

Summary

Signs of terrorism and the investigation practice

The act on the extension of the scope for investigation and prosecution of terrorist crimes, two years in effect.

On 1 February 2007, the Dutch Act on the Extension of the Scope for Investigation and Prosecution of Terrorist Crimes (Wet ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven) entered into force. The purpose of this Act is to enable investigations into terrorist offences to take place at an early (or earlier) stage. In order to facilitate this, the following powers 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.
- In order to increase the effectiveness of the so-called 'exploratory investigations', two stipulations have been incorporated into the act which pertain to demanding the surrender of data bases and identifying data such as name, address and administrative characteristics.
- The powers of the authorities to search individuals and vehicles have been extended in designated areas. In areas – whether or not permanently – designated for that purpose, individuals and vehicles can be examined if there are indications that a terrorist offence may be at stake.
- 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 cases 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 crime will be allowed to inspect all court documents can be postponed for a longer period of time, as the maximum pre-trial detention period can continue for an extra two years.

This report forms part of a monitor, which charts the application of the Act and experiences in applying it in practice. This second report covers the one-year period running from February 2008 to February 2009. As was the case in the first monitor report (De Poot, et al, 2008), this report focuses primarily upon the way in which the Police and the Public Prosecution Service make use of the new act in practice. In addition, the report discusses the role of the Criminal Intelligence Unit (criminele inlichtingen eenheid or CIE) of the police, the characteristics of investigations into terrorist crimes and the manner in which the police acts if they decide not to start an investigation despite signs of a terrorist crime.

The Criminal Intelligence Unit

Chapter 2 addresses the question of whether or not initial intelligence is also passed on to the investigation department at an earlier stage, now that the police and the public prosecution service can earlier start an investigation based on indications of a terrorist offence. In other words, do the police become aware sooner of any clues on the basis of which they can conduct an investigation? Between February 2007 and February 2009, there were a few investigations based on intelligence from the Criminal Intelligence Unit. This could mean that the new statutory possibilities have an influence on the way in which the CIE gathers and provides information.

According to the CIE Unit Heads we interviewed, the CIE has been paying more and more attention to terrorism over the past few years. This was already a trend, however, before the introduction of the new Act, and it was fed primarily by the terrorist attacks in New York and Madrid. Even before the introduction of the new Act, it had already become policy to share – at an early stage – any intelligence which potentially relates to crimes of terrorism with the Regional Intelligence Service (*Regionale Inlichtingendienst* or *RID*), even where this intelligence is still unripe or not very substantial. The possibility of sharing intelligence with the RID has the effect that terrorism-related CIE intelligence is only rarely passed on to a team of criminal investigators. According to the interviewees, this is done at most a couple of times per year.

In this context, the new legislation has not had any essential implications for the work of the CIEs, nor for the transfer of terrorism-related CIE intelligence to investigative teams.

The use of the new Act

Chapter 3 of this report sets out that in the second year that the Act has been in force, only limited experience has been obtained in using the new Act.

Between February 2008 and February 2009, in total 29 terrorism-related investigations have been commenced, of which 15 investigations were conducted by the National Crime Squad (*dienst Nationale Recherche* or *dNR*) on the authority of the National Public Prosecutor's Office (*Landelijk Parket*), and 14 in the police regions on the authority of the district public prosecutor's office. In three of these 29 cases, the police have used the new legislation to commence an investigation on the basis of indications. This happened twice by the dNR and the National Public Prosecutor's Office, and once in an investigation that was conducted at regional level.

Moreover, in the period under review, there was one instance of remand in custody being demanded without a grave presumption of guilt, and the new investigative powers have been exercised in one of the designated security risk zones, namely in the area around Schiphol airport. In this period, no exploratory investigations have been conducted in the field of terrorism, no new security risk zones have been designated, and the possibility of deferring the opportunity of inspecting court documents has not been used.

Investigations into terrorist offences

Based on information from court files, Chapter 4 addresses in more detail the start, content and the result of more elaborate investigations into terrorist offences in which special investigative powers have also been exercised. For the analysis, fourteen investigations have been chosen from the first and second monitoring periods: seven investigations which started on the basis of indications and seven which started on the basis of a suspicion.

The analysis of the 14 criminal files does not show any striking differences between investigations based on indications and investigations based on a suspicion, where it concerns the nature and the source of the initial intelligence. Official reports of the General Intelligence and Security Service (AIVD) and official CIE reports have resulted in both investigations prompted by indications and investigations based on a suspicion. Official AIVD reports have usually been a reason for a suspicion in the files studied, and intelligence obtained from any CIE has usually been a reason for 'indications', but the considerations made do not appear to be directly related to the nature of the source. Nor are these considerations directly influenced by the nature of the intelligence.

The considerations and choices that were made seem to be connected to preferences and specific know-how of the judicial officer who is involved in the start of

the investigation. As for contents, the investigative strategies used in investigations initiated on the basis of indications do not essentially vary from strategies used in investigations based on a suspicion. The investigative actions taken in these cases are similar.

Looking at the result of the investigations studied, we can establish that none of the investigations has resulted in prosecution on account of suspicion of committing or plotting a terrorist offence. Sooner or later, all investigations have been discontinued due to lack of sufficient evidence against the subjects that played a key role. The investigations can be divided into two categories with respect to the reasons why an investigation that had been initiated was then discontinued. In a part of the investigations, not one corroboration was found for the intelligence that had prompted the investigation. In addition, we can see that a number of investigations have not revealed any facts or circumstances that suggest that terrorist attacks had actually been plotted, but the existing indications were not refuted either in those cases. In those cases, the indications that had previously prompted the investigation were still in existence. Due to the fact that indications of an imminent attack were not forthcoming in the course of the investigation, these initial indications proved to be no longer a reason to continue the investigation. In that case, the indications of possible terrorist activities do not disappear, but the investigation is nevertheless discontinued. One explanation could be the timeframe and considerable work force that is required to investigate individuals for a longer period of time where indications of possible terrorism-related activities justify that. Due to the timeframe of terrorism-related activities and the associated patience and sheer stamina needed to pursue a long-term investigation of conduct liable to punishment, a file is necessarily 'handed back' or transferred to the AIVD in due course, after which the AIVD can take over the investigation into those individuals. Whether or not, and in what manner, the AIVD continues an investigation, is for that matter not visible for the public prosecutors. The question is whether the criminal-proceedings route is the most appropriate route to investigate individuals for a long period of time, if there is neither an actual threat nor any indications that the plans are crystallising into a more definite form.

Regional action strategies

Chapter 5 reveals that, during the period that was monitored, there were also incidents and situations at regional level in respect of which the decision was taken *not* to commence criminal investigations. In those cases, the regional investigative officers concerned found the initial intelligence not substantial enough to institute an investigation on the basis of indications. In addition, the possibility of conducting an investigation based on 'indications' is often not considered by the police in those cases, as the existing regular policing powers – pursuant to Section 2 of the Dutch Police Act (*Politiewet*) – provide enough possibilities for gathering additional intelligence, according to the interviewees.

It has also become evident that the police almost always obtain advice from the RID when considering the conduct of an investigation based on possible terrorism-related signs. The police always transfer terrorism-related signs and reports to the RID if they decide *against* instituting further investigations on the basis of this intelligence. The idea is that the RID (or the AIVD) can use the intelligence to carry on the investigation, and the RID will give the 'green light' if it is necessary to institute a criminal investigation. The RID therefore serves as a back-up for regional investigation departments, should they decide (for the time being) against instituting an investigation.

This second monitoring period shows that among police officers and investigating officers different opinions exist on how to interpret the concept of terrorism-related 'indications'. Differences of opinion on the meaning of the concept 'indications' seem to be connected to officers' personal involvement in the new legislation and also with their previous experiences in such matters. Some interviewees are very motivated to further investigate any signs of possible terrorism-related activities. Some also feel the need to test the new legislation, and to explore 'the limits of the law' as one of the interviewees referred to it. However, these are exceptions. In general, little difference is made between 'indications' and a suspicion. When there are signs of a terrorist crime either an investigation is instituted on the assumption of a suspicion, or no investigation is instituted at all.