

SUMMARY

De Wet BOB: Titels IVa en V in de praktijk

Besluitvorming over bijzondere opsporingsbevoegdheden in de aanpak van georganiseerde criminaliteit

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Introduction

The Scientific Research and Documentation Centre (Wetenschappelijk Onderzoek- en Documentatiecentrum: WODC) of the Dutch Ministry of Justice has commissioned the Faculty of Law (the Institute for Criminology and the section of Criminal Law) of the Radboud University Nijmegen to study the investigative powers used in criminal investigations aimed at organised crime. Special investigative police powers have been regulated in the introduction of the Act on Special Investigative Powers (Wet bijzondere opsporingsbevoegdheden, hereafter: the Act), which is incorporated into the Code of Criminal Procedure (Wetboek van Strafvordering). At the same time, possibilities for criminal investigations into organised crime are broadened. The Act provides a legal basis to investigate crimes that have been or are likely to be committed by criminal groups. Before the Act was introduced criminal investigations were restricted to crimes which had already been committed. For both instances the use of investigative methods is regulated in different Titles: Title IVa and Title V. Title IVa is meant for criminal investigations into committed crimes, whereas Title V is meant for criminal investigations into organised criminal groups. This study concerns the actual use of investigative methods under Title IVa and Title V. The main focus of this study is on Title V. The reason for initiating this study was a lack of information with regard to what extent Title V is used in practice, in what instances this Title is used and the possibilities and impossibilities that exist on the use of Title V.

Structure of the research

The purpose of this study is to gain insight in the significance of Title V for criminal investigation in practice. The study focuses on the actual use of Title V (in relation to Title IVa) in both a quantitative and a qualitative manner and also on the decision making on the Title on which the exercise of special police powers is based (Title IVa/Title V).

The study is set up according to the case study method. The study has been carried out at the Office of the Public Prosecution Service in five districts: two districts in ‘the Randstad’¹ (Amsterdam, Rotterdam), one district in a border region (Maastricht), a small district (Arnhem) and the National Office of the Public Prosecution Service.

Different research methods have been used. First, for each office was analysed to what extent and in which cases special investigative methods under Title V were used. It was not possible to obtain this information through COMPAS (the business information system of the Public Prosecution Service). The application of special police powers based on Title V was studied by means of case file analysis and interviews. The case files provide information on the investigative powers used (based on Title IVa or Title V) and some information about the criminal investigation process. After the case file analysis, interviews were conducted to reconstruct the decision making and to gather information about the circumstances and considerations of this process. Interviewees were also more generally asked about their opinions on the new possibilities of Title V and the problems they expect or experienced. Finally the conclusions of this study are considered from a legal perspective.

Information has been collected from 47 criminal investigations. Case files have been analysed for 44 of these criminal investigations. The other three criminal investigations were only

¹ Note translator: urban agglomeration of Western-Holland.

discussed verbally. In addition to these three cases 27 cases (of which the case file was analysed earlier) were discussed with the public prosecutor and/or the police team leader. Furthermore interviews were conducted with public prosecutors with special duties regarding the serious crime division or his/her staff members, police officers from the Central Criminal Investigation Division and members of the National Criminal Investigation Division, an examining magistrate, a lawyer, the secretary of the Central Assessment Committee of the National Prosecutor's Office and a legal subject expert.

The extent to and situations in which Title V is used

This study shows that Title V has not often been used in practice. Over a period of three years (2004-2006) the five offices examined have carried out only twelve criminal investigations on this basis. Nine of these criminal investigations were found at the National Office. In the same period only three examples were found in other districts. In one district Title V has not been used at all in the three year period. The report describes these cases and the special investigative powers used.

Criminal investigations under Title V are characterized by a broad focus and they aim to give insight in an organised criminal group. The main focus of these investigations was to gather information what criminal groups were doing, who were involved and the way criminal activities were organised, rather than on solving individual, reported and already committed offences only. The intention is to disrupt and deter further criminal activity by organised criminal groups.

Most criminal investigations under Title IVa can be distinguished from those under Title V. These criminal investigations mostly have a limited objective. Right from the beginning the focus was limited to a specific offence and/or on specific suspects, even when a serious crime was committed by an organised criminal group. However some criminal investigations with investigative methods under Title IVa – although small in number – had a broad focus. In those cases the focus was (in the course of the investigation) also on the organisation behind the crimes committed and the crimes that were likely to be committed. These criminal investigations show a similar course as the investigations with investigative methods based on Title V.

Decision making on Title IVa and Title V

In most cases the application of special investigative powers was usually based on Title IVa, without being subject to explicit consideration. It was linked with the way a criminal investigation starts. From the outset it was clear which offence(s) and suspects were to be investigated. The reasonable suspicion which existed was translated into a well defined, narrow objective. In these cases the special investigative powers used were based on Title IVa. Only after the first time special investigative methods were used the 'choice' of the Title became apparent in the request.

In a preliminary stage of the criminal investigative process it was decided to use special investigative powers based on Title V (except for two of the criminal investigations studied). It is part of the decision making on the approach of the criminal investigation. Special investigative methods are based on this Title because methods under Title IVa were not (no longer) allowed or because criminal investigations carried out (with a small focus and special investigative powers based on Title IVa) earlier did not deliver the expected results. The

decision for using special investigative powers under Title V is a consequence of the reason and objective of the criminal investigation.

The police and the public prosecutor confer on the application of special investigative powers. For some investigative powers an examining magistrate or the Central Assessment Committee of the National Prosecutor's Office has to be consulted. In these cases the subject of consultation is the type of investigative powers rather than the Title on which it is based. It is the public prosecutor who takes decisions on the Title in particular cases.

The logic of decision making on Title IVa and Title V

In case a reasonable suspicion of a specific offence is lacking special investigative powers are based on Title V. The reason to start a criminal investigation is the presumption that offences are (likely to be) committed by an organised criminal group. It is not clear what crimes have been (or are likely to be) committed, how and by whom. Nevertheless there are some clues that certain persons or in some places criminal activities are being planned or committed.

However, in most criminal investigations, even when serious crimes probably are committed by organised criminal groups, special investigative powers are based on Title IVa. Interviewees give several arguments. As stated before, it depends on the way a criminal investigation starts (based on a reasonable suspicion) and as a result a well defined, narrow objective. This approach is also influenced by other factors, such as indicators of detectability, controllability, available resources and focus on result within the police force. Furthermore the avoidance of special investigative methods under Title V comes forward from the unfamiliarity with the provisions for and possibilities of this Title.

Significance of Title V for criminal investigation

Although the number of Title V-criminal investigations is limited, this Title has been useful according to the public prosecutors and policemen involved in these cases. If Title V was not available the studied criminal investigations on this basis couldn't be carried out at that point in time, except for one.

The way criminal investigations with methods under Title V are carried out apply to the development of a more proactive approach to criminal investigation. These criminal investigations do not respond ad hoc to individually reported and already committed offences, but involve a more problem oriented approach to organised crime.

Different opinions exist on how organised crime should be ideally investigated and how Title V should be used in theory. At the same time only a few interviewees could give examples of criminal investigations where Title V was or could have been considered. One of the explanations the interviewees gave was that in most cases a reasonable suspicion existed against particular individuals (part of an organised criminal group) at the start of a criminal investigation.

Scope and limitations of Title V from a legal perspective

From a legal perspective there is a clear distinction between criminal investigations under Title IVa and those under Title V. If the objective of the criminal investigation is solving one or more offences which have already taken place special investigative methods have to be based on Title IVa. Criminal investigations under Title V are not only restricted to solve

specific offences, but are focused on an organised criminal group and the criminal activities which are committed.

Especially those who are lacking experience with special investigative methods under Title V expect that more conditions have to be met in comparison to Title IVa. That is a reason to hold on to the conventional approach using special investigative methods based on Title IVa. Although this argumentation is not appropriate from a legal point of view (the investigation's objective has to be leading) the assumptions are incorrect.

The study shows that good experience has been gained with Title V. The application of special investigative powers on this basis could have considerable benefits with regard to the possibilities of Title IVa. If the conditions of an organised criminal group and multiple offences have been met the consideration should be made between a criminal investigation into an offence which has already taken place (Title IVa) or a criminal investigation into an organised criminal group (Title V). In case of organised crime the use of special investigative powers based on Title V is more appropriate from a legal and practical perspective to criminal investigation.

Krommendijk, M., J.B. Terpstra & P.H.P.H.M.C. van Kempen, *De Wet BOB: Titels IVa en V in de praktijk. Besluitvorming over bijzondere opsporingsbevoegdheden in de aanpak van georganiseerde criminaliteit*, Den Haag: Boom Juridische Uitgevers 2009.