

Summary

Criminal investigation of terrorism in practice

'The Act on the extension of the powers of investigation and prosecution of terrorist crimes', four years in effect

On 1 February 2007, the 'Act on the extension of the scope for investigation and prosecution of terrorist crimes' (further referred to in this summary as The Criminal Investigation of Terrorist Crimes Act) came into effect. The aim of this Act was to make it possible to start criminal investigations into terrorist offences in an early/earlier stage and continuing those investigations for a longer time. For this purpose, the following arrangements have been introduced:

- A lighter criterion was introduced for the application of special investigative powers: these investigative powers can be applied in case of 'indications' of a terrorist offence.
- To increase the effectiveness of an explorative investigation, two provisions have been introduced which make it possible to demand for automated data files and identifying data such as names, addresses and administrative characteristics.
- In either temporarily or permanently designated areas, the possibilities to search people, vehicles and objects have been enlarged.
- The new Act has made it possible that an individual suspected of being involved in a terrorist crime, may be remanded in custody, even in casus where on top of the requirement of a suspicion, the additional requirement of a grave presumption of guilt has not yet been met.
- The moment at which the suspect of a terrorist offence is allowed access to all documents relating to the case can be postponed for a longer period of time, as the maximum pre-trial detention period can continue for an extra two years.

To keep an eye on the way in which this new Act is applied, the effect of the new legislation in actual practice has been monitored. This fourth monitoring report covers a one-year period, running from February 2010 to February 2011. This is the last report that pays attention to the experiences gained by the police and the Public Prosecution Service with the application of the Act. In addition, this report also focuses on the use of investigative powers in (temporary and permanent) security risk areas and on the experiences of the incumbent magistrature (examining judges) and the legal profession with the Act's extended powers. In the concluding chapter, we will look back on the way in which the Act on the extension of the powers of investigation and prosecution of terrorist crimes has been used during the past four years.

The use of the new Act

Chapter 2 of this report has shown that, during the fourth year that this Act has been operative, only limited experience has been acquired regarding its use. Between February 2010 and February 2011, 17 terrorism-related criminal investigations were started in total: 10 cases were carried out by the National Criminal Investigation Bureau under the authority of the National Public Prosecutor's Office, and 7 under the authority of a District Public Prosecutor's Office in a police region.

In most of the investigations (14) started in this period, special powers of criminal investigation were used.

The new Act on the criminal investigation of terrorist crimes has been applied in 2 of the 17 criminal investigations; in both cases, special powers of investigation were used based on indications. This happened once during an investigation by the National Criminal Investigation Bureau and the National Public Prosecutor's Office and once during an investigation that took place in a police region.

When we look at the (semi)permanent security risk areas designated in the context of the Act, we see that powers included in the new Act have been utilized in one permanent security risk area, that is, at Schiphol Airport. During the research period under consideration, no new security risk areas were established, nor were any new temporary risk areas designated.

Furthermore, no use has been made during this research period of other extended powers the Act provides for: no explorative investigations were carried out and no use has been made of the possibility to postpone complete access to documents relating to a particular case. Neither has the power been used during this monitoring round to order a person to be taken into custody without the necessity of any serious complaints. This picture of how the Act has been used matches the picture that emerged from the three previous monitoring rounds.

Signs of terrorism in security risk areas: Investigative possibilities in practice

The Criminal Investigation of Terrorist Crimes Act provides an extension of the possibility to body-search persons in public places and to search vehicles and objects (Title Vb, art. 126zq - zs Code of Criminal Procedure). This pertains to powers that may be carried out in designated areas, so-called *safety risk areas*. In Chapter 3 of this report, we have discussed the way in which these powers have been used since the Act's introduction. We also examine in which ways and in which situations the application of these powers has been *considered* by officials working for the police, the judiciary and local government. What other legal powers have also been thought about in that situation to further investigate information about a threat specific to a particular area? What are the alternative action strategies when, after the receipt of information about a threat specific to an area, no use is made of the Criminal Investigation of Terrorist Crimes Act?

Our research shows that, in practice, the extended powers to bodily search people in the designated security risk areas are mainly considered with an eye to security. The primary goal of utilizing these powers is to prevent a terrorist attack. To a much lesser extent the use of these instruments is considered from an investigative perspective. According to interviewed key informants from the practice of investigation, the investigative powers could play the following specific role:

- For the further investigation of deviant behavior in a crowd, at busy locations or in risky areas (Schiphol Airport, train stations, during personal protection). This utilization involves the linking of 'indications of a terrorist offense' to observed deviant behavior.
- During investigations in situations in which there is (the threat of) a crisis, to maintain order and to track down possible suspects. This application involves the linking of 'indications of a terrorist offense' to a heightened level of alertness, possibly generated by a notification of the police. This situation may also occur during an event with an increased threat level.
- During the investigation of people about whom the police have been notified but who are not (yet) suspects. This pertains to situations in which other countries

have requested the Dutch authorities to interview people who will arrive at Schiphol Airport. This application involves the linking of 'indications of a terrorist offense' to a notification and a request from a foreign criminal investigation service. The possibility of the bodily search enables investigating officials to investigate the person in question more specifically without the need to start a criminal investigation process.

In practice, during the investigation of a possible area-specific threat, use was almost always made of other legislation already longer in existence. This especially involved article 2 of the 1993 Police Act (for cordoning off and/or evacuating an area and for addressing people), article 176 of the Municipal Act, the Municipal Emergency Decree (for establishing area-specific conditions, demands and prohibitions during events and other special, area-specific occasions), and the Act on the requirement to carry ID papers (for asking for ID papers and for searching bags and clothing). The interviews show that situations are conceivable in which the power to perform bodily searches may have added value. At the same time, interviewees thought that there scarcely is any conceivable situation in which it would be impossible to respond to a threat with an action. In this context, an important aspect is the fact that the police and judiciary do not take any risk when in doubt; they address people, investigate them in more detail and arrest them when there is reason for doubt. To them it is less important that, in doing so, it is not always clear on the grounds of which power it happens.

In addition, Chapter 3 has shown that, in practice, the executants' knowledge about the new legal power to carry out a bodily search is limited. The fact that the Act is seldom used also causes it 'to gather dust'. National police services such as the Railroad Police and the Royal and Diplomatic Security Service (DKDB) regret that no concrete instruction regarding its execution was written when the Act was introduced. According to executive officials, in practice, the required attuning with the local triangle has caused stagnation and has put a stop to the further elaboration of and spreading of knowledge about the legal powers involved. The result of this is that executants have insufficient knowledge at their disposal to use these powers properly.

In actual practice, the threat of terrorism is hard to distinguish from other threats specific to an area. It gives rise to the question whether people can deal with that distinction between different area-specific threats in practice when it comes to the application of powers.

Experiences of attorneys and examining judges

Some of the criminal investigations during which powers included in the Criminal Investigation of Terrorist Crimes Act have been used have resulted in the involvement of examining judges and attorneys. Their involvement was related to the use of means of coercion or investigative powers during those criminal investigations. Although the possibilities to investigate people and take them into custody have been extended by the Act, it has turned out that these possibilities are only sparsely used in practice. This is the view of attorneys and examining judges as well. The attorneys express their criticism about the range of possibilities provided by the legislation. For the examining judges, the limited use made of the Act seems to take the edge off it somewhat. The perspective of the interviewed attorneys and examining judges does not differ substantially when it comes to the acknowledgement of the existence of situations in which it is necessary to be able to respond with haste

to a threatening situation. This corresponds with the opinions of the police and the Public Prosecution Service regarding this subject.

Overview of the Act four years in effect (2007-2011)

In the concluding chapter of the report, we have presented an overview of the use of the new Act during the four years it has been in effect. In four years' time – between 1 February 2007 and 1 February 2011 – a total number of 106 terrorism-related criminal investigations have been conducted. This involved both extensive, lengthy cases and brief 'mini-investigations'. Among these 106 criminal investigations carried out in four years' time were 18 investigations in which use was made of the new investigative powers. During the first year use was made relatively often of the new legal possibilities. Subsequently, special investigative powers were applied on the basis of indications in five investigations. In addition, during that year, the power to take a suspect into custody without any serious complaints has been used three times. During the years after that, the possibility to apply special powers based on indications has been made use of several times each year. Furthermore, the possibility to take suspects into custody without any serious complaints has been made use of an additional two times. Since the summer of 2008, use has also been made in one permanent security risk area of the powers to search persons, objects and vehicles, in the environs of Schiphol Airport. To conclude, during the four years in which the Act has been in effect, no use has been made of the other extended powers provided by the Act: no explorative investigations have been conducted, and no use has ever been made of a postponement of access to all documents relating to a case. In the course of the four years in which we carried out this study, we have never heard interviewees state anything about considerations regarding the use of these last-mentioned powers, either.

Of all the extensions provided by the Criminal Investigation of Terrorist Crimes Act, the possibility to deploy special investigative powers on the basis of Title Vb has been made use of most often. The legislator's assumption regarding this extension was that the police and the judiciary would be able to use special investigative powers at an earlier stage, which would increase their ability to gather evidence with which to prosecute persons involved in the preparation of a terrorist crime. It would become possible to interpret information that was already available more adequately at an earlier stage, by means of an investigation, which would make it possible to exclude risks and to detect criminal behaviours. Until now, a tactical investigation has been started a few times each year, based on the criterion of indications. We cannot say whether or not these investigations would have been conducted in the past on the basis of suspicion. The interviewees do argue, however, that it is comfortable to be able to fall back on the criterion of indications when there is doubt about a suspicion, which makes it possible to conduct a thorough investigation into the situation all the same. Most of the indication-based investigations carried out during the past four years were sooner or later put to a stop because of a lack of evidence; no confirmation could be found of the initial information or the edge was taken off existing indications (for instance about the preparation of an attack or the possession of explosives). Some indication-based investigations have been changed after a short time into a suspicion-based investigation. In these criminal investigations the initial information was actually confirmed; based on Title Vb, a sufficient amount of information was gathered to come to a suspicion (for example about involvement in a threat with a terrorist purpose, or about involvement in the funding of terrorist activities). In

those cases, the criminal investigation and the use of special investigative powers have been continued on the basis of the criterion of suspicion. The other way round, a few suspicion-based investigations have also been changed into indication-based investigations after a short time, when it turned out that there no longer was any reason for a suspicion but there still were indications that justified further investigation.

Furthermore, the monitor shows that a number of indication-based investigations were part of regular criminal investigations, started on the basis of a suspicion. In such cases, the indication-based investigation is carried out parallel to the regular, suspicion-based investigation. This is usually the case when the investigation team wants to investigate a group of people around a suspect, without the whole group being under suspicion. In those cases the Act provides a solution, enabling the team with the aid of the extension to investigate which connections actually exist between the people involved. In the practice of criminal investigation, the use of special investigative powers on the basis of Title Vb therefore particularly yields added value in combination with Title IV: the criminal investigations are conducted simultaneously or take place in succession. Several officials representing the police and the judiciary have mentioned the possibility of shifting between different criteria as an important added value of the new Act. Powers can be used in a proportional way, while the new Act provides relief in different stages of an investigation, or so the argument goes. A number of investigating officials argue that to include an additional phase in an investigation also serves the protection of the people who are the subject of a criminal investigation. When the initial information is not corroborated or is even negated, the people involved do not appear in the judicial registers as suspects of a terrorist offence. This prevents any damage such a registration may inflict on people from taking place.

The definition of terrorism and the effects on registration and the application of the Act

When we look, in conclusion, at the total number of terrorism-related criminal investigations conducted in the past four years (see table 2), what attracts attention is that the number of investigations in this last monitoring round is considerably lower than it was in the previous years. This may be pure chance and does not necessarily indicate a trend-like development. The lower number of criminal investigations carried out during the last year may also be related to a registration effect. This may be the case in particular with regard to a number of regional investigations.

In the region, the number of terrorism-related investigations in this monitoring round is lower than it was previously; in this round, we counted 7 regional investigations, against 9 (first round), 14 (second round) and 21 (third round), respectively, in previous monitoring rounds. In the previous two monitoring rounds, the (very) short investigations into threats and bomb alerts were part of the total number of criminal investigations in the region. On further consideration, these brief investigations always turned out to be false alarm; in the course of the investigation, the bomb alert or threat could be connected to mischief or psychological problems, proving it to be a threat that need not be taken seriously. Yet, these investigations were initially started on the basis of a suspicion of a terrorist threat and were thus included in our overview in figures. During the last monitoring round, interviewees mentioned such small investigations scarcely or not at all. It is conceivable that criminal investigators now no longer consider such small cases – pertaining to threats and bomb alerts – to be terrorism-related, the reason why they no longer

appear in our overview, either. After all, the starting point of our overview consists of the definitions used by the police and the Public Prosecution Service themselves. This is a possible explanation for the much lower number of criminal investigations in the region, and would fit in with a tendency to classify incidents and threats less rapidly as 'terrorism'.

The general questions related to this are which definition is used in the investigative practice for the concept of 'terrorist crime', and which phenomena are thus considered to be 'terrorist' during investigations. As this report and previous reports have shown, that definition is not univocal and differs between people, services and regions. In one region, for instance, the threatening of a Public Prosecutor was seen as a threat with a terrorist purpose, while in another region, this offence was not classified as 'terrorism'. The different monitoring rounds have also revealed that not all terrorism-related threats can be linked to a religious, political or ideological motive. This is not required by the Act, either. The threats and notifications that could actually be linked to an ideology or religion did not focus exclusively on Islamic terrorism. In the past years, for instance, terrorism-related investigations have been carried out into animal rights extremism, separatist movements and a far-right organization.

It is likely that the definition of a 'terrorist crime' changes over time as well, for instance under the influence of social developments, political agendas and current events. While interpreting the figures on terrorism and terrorism-related investigations, this needs to be taken into account.

Which definition of terrorism is used not only has an effect on the number of terrorism cases registered, but also on the application of the Act. Cases that were considered to be possibly terrorism-related at the start of an investigation by the police and the judiciary are, in principle, suited for the new Act to be applied. In the investigative practice, executives especially experience difficulty interpreting the concept of 'terrorism' when threats are area-specific. In practice, it is hard to tell a terrorism threat from other area-specific threats; on site - in a crisis situation or in a busy crowd - police or judicial officials are often unable to immediately assess whether or not a threat is terrorist in nature. The question then arises whether the powers to bodily search people, provided by the The Criminal Investigation of Terrorist Crimes Act, should be used in such situations. The definition we use of a terrorist crime thus has immediate consequences for the possibilities to apply the new Act.