5 Integrity investigations in the Netherlands
Quality and credibility

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Introduction

The Netherlands has a *council* (Chapter 4) , but not a national *agency* for integrity investigations. Whether this is necessary and/or desirable was recently examined in detail (Zouridis & Van der Vorm, 2013). Apparently, the disadvantages of such a national agency outweigh the benefits in this country. The main disadvantage of a national integrity agency lies in a typically Dutch aspect of integrity investigation: responsibility for this rests primarily with the administrative body concerned.

The disadvantages of organising your own investigation are not hard to imagine: looking the other way, denial, lack of uniformity, the legal framework, professionalism and the inherent pitfalls of self-evaluation. But according to the researchers, these are minor problems. The primary responsibility, therefore, is apparently an important matter. This is not the case everywhere. New York City, for example, has its own Department of Investigation (DOI), the tasks and jurisdiction of which are clear and can be described as very broad:

> 'Investigations may involve any agency, officer, elected official or employee of the City, as well as those who do business with or receive benefits from the City. As New York City's watchdog, DOI's strategy attacks corruption comprehensively through systemic investigations that lead to high-impact arrests, preventive controls and operational reforms that improve the way the City is run.' (www.nyc.gov)

The Netherlands tend to be fearful of such a central approach. These fears are almost certainly related to fears of central government intervention, but also have a more noble reason: repression and investigation are the final resort in the promotion of integrity. The real way to address integrity lies in prevention, which goes beyond the very broadly-formulated ambitions of the DOI. Furthermore, there is a conviction that every level should be assigned primary responsibility for its own integrity, because it could otherwise be too easy to evade it.

This contribution concerns (internal) investigations of possible breaches of integrity. Distinctions are sometimes made here between official (concerning civils servants) and administrative (appointed and elected office holders) integrity. These will be clearly named. If the distinction is not mentioned, aspects that apply for both sides are involved. Following a general discussion of integrity investigations, this contribution raises the following points for attention which play a role in internal integrity investigations (as performed by the organisation itself):

- peace-time talks in order to reach agreements 'under a clear blue sky';
- protocols: providing for the necessary uniformity;
- after-care: avoiding a return to 'business as usual';
- convergence with criminal investigations: don't linger on this.

I will end with a brief reflection on trends, problem areas and ambitions for the coming years.

General discussion of integrity investigations

Breaches of integrity committed by civil servants (officials) or elected/appointed administrators damage the credibility of the government. Issues that come to light are sometimes incorrectly lumped together. Among groups, this can create a sentiment of diminishing trust in the operations of the government, or even of mistrust. This therefore calls for careful investigation of possible misconduct.

In the Netherlands, interest in matters of this kind is still growing. The media devote a great deal of attention to it and are often the first warning parties. Contributions in social media also often concern integrity incidents and their investigation. National newspapers and other media call on the public to report such matters to them, anonymously if need be. Publeaks,[1] a foundation set up by the media, facilitates anonymous uploading of documents for journalistic investigations as safely as possible. That high level of interest can be explained. Civil servants are monopolists who work with public funds and must handle these with the utmost care. Administrators are elected or appointed to serve the public cause and should never allow their personal interests to take precedence.

Such a high level of attention entails a risk. Public confidence in public servants can sink below a critical level and lead to cynicism. It is also sometimes far too easy to do irreparable harm to reputations, resulting in civil

servants being unfairly dismissed as lazy, incompetent or crooks. Raising misconduct issues within the relevant organisation first remains a healthy principle. Deviations from this principle must remain exceptions with sound justification. After all, healthy feedback and warnings form part of well-organised business operations. This is the most important reason for organising investigations into potential breaches with extreme care.

In the absence of a national agency in the Netherlands, investigations of possible breaches of integrity are conducted by investigation agencies. These may include private investigation agencies, internal departments, (forensic) accountants and management consultancies. Legal service providers also operate in this market. Lawyers have attorney-client privilege, which means that the Public Prosecution Service cannot demand the information gathered. Accountants are subject to disciplinary law, which in earlier years led to critical observations concerning the quality of the investigations they conducted. Lawyers do not have internal rules of that kind and face suspicions of excessive involvement with their clients. On the other hand they can realise the necessary (legal) follow-up themselves. Sometimes, cases are investigated by (former) administrators or professors in a particular field. All in all, the supply is diverse and differences in quality can be distinguished. Investigations usually focus on fact finding, compared with the current accepted set of codes and standards. The issues involved are usually conflicts of interest, leaks or incorrect handling of confidential information, misappropriation of funds, undesirable conduct and occasionally, simply theft.

As mentioned, the media report on potential misconduct, but so do employees and administrators. Members of the public also make reports, sometimes anonymously. Naturally, investigations based on anonymous reports are complicated. Proper verification is often not possible and the primary source of a report is very often important for the assessment of the alleged facts. There are systems available in the Netherlands for anonymous reporting, where verification is made possible. However, these are not widespread. Efforts to promote a 'whistleblowers' procedure that does justice to all concerned in the case of possible misconduct have reached an advanced stage. A number of major fraud scandals in recent years were marked by high personal damage to the sources. This included loss of jobs and lack of legal protection. Good quality investigative journalism is under pressure, and the profession is aware of it. The media show an

increased need for speed and sometimes there is not enough time for necessary checks. Fortunately cases still come to light in which it can be established, albeit in retrospect, that the underlying journalistic investigations were of decisive importance.

Peace-time talks

A first point of attention for integrity investigations is that integrity procedures and agreements on these should preferably be made before anything goes wrong. This avoids arguments in the political arena regarding the investigation procedure, or even concerning the question of whether the investigation is necessary at all. Preparations in 'peace time' also have a preventive effect and increase awareness. Furthermore, it is also a fine alternative to the good old dilemma training, which has become somewhat 'worn-out'. It is therefore better to ask the question in advance. Suppose a member of a municipal executive is accused by civil servants of undesirable conduct and intimidation. Who should investigate this case? How will the publicity be handled? What role must the municipal council play, and at what point? Isn't the municipal executive as a whole too closely involved or possibly even party to the alleged misconduct? Can the King's commissioner help? These are questions that are easier to discuss when the case is still entirely hypothetical. Such talks need not lead to a 'violations by bosses' manual, but it does no harm to codify who will take what steps at what times. This discussion is in itself an ample return on the investment made. It can often be very simple. Similar towns with their own investigative capacity may reach agreements on mutual assistance where a case involves a member of the municipal executive, for example.

Protocols

The importance of a good investigation protocol is another point for attention. A protocol codifies the working method and investigative resources. It gives statements on their deployment. Good investigations show a healthy balance of proportionality and subsidiarity of investigative actions as well as the method used for this. Researchers may experience a protocol as a straitjacket. A protocol must indeed always be followed, while determining the truth is usually a dynamic and sometimes even a purely creative process. However, the protocol is convenient for the person concerned (the subject of the investigation) and also acts as a guide for legal professionals who have to consider the case at a later date. The courts, for example, will explicitly include the question of whether an investiga-

tion was conducted with due care in their assessment of the matter. In that sense, the protocol is also useful for the investigator. If he has worked according to the book, he will as a rule pass the test in court. The straitjacket, however, is not the only disadvantage for the investigator. Investigations are always aimed at finding the truth. For an investigator, it is usually not effective to give away all his methods in advance to the person concerned, who, after all, may potentially be a malicious offender. Nevertheless, a protocol is more than advisable. It should also be noted that in cases of this kind, gathering evidence is not normally subject to the stringent requirements of criminal proceedings (see '6. Concurrence' below).

After-care

Integrity investigations have a very high impact, not only on those involved and the organisation in question, but also on the public and its perceived confidence in official organisations and administrators. Very often a mistake is made, once the integrity investigation has been completed. Quite often, there is a tendency to return to 'business as usual'. However, closure of the case and the broadest possible communication are extremely important, which makes them a third point of attention.

It is essential that the entire environment can count on signals and investigations receiving the attention they deserve. The resulting growing trust in the organisation will pay for itself. Reports will continue to come in. Favourable developments are also seen in something as banal as sickness absence. The relationship between low sickness absence and high trust in the organisation and in the management has been demonstrated in various studies. It is therefore advisable for an integrity investigation to be followed up by at least one evaluation meeting in which managers and/or civil servants may take part. In that way, an insight can be gained into the course that was followed and its outcome. Misunderstandings that have arisen can thus easily be eliminated. Control of an unwanted flow of rumours and the formation of camps with regard to legal prosecution is a worthwhile goal at such a meeting. There are often completely opposing views on the course that should be followed. There must be an opportunity to discuss this with each other. As a rule, such talks lead to the reaffirmation of standards and values that apply in the organisation. It is certainly worthwhile to discuss the lessons learned. If a decision is made to close the matter the easy way and to return to 'business as usual', the issue could continue to spread for years and become part of an episode that is collec-

tively perceived as distressing. That would be a pity and, as already mentioned, is unnecessary.

Concurrence

If the alleged misconduct involves a criminal offence, it should be reported to the judicial authorities. Whether this always happens cannot be determined with certainty. After all, the relative facts are often only known within the organisation in question. In the Netherlands, the judicial authorities themselves decide whether or not to prosecute and what resources will be released for that purpose.

As mentioned above, internal (in-house) investigations are subject to less stringent rules. According to established jurisprudence (ECLI:NL:CRVB:2011:BT1997), in civil service disciplinary law, the strict rules of evidence applying in criminal law do not apply. For a finding of dereliction of duty that could give rise to disciplinary punishment, it is necessary that the available and soundly established facts have led to the conviction that the civil servant concerned has committed the misconduct of which he is accused. Also according to established jurisprudence (ECLI:NL:CRvB:2011:BT2637), in relation to a disciplinary investigation, the administrative body must independently investigate the facts that could give rise to disciplinary punishment. Under certain circumstances, information that came to light in a criminal investigation can be used, but there is no obligation to wait for such information to become available.

This very resilient line of the Central Appeals Court, the highest legal body for the assessment of civil service disciplinary law, encompasses the obligation to perform independent investigations and not to wait too long for the actions of the judicial authorities. In fact, such waiting may be penalised, in the sense that this can lead to the (partial) loss of the right to impose sanctions.

It is clear that there is concurrence, and how this is followed up differs from one organisation to another. Who does what may also be agreed in the 'three-way talks' (civil service employer, the police and the Public Prosecution Service). For example, it is possible that the organisation's own investigators view internal documents and hear witnesses and that the police take the suspects away for questioning. After all, the organisation's own investigators do not have such powers. At the same time, the

organisation's own investigators will often know more about internal procedures and processes. Criminal proceedings take a great deal of time and manpower. Employers cannot usually afford to leave employees in the dark about the potential consequences for their employment for all that time. Cooperation and consequently, concurrence, is therefore useful and necessary.

In concurrence matters, another distinguishing difference may be raised; the caution in administrative law. This caution is regulated in Article 5:10a of the General Administrative Act (Awb): a person to be questioned with a view to imposing sanctions on him, is not obliged to make statements for that purpose concerning the violation. He is informed before the hearing that he is not obliged to answer questions.

We find ourselves here in the grey area between administrative law and criminal law. A true caution is only issued in criminal proceedings. It is an expression of the principle known in Latin as *Nemo tenetur prodere se ipsum*, or in short, the 'nemo tenetur' principle. Literally, this means 'no man is bound to accuse himself'. We know this as the right to remain silent: i.e. the right of a suspect to refuse to answer questions from investigating officials, public prosecutors, courts et cetera.

Note that this concerns criminal law only. In administrative law, a completely different principle applies. That principle is laid down in Article 5:20 of the Awb. Everyone is required to provide a supervisory authority, on request, with all the assistance that can reasonably be required for the exercise of its powers, within a reasonable term set for this. This is indeed precisely the opposite to the right to remain silent. It is the obligation to speak. In fact even more than that, it concerns 'every assistance' and therefore also includes the surrender of business assets and, under certain conditions, granting access to professional e-mail traffic. In conclusion, the purpose of the talks between (the investigator of) the employer and the employee is of great importance. If this involves a hearing in connection with the possible imposition of a sanction, the person concerned is not obliged to cooperate with it fully, whilst in all other respects, the employee is required to provide full cooperation.

Trends, problems and ambitions

In my introduction, I referred to the Tilburg University study of 'problems and solutions in integrity investigations in the Netherlands' (Zouridis & Van der Vorm, 2013). This concerns a study of civil servants and holders of political office. The central problem definition of this study dates from 2013 and reads as follows:

'Which solutions, including a national agency for integrity investigations, are conceivable and feasible for (any) problems that arise in setting up and conducting investigations into alleged breaches of integrity by civil servants, holders of political office and managers of independent administrative bodies?'

And the sub-questions are: 'What is the landscape of investigative institutions, working methods and investigations like in relation to the investigation of suspected breaches of integrity by holders of political office, managers of independent administrative bodies and civil servants? Which problems do those who set up and conduct these investigations encounter? Which solutions for these problems are conceivable and feasible, including an integrity investigations institution?'

The study has shown that the different types of investigators all work in accordance with a uniform legal framework. The clients for such investigations see no added value in a national investigations agency. It was however commented in the field that there was a need for individual advice in current cases. To that end, the Support Centre for Integrity Investigations of Holders of Political Office was set up as a follow-up to the Tilburg study at BIOS (Dutch National Integrity Office). This Support Centre has been operational since 1 January 2015 and provides advice on investigations, without conducting any investigations itself. At present, experiences with this form of support have been very positive. The decision-makers on integrity investigations appreciate the discreet, solution-oriented advice in which powers remain where they belong, at the relevant organisation itself. This confirms the need to bundle expertise without the need to set up an unwanted new national investigations agency for integrity investigations.

It should be noted that integrity investigations in the Netherlands are still regarded as a logical last resort in a balanced integrity policy. The continu-

ing need for a balanced integrity policy was emphasised once again in the latest Speech from the Throne by the King, on Prince's Day. A policy in which clear rules are fairly enforced. Prevention will take first place in the future. Quite rightly, there is more attention to preventive investigation. The screening of candidates for appointed/ administrative offices for integrity risks has taken off quickly. Screening of (civil service) employees who are assessed for work with vulnerable groups such as children, the elderly and the handicapped has also become 'mainstream' in a short space of time. For example, it was recently announced that in 2014, more than 100 candidates were rejected for jobs in child care in this way, due to dubious antecedents. Preventive screening of this kind (another term used in this regard is 'risk analysis') was embedded in law in the Netherlands following the Amsterdam 'sex crimes case', in which it was revealed that a single perpetrator was able to very frequently abuse, sometimes very young children, for years in the performance of his work as an employee in a child care centre.

The risk of cynicism concerning corrupt and greedy bankers has not yet been eliminated in this country. In the media, cases are easily lumped together, with all the consequences for public trust in civil servants and administrators. The Netherlands ranks in the top 10 of the corruption perception index of 'Transparency International', but needs to remain alert on integrity issues. Both a preventive approach to integrity and sound investigations contribute towards protecting the level of public trust in official organisations and administrators.[2]

The quality of investigations is improving. There is competition between the different disciplines (lawyers, accountants, investigative agencies et cetera) active in integrity investigations. Investigations and the relevant investigators are also increasingly involved in legal proceedings. This will undoubtedly put positive pressure on the 'due care' exercised. The degree of 'due care' was high already, but as a result of this legal 'stick', it will increase still further.

Cooperation between (commercial) providers of integrity care is an obvious development. In terms of care for integrity, the government is far ahead of the compliance-oriented care deployed at banks and in the business sector. This is just a matter of time. Attention to public sector integrity with a focus on civil servants in particular, has existed since the

early 1990s. The compliance field in the Netherlands not only has a fundamentally different approach towards integrity, but it has quite simply not existed that long yet.

It cannot be ruled out that private parties will increase to play a more active role in the conduct of investigations into breaches of integrity within the government.

The government is exercising restraint in its involvement in various areas. Self-reliance leads to public-private partnerships in fields in which government exclusivity was previously taken for granted. The possibility of new integrity risks looming here is quite feasible. For investigations into possible misconduct, this is a complicating factor. A civil servant is required to answer questions from the competent authority. Holders of political office are held to account by the electorate and cannot work without trust. Private parties can evade investigations of possible misconduct more easily. Legal provision must be made to avoid this effect in public-private partnerships.

Notes

1 www.publeaks.nl/over-publeaks.html
2 www.transparency.org

Literature

www.nyc.gov/html/doi/html/about/about.shtml
www.transparency.org/whatwedo/publication/global_corruption_barometer_2013
Zouridis, S., & Vorm, B. van der, (2013). *Omwille van geloofwaardigheid (In the interests of credibility)*. Tilburg: Tilburg University.