

Summary

The Regulation of Special Investigatory Powers Act, first phase of an evaluation

On February 1st, 2000, a new Act regulating special investigatory powers came into force in the Netherlands. By amending and supplementing the Dutch 'Code of Criminal Procedure', it puts several intrusive investigative techniques such as infiltration, test purchasing, (covert) surveillance and the use of informants on a statutory footing for the very first time. The Act is a direct result of a parliamentary inquiry into criminal investigation methods carried out in 1995-1996. Although most of the investigative powers regulated in the Act had to a certain extent previously been regulated by case law and/or by guidelines issued by the Ministry of Justice, the parliamentary inquiry revealed that the way these methods were deployed remained obscure and lacked proper supervision by the public prosecutor and the judiciary. Furthermore, it was questionable whether the various methods of investigation met the requirements of legality. The Act addresses these findings in three ways: by enhancing the role of the public prosecutor in the criminal investigation process, by creating a statutory basis for various methods of investigation, and by setting up procedures to effect accessibility to both the judiciary and the defence, of the way investigation methods have been deployed. Last mentioned places great emphasis on written reporting. There were two main reasons for regulating certain methods of investigation by law: likelihood that the method will involve an apparent breach of fundamental human rights (e.g. covert surveillance) or will pose a risk to the integrity of the officers conducting the criminal investigation (e.g. infiltration).

The Minister of Justice commissioned the Research and Documentation Centre (WODC) to carry out an evaluation of the implementation, effectiveness and consequences of the new Act. Because of the broad scope of issues related to the new legislation, the evaluation is divided into two phases. The present report gives an account of the findings of the first phase. It traces the history of the law, provides an overview of the parliamentary proceedings, and presents the results of interviews with 45 police officials, members of the judiciary, defense counsel and public prosecutors. Overall, the new legislation has been well received, likewise the aforementioned objectives of the law are supported. The role of the public prosecutor in supervising the criminal investigation has been noticeably strengthened, although the workload of the public prosecutors sometimes can interfere with the proper fulfilment of this task. The required written disclosure of the methods of investigation used and their results, can result in considerable work for the police in particular, especially when intercepting telecommunications (phone tapping). Another side-effect that is mentioned regarding

the extensive written reporting about the methods of investigation used, is that it might reveal details that could hamper the effectiveness of these methods in the future. Covert surveillance and the use of informants fall within the scope of the law only to the extent that they entail the possible breach of personal privacy to more than a minor extent. When this criterion is met remains open to discussion. The police and officials of the public prosecution service are reluctant to label the use of an informant in this way (as constituting an infringement of personal privacy) since it brings about formalities which, they fear, might easily put the informant in danger. Though the Act provides for a procedure involving an examining judge in matters regarding (non-)disclosure, so far it has not often been used. Whether these objections to disclosure of investigation methods and the use of informants under the new law can be counter-balanced by this procedure remains to be seen. Further research is needed to evaluate the validity of the objections raised.

The immediate reason for initiating the parliamentary inquiry was the use of a “method of investigation” that allowed criminals and informants to engage in drug trafficking in order to make arrests later on. The new law strictly forbids this *laissez passer*, with one exception that requires approval by the Minister of Justice. Seizure of illegal goods (e.g. drugs, weapons) is now mandatory if an investigating officer is “aware” of the location as well as the illicit nature of these goods. This poses the question of the definition of “aware”. The police and public prosecutors claim that in practice they are regularly confronted with situations that call for application of this rule, e.g. when they bear knowledge of the presence of a small amount of soft drugs because of a telephone tap. Strict adherence to the rule could hamper criminal investigation because it might alert the suspect under investigation. In practice several ways to deal with these situations have been developed.