

Special Powers of Investigation Act

(Wet Bijzondere opsporingsbevoegdheden)

The Special Powers of Investigation Act or **Wet BOB** came into effect on 1 February 2000 and relates to an amendment to the Dutch Code of Criminal Procedure. The act is a direct result of the parliamentary inquiry into criminal investigation methods. The inquiry underlined the fact that there seemed to be a number of investigative processes that were unknown to many parties. The committee of inquiry (named, after its chairman, the **Van Traa** committee) investigated the various, often unknown, investigative methods. The **Wet BOB** now legally regulates methods of this nature.

Starting points of the Wet BOB

The object of the **Wet BOB** is to standardise and improve methods of managing criminal investigations. A number of starting points of this act are outlined below, including:

Principle of legality

The principle of legality means that a statutory basis is required for methods of investigation that could seriously impact the integrity of the investigation or ability to monitor it, or could infringe civil rights.

The Code of Criminal Procedure does not contain a systematic description of all methods of investigation. The new **Wet BOB** names a number of such methods, which are dealt with in brief in this fact sheet.

Openness and scope for monitoring investigations

One of the act's key aims is that investigations must be open and must offer scope for monitoring the methods used; accounting for the powers deployed during the investigation in a public hearing must be vouchsafed.

Information can only be protected if the interests of the investigation or of a witness are seriously endangered. In addition to the possibilities already offered by the Civil Code and case law, the **Wet BOB** adds another: the examining magistrate can interview a witness without the presence of the defence lawyer.

More openness and control is countered by the justified need to preserve the secrecy of certain working methods and strategies and to protect the identity of informants. For instance, the witnesses could be investigating officers who have used a certain technique or who have run an informant. In the most extreme cases, the informant may also be interviewed himself.

The so-called obligation of notification is another stipulation and means that, once the interests of the investigation permit, the public prosecutor informs the individual who is the subject of the special investigation. Especially if the investigation preliminary to prosecution does not lead to a criminal trial, it will prevent that the special powers of investigation used remain secret.

Goal of the investigation: settlement of criminal offences by a criminal court

Special powers of investigation must only be applied to investigate and settle criminal cases in a criminal court. Other purposes, such as only improving the intelligence held by the police or the dismantling of a criminal organisation that do not lead to settlement by a criminal court are thus excluded here.

Authority of the Public Prosecutions Department

The **Wet BOB** confirms that the public prosecutor is the appropriate official to lead the criminal investigation. Every special power of investigation can be used once the public prosecutor has issued a warrant. Prior authorisation of the examining magistrate is only required if confidential communications or telecommunications are to be recorded. The Act determines that the public prosecutor must have the consent of the board of procurators general for civilian infiltration and matters involving **laissez passer**. The board must first present its decision to the Minister of Justice. More information on this point is given later in this fact sheet.

Special Powers of Investigation

The **Wet BOB** provides for three **under cover** powers: covert investigation (infiltration), pseudo purchase/services and systematically obtaining intelligence about suspects through **under cover** investigations. These powers involve situations in which an investigating officer is active in the milieu of the suspected persons without his identity as investigating officer being known. In addition, the **Wet BOB** covers all types of surveillance, or entering and 'looking into' premises and recording of confidential communications.

Surveillance

The Act defines surveillance as systematically following a person or systematically observing their whereabouts. Systematically following or observing a person is only permitted in the case of a suspected crime and at the order of the public prosecutor. Surveillance is systematic if it enables a more or less complete picture to be gained of certain aspects of a person's life such as their financial activities or structural personal contacts with specific individuals. Systematic surveillance can include observing a person over a number of days using an observation team or following someone using a scanning device. Non-systematic surveillance is ordinary surveillance or the incidental observation of a number of actions or events. If technical aids are used which register signals of the person under surveillance, this is similar to systematically following or observing the individual. Surveillance of private homes is not permitted. Other locked premises such as office buildings or warehouses and storage buildings may be placed under surveillance, but only in the case of serious crimes. These locations may be entered without the owner's permission in order to place recording equipment or to perform other activities to enable the surveillance.

Infiltration

Covert investigation or infiltration is defined as participating or co-operating with a group of people that is believed to be planning crimes or to have committed crimes. If the officer involved in the covert investigation wishes to seem plausible to the group, he will have to take part in their activities. In a covert investigation there is a serious risk that the covert investigator will have to commit criminal offences. The act lays down that actions that could give rise to a criminal offence should be listed in the warrant issued by the public prosecutor.

As an infiltrator, the investigating officer cannot incite a person to commit criminal offences other than this individual had already planned: inciting the perpetration of an offence is ruled out. This is known as the "Tallon Criterion".

Various types of infiltration are covered by the covert investigation regulation. The starting point is that the covert investigation is carried out by a police officer. The act provides for a regulation for the activities of a special investigating officer. Infiltration by members of the public (civilians) is outlined in the paragraph **Civilian Support and Covert Investigation**.

Pseudo purchase/services

The **Wet BOB** defines pseudo purchase/services as the purchase of goods from, or the supply of services to, the suspect. The characteristic feature of this power is that the investigating officer behaves towards the suspect in such a way that a criminal offence could result. For this reason, the Act incorporates the Tallon C criterion to regulate pseudo purchase/services in a similar way to covert investigation.

Pseudo purchase/services can also take place without being part of a covert investigation, which is why this power has been regulated separately to covert investigation.

Systematically gathering intelligence under cover

This means that a police officer systematically obtains intelligence on the suspect through under cover activities such as frequenting the suspect's haunts (sports club, bar or newsgroup) without it being apparent that he is acting as a police officer.

The fact that the investigating officer is infringing the suspect's privacy and misleading him is of key relevance: the suspect does not know that a police officer has entered his environment, while the officer himself takes active steps to become involved in his life. Because the investigating officer is not committing punishable acts, under cover work poses far fewer risks to the integrity and security of the investigation than covert investigation and pseudo purchase/services. Therefore the power is bound by less serious conditions.

Powers to enter locked premises: 'looking in'

'**Looking in**' refers to entering locked premises (not private premises, but an office or warehouse) without the owner's permission. The objective is to look around and secure traces, such as a sample, a fingerprint or a photo. But it could also provide an opportunity for the placement of technical aids (such as a scanner) in a vehicle in a garage. Opening cupboards and cabinets and breaking down doors is not permitted.

In order to take samples, packaging can be opened, even if kept inside a container (which is not the same as a cabinet or cupboard).

'**Looking in**' also includes examining a location using technical equipment such as a robot, a rod or an infra red camera.

Recording confidential information

This involves recording confidential communications using technical equipment such as recording conversations and telecommunications in a closed network such as a company network. This category also includes bugging a personal computer to access messages before they are sent over the Internet or encoded and 'scanning' (using a radio receiver to intercept mobile telephony).

On the whole, recording confidential communications involves more risks than recording telecommunications. To record confidential information, technical equipment must be placed close to the suspects' environment. The regulation does not include communications that can be picked up without using technical aids, for example audible conversations in a bar or on the street. The regulation only concerns confidential communication: exchanges between persons or organisations that take place behind closed doors. Behind closed doors means that the parties involved have every right to believe that third parties cannot hear what they are discussing in normal circumstances. However, the regulation does include confidential communications in which the investigating officer takes part, for instance in cases of covert investigation.

Recording confidential communication in a private house is only permitted under strict conditions: if it is urgently required for the investigation, if the offence carries a term of imprisonment of eight years or more and the examining magistrate has given explicit authority.

Investigating telecommunications

This involves telephone taps and claiming data concerning telephone traffic. The power to claim data on telephone traffic remains unaltered although the power to tap telephone lines has been amended.

It is no longer the examining magistrate but the public prosecutor who, after receiving authority from the examining magistrate, issues a warrant to tap a telephone and ensures that the data acquired thereby is stored and destroyed. The condition that the suspect takes part in the telecommunication has been abolished; instead the offence in question must pose a serious breach to law and order.

Special powers of investigation in fighting organised crime

The powers outlined above may not only be used to resolve concrete offences that have been committed, but can also be applied to investigations into organised crime.

This means that investigative efforts need not be restricted to the investigation of concrete crimes that have already been committed because organised crime involves the constant planning and perpetration of crimes that have serious impact on society.

This so-called pro-active investigation, investigation into offences that have not yet been committed, can only be deployed when tackling organised crime. For less serious forms of crime, special powers of investigation can only be used to investigate offences that have already been committed.

Civilian Support and Investigation

The **Wet BOB** contains a regulation describing informants, civilian infiltrators and civilians involved in pseudo purchase/services.

The informant

An investigative officer can use a civilian to systematically acquire information on a certain person, once the public prosecutor has issued a warrant, for the duration of that warrant. This suspect must be minutely described in the warrant and must be an individual involved in the organised planning or perpetration of serious crimes.

The act only regulates informants who provide systematic information because this could violate the personal privacy of the individual about whom he obtains information. Someone who gives tips or an informant who provides general or incidental information is not regulated by the act.

Civilian infiltration

The **Wet BOB** determines that, if the public prosecutor finds that covert investigation by an investigative officer is impossible, he can deploy a civilian infiltrator. A written agreement must be drafted containing the reward and possible indemnification. Indemnification is only possible if the public prosecutor has given prior consent to criminal actions.

Civilians involved in pseudo purchase/services

The **Wet BOB** determines that, if the public prosecutor finds that pseudo purchase/services by an investigative officer

are impossible, he can deploy a civilian as pseudo buyer or pseudo service provider. As with infiltration, a written agreement must be set down.

Ban on laissez passer

The law prohibits harmful or dangerous substances or goods from entering the market. If an investigative officer is aware of the location of prohibited objects (like weapons or drugs) through using one of the special investigative powers, he is under obligation to seize these substances or goods. The public prosecutor can only decide not to seize these substances or goods if a serious investigative interest is at stake. This is governed by a stringent approval procedure: the board of procurators general must agree on a decision not to seize the objects. This decision must be presented in advance to the Minister of Justice. The same procedure also applies to allowing entry to individuals.

Exploratory investigation

The regulation of the exploratory investigation describes investigations into the influence of more serious types of crime in a certain social sector, preparatory to an investigation. Exploratory investigations are therefore not investigations and powers of investigation may not be applied. An exploratory investigation covers the gathering, combining and analysing of data from police and other records from which the investigative officer can obtain information, such as the registers of the Chamber of Commerce. Privacy legislation, specifically the Police Records Act and the Data Protection Act offer a context for processing personal details. This legislation determines the purpose for which information may be provided and stored.

Public Prosecutions Department Policy regulation

The board of procurators general has adopted the Powers of investigation Order (**Aanwijzing Opsporingsbevoegdheden**) (Netherlands Government Gazette, 4 February 2000, no. 25) for the implementation of the new legislation. For more information, please consult the website of the Public Prosecutions Department: www.openbaarministerie.nl.

More information?

If you would like more copies of this fact sheet or more information on this topic, please contact:

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