

Rapport
Onderzoek toepassing artikel 13b Opiumwet

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Groningen, augustus 202



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Summary

Background

Under Article 13b of the Dutch Opium Act (the Dutch Anti-Drugs Act, also known as the Damocles Act), the mayor has the power to impose an administrative enforcement order on a building if drugs are sold, delivered, supplied, or present for one of these purposes, in or near the building. This includes both public and non-public premises, including owner-occupied housing. An administrative enforcement order often leads to the closure of the public or non-public premises (or entire plot), a coercive penalty payment or a warning. Since 2019, the mayor is also entitled to impose an administrative enforcement order if objects or substances are present of which the person concerned knew or should have known that they are used for the sale of drugs, amongst other things.

In the Buitengeweg-Van-Nispen motion, the Dutch House of Representatives requested the government to monitor the use of the power in Article 13b of the Opium Act and to inform the House every three years about the legitimacy, accuracy and consequences of the application of the power. The Dutch Senate also asked for clarification on the number of times mayors use their power in Article 13b of the Opium Act, and the number of times people (interested parties) seek legal protection against these orders through objection and appeal. Moreover, the Senate asked how mayors use their power and how judges review the use of this power. The aim of our study is to provide this information. The study covers the period from January 1, 2018 to June 1, 2020.

Research questions and approach

The main questions of this research are:

- 1) How is the power in Article 13b of the Opium Act applied by mayors?
- 2) What are the consequences of the application?
- 3) How often is legal action taken against the use of this power?
- 4) How do judges in (higher) appeal cases review the application of the power in Article 13b of the Opium Act?

These questions were answered using various research methods. We conducted surveys among all Dutch municipalities. The results show how often the power in Article 13b of the Opium Act is utilised, what types of premises are closed, how often objections and appeals are filed and how successful interested parties are in the objection and appeal cases. The first survey had a 70% response rate, and 135 municipalities provided exact numbers in a second survey. In addition, almost thirty interviews were held with, inter alia, municipal officials, police officials, lawyers and mayors. We also organized an expert meeting in which professionals shared their experiences and reflected on our research findings.

In order to gain insight into the decision-making process of mayors and (successful) defences put forward by interested parties in the notice of objection, a total of thirty case studies in ten municipalities were conducted. All case studies included an analysis of the police report, the preliminary decision of the mayor and the final decision of the mayor. Depending on the case, the

case studies also included an analysis of the opinion of the interested parties, a report from a medical specialist, care providers or social workers, the notice of objection, the decision on objection, the request for preliminary injunction, the decision of the preliminary injunction court, the notice of appeal, and the decision of the court in the appeal case.

We conducted a qualitative analysis of all case law from the Administrative Jurisdiction Division of the Council of State concerning Article 13b of the Opium Act in the period January 2018 to January 2021. A doctrinal analysis was carried out in which the judgments were carefully read and analysed to discover trends and to provide explanations for the judicial review in Article 13b Opium Act-cases. In addition, we conducted a quantitative analysis of preliminary injunction cases, appeal cases and higher appeal cases to provide numerical insight into Article 13b Opium Act-cases. A total of 507 unpublished and published judgments, issued in the period from 1 January 2018 to 1 June 2020, were read and coded. The published judgments have been collected on Rechtspraak.nl. To find unpublished case law, we used the electronic archive of the Dutch Council for the Judiciary.

Application of the law in practice

The results from the survey among all municipalities reveal that the power in Article 13b of the Opium Act has been applied by a large number of Dutch mayors between January 1, 2018 and June 1, 2020. These are mayors from small, medium-sized and large municipalities. Only in a few relatively small municipalities did the mayor choose to refrain from applying the power.

Our study shows that mayors mainly use the power in Article 13b of the Opium Act to give warnings and to close buildings. Approximately half of the respondents issued a warning during the research period. The vast majority of the mayors that indicated that they had issued warnings, issued an average of 1 to 10 warnings per year. Almost all the mayors which applied the power in Article 13b of the Opium Act during the research period stated that they had closed at least one building. On average, 1 to 10 premises per municipality per year were closed. The majority of the closures concern houses. Mayors make little use of the option to impose a coercive penalty payment. The survey shows that about 10% of the respondents impose 1 to 10 coercive penalty payments per year.

Mayors have to balance all the interests involved before making a decision: the purpose, means, and consequences of a sanction should all be balanced. While this study shows that mayors address the arguments that the interested party has put forward, mayors do not always offer a sufficient tailor-made decision. Our study reveals that mayors (in the municipalities subject to the study) rarely deviate from their preliminary decision. They often use standardised texts to motivate that the general interests, such as restoring public order, outweigh the individual interest. The arguments put forward by the interested party lead only in a few cases to a less severe sanction, such as a warning, a coercive penalty payment or a shorter closure period. For mayors, important factors are the health situation of the person concerned or the presence of children. However, the presence of children is not likely to result in a decision to refrain from closing the building, but care and social work agencies will be contacted to investigate how best to deal with the situation.

Consequences of application

An important consequence of applying the power to close a building is that residents temporarily lose their home. In the case of a (social) rental home, closure almost automatically means dissolution of the rental agreement and blacklisting by the housing authority, which results in the permanent loss of the home. Moreover, as a result of being blacklisted, the person concerned is also no longer eligible for social housing in the region. Hence, the consequences for tenants under landlord-tenant law are often more drastic than the administrative closure itself. The study shows that there is little insight into the whereabouts of (former) tenants after a residence has been closed down. Movements of tenants are not systematically monitored by the municipalities or the police. As far as is known, most people stay with friends or family after a closure, or they find temporary accommodation in a holiday home.

Local authorities and the police also have little insight into the consequences of a closure for local residents and the situation in the neighbourhood. Again, there is no systematic monitoring. Interviews show, however, that the effect of a closure depends very much on whether there was (drug-related) nuisance. The closure of a building that caused nuisance to the people living in the neighbourhood ensures that peace returns to the area. However, if there is no nuisance, the closure could lead to a decline in the sense of security in the neighbourhood.

The consequences for entrepreneurs, business owners and landlords mainly relate to financial damages, such as loss of rent. Some mayors made certain agreements with landlords, such as housing authorities, but there are significant regional differences in these agreements. In some municipalities, the mayor's policy is to not close a rental property if the landlord has terminated the rental lease with the drug-dealing tenant, while in other municipalities, no agreements with landlords exist at all.

The interviewed municipal officials stated that recidivism is rare after application of the power. This suggests that applying the power in Article 13b of the Opium Act is effective in ending the violation and preventing repetition. In addition, the closure is said to have a signalling and deterrent effect. Yet, interviewed professionals in the field have their doubts about the effect of closures on the broader approach to drug-related crime. They believe that particularly vulnerable people are affected by closures.

Legal protection

Interested parties regularly seek legal protection when confronted with the closure power in Article 13b of the Opium Act. In this study, we analysed all case law of the Administrative Jurisdiction Division of the Council of State to outline the normative legal framework. This framework consists of two main questions: a) is the mayor entitled to impose an administrative enforcement order on the basis of Article 13b of the Opium Act?; and b) is the mayor's power reasonably exercised? Under the second question, both the reasonableness of the local policy and the reasonableness of the measure (closure, coercive penalty payment or warning) are reviewed. The latter means that the measure should be necessary and proportionate. To review this, the court looks at the culpability of the person concerned, but also the consequences of the closure due to the medical situation, the housing situation and/or the consequences of the closure for the rental lease, and the presence of underage children, amongst others.

An administrative enforcement order can be contested by filing a notice of objection with the mayor that issued the order. The number of notices of objection varies greatly from one municipality to another. The survey shows that about half of the respondents received an average of 1 to 10 notices of objection per year. In the vast majority of cases, however, the procedure ends after the objection phase. Few interested parties submit a request for preliminary injunction or lodge an (higher) appeal. Slightly more than a quarter of the respondents report 1 to 10 requests for a preliminary injunction per year, and one in ten respondents report 1 to 10 appeals per year. In total, there were 80 higher appeal cases about the closure a building based on Article 13b of the Opium Act, in the period from January 1, 2018 to June 1, 2020.

There are a number of defences that interested parties put forward in objection, primarily injunction and (higher) appeal procedures. Interested parties often mention that the mayor should have imposed a warning first or other less severe measure. They also argue that the drugs found were intended for personal use instead of dealing, or that the closure has disproportionate consequences because of the lack of alternative housing.

Interested parties are not very successful in challenging administrative enforcement orders. The number of times that an appeal is upheld is very small. No more than 20% of the requests for preliminary injunction are granted. In the appeal procedure, no more than 20% of the appeals are declared well-founded. On higher appeal, the success rate of interested parties is below 10%. If an appeal is well-founded, it usually is because the mayor failed to sufficiently motivate the order.

Recommendations

The results of this study lead to a number of recommendations. We expect that following these recommendations is likely to remove a number of bottlenecks regarding the use of the power in Article 13b Opium Act. First, we recommend to create regional policies to avoid major differences between the policies of the municipalities in the same region. Second, we recommend that mayors provide more tailor-made decisions and create local (or regional) policies that offer more room for customization. Third, we recommend to include the coercive penalty payment in the local (or regional) policy. Fourth, we recommend that mayors use the normative legal framework of the Administrative Jurisdiction Division of the Council of State to draft and motivate their decisions. Fifth, we recommend to strengthen the cooperation between municipalities, housing associations and private landlords. Sixth, we recommend to monitor the consequences and effectiveness of the power in Article 13b of the Opium Act. Especially relocation movements and the effects of a closure should be systematically monitored by the municipality and the police. Finally, it is recommended to study how the quality of administrative police reports could be improved and how the entire process from noticing a drug violation to imposing an administrative enforcement order could be enhanced.