Summary

The Act on Special Investigative Police Powers – final evaluation

Aim and structure of the research

This report concerns the second phase of evaluative research into the Act on Special Investigative Police Powers (*Wet bijzondere opsporingsbevoegdheden*, hereafter: the Act) that became effective in the Netherlands on 1 February 2000. The first phase was conducted by the Scientific Research and Documentation Centre (*WODC*) of the Dutch Ministry of Justice, and the results published in 2002 (Bokhorst *et al.*, 2002). The second phase was a collaborative effort by *WODC* and the Willem Pompe Institute for Criminal Law and Criminology, University of Utrecht.
The overall research question focuses on the extent to which the objectives of the Act itself are met in practice, and from this derive general research questions with regard to the effects of codification, monitoring and transparency, and the efficacy and legitimacy of special investigative powers. The first phase of the study produced a number of issues for further research: the terminology and definitions contained in the Act, which must be sufficiently unambiguous for it to provide a normative framework for the exercise of special investigative powers; the shift in authority between public prosecutor and examining magistrate; the increased workload; and the question of international co-operation in criminal matters, which was not specifically addressed during the first phase. These issues were translated into the following six general research questions:

– How are the provisions of the Act aimed at increasing both the transparency of special investigative powers and the potential to monitor their exercise? To what extent do they achieve this objective?
– To what extent does the public prosecutor form the central authority in criminal investigations?
– How does reinforcement of the public prosecutor's position relate to that of the examining magistrate in pre-trial investigation? What are the consequences for the management of the investigation and for the way in which the examining magistrate is able to perform the remaining tasks the Act allocates to him?
– To what extent do the provisions of the Act, which delimit and provide procedures for the exercise of special investigative powers on paper, actually do so in practice? Does the Act provide a sufficiently clear and workable framework in this respect?
– What are the consequences of Act for the workload of those involved in its practical implementation? What are the options for reducing this workload?
– What are the effects of the Act in the area of (increasing) international co-operation in criminal investigations?

Sources/methods

Experiences with the Act in practice were researched by means of a number of methods, the foremost of which was the interviewing, in 7 regions, of respondents from the following categories:
- public prosecutor with special duties regarding the criminal investigation division/serious crimes division and/or so-called 'key team';[1]
- police officer from the central criminal investigation division and a member of a key team;
- public prosecutor with special duties regarding the Criminal Intelligence Division (CIE);
- member of the CIE;
- member of a police observation team;
- police officer from a technical support section;
- judge;
- examining magistrate.

Interviews were also held with:
- members of a police infiltration team (5);
- lawyers (members of the Dutch Bar Association), distributed across the regions (7);
- member of the police infiltration policy group (1);
- Foreign Liaison officers (5);
- Foreign Liaison magistrates (2) ;
- Belgian federal police (1);
- Royal Netherlands Military Constabulary (2);
- Fiscal Intelligence and Investigation Service – Economic Investigation Service (1);
- specialist Criminal Investigations Service (1);
- National Intelligence Unit of the criminal investigation division (1);
- National Office of the Public Prosecution Service (2);
- International Networks Division (2);
- Europol (1).

Between May 2003 and March 2004, a total of 110 persons were interviewed about their experiences with Act. Some interviews were conducted with more than one respondent from the same category of interviewees. In order to obtain more quantitative information on the use of special investigative methods, the Public Prosecution Service was requested to provide data from COMPAS, its business information system. The annual reports by the Central Assessment Committee[2] provided information on those investigative powers

1 Note translator: a key team is a police unit charged with the investigation of inter-regional crime.
2 Note translator: the committee is part of the Public Prosecution Service and is charged with the internal monitoring of some (invasive) special investigative powers.

whose exercise requires authorisation from the Committee. With regard to the recording of confidential communication (bugging), six investigations were selected in which this method was authorised and used. The report describes these cases, the experiences of the police officers and authorities involved, and assesses the benefits of this special investigative power. The researchers also consulted legal literature, parliamentary documents and case law.

Principles, special investigative powers and other regulations of the Act on Special Investigative Police Powers

The Act is based on the following principles:
- *Codification of methods of investigation:* Investigative methods must be properly regulated with regard to content and procedure. Methods of investigation that carry risks for the integrity of the investigation or violate the fundamental rights of citizens must have a written basis in the Code of Criminal Procedure (*Wetboek van Strafvordering*, hereafter: CCP).
- *The central authority in criminal investigation is the public prosecutor:* Pursuant to Section 148 CCP, the public prosecutor has sole authority over the investigation. The exercise of special investigative powers is dependent on authorisation by the public prosecutor. However, particularly invasive powers (telephone tapping and bugging) require authorisation from the examining magistrate.
- *Monitoring criminal investigations*: A report must be made of the special investigative powers used and, in principle, their deployment must be accounted for at trial. To this end, the use of special investigative powers must be accounted for in the trial 'dossier'. Notwithstanding this principle, and if the safety of persons or important interests of the investigation so require, section 187d CCP allows certain information to be kept out of the public domain, through proceedings in camera before the examining magistrate.

The Act, which is incorporated into the Code of Criminal Procedure, regulates the following special investigative police powers: systematic observation; demanding telecommunications data; the recording of telecommunications (wiretapping); the recording of confidential communications (bugging); entering an enclosed space; three 'undercover powers' (infiltration, buying illegal goods or substances, and providing illegal services) and the systematic gathering of intelligence. The Act also regulates the use of civilians in criminal investigation (informers), their deployment in systematically gathering intelligence, buying illegal goods or substances and providing illegal services, and civilian infiltration.[3] Although the Act itself does not specifically forbid the

3 Note translator: Dutch legal terminology distinguishes between civilian informers and civilian infiltrators (infiltration being a more far-reaching activity than informing), rather than using one single category of participating informers.

use of civilians in infiltration operations, the existence of such a prohibition can be inferred from the legislative debate. A duty of notification applies to the use of special investigative powers, which includes notifying a citizen if they have been deployed against him and, not having been involved in criminal proceedings, he has remained unaware of the fact.
In its regulation of 'exploratory investigation', the Act provides a legal basis for investigating specific sectors of society where crimes may be being committed or planned. At the same time, it introduces a new and broader concept of 'reasonable suspicion' (probable cause) for the benefit of investigations aimed at organised crime. Finally, the Act requires that illegal goods or substances that constitute a risk to public health or public safety, be confiscated. This has been interpreted as a duty of confiscation on the part of the investigating officer who, in exercising an investigative power pursuant to the Act, knows where such goods or substances can be found. Depending on permission from the Council of Procurators General and the Minister of Justice, that duty may be suspended in the interests of the investigation.

Special investigative powers from an investigative perspective

Interpretation
The research shows that the scope of some of the Act's provisions remains unclear. This is especially true of the term 'systematic', which plays a role in both observation and intelligence gathering by an investigating officer or civilian (in short, 'systematic' means that such observation or intelligence gathering activities may constitute a far-reaching breach of privacy). Another example is the question of when an investigating officer 'knows' where illegal goods or substances can be found and is therefore under a duty to confiscate them. Such problems of interpretation do not seriously hamper criminal investigations in practice. On the one hand, this is due to case law (especially in relation to confiscation). On the other, even if it is doubtful whether authorisation from the Public Prosecutor should be obtained in a given situation, there is also no reason why it should not – 'just in case'.
However, the interpretation of some sections of the Act is influenced by a desire to avoid using the investigative methods they allow for. First of all we see this in systematic intelligence gathering by civilians. The term 'systematic' is interpreted in such a way as to barely cover any action on the part of a civilian. Moreover, as soon as an informer looks like engaging in systematic activities, these are immediately curtailed. As a result, the work of the Criminal Intelligence Division (CIE) with informers takes places almost entirely outside of the context of the Act.
In regulating undercover police activity, the legislator opted for a three-way division in powers: systematic intelligence gathering, purchasing illegal goods or substances and rendering illegal services, and infiltration. These

investigative methods are assumed to be of an increasingly invasive nature, and the requirements with regard to their deployment are therefore increasingly strict. The research shows that, in practice, such methods can be combined to allow for invasive undercover investigations that are nevertheless not regarded as infiltration. The duty to confiscate illegal goods and substances depends on whether the investigating officer 'knows' where they are, but the level of 'awareness' of the presence of, for instance, drugs, can be influenced by choices made during the investigation (this emerges specifically in wiretapping). This creates a somewhat grey area, with the actual conduct of an investigation sometimes determined by a desire to avoid the possibly detrimental consequences of unduly early confiscation. There is a lack of clarity as to what exactly is permitted with regard to bugging and, in combination, entering enclosed spaces, among other things where the installation of the necessary equipment is concerned.

Procedural regulations
There has been some criticism of the way in which the investigative powers pursuant to the Act have been translated into procedural regulations, especially with regard to observation and bugging, given the technical requirements concerning the equipment and the reporting associated with the deployment of these powers. It is alleged that the technical requirements render equipment less effective, and that reporting constitutes a considerable administrative burden. The respondents do support an important objective of these procedural regulations, which is to create the transparency that makes monitoring possible. Nevertheless, they sometimes experience the practical consequences as unnecessarily obstructive. For the most part, the administration concerns applying in writing for the necessary authorisation (and its extension). The biggest administrative burden, therefore, rests with the police. Most teams seem resigned to the situation.

Transparency and the protection of investigative methods
Investigative methods that involve the use of technical equipment, such as bugging and observation, require the technicalities themselves to be kept secret. There is some concern that documents made public by adding them to the dossier, may provide too much insight into the methods used if they contain information registered with the aid of technical equipment.
At the same time, the research does not indicate that much is done to prevent this. The options provided by Section 187d CCP remain unexplored. The public prosecutor may also decide not to add certain documents to the dossier, if he considers them irrelevant for assessment of the case at trial, although the judge may reverse that decision. There is also some concern that the tactics involved in undercover work will be subject to 'wear and tear' if publicised too freely. Notifying suspects could be another problem, as it alerts them to a specific method, such as infiltration, having been used against them.

A number of objections have been raised against the way in which the Act regulates the use of systematic civilian informers (Section 126v CCP), the main tenet of which appears to be that the relevant provisions make it impossible or difficult to protect the informer's identity. Among other things, these objections concern the expectation that the judge will be more inclined to have a systematic informer called as a witness, uncertainties as to what information based on (CIE) intelligence should be added to the dossier, and what information must be shared with the public prosecutor leading the case. In practice this has resulted in a deliberate policy of not using systematic informers. At the same time, not all of these objections are based on practical experience, for the very reason that there is a reluctance to use systematic informers because of the problems anticipated. There is now something of a stalemate, with the courts unable to further interpret and develop the rules of Section 126v of the Code of Criminal Procedure.

Effects on the efficacy of the investigation
Given that the term 'systematic' is interpreted restrictively, most informer work is not regarded as systematic so that it remains outside the scope of the Act. In addition, limits to the demands made on informers, prevent intelligence gathering from becoming systematic in character. In concrete terms this means that as yet the Act has had only a limited effect on the effective use of informers. A broader interpretation of systematic intelligence gathering would clearly limit the CIE in its work were it to continue to adopt a policy of not using systematic informers. Remarkably, given the debate on the significance of criminal civilian infiltrators for criminal investigations, none of the respondents was in favour of abolishing the ban on criminal civilian infiltrators. One or two pointed to the advantage of a criminal civilian infiltrator having easy access to the criminal scene. At the same time, others drew attention to the difficulties of keeping a civilian infiltrator under control, to the risks to the infiltrator himself and the problem of protecting his identity. Civilians with a criminal background are allowed to purchase illegal goods and substances and provide illegal services in the interests of the investigation. Here the problems are mainly associated with keeping information about these activities out of the public domain. In principle, informers in particular would be in a position to play a role here, but this is difficult to reconcile with using the results in evidence. Even if the results are not used in evidence, respondents expect the same problems in protecting the identity of the informer. As a result, they say, these methods are only very rarely used. Formerly, the activities of CIE informers went far beyond providing intelligence and they were regularly involved in purchasing illegal substances or goods; the implementation of the Act, however, has severely limited their being deployed.
The research shows substantial support for the rationale behind the duty to confiscate (in so far as allowing illegal goods and substances to pass unchecked is used as a deliberate investigative tactic): the confiscation of

drugs (also) benefits the investigation, for it contributes to the evidence. Nonetheless, the interests of confiscation and those of the investigation may clash. In practice, a number of different ways have been developed to avoid the undesirable consequences of (unduly early) confiscation as much as possible, but these sometimes have consequences for the efficacy of the investigation. Authorisation to suspend the duty to confiscate is rarely requested from the Council of Procurators General and the Minister of Justice, mainly because most relevant cases are of minor importance and the dilemma does not arise. If the case is more serious, the need and desire to intervene increase proportionally.

Respondents are positive about the opportunities that bugging affords, albeit that the long period of preparation it may require, and problems of limited capacity, occasionally detract from this. Bugging is used especially if no (further) results are to be expected from other methods such as wiretapping and observation. Listening to recorded conversations (almost) immediately increases their value. At present this is impossible for technological reasons, combined with the technical requirements for the equipment. Nonetheless, bugging does appear to contribute significantly to investigations: not only are its direct results important, they are particularly so in conjunction with intelligence obtained by means of other methods of investigation.

The Act (in Title V CCP) introduces a separate concept of probable cause or reasonable suspicion, in order to broaden the legal basis for investigations into organised crime. It is clear that more experience with this new concept has been gained in the regions surveyed. Most respondents have, at some stage, carried out one or more investigations on this basis, or considered doing so, when faced with a possibly criminal group without it being entirely clear who plays what role and who can be regarded as a suspect. Opinions differ as to whether Title V actually increases the possibilities for criminal investigation. Some respondents feel that Title V allows certain investigations to get off the ground sooner. Others regarded the existing legal provisions as already sufficient. In a number of cases, it is not a matter of starting an investigation sooner, but of using Title V as a substitute: investigations that would previously have been started on the old basis are now started on the basis of Title V. All in all, the extended legal basis for criminal investigation has not resulted in a major extension of investigation methods.

The transparency of criminal investigation

One of the objectives of the Act is to render criminal investigation more transparent and easier to monitor. To this end, an official report must be made in writing of any power exercised under the Act. If these powers are not relevant at trial, that report can, in principle, be omitted from the

dossier, but it must be noted that they have been deployed. Opinions differ as to whether the introduction of the Act has improved the transparency of the use of special investigative methods. Judges think it has. They are satisfied with the quality of the dossier and they generally feel that no important documents are missing. As a result, they do not actively involve themselves in gathering more information at trial, nor do they think they need to do so. According the public prosecutors and police officers, requirements relating to public access to, and written reports of, the investigation benefit the quality of the investigation, as this enables internal and external monitoring of their performance and, among other things, results in more consultation between police and prosecutors.
Lawyers are much less convinced that transparency has increased after the Act was introduced. Some feel that there is still illegal or semi-legal police activity. The codification of police powers and the strict requirements that govern their exercise do provide concrete opportunities for requesting the court to decide on their legitimacy in a given case. This is not, however, always possible, since lawyers often receive the necessary documents at a very late stage. The district court of Zwolle, meanwhile, has penalised the prosecution service for not supplying the documents relating to special investigative powers until very late during the trial. It appears that, partly because of the comprehensive reporting of the investigation, lawyers are now focussing their attention on its preliminary phase. At the same time, it is difficult for lawyers to obtain any real insight into this phase. In the Explanatory Memorandum to the Act, it was anticipated that, not withstanding the principal rule of transparency, under certain circumstances the defence would find it difficult to show that mistakes had been made during the investigation. For that reason, police and prosecutors would have to account further for the conduct of the investigation if required to do so. There is, therefore, also a task for the trial court in this respect.
Notification still only takes place sporadically. Contributory factors seem to be that a person against whom special investigative powers have been deployed need not be notified if the interests of the investigation so require, that there is no sanction associated with failure to notify and that the Public Prosecution Service does not regard notification as a priority.
In practice, little use is made of the possibilities afforded by Section 187d CCP to keep certain information out of the public domain via proceedings in camera before the examining magistrate, if the safety of persons or an important investigative interest so require. Judges and examining magistrates appear somewhat unfamiliar with this provision. Public prosecutors and other investigating officers regularly involved in the use of special investigative methods are more aware of the opportunities of Section 187d CCP, even if most prosecutors do not have any personal experience with it. As an explanation for the limited familiarity with Section 187d CCP, one public prosecutor refers to the turnover among examining magistrates and public prosecutors. Another factor is that not the examining magistrate but

the trial court has the last word on whether information becomes public, so that protection is not guaranteed.

Monitoring the investigation

The Public Prosecution Service
The public prosecutor is now more involved in actual investigations than before. The link between police powers and authorisation means that the public prosecutor must be involved, in order to substantiate his position as leader of the investigation and to keep it on course. The fact that one person is now clearly in charge has also increased the clarity of everyone's position. A secondary effect of such internal hierarchical monitoring is that the police can anticipate supervision by prosecutors and the considerations upon which their decisions will be based. Police officers appear to be persuaded of the fact that, initially, it is up to them to guarantee the integrity of the investigation. This same mechanism occurs among public prosecutors with regard to the Central Assessment Committee. Some invasive investigation powers are subject to monitoring and authorisation by the Central Assessment Committee, the Board of Procurators General (infiltration and bugging of residential premises) and the Minister of Justice (suspension of the duty to confiscate). In many regions, potential assessment by the Central Assessment Committee has resulted in closer internal scrutiny of the necessity and legality of deploying a certain method. Investigators would rather avoid a trip to the Central Assessment Committee and make their decisions in anticipation of the criteria of proportionality and subsidiarity that the Committee would apply.

Examining magistrate
The research shows that, initially, examining magistrates express themselves in positive terms about the division of authority between the examining magistrate and the public prosecutor under the Act. That the public prosecutor now makes virtually all the decisions relating to an investigation is seen as a clear and unambiguous principle. Their own workload has something to do with this: the Act has resulted in considerably less work for the examining magistrates. The interviews show that the examining magistrate is not involved in the investigation unless his authorisation is required, namely for tapping telephones and recording confidential communications. Examining magistrates are not involved if methods are used for which they need not give permission. However, if the examining magistrate ever feels the need to do so, he can ask to be updated by the public prosecutor. The extent to which this actually happens depends on the examining magistrate in question. The overall picture is that examining magistrates are only involved in investigations from the sidelines. Both examining magistrates and the other respondents state that authorisations

are rarely refused. In view of the limited involvement of the examining magistrates in the investigation, refusing authorisation is a difficult decision. Examining magistrates do not really consider this position to be a problem: they are confident that any unlawful or negligent exercise of police powers will come up at trial.
It should be noted that the more restricted position of the examining magistrate is in line with the desire of the legislator to reinforce the position of the public prosecutor as the investigation's central authority. On the other hand, this renders the examining magistrates less able to fulfil their remaining duties of monitoring two invasive powers of investigation and protecting sensitive information. With regard to their role in the application of Section 187d CCP, some indicate that they feel too far removed from the case to be able to make a responsible decision on such a sensitive issue.

Judges
The judges among our respondents are of the opinion that the introduction of the Act has given them more insight into the exercise of special powers of investigation than they had previously, inter alia because, in their opinion, the necessary documentation is usually complete. However, the confidence they have in the extensive internal monitoring procedures for which the Act provides also plays an important role. This means that monitoring of the investigation by the court is mostly passive, and that the lawfulness of the investigation is not assessed ex officio unless some illegality is obvious from the documents of the case. Case law shows a development whereby flawed internal supervision and monitoring of powers or procedures under the Act, are measured against the question of whether the interests of the defendant are directly and adversely affected. If not, then such flaws are, in practice, not subject to external scrutiny by the court. This increases the already existent emphasis on internal supervision and monitoring by the Public Prosecution Service.

The defence
The conclusion appears to be justified that defences concerning the use of special investigative powers are raised less frequently than prior to the introduction of the Act. After all, the dossier makes it clear that such powers have been exercised. It should, however, be noted that insofar as defence counsel feel the need to raise a defence concerning pre-trial investigation, they are only able to do so to a limited extent, given that they lack sufficient information and their own means of investigation. According to the respondents, defences raised are rarely accepted. Even if found valid, procedural sanctions against the prosecutor are unlikely. Section 395a CCP is rarely applied, so that the tail end of judicial monitoring has lost its sting.

Monitoring and the protection of information
The protection of CIE intelligence implies that it is not, or practically not,

subject to external monitoring. If the CIE provide the police and the prosecutor leading the case with a report containing no more than the information required for the case, court and defence counsel are more or less unable to check what the informer actually did – for instance whether he was involved in systematically gathering information. In this situation, the legality and integrity of using civilian informers depend almost entirely on internal monitoring. There is no reason to suppose that internal monitoring does not work, but it is not backed up with external scrutiny. Insofar as the regulation of systematic information gathering was intended to make this CIE process more transparent and easier to monitor, this has not yet been successful. By introducing Section 187d CCP, the legislator showed an understanding of the problems associated with protecting CIE and other intelligence, but because only very limited use is made of this provision it remains an moot question whether two (potentially) conflicting principles – protection and external monitoring – can be sufficiently balanced. Neither can the protection of information be effortlessly combined with monitoring where the instalment of technical equipment for invasive surveillance methods is concerned. As it is generally essential to keep the technicalities of such activities secret, it is not easy to see how they could be subject to monitoring in open court.

International co-operation

Insofar as problems occur in international police co-operation, these are only partly the result of the Act. They are also caused by general differences in (legal) culture and policy that, as such, have nothing to do with (differences in) legislation. Many issues are solved through proper information and regular contact with the liaison officers staying in the Netherlands. Requests for legal assistance follow a procedure greatly more streamlined than previously, even though some foreign partners are confused by the decentralised organisational structure. The way in which the Schengen power of cross-border observation has been implemented is a cause of particular satisfaction. Neither do requests for legal assistance in the form of (systematic) observation by Dutch investigating officers, cause any problems as such, although limited police capacity plays a part. Both Dutch and foreign respondents are critical of the immense quantity of (written) formalities and lengthy procedures in the case of some powers, and, more importantly, of the transparency envisaged by the Act in order to facilitate the monitoring of special powers of investigation.

Bugging of vehicles
In many countries, the recording of confidential communications is not subject to such stringent control requirements as is the case in the Netherlands. When vehicles cross the border and are equipped with bugging

equipment installed abroad, authorisation for bugging must be obtained from the Dutch examining magistrate and an order for the recording of confidential communications issued, with all the associated procedural regulations (apart from technical and certification requirements). Given the procedure in the Netherlands, this is virtually impossible. Dutch respondents are under the impression that, in these cases, other countries do not take too much notice of Dutch regulations and that intercepted conversations are simply listened to.

The deployment of citizens and the protection of information
Among most foreign partners, working with criminal civilian informers and civilian infiltrators is regarded as a normal and inevitable method of criminal investigation. In all countries except the United States, civilians and the information they supply are kept well away from the public domain of a criminal trial. However, this clashes with the restrictions the Netherlands places on these practices. Foreign respondents complain that effective investigations could be hampered by these limitations. Moreover, they consider the level of protection in the Netherlands insufficient, not only with regard to persons but also with regard to the interests of the investigation in a broader sense. They do not see Section 187d CCP as a solution, as it does not guarantee that the trial court will not overrule the examining magistrate. On this point, differences with Germany are so great that co-operation with that country appears to be seriously affected. In the past, such problems occasionally led foreign investigative services to use their own civilians or police infiltrators in the Netherlands, without having obtained prior permission from the Dutch authorities. This research does not offer any hard evidence that this is still the case, but there are some indications that it may be. The main effect, however, appears to have been that operations are moved elsewhere, where the use of civilians is easier and an increased level of information protection is possible.

The duty to confiscate illegal goods and substances
In all neighbouring countries, there is a duty to confiscate illegal goods and substances and in this sense, Dutch regulations are the same. The matter becomes a problem in the case of cross-border transports of such goods and substances; not because of the Act, but because of coordination problems, whereby different national authorities must give permission for an actual monitored transport and ultimate delivery, and guarantee it takes place. There are indications that, because of such intransigent issues, countries whose permission is required for entry (the transit countries) are sometimes not informed of the transport.

Mutual recognition
The Act goes against the current trend to achieve mutual recognition, and the desire that has been expressed within the context of the EU for this to

extend to the legal decisions upon which investigative acts are based. This could indeed solve a number of problems, for instance with regard to bugging and the controlled delivery in an international context. However, this would mean a radical breach with the principle expressed in the Act and its attendant regulations that special investigative powers on Dutch soil must conform to relevant Dutch legislation.