

# Summary

## Undercover policing

Regulation, implementation and results of undercover operations

### **The study: background, research questions and data collection**

#### *Background*

During an undercover operation, an investigating officer will establish contact, without identifying himself as an investigating officer, with one or more persons (subjects) for the purpose of collecting information or evidence on/against them or other persons. The investigating officer, an undercover agent, will operate on the basis of a certain cover and plays a role, for example that of 'fellow criminal'.

The Dutch Code of Criminal Procedure provides for three undercover powers: the systematic gathering of information (SI); pseudo purchases and provision of services (PK/PDV); and infiltration (IF). The implementation of undercover operations is usually performed by specialised infiltration teams of the police force. It is however possible, in principle, that investigating officers other than members of the infiltration teams implement an undercover operation. Civilians can also be deployed in undercover operations.

The elements of concealment and deception that characterise undercover operations as investigative instruments entail both specific investigative opportunities as well as potential risks. It is partly for this reason that it is important to have insight into the implementation and the results of this type of investigative instrument. The Scientific Research and Documentation Centre (WODC) offers that insight with this study.

#### *Research questions*

The study was performed on the basis of the following central research question:

*What undercover powers are exercised by police infiltration teams and what contribution is made to the investigation by the exercise of the various powers?*

This central research question has been elaborated into various sub-questions, which can be summarised as follows: how often, why and when are undercover operations started; what contribution is made by the deployment of undercover operations to investigating and trying crimes; and which factors are of influence on the implementation and results of undercover operations? Our study furthermore compared the regulation of undercover operations in the Netherlands, Belgium, Germany, England and Wales and the United States (US).

*Collection of data*

Two categories of cases were studied within the context of this study. Firstly, information was collected on all 37 Dutch investigations in 2004 during which contact was established with an infiltration team and in which it was decided to implement an undercover operation. That year, all cases concerned SI and/or PK/PDV, none of them concerned IF. These 37 cases were examined on the basis of telephone interviews with the designated Public Prosecutor (zaaksOvJ) or a police officer and the data of the infiltration teams. Concerning IF we have information over a longer period of time. The second category of cases we studied namely consists of 23 Dutch investigations in respect of which approval was requested in the period 2000-2005 from the Central Assessment Committee (CTC)<sup>301</sup> for the deployment of IF. In those years, a total of 24 Dutch cases were presented to the CTC for assessment of the intended deployment of IF. However, as in one case the IF operation was still ongoing at the time of this study, that specific case was not included. The 23 cases were studied on the basis of files held by the CTC, the actual investigation files at the public prosecutor's offices and also, with respect to part of the cases, on the basis of face-to-face interviews with the designated Public Prosecutor and/or a police officer.

Face-to-face interviews were conducted with a total of 35 employees of the judicial or police authorities. Some of the officials were interviewed by reason of their involvement in one (or more) of the investigations in respect of which approval was requested for the deployment of IF. The interview of the remaining officials was based on a more general involvement with the subject.

Furthermore, data on their activities were requested from the infiltration teams. Dutch legislation, regulations and case law and Dutch and English scientific and professional literature were also studied. In order to gain insight into the regulation of undercover operations in Belgium, Germany, England and Wales and the US, legislation, regulations, case law and literature were studied and information was obtained from Dutch and foreign key figures.

**The regulation of undercover operations in a comparative perspective**

Formal legislation for the use of special investigative powers, including undercover operations, has since been introduced in the Netherlands, Belgium, Germany and England and Wales. The US regulates the use of undercover operations by means of case law. If we look at the four countries in which undercover operations have been embedded in a formal

301 Note translator: the committee is part of the Public Prosecution Service and is charged with the internal monitoring of some (invasive) special investigative powers.

Act, we observe that the codification has been elaborated most extensively in the Netherlands.

As regards proportionality and subsidiarity, there is mainly a difference between the four European countries studied on the one hand and the US on the other hand. In the US an undercover operation is not seen as a great violation of a person's rights. The use of undercover operations in the US is therefore not limited to a certain selection of crimes or investigations. The regulations and/or implementation practice with respect to the deployment of (certain) undercover operations in the Netherlands, Belgium, Germany, England and Wales on the other hand, prescribe that the crimes should be of a certain seriousness (proportionality) and that other investigative instruments are inadequate (subsidiarity).

A prohibition on instigation, i.e. a prohibition on unacceptable incitement, applies in the Netherlands, Belgium, Germany, England and Wales and the US with respect to the implementation of undercover operations. Each country, however, has its own elaboration of the prohibition. In the US, it seems that undercover agents are allowed to assume a more proactive and initiatory role than is the case in the Netherlands; in the US the police are therefore allowed to do more than is permitted, in any case, in the Netherlands, without such conduct being regarded as instigation.

A prohibition (although not absolute) applies in Dutch implementation practice on the deployment of criminal civilians in IF. The use of a criminal civilian in SI or PK/PDV is in principle possible, but it does not seem to occur often in practice. Criminal civilians are regularly, or even often, used in undercover operations in Germany, England and Wales and the US but not in Belgium.

The openness observed with respect to the undercover operations in the criminal proceedings is greatest in the US. In Germany, the transparency is much smaller than in the US and the Netherlands.

### **The deployment of undercover operations**

In 2004, infiltration teams were contacted and implementation of an undercover operation was considered with respect to 89 Dutch cases. It was decided to actually implement an undercover operation in 37 of those cases. As stated, this concerned the intended implementation of SI and/or PK/PDV in all of those 37 cases. In the end, the undercover operation was actually started in 34 of these 37 cases. With respect to IF we have information over a longer period of time. Approval to deploy IF was requested in 24 Dutch investigations in the period of 2000-2005. We studied 23 of those 24 cases. Approval to deploy IF was obtained in 16 cases and an IF operation was actually started in 14 of those cases. Therefore, undercover operations in general and IF in particular are not used very often.

Undercover operations are mainly implemented by members of infiltration teams; implementation by investigating officers other than members of infiltration teams and civilians, which is allowed (subject to certain conditions), does not seem to occur often.

### **Results of undercover operations and their contribution to the investigation and trial**

In 31 out of the 34 cases in which in 2004 (year of registration with the infiltration team) SI and/or PK/PDV was deployed, contact was successfully made with the subject (not necessarily the main suspect). In the end, the SI and/or PK/PDV made a contribution to the investigation and/or trial in 12 cases. The undercover operation generated evidence in 7 of those cases. In 6 of the 7 cases, the evidence obtained via the undercover operation played a significant role in the conviction of a suspect or suspects. In the 7<sup>th</sup> case, the evidence was not of decisive importance, but the SI deployed did provide the insight that another part of the suspicion that existed against the suspect was incorrect. In 4 cases, the undercover operation did not result in evidence, but it was concluded on the basis of the information collected during the operation that the suspicion against the suspect was entirely or partly incorrect or less serious than assumed (exclusion). And finally in 1 case, the undercover operation did not produce evidence or information on the basis of which persons can be excluded from further investigation, but 'only' resulted in steering information, that is information that for example leads to a better picture of the suspects or that helps to deploy other investigative instruments.

In 13 of the 14 studied Dutch investigations in which an IF operation was started in the period of 2000-2005, the undercover agent successfully established contact with the subject. The implemented IF operation made a contribution to the investigation and/or trial in 10 cases. The operation produced evidence on the basis of which suspects were convicted 6 times; this evidence played a significant role in 5 cases and a less important role in 1 case in the conviction of the defendant. 4 IF operations did not produce evidence, but did result in steering information and/or residual information (information that is used in another criminal investigation). It is very difficult or impossible to make a comparison of the results of the undercover operations with the results of other investigative instruments. In order to make such a comparison, the investigations in which an undercover operation was implemented would have to be compared to investigations in which no undercover operation was used, but which are more or less similar in other respects. Moreover, it would have to be possible to isolate the influence of each deployed investigative instrument

used in the investigations of both categories, so that the exact, separate contribution of, for example, an implemented observation, telephone tap or undercover operation, would become clear. These conditions have not been satisfied. It is therefore impossible to make far-reaching pronouncements on the 'effects' of undercover operations or to answer the question as to whether the identified results of undercover operations are 'good' or 'bad'.

We are able however, with respect to some cases, to indicate, with some reservations, to what extent the achieved targets in the studied cases can be attributed to the deployed undercover operations. With respect to cases in which only SI and/or PK/PDV were deployed and the operation led to evidence or (partial) exclusion of the suspect, we can, for the reasons mentioned in the report, conclude that this outcome could not, or less easily, have been achieved with other resources. With respect to cases in which IF produced evidence it is, because of the considerable complexity of the cases in which IF was deployed, more difficult to indicate whether the outcome could also have been achieved with other resources.

The WODC has previously performed a study into undercover operations and a report on this study was published in 1999. An unambiguous comparison of the results of undercover operations, such as those presented by both studies, is not really possible. One of the reasons is that the types of undercover operations, which were deployed in the respective periods under study, differ. It is clear, however, that in 2004, when compared with 1996 (the year under study at that time), undercover operations were implemented in more investigations and that, in 2004, SI was deployed more often and such in particular to establish the complicity of a suspect in a serious violent, terrorist or sexual crime.

### **Risks of working under a cover**

Various risks related to undercover operations such as, inter alia, integrity risks, risks to physical safety and risks to the psychological wellbeing of undercover agents are described in the legislative history and the literature. In the period under study no Dutch cases in which integrity or physical risks actually manifested themselves, were identified.

Although the respondents did indicate that the work of undercover agents could have certain personal or psychological consequences, there is no evidence that this actually happens on a large scale. We make these pronouncements with some reservations, as undercover agents themselves are not directly involved in the study and we did not perform an exhaustive study of the dangers that occurred.

At this time, undercover operations are not implemented often, which makes it unlikely to find a high (absolute) frequency of the potential

problems discussed. In addition, it is likely that the specific conditions subject to which undercover operations are implemented in the Netherlands play a role. We will revert to this later.

### **Factors that influence the implementation and results of undercover operations**

We distinguish four factors that are of influence on the implementation and results of undercover operations: the legal framework; the criminal context; characteristics of the criminal investigation; and the environment.

#### *Legal framework*

Generally speaking, there are no major problems with respect to the practical application of the provisions of the legal framework. It does appear that the notification obligation – the obligation to inform a subject that a special investigative power was deployed against him – is not always implemented consistently. The Public Prosecution Service has, for several years now, been steering more strictly towards implementation of the notification obligation. For that matter, the formulation of the notification obligation, as referred to in Article 126ff of the Dutch Code of Criminal Procedure, explicitly leaves room to postpone the notification if this is in the interest of the investigation.

A number of respondents referred to the limitations inherent in the ‘ban’ on the use criminal civilian infiltrators.<sup>302</sup> The deployment of criminal civilian infiltrators is supposed to, in some cases, offer the possibility to establish contact (more quickly) with suspects who are harder to approach. The study has, however, determined that the leeway available for the use of (criminal) civilians is used rarely. This raises the question of why the possibilities that are currently available for the deployment of civilians are used so sparingly. The report provides several possible solution directions.

The transparency practised by the police and the Public Prosecution Service turns out to be of great importance to the outcome of the assessment by the courts as to whether an undercover operation was sound. If that transparency is present, the defences put forward by the counsel for the defence concerning the undercover operation implemented will usually be rejected, as is shown by the case law

<sup>302</sup> 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.

studied. And that transparency is present, according to the courts; the overwhelming majority of defences, in any case in the decisions studied, are rejected because the courts in question did not find any illegalities in the reports. In the smaller number of cases in which a defence is accepted, this is often due to defective reporting of and insufficient insight into the operation.

### *The criminal context*

Undercover operations are deployed for the purpose of the investigation of suspects of crimes. Certain characteristics of those suspects and of the crimes they commit (as is assumed) are of influence on the implementation and practicality of the investigative instruments and the results that can be achieved with those instruments.

#### *Characteristics of the suspects*

A number of characteristics may make it difficult to implement an undercover operation with respect to certain subjects. For example, an undercover agent will, in principle, have fewer possibilities for contact with respect to a subject who leads an *isolated, withdrawn existence* than as regards a subject who leads an active social life.

Another aspect that is of importance in the approachability of a subject is his *investigation awareness*. Investigations in the area of organised and/or large-scale crime, in particular, are often aimed at professional suspects. Such suspects have, to a greater or lesser extent, experience with the investigative instruments deployed against them and are, in any case, aware of the possibility that they may become the subject of an investigation. We therefore see in various cases that suspects display guarded, concealing behaviour. Suspects, for example, do not talk on the telephone, or do so very rarely or in code, often change telephones, drive in a manner that makes it hard to follow them, often change vehicles or are very suspicious.

Undercover operations, and IF in particular, are often deployed because of the anticipated or demonstrated inadequacy of other investigative resources. The inadequacy of the other resources to achieve the object of the investigation is for undercover operations, and again particularly for IF, also often a statutory condition for deployment of the relevant instrument (subsidiarity). The anticipated or demonstrated failure of other investigative resources is mainly related to the guarded behaviour of the suspects. Such behaviour is therefore often the reason an undercover operation is implemented, but it can naturally also make the implementation of that process more difficult. The reason for deployment of the instrument can therefore also be reason why the undercover operation is not (entirely) successful. There are several examples, among

the cases that were studied, in which the aforementioned guarded behaviour was the (or one) reason that the operation failed (in part). The general awareness that you may become the subject of police attention and the ability to act on that awareness does not, for that matter, apply to all suspects. It happens on rare occasions that a suspect, assessed as professional, unexpectedly quickly discloses matters to an undercover agent, presumably to enhance his reputation or in pursuit of money or because he is naive.

The approachability of a subject can also be determined by the '*demographic alignment*' between the subject and the undercover agent. It may be the case, with respect to certain groups of persons of foreign heritage, that there is no 'suitable' undercover agent to successfully approach the group. Groups that consist of very young persons can also be very difficult to 'enter', because there are very few or no very young undercover agents.

*Violent* persons and groups can, furthermore, form a problem for the practicality of an undercover operation, because the violent character of a subject can pose a direct risk to the undercover agent and due to the risk an undercover agent, in order to maintain his cover, would have to 'participate' and therefore become involved in violent crimes. Persons who are *mentally unstable and/or have serious psychological disorders* can also constitute a difficult category of subjects. They can be hard to approach due to their unpredictability or they can pose a safety risk.

#### *Unpredictability as 'essential characteristic' of undercover operations*

The most important shared characteristic of undercover operations presented by this study is the unpredictability of the course of such operations.

Undercover operations consist, in contrast to many other investigative instruments, of interactions between persons – undercover agents on the one hand and subjects and any third parties on the other.

Human behaviour, and therefore the course of undercover operations, is harder to control and predict than the operation of a purely technical instrument, such as a telephone tap. This does not mean that the effective deployment of a technical instrument is 'easy'. It is the case, however, that the factors that influence the practical operation of, for example, a telephone tap, are fewer in number and less complex than the factors that may be of importance in the implementation practice of an undercover operation. In addition, the unpredictability that characterises human interaction in general seems in some respects even greater in criminal environments: the course of contacts between the undercover agents and the subjects is often different than anticipated and intended PKs, in the majority of the cases studied, do not progress according to the plan or agreements made in advance. Either a PK does not go ahead at all, for example because the suspect cannot or will not deliver, the goods have

already been sold or the suspect could deliver, but only via a person who does not belong to the circle of suspects at which the investigation is aimed. Or the PK does go ahead, but the PK, for example, does not commence until after a previously failed effort or the size of the PK is smaller than originally anticipated.

This unpredictability of undercover operations and unreliability of suspects, do not necessarily mean that undercover operations fail completely. It is the case, however, that unexpected developments in general have a negative influence on the course and/or outcome of the process: operations take longer as a result or do not achieve the intended result. Due to the high frequency, at least in the cases studied, with which expectations are not met, it is in any case not easy to do business with criminals in an efficient manner.

#### *Characteristics of the crime*

Crimes differ from each other in the extent to which they offer *leads* or starting points to implement an undercover operation. For example, the entire criminal business process of drugs trafficking consists of several links, such as the trade in raw and ancillary materials, the production of the drugs, the import and export of the drugs and the distributive trade. All those links potentially offer the police a way in with an undercover operation. Moreover, the interested parties to a crime such as drugs trafficking have a profit motive. This means they will, in principle, be open to entering into new business relationships. With respect to crimes such as terrorism and homicide, however, the 'business process' consists of fewer chains and the profit motive usually does not exist, which is of influence on the possibilities for police interventions.

The *seriousness or nature of a crime* can, furthermore, be of influence on the degree to which an undercover operation is deemed to be *permitted*. With respect to child pornography, for example, the implementation of an undercover operation would be less logical for some interested parties. (perceived) Legal objections and considerations concerning the safety of the victims – a 'pseudo buy' could, for example, induce suspects to make new victims – can play a role. Moral and social acceptability can also apply as an objection; 'the government should not be involved' in such crimes, not even through an undercover agent. The seriousness of a crime can, on the other hand, also be precisely the reason why fairly exceptional resources are deployed. For example, the intention of an IF process in an investigation into terrorism was to ultimately have weapons supplied *by* the undercover agent *to* the main suspect, who was to be directly detained during the delivery. The main suspect, however, failed to show up at the planned meeting.

### *The criminal investigation*

#### *Steering of criminal investigations*

A more business-like approach has become the central focus of the steering of the police for some time now. Terms such as the relationship between costs and benefits, efficiency and lead-times have become more important. There is a certain *rationalisation* of the criminal investigation. This means that the implementation of the judicial duties of the police, whose central objective is the investigation and therefore combating of crimes, is subjected to conditions concerning the deployment of resources, accountability and results. Measurable targets and results and an overseeable period of time within which these can be achieved are important in this steering of the criminal investigation. A certain aim to reduce uncertainties is inherent in this process, which could conflict with the nature of undercover operations and of certain investigations in general. Very strict steering (on *output*) can have an obstructive effect on mainly long-term, 'difficult' and/or hard to predict undercover operations and investigations.

#### *Interaction between a undercover operation and other aspects of a criminal investigation*

Normally other investigative instruments are deployed in addition to IF operations and longer SI and/or PK/PDV operations. The interaction between the undercover operation and the investigation team as a whole, if all goes well, is accompanied by *mutual input of information*. A flow of information from the investigation team to the infiltration team is important at the start of a process to be able to form a picture of the person of the subject, his environment and activities. That flow of information is of importance to be able to respond properly to the subjects and events during the implementation of the process. The extent to which relevant information is passed on depends, in turn, on the extent to which the members of the investigation team are aware of the undercover operation. If, for example, an officer listening to a telephone tap is not aware of the undercover operation, the chance exists that information produced by the tap, which is relevant for the undercover operation, such as information on the personality of the subject or his activities, is not passed on because the listener is generally more focused on information that refers to criminal activities. Information derived from other elements of the criminal investigation is also important for the safety of the undercover agent. For example, the telephone tap may reveal information about how a subject thinks about an undercover agent or whether there are certain 'sensitive areas' (topics for conversation, certain behaviour) the undercover agent better stay clear of. If the deployment of investigative instruments, such as observation and the telephone tap are impossible or difficult, this can make the implementation of an undercover operation more difficult.

And, vice versa, the undercover operation also provides insights and information that can be used in for example the deployment of other investigative instruments; an undercover operation may identify which telephone numbers suspects use to communicate with one another.

The criminal investigation as a whole and the undercover operation that is part thereof each have their own *lead-time and agenda*. These are not always parallel. For example, it is sometimes necessary, when arresting a large number of suspects simultaneously, to set a date well in advance, as (many) dozens of police officers and employees of the Public Prosecution Service have to be deployed at the same time on such an 'action day'. When the action day has finally arrived, it may turn out that the undercover operation has not yet progressed to the intended stage; for example, a PK may not yet have taken place in contrast to what was anticipated and despite good contact between the undercover agent and subject. In a case in which the above took place, it was possible to try the suspects on the basis of the results of other investigative instruments deployed, but the undercover operation made a smaller contribution than was originally intended as a result of its premature termination.

#### *Learning capacity of the organisation*

There is, with respect to the period under study, no general view of the numbers, type and background and results of the undercover operations implemented. The knowledge of the implementation and the ability to learn from the implementation practice is therefore for the time being limited to individual experiences. Recording and analysing the aforementioned information could benefit the learning capacities.

#### *Selection, supervision and safety of undercover agents*

Potential undercover agents undergo a strict selection and, once they are active, they are strictly supervised during the operations and (when necessary) provided with security. Earlier we saw that the potential risks inherent in working under cover in the Dutch investigation practice, although certainly real, do not lead, as far as is known, to significant problems. The selection, supervision and safety of undercover agents probably have a preventative effect in this context.

#### *Moment of notification of a case to the infiltration team*

It is important, as undercover operations require a certain preparation and the course of undercover operations is often uncertain, that investigation teams contact the infiltration team in time. If the report is made in time, the infiltration team can contribute on the basis of the specific targets and circumstances of the investigation and it will be possible, if it is actually decided to implement an undercover operation, to start that process faster and possibly more effectively. In this connection it is some-

times argued that implementation of an undercover operation should be considered as early as the project preparation phase.

*Knowledge of, experience with and attitude towards undercover operations*  
With respect to the choices made by an investigation team to deploy investigative instruments, experience, knowledge and attitude towards certain alternatives play a role in addition to the team's assessment of the extent to which a choice can contribute to achieving the ultimate objective of the investigation.

Public Prosecutors and police officers who are in charge of a criminal investigation often do not have a great deal of experience with undercover operations simply because not many undercover operations are implemented in the Netherlands. This applies to undercover operations in general and in particular to IF. The attitude towards these investigative instruments can also act as a brake on their use. It concerns, on the one hand, a possibly 'overly strict' interpretation of the statutory framework and a too drastic image of undercover operations as investigation resource. On the other hand, there may be certain reservations concerning undercover operations, because the Public Prosecutor may have the idea that he, when choosing that instrument, will surrender partial control of the investigation.

Generally limited experience and perhaps also a certain reticence that exists among Public Prosecutors and police officers with respect to undercover operations, may lead to: the possibilities that exist within the investigation to implement an undercover operation not always being seen or used; contact is made (too) late with the infiltration team; and/or the use of this resource remains limited to a segment of crime that is too small. Further increasing familiarity with undercover operations can benefit the use of the possibilities of this instrument.

### *The environment*

The final factor is the political and social environment. The environment can be of influence via the anticipation of investigation teams on political positions or expected political decisions. An already somewhat older example of the above is provided in a previous study conducted by the WODC into undercover operations (1999).

But events in a broader, social environment can also directly or indirectly influence undercover operations. For example, a person suspected of arms dealing could no longer 'do business' after 11 September 2001 as a result of the (allegedly) tightened checks.

### **Reorganisation of the infiltration teams: the new Working Under Cover unit**

A reorganisation of the infiltration teams was recently implemented at the time of preparation of this document. The various infiltration teams – one national and several regional teams – have been joined into one centrally-controlled unit: the *Working Under Cover* (WOD) unit. Whether, and if so, which effects the reorganisation will have on the implementation and in particular on the results of undercover operations cannot be determined at this time.

### **Finally: undercover operations as investigative instrument**

Gary Marx, an American sociologist who wrote a standard work in the field of undercover operations, referred, when classifying investigative instruments, to concealment and deception as identifying characteristics of undercover operations. Our own study into the actual implementation of undercover operations furthermore showed that unpredictability is an important element of such operations.

The elements of concealment and deception entail possibilities for criminal investigation, but also potential risks. The aforementioned characteristics have also played an important role in the *crisis in the investigation* identified by the *Parliamentary Committee of Inquiry into Investigation Methods* (PEO). The PEO presented recommendations to deal with the crisis. *Transparency* was a key term of those recommendations. In the end, the PEO recommendations would play an important role in the formation of new legislation, the Act on Special Investigative Police Powers (BOB Act).

Court decisions in criminal cases in which undercover operations played a role show that there is transparency, at least in the opinion of the judges. Judges have furthermore indicated, in the context of an evaluation of the BOB Act, that they have more insight into the application of special investigative powers since the introduction of said Act. In this sense the basic principle of transparency has been satisfied. This transparency ensures that undercover operations, which are perhaps hard to *control* due to the unpredictability and concealment, are *verifiable*. We hope, by offering insight into implementation and results of undercover operations, that this study has made a contribution, at a more general level as well, to the transparency surrounding the deployment of this instrument.