

Criminal & Regulatory Enforcement Newsletter

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Wiretap statistics

In September 2009, the Second Chamber of the Dutch Parliament (*Tweede Kamer*; the “**Second Chamber**”) referred questions to the Dutch Minister of Justice (the “**Minister**”) regarding the information he provided on wiretapping statistics for the second half of 2007. The questions inter alia concerned the costs, the necessity and benefits, the number and the effectiveness of wiretaps, as well as the use of wiretaps in the Netherlands compared to the use of wiretaps in other countries. In addition, the Second Chamber

asked the Minister whether wiretapped conversations between suspects and their lawyers are treated confidentially and thus are not used in criminal investigations.

In his answers, the Minister indicated, amongst other things, the following:

- In order to clarify the necessity and benefits of the use of wiretaps, all wiretaps should be examined afterwards. The Minister finds that this is unnecessary as it is clear from the findings of several different researchers that wiretapping is an effective means of investigation. Research shows that wiretaps play a very important role in criminal investigations.
- The Dutch Code of Criminal Procedure includes sufficient safeguards to prevent the unnecessary use of wiretaps. The Minister further elaborated on the procedure in the Dutch Code of Criminal Procedure.
- In spite of the fact that it is difficult to identify the effectiveness of wiretaps, as the results always depend on a combination of different investigative activities, research shows according to the Minister that wiretaps are effective. Wiretaps are especially effective in determining the course of investigations.

- Comparing the use of wiretaps in the Netherlands to the use of wiretaps in other countries is not possible according to the Minister because of the different legal systems in these countries.
- Client-attorney privilege plays a very important role in the investigations. The Minister referred in this respect to the recent advice of a committee regarding privileged information. According to the committee the solution for the problems that exist regarding the manual recognition and destruction of taped privileged discussions can be solved by a computerised system that recognises and destroys privileged information.

State liability for foreign seizure of assets

On 18 September 2009, the Netherlands Supreme Court held that the State of the Netherlands (the “State”) was liable for an unlawful governmental action in a criminal case, particularly in relation to the confiscation of proceeds from crime. The case originated from a conviction of a person for international drug trafficking in 2002. He and three brothers held shares in the English company “Newbay”. As part of a criminal financial investigation by the Dutch authorities, intended to seize and forfeit illegal proceeds, the Dutch public prosecutor filed a request for assistance in the United Kingdom and a prejudgment seizure was levied on certain property of Newbay. Upon approval by an English Court, some property was sold with total proceeds of GBP 1,275,490. In summary proceedings, a Dutch Court ruled that the attachment of some property had to be lifted and the British authorities transferred the proceeds of the sale of some of the property, after deducting certain costs and an amount withheld. The total amount transferred by the British authorities was GBP 693,528. Thereupon, Newbay charged the State to pay compensation as it did not receive the full proceeds of the sale of the hotel. The Netherlands Supreme Court held that the State was liable regardless of the fact that the British authorities had acted in accordance with English law.

This means that State liability could be the result of an unlawful governmental action in a criminal case, particularly in relation to the confiscation of proceeds from crime, even though such action is

executed by a foreign state in accordance with the law of that foreign state.

Inadmissibility of Public Prosecution Office

On 7 October 2009, the Amsterdam District Court declared the Public Prosecution Office (*Openbaar Ministerie*) inadmissible in the prosecution of 16 suspects in a drugs-related case. Counsel for the defence in this case took the position that the Public Prosecution Office should be declared inadmissible because it violated applicable procedural rules including:

- a deliberately false transcript of a wiretap was produced during the criminal investigation;
- privileged conversations between clients and attorneys were recorded and subsequently not destroyed in conformity with applicable law. The content of these conversations were used in the criminal investigation;
- at the start of the investigation special investigative powers were used in breach of applicable law; and
- the prosecution made promises to different suspects in exchange for statements against the prime suspect.

The Court first considered that from the beginning, the criminal investigation focused on a specific person. This mode of investigation is not unlawful. However, the results of such an investigation must be assessed critically, according to the Court. According to the Court, transcripts of wiretapped conversations must be very precise because of the impact of these reports on the criminal investigation. The prosecution however admitted that the transcripts were indeed false. With regard to client-attorney conversations, the Court considered that a great number of such conversations were tapped for an extended period of time and were included in the criminal case file. The transcripts of these conversations were available to anyone who worked on the case. This was a gross disregard of the rights of the accused according to the Court. Although the prosecution argued that the conversations did not determine the criminal investigation, the Court ruled that this was impossible to verify. The overall conclusion of the Court was that as there were several violations

of procedural rules where the truth was at issue, the prosecution was declared inadmissible in the criminal proceedings.

New bill: stronger position of the examining magistrate

A new bill entitled “Strengthening the position of the examining magistrate” (*Wet versterking positie rechter-commissaris*) has recently been submitted to the Dutch Parliament by the Dutch Minister of Justice.

The bill provides for a new, more active role of the examining magistrate (*rechter-commissaris*) in the preliminary investigation of criminal cases. The public prosecutor will remain in charge of the investigation and prosecution. In turn, the examining magistrate will be granted the position of supervisor of the preliminary investigation, ensuring that investigative powers are used lawfully. Furthermore, the magistrate will be able to perform additional investigative actions during the entire preliminary investigation at the request of both the public prosecutor and the defendant. The preliminary judicial investigation (*gerechtelijk vooronderzoek*) will be abolished.

As a result of the bill, counsel for the defence will have greater opportunities to contribute to the preliminary investigation by requesting additional investigative actions. This together with a more active examining magistrate, should lead to a more balanced compilation of the case file to be submitted to the court for further legal proceedings. The above should according to the government in turn lead to a more successful handling of the case during the examination in court.

The bill is part of the project to review the Dutch Code of Criminal Procedure. Other bills that will follow in the future will include the regulation of the procedural documents, the position of the defense and the regulation of investigative powers and coercive measures. Due to their interconnectedness, the proposed bills are expected to ultimately enter into force on one fixed date, in the course of 2011.

Strengthening the multidisciplinary approach in the fight against organised crime

On 2 November 2009, the Minister of Justice and the Minister of the Interior and Kingdom Affairs (“**Ministers**”) presented their views to the parliament on how to take decisive action against organised and financial/economic crime and how to eliminate problem areas that might occur during the exchange of information between the authorities involved. Their views are in line with the policy of the Dutch government to not only dismantle organised crime, but also tackle the root causes of organised crime by strengthening the collaboration between the police, administrative bodies, regulatory authorities, the Public Prosecution Office and special investigative services.

The Ministers consider that in order to improve the prevention of organised crime a targeted application of criminal, fiscal, administrative and preventive measures is required by criminal, fiscal and administrative law authorities. This multidisciplinary approach has led to the establishment of several collaborative arrangements, through which certain forms of organised and financial/economic crime are tackled. The participants in these collaborative arrangements operate on the basis of joint objectives. Within this framework they share information, prepare a united analysis and jointly determine which combination of interventions (administrative, criminal, fiscal) will be applied to a particular matter.

The Ministers recommended a widening of the multidisciplinary approach. To stimulate and strengthen the coordination of this approach they indicated the underlying starting points of the approach.

- *National prioritisation.* The National Threat Policy should determine which manifestations of organised and financial/economic crime will be tackled through the multidisciplinary approach and will extend to a supra-regional and regional level.
- *Clear arrangements.* These should be laid down in an agreement that deals with the exchange of information, the legal framework, the objective and the duration of the cooperation.
- *Effective control on collaborative arrangements.* This control should be carried

out by daily monitoring of the progress of the parties involved, strategic management on a regional level and guidance on a policy-related level.

- *Escalation of problem areas during the cooperation.* The competence and responsibilities among the administrative, fiscal and criminal law authorities differ, which could result in differences in perception. Problem areas should firstly be resolved on an operational level, secondly on a regional level and in exceptional cases on the level of the ministers responsible.
- *Appointment of a national coordinator of the Public Prosecution Office.* This post will be appointed by the head of the Public Prosecutor's Office for Financial, Economic and Environmental Offences (*Functioneel Parket*). His or her focus will be the fight against organised crime and will be appointed for a period of three years. The coordinator will be the point of contact for authorities that experience problem areas. The coordinator also needs to actively detect and address problem areas.

The recommended multidisciplinary approach by the Ministers is currently being debated in the Second Chamber of the Dutch Parliament.

Money laundering and terrorist financing in the Securities Sector

In October 2009 the Financial Action Task Force ("FATF") published a report entitled "Money laundering and terrorist financing in the securities sector". The purpose of the report is to identify the vulnerabilities in the sector and to raise awareness of these vulnerabilities.

The securities sector is one of the core sectors through which individuals and entities can access the financial markets. The sector is characterised by complex products, rapid electronic transactions and global reach. The FATF qualifies these features as attractive for criminals. In this light the FATF considers it remarkable that the level of reports of suspicious transactions in the securities sector is relatively low compared to other industries, such as banking.

The report shows how criminals can abuse securities firms for money laundering purposes and how illicit funds can be generated through fraudulent activities. The report further identifies specific risks based on different types of products, intermediaries, clients, markets, payment methods and distribution channels.

The FATF concludes that more liaising and cooperation between law enforcement, regulators, supervisory bodies and the industry is needed on this topic to increase awareness of the vulnerabilities and the number of reports of suspicious transactions in this sector.

Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism in Aruba

On 16 October 2009, the FATF and the Caribbean Financial Action Task Force ("CFATF") published their mutual report of the anti-money laundering ("AML") and combating the financing of terrorism ("CFT") measures in place in Aruba, the Kingdom of the Netherlands in December 2008 and immediately thereafter. The report describes and analyses those measures and provides recommendations on how certain aspects of the system could be strengthened. It also sets out Aruba's level of compliance with the FATF recommendations.

In general, Aruba's system of AML/CFT preventive measures is incomplete and lacks coherence and effectiveness. The key recommendations to Aruba are, *inter alia*, that it should:

- review the AML/CFT preventive measures regime, including the legislation;
- give clearly defined tasks and priorities to the agencies in charge of AML/CFT;
- prepare new and coherent legislation dealing with all the deficiencies and implement all the FATF requirements;
- reorganise the AML/CFT supervision of financial institutions, which is currently handled by both the Central Bank of Aruba and the Aruban financial intelligence unit (*Meldingspunt ongebruikelijke transacties*); and introduce a number of enhancements at both judicial and administrative levels.

Contact information

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