

# 6 Criminal investigation *First aid for administrative mishaps?*

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## Introduction

In the public sector, monitoring of integrity is aimed primarily at preventing violations, in order to ensure that matters such as government decisions, their implementation and the distribution of public funds take place fairly, transparently and in accordance with the principles of a state under the rule of law. And to ensure that government action remains within the scope defined by the rule of law. The different tiers of government (central government, the provincial authorities, the municipal authorities and the water authorities) and the different bodies and agencies within them, hold responsibility for this themselves. If things nevertheless go wrong and violations have been detected, they can take measures to halt these and to call those responsible to account.

However, there are some violations that call for a different approach to political, administrative or official intervention (alone). In the case of serious violations of integrity which also constitute criminal offences, action under criminal law comes into play. This contribution concerns the deployment of criminal law to control serious offences such as corruption and fraud in the public domain, and how this relates to the administrative approach. This article provides a brief description of the national policy, features of criminal action and the role of investigative bodies and the Public Prosecution Service in combating corruption and fraud in the public domain.

## Policy framework, primacy in administration and reporting obligation

The administrative approach to integrity violations in the Netherlands follows the autonomy of the administrative tiers, with the Minister of the Interior and Kingdom Relations as the system manager for e. g. legislation and support for government organisations from the different administrative tiers in the creation of integrity policy.

The investigation and prosecution of serious offences affecting or involving abuse of public office is the responsibility of the Minister of Security and Justice. The judicial machinery is not organised along the lines of the administrative tiers. This means that integrity violations that are also criminal offences can be countered simultaneously via different systems and at different levels.

Public officials such as civil servants, administrators and politicians have an obligation to report offences involving abuse of office to criminal law enforcement agencies. It could be argued that the justice department rather than the administration has primacy in relation to serious offences involving abuse of office. But this is overly strict: even in the case of criminal proceedings, government organisations remain responsible for their own integrity. And as employers, they must address offenders employed within or contracted by their own organisations. This means that investigations of corruption and fraud in the public domain may be necessary under both administrative/disciplinary law and under criminal law. This requires coordination and at the same time, respect for both the necessary space for administrative action and the need for unimpeded gathering of evidence for criminal prosecution.

In this context, the Netherlands opts for combating corruption with all available remedies and instruments (Ministers of Security and Justice and of the Interior and Kingdom Relations, 2015), through a broad and integral approach involving close cooperation, within the limits of each party's position. This article focuses primarily on two concrete policy objectives: the detection and (timely) reporting of indications of corruption and the importance of solid investigation of corruption, including effective law enforcement and imposition of sanctions.

### **Application of criminal law against serious offences involving abuse of office**

The report of a criminal offence to a criminal law enforcement agency marks the borderline between administrative and criminal action. Civil servants, politicians, the courts and administrators must report criminal offences involving abuse of office as soon as they believe that they have observed one. Examples include payment, offering, requesting or acceptance of bribes by civil servants, or the disclosure of confidential information. Other examples include forgery or falsely drafting declarations or statements.

Swift reporting enables the Public Prosecution Service to determine in good time whether investigation and criminal prosecution are (also) necessary. However, if there is to be a report, a potential criminal offence must first be observed and identified as such. The administrative domain must have sufficient detection capacity for this. That calls for alertness and surveillance, and sufficient knowledge.

Administrative and criminal law definitions of integrity violations differ, as do the groups of persons to be investigated. Not all violations of integrity are penal offences: criminal law enforcement is based on detailed and limitative descriptions of offences stated in a Penal Code.

Under criminal law, the term ‘civil servant’ is broadly defined (Court of Appeal of Amsterdam). Under Dutch criminal law, a civil servant is a person who, under government supervision and responsibility...:  
... is appointed to a position ...  
... with an undeniably public character ...  
... to perform duties of the State or one of its bodies.

Few requirements are made under criminal law for the formal status of an appointment: a freelancer who works for the government can be regarded as a civil servant under criminal law, as can a managing director of a private limited liability company that performs state tasks. The protection of the administration and the machinery of government against undermining of integrity is more important under criminal law than the nature of an appointment. A legal point of view well established in Dutch case law and consistent with the development of decentralisation, privatisations and public-private partnerships within the public sector (Court of Appeal of Den Bosch).

### Added value of criminal law

Criminal investigation offers added value in relation to other forms of investigation, firstly because of its independent character. With a disciplinary investigation, even if the government body in question deploys and external party, there is a risk that the effectiveness will be limited, for example by restrictive investigative questions, or because an influence on the conclusions is sought for administrative and/or political reasons. Even if that influence does not in fact exist, the client status of an organisation that is investigated can give rise to persistent and disruptive discussions regarding bias or selectivity.

Criminal investigations are conducted by an investigative body that does not have any dependent relationship with the government body concerned. It is headed by a public prosecutor of the Public Prosecution Service, which is part of the judiciary. The outcome is presented to an independent criminal court, unless the prosecutor decides to settle the matter by other means. Stakeholders in the case can submit that decision to the Court of Appeal, which may still order the Public Prosecution Service to take a suspect to court.

Then there are the investigative powers. Criminal investigators have possibilities that are not available, or are less available to private or disciplinary investigators, and can therefore produce evidence that would otherwise remain hidden. Particularly with complex and serious criminal offences, such as payment of bribes via intermediaries and protective constructions, leaks of information, or where evidence is located physically or as data outside the government's or administration's offices, or even outside the Netherlands, those powers are virtually essential. They give access to the private domain of public officials and their entourage, to administrations within and outside the government body concerned and to the office environment and the online world of the suspect. They provide an insight into the flow of goods, funds and services linked to the suspect, into the suspect's finances and into his relationship networks. They also enable investigation outside the Netherlands.

This makes it possible to look beyond the directly visible consequences of a violation, such as the provision of confidential information. Other things may come to light, such as a criminal alliance that buys the information, uses it to enable other crimes and also pays bribes for this. Criminal investigation then not only provides an insight into the wider circle of those directly involved, but also into vulnerabilities and underlying threats for government and administrative bodies. These can then be eliminated, or the organisation's resistance to them can be strengthened.

A third advantage of criminal investigation is that it reduces the chance of re-offending, and not only because of the deterrent effect of the risk of being caught and the threat of punishment. Today, a Certificate of Good Conduct (VOG) is mandatory for many positions, before an appointment can be made. If a job applicant has committed crimes in the past and has been sentenced for these, he cannot obtain this VOG for certain positions. That denies him an opportunity to commit similar crimes.

The fact that criminal proceedings are public provides another advantage, apart from transparency. A court case can lead to commotion and insight. Officials, administrators and politicians are then given arguments for putting their affairs in order. This applies not only to the organisation involved; a criminal investigation can also help to identify weaknesses in procedures, regulations and laws that could be amended, or to make abuses in the private sector visible. By this criminal investigation contributes towards prevention of violations of integrity and strengthening of resilience to criminal undermining of government performance.

Some serious offences (involving abuse of public office) cause so much damage that a penalty or sentence is called for. To that end, criminal investigations can also be directed against persons other than civil servants. A civil servant who accepts bribes is committing a serious offence. This carries a sentence of up to twelve years of imprisonment and a high financial penalty. The value of the bribes can also be confiscated. However, the party who pays the civil servant is also committing a crime and can also be sentenced to prison or be ordered to pay a penalty for this. If the briber is a company, the penalty can rise further. In a recent case, the penalty imposed was more than 150 million. The maximum penalty for companies is 10 percent of the annual revenue.

In short, timely criminal investigation can make the difference between halting the visible symptoms of an integrity violation and determining the sometimes inconvenient truth that lies behind it, which constitutes the real problem and calls for broader action.

### **Criminal law is not always the best remedy**

At the same time, the deployment of criminal law is not always the best or the only solution. If a civil servant or administrator has committed a less serious offence and has been punished sufficiently under disciplinary or public law, criminal investigation sometimes adds little to the disciplinary investigation. The administrative approach then suffices. The public prosecutor and the criminal court therefore take account of the consequences for a suspect of, for example, dismissal or negative publicity.

Criminal evidence must also comply with strict requirements: the court has the final say and must be convinced beyond all doubt of the guilt of the suspect before it will convict him. This makes criminal investigations

labour-intensive. They not only take time and money: the longer an investigation takes, the more likely it becomes that the employer of a suspect will face more pressing dilemmas, such as the question of what should be done with the employee under suspicion during the investigation, since it can sometimes take years before his guilt or innocence is established. There is also the question of whether the number of offenders will remain confined to that one suspect, or whether only one activity is involved. For that reason alone, it is important that criminal investigations are not only conducted with care, but also as quickly as possible.

In addition, due to the fact that criminal proceedings are public, it may become generally known that a serious integrity violation has taken place within a government organisation. For those with political responsibility, this represents a reputation risk and may harm the image and moral authority, and thereby the support and effectiveness, of the organisation concerned, or even the entire government. As little time as possible must pass between the disclosure of the fact that the investigation has been opened and the outcome, including any court verdict. A good communication strategy is also important. The administrative downside of the independence of criminal investigation is that the government organisation affected by a crime has no control over the investigation: that rests with the Public Prosecution Service. That service will focus on finding evidence, but at the same time will be aware of and bear in mind the interests to be seen as a government body that holds integrity high.

In summary, the ‘blind’ deployment of criminal law can cause more damage than is necessary to serve the higher interest: protection and restoration of the performance of public tasks in relation to integrity. Criminal law is a strong remedy that is necessary to investigate certain violations and penalise the perpetrators. But the choice of criminal law is not without consequences and should therefore be assessed in the light of alternatives. To return to the principle of the Dutch policy: deployment must fit within a broad and integral approach involving close cooperation, provided that this serves objective and effective determination of the truth and effective enforcement and sanctioning, with a role for criminal law which also depends on timely reporting and is ultimately determined by the Public Prosecution Service.

## Specialist criminal investigation into bribery of public servants

In the event of very serious offences involving abuse of public office committed within or close to public centres of power and requiring investigation at a distance, the specialised and independent criminal investigation service *Rijksrecherche* comes into play. Unlike other investigation services, this agency does not operate under the direct control of the minister who holds political responsibility for it. The *Rijksrecherche* operates under the authority and management of the Board of Procurators General, the highest authority of the Public Prosecution Service. As the prosecution, this is part of the judiciary. This position creates a distance between the *Rijksrecherche* and the political/administrative stakeholders in investigations. At the same time, good, expert control of the *Rijksrecherche* remains possible; a necessity within the system of checks and balances.

The *Rijksrecherche* employs one hundred specialised investigators with the same investigative powers as the police. Investigations are headed by a public prosecutor and are aimed at finding the truth. Drawing conclusions and prosecution of suspects is the responsibility of the prosecutor. Where this can be done effectively, while retaining distance, the Central Criminal Intelligence Agency works together with other investigative services such as the police, the Fiscal Intelligence and Investigation Service (FIOD) and the Royal Netherlands Military Constabulary (KMAR). The *Rijksrecherche* can also advise institutions, as an expert, on politically and administratively sensitive investigations.

The deployment of the *Rijksrecherche* is coordinated via a committee within the Public Prosecution Service. That committee considers the statutory duties and deployment criteria for the *Rijksrecherche* and the guideline for investigation and prosecution of corruption instructions of the Public Prosecution Service. As a rule, the *Rijksrecherche* is not deployed if other investigative services can conduct independent investigations without creating the appearance of bias.

In recent years, the *Rijksrecherche* has brought major bribery cases to light. These involved both political administrators and civil servants. In addition to prison sentences for the culprits, these investigations provide an insight into the proliferating effect of corruption if it is not discovered and addressed in good time, and demonstrate once again the importance of sufficient resilience and detecting capacity of government bodies. That

strengthens awareness that timely and effective enforcement is important in the field of integrity.

The Rijksrecherche conducts on average almost twenty investigations each year that are directed specifically at corruption of public servants. In addition, there are up to dozens of investigations each year into crimes that *could* be related to this.

**Table**      **Number of investigations by the Rijksrecherche into corruption of public servants (Public Prosecution Service 2014)**

	2010	2011	2012	2013	2014
Bribery of public servants	15	24	18	12	21

The number of criminal investigations says little about the scale of bribery of public servants. Not everything is discovered, reported or investigated and other interventions are also sometimes chosen (as already mentioned, criminal law is not always the best remedy). As an illustration, reference is made to a recent study by the VU University. Of more than 7,000 government officials, almost 150 saw ‘corruption/bribery’ and more than 175 (also) saw fraud, theft and embezzlement (De Graaf et al., 2014). The relationship between the number of signals and the number of officials would indicate a larger scale than the figures of the Rijksrecherche, which involve a small fraction of a percent of all government officials.

Earlier, the Rijksrecherche analysed bribery of public servants using reports received and investigations performed by the Rijksrecherche, the FIOD and the former Social Security Information and Investigation Service (SIOD) in the years 2003 to 2007 (Public Prosecution Service, 2010). This analysis, too, showed that the number of reports in relation to the number of civil servants is low, and is not spread evenly over the administrative tiers. This inequality is not explained by differences in the vulnerability to bribery between the tiers of government.

The reports of suspected bribery for the years 2003 to 2007 showed that the domains most frequently affected were construction and property, the prisons service, border controls and access and residence including naturalisation. Most investigations concerned bribery in relation to

‘construction and property’. The civil servants concerned had tasks such as participating in economic transactions on behalf of the government, supervision and enforcement and policy-making and setting standards. Almost all the officials investigated had functional contacts outside the government. Risks appear to be associated with one-to-one contacts and unclear and fluid boundaries between networks, relationship management and bribery. The organisational culture also plays a role here, particularly where work takes place without established procedures or agreements, where an informal organisational culture exists or where there awareness among civil servants is inadequate. The latter applies equally within public-private partnerships. Often, the return on bribery for the briber is a multiple of the value of the benefits for the civil servant.

### **FIOD, police and fraud**

Together with the Netherlands Tax and Customs Administration, the FIOD falls under the responsibility of the Minister of Finance. Investigations are headed by a public prosecutor of the National Public Prosecutor’s office for serious fraud and environmental crime and asset confiscation of the Public Prosecution Service. The FIOD is leading in combating fiscal offences and is an important investigator of crimes that are committed within complex financial structures, such as fraud, corruption and money laundering. The FIOD also investigates criminal breaches of integrity in the financial sector. Government officials are sometimes involved in cases of this kind. An insight may arise into crime that harms the correct functioning of the government, such as abuse of allowances and subsidies. A government agency may be the abused party in this case, but government officials may also be (co-)perpetrators, for example because they have been bribed. In investigations of this kind, the FIOD often cooperates with the Rijksrecherche.

In the fraud domain too, criminal law is not always applied automatically: it must be the best way to address the undesirable behaviour. Confiscating criminal assets is an important element of a criminal law approach. It is extremely important that this sends the message to the public that crime must not pay.

Estimates of the scale of fraud vary, but run to many billions of euros. These include funds withdrawn from the public sector (e.g. subsidy and allowance fraud) or kept from it (as with tax evasion). Although the scale of

fraud cannot simply be captured in hard figures, it is potentially large enough to influence the financial administration of government bodies and the effectiveness of their spending. For that reason, the FIOD, in particular, has been strengthened in recent years. But the police, too, devote structural attention to fraud and money-laundering. It has formed units for that purpose, recruited specialists in combating financial and economic crime and the police force accommodates the Financial Intelligence Unit (FIU), which receives and analyses reports of unusual transactions.

## Conclusion

From the point of view of criminal law enforcement, it is positive that political, official and administrative awareness of threats to integrity and risks of fraud has grown in recent decades, as has the awareness that timely detection of violations is important. Segments of the private sector also appear to be more alert to the risks of poor compliance, including in their dealings with the public sector. The Rijksrecherche sees risks in the decentralisation of government action and the performance of public tasks via public-private constructions or through central facilities such as shared service centres, where it is not always clear who is responsible for their political and administrative supervision.

Another development is growing cooperation through intensification of contacts between administrative and criminal law parties. For example, an institutionalised forum has arisen through the emergence of multi-disciplinary Regional Information and Expertise Centres (RIECs), in which the police and various administrative organisations participate. Information from administrative bodies and criminal law enforcement agencies is gathered here and, following analysis, is placed at the service of government-wide prevention, detection and control of fraud and corruption. For example, it is easier to refuse criminal businesses a licence or to reject a party acting in bad faith from a contracting process.

Investigations by the Rijksrecherche also show that serious violations of integrity or their criminal nature are not always recognised and/or reported (in a timely manner). The administrative gateway to the criminal law process, where detection and reporting of potential abuses originate, is precisely where gains can be made. If criminal law can be deployed at an earlier stage, investigations can be conducted faster and at lower costs than if this is delayed (for too long). It will also prevent a criminal violation of

integrity from spreading further. These are important arguments for the creation this year of a contact centre within the Rijksrecherche, where government officials with knowledge of a crime can obtain advice on reporting.

For the process after reporting, the cooperation between different investigation services and with the Public Prosecution Service means that large-scale corruption investigations can be conducted more effectively and efficiently. This is also necessary: capacity in investigation services is scarce and the national call for and complexity of corruption investigations means that heavy demands are made of that capacity. These factors make clear that the specific and timely deployment of sufficient capacity in the police force, the Rijksrecherche and other investigation services will continuously require attention in the coming years.

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