that the capacity at the Public Prosecution Service is completely insufficient to draw up the desired reasoning in each individual case. An actual explanation of the decision requires that someone with a knowledge of the case provides reasons tailored to the individual case; there is insufficient capacity available to put in the time that, given the number of cases in which decisions not to prosecute are made, is necessary for a clearly reasoned written decision not to prosecute. Investing time, certainly

considered important by some respondents, in the explanation of decisions not to prosecute is – even by them – usually not done. The reason given is the culture of the Public Prosecution Service which is guided by disposal rates and processing times. No capacity is deployed to prevent Article 12 DCCP complaints, but there is capacity for the processing of these complaints; the investment in the prevention of complaints takes time from the person in question which decreases the time left for work which has been assigned priority and upon which he or she is assessed.

Secondly, the letters informing the victim of the decision not to prosecute are not written, but are generated automatically. This automation has been around for many years and has its origin in the need to reduce capacity: letters on the decision not to prosecute get sent with a limited investment of time by employees with a low job level without knowledge of the case – even from a 'virtual office' these letters are sent. According to respondents, the automation system is, as such, a limitation of the possibilities to explain the decision not to prosecute, as well as a source of errors in the letters. The 'logistics' of the auto-generated letters are therefore mentioned as an independent source of Article 12 DCCP complaints.

The way in which the obligation to provide explanation laid down in the Guidelines on the Care of Victims ('Aanwijzing Slachtofferzorg') 2011 has been implemented has, according to respondents, actually caused complaints: in particular, the inclusion – without further explanation – of the dismissal grounds 'insufficient evidence' or 'shared blame injured party' is seen as an independent cause for an Article 12 DCCP complaint. The fact that, pursuant to the Guidelines, in the letters to the victims notification is made of the possibility to file an Article 12 DCCP complaint is also named as a cause of the increase of complaints. At ZSM in particular the above-mentioned factors are said to lead to an increase in complaints: decisions taken too quickly lead to an erroneous judgment, different employees successively enter changes into the registration of the case which results in an erroneous letter, and the letter containing the decision not to prosecute, often referring to 'insufficient evidence', reaches the victim so quickly that as a result a strong indignation is evoked.

That the lack of an explanation – in the letters on the decision not to prosecute or otherwise – and an inadequate investigation into the evidence, while the case is dropped on grounds of 'insufficient evidence', is a source of Article 12 DCCP complaints was confirmed in the interviews we held with complainants (IV.1 Scooter op het schoolplein; IV.4 Inbraken in garage; IV.5 Ramkraak met betonnen balk; IV.8 Gestolen oldtimeronderdelen; IV.9 Mishandeling door buurman). Moreover, in these interviews the social cause given by respondents of the increase in complaints strongly comes to the forefront (see 5.4.1): victims desire to be seen and to be recognised, but they feel ignored due to the way in which their reports of the crime are dealt with and due to the communication by the police and the Public Prosecution Service about the decision not to prosecute. An increasing number of people do no longer accept this.

The Article 12 DCCP procedure now operates in a social and legal context in which the wishes, experiences, rights and interests of victims are considered to be very important. This modified social significance of the procedure provides an explanation for the increased influx and for the increasing processing times, of which the organisation of the procedure has proven to be a major cause. However, the context which determines the functioning of the procedure and the actions of the organisations involved has also changed in certain respects.

In this respect, the phenomena of enforcement deficit, lack of capacity, cuts, production standards, automation, lack of personal responsibility of officials for individual cases, and prioritisation are mentioned. These phenomena largely determine the culture in which the employees involved have to do their work and, therefore, the way in which Article 12 DCCP complaints can be dealt with. A significant part of the solutions suggested by the respondents are not possible due to a lack of capacity and the centrally directed priorities.

Sub-report II

A quantitative research was conducted amongst citizens who have filed a complaint in the period of January-June 2015 about the decision not to prosecute (Article 12 DCCP procedure). This quantitative research consisted of two questionnaires. The first questionnaire consisted of a so-called baseline measurement. This T0-questionnaire intended inter alia to examine what the expectations of citizens were. These expectations were measured with a questionnaire at the moment that the citizens lodged their complaint. A total of 260 citizens completed this questionnaire. The second questionnaire consisted of a follow-up measurement. These T1-questionnaires were conducted eight months after the submission of the complaint on the decision not to prosecute. The period of eight months was chosen because the aspiration of the courts is to deal with and take a decision on the complaint within six months. The T1-questionnaire was conducted under the T0-respondents who had indicated their willingness to fill in the T1-questionnaire. Ultimately, 109 respondents completed the T1-questionnaire. The samples described in the quantitative research can thus be said to be of interest, although it cannot be ruled out that they are not representative of the entire group of citizens who file a complaint against the decision not to prosecute. Thus, this relatively low response rate should be taken into account in the interpretation of the data of the quantitative research project.

An important part of the research question relates to the expectations that complainants have about the outcome of the complaint procedure, perceived justice and the criminal justice authorities involved before they start the procedure. Below these expectations are briefly discussed, for a complete overview the tables in the T0 report can be consulted. The complainants show through their replies to the questionnaire that they have high expectations of the Article 12 DCCP procedure. For example, some expect to be awarded compensation and to, through the procedure, show the offender the effects of the alleged offence. Complainants were also of the opinion that their complaint could prevent recurrence and that it would help them in emotionally dealing with the alleged offence.

A possible explanation as to why Article 12 DCCP procedures are started is that complainants attach great importance to procedural justice, but that, in the earlier treatment of their complaint, they have not sufficiently experienced this. In accordance with this explanation, respondents indeed appear to attach great importance to fair and equitable treatment of their case, with attention to their side of the story. Thus respondents started a complaint procedure with the motive of experiencing a high degree of procedural justice, and in addition, they usually have the motive of achieving a fair and favourable outcome.

In T0 the respondents were also asked about their expectations and experiences with the Public Prosecution Service, Dutch judges and the Dutch criminal justice system. It was striking that respondents had little confidence in the criminal justice authorities in the T0-

measurement. In addition, the marks handed out by the respondents were generally low, with an average of failing marks for the Public Prosecution Service and the Dutch criminal justice system and a meagre pass for Dutch judges.

Striking in the T1-research is that many marks given by respondents are low and that also other opinions are negative. It was expected that during the dealing of the case these opinions would be less negative. That was not shown in the T1-research. In fact, respondents who participated in the T1-questionnaire were more negative than when they filled in the T0-questionnaire. The opinions and comments are on average more negative eight months after filing the complaint against the decision not to prosecute than at the time of filing this complaint.

An important starting point of this research is that opinions of citizens about the law and the legal system are significantly more positive when citizens perceive that they are treated in a fair and equitable manner during the processing of their case. This experience of procedural justice indeed appears to play an important role in the responses of the complainants involved in this research. In particular, the respondents who experienced a low degree of procedural justice give very low marks as to how they were treated, the decision in their case, the Public Prosecution Service, Dutch judges and the Dutch criminal justice system. It is also remarkable that respondents who have experienced a higher degree of procedural justice, give significantly higher marks for how they were treated, the decision in their case, the Public Prosecution Service, Dutch judges and the Dutch criminal justice system. The marks given to their own treatment then score, for example, a (just) sufficient. This effect of fair treatment also extends to the judgments of the respondents as to the justice system, in the sense that Dutch judges scored a (meagre) sufficient when respondents had experienced a high degree of procedural justice. These important findings are summarized in Figure 1.

In conclusion, sub-report II clearly shows that respondents who participated in this study are negative about different parts of the Article 12 DCCP procedure, such as how they are treated during the procedure. They are also negative about various legal actors, such as the Public Prosecution Service and Dutch courts, and about the entire criminal justice system. The importance of perceived procedural justice for the correction of possible dissatisfaction with the Article 12 DCCP procedure, legal actors and the criminal justice system is an important implication of the present report and provides points of reference to achieve a better functioning legal system in the Netherlands.